Form No. 7

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WILCOX & CO

No. 6523

United States
Circuit Court of Appeals
For the Ninth Circuit

NARCISO LUCHESSI,
Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration, at the Port of Seattle, Washington,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL.

Messrs. JOHN J. SULLIVAN and MICHAEL F. WARD, Attorneys for Appellant, 1801 Smith Tower, Seattle, Washington.
Mr. LOUIS F. BUTY, Attorney for Appellant, 1605 Exchange Building, Seattle, Washington.

Messrs. ANTHONY SAVAGE and HAMLET P. DODD, Attorneys for Appellee, 310 Federal Building, Seattle, Washington. [2]*

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20,470

In the Matter of the Application of

NARCISO LUCCHESI,

for a Writ of Habeas Corpus.

PETITION.

The petition of Narciso Lucchesi respectfully shows:

I.

That he is a citizen of the Kingdom of Italy. That petitioner first arrived in the United States in the year 1906 at the port of New York, and has

*Page numbering appearing at the foot of page of original certified Transcript of Record.

lived in the United States continuously since said time, except for two short trips to Italy, one in 1908 and one in 1925. That his last entry was at the Port of New York, August 25th, 1925, and ever since said time he has been continuously lived in the United States.

II.

Petitioner further alleges that he is now being confined, restrained and deprived of his liberty by Luther Weedin, Commissioner of Immigration, Seattle, Washington, at the Immigration Station at Seattle; that said confinement, restraint and deprivation is illegal, for the following reasons, to-wit:

That your petitioner has been charged by the United States Department of Labor, through the Secretary of Labor at Washington, D. C. and the Commissioner of Immigration at Seattle, Washington, with violation of the Immigration Act of February, 1917, to-wit:

That he has been found managing a house of prostitution, or music, or dance hall, or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather.

III.

That your petitioner was not granted a fair hearing in that witnesses were examined in the absence of his counsel of record, and that the record and evidence discloses no facts or [4] evidence upon which the Secretary of Labor and Commissioner of

Immigration at Seattle, Washington, could base the findings that your petitioner had violated said act, as charged.

IV.

That your petitioner has never managed a house of prostitution, or music, or dance hall, or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather, and that there is no evidence disclosed in the proceedings taken for his deportation upon which the said Secretary of Labor or Commissioner of Immigration at Seattle, Washington, could legally base a finding that your petitioner had ever*y* managed a house of prostitution, or music, or dance hall, or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather.

WHEREFORE, petitioner prays that an order issue out of this Court directed to Luther Weedin, Commissioner, as aforesaid, commanding him to show cause if any he have at a time and place to be fixed by the Court, why a Writ of Habeas Corpus should not issue, and petitioner restore to his liberty or such other and further order made, as to this Court may seem lawful in the premises.

H. SYLVESTER GARVIN,
LOUIS F. BUTY,
Attorneys for Petitioner.

United States of America,
Western District of Washington,
Northern Division.—ss.

Narciso Lucchesi, being first duly sworn on oath deposes and says: That he is the petitioner above named; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

NARCISO LUCCHESI.

Subscribed and sworn to before me this 24th day of February, 1931.

[Notary Seal] WESLEY J. MIFFLIN,
Notary Public in and for the State of Washington, residing at Seattle. [5]

[Endorsed]: Filed Febr. 24, 1931. Ed. M. Lakin, Clerk. [6]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

This matter coming on this day for hearing before the Court upon petition of Narciso Lucchesi for a writ of habeas corpus, the petitioner appearing by his attorneys H. Sylvester Garvin and Louis F. Buty, and the Court having read the petition herein and it appearing therein that the said Narciso Lucchesi is illegally restrained of his liberty at Seattle, Washington by Luther Weedin, Commissioner of Immigration, and all and singular the law and the premises being duly considered,

IT IS HEREBY ORDERED that the said Luther Weedin, Commissioner of Immigration, be and he is hereby commanded to appear before this Court on the 2nd day of Mar. 1931, at the hour of 10 o'clock in the A noon to show cause is any he may have, why a writ of habeas corpus *who*uld not issue herein and said petitioner be restored to his liberty and it is further

ORDERED that pending the final determination hereof said petitioner shall not be deported but shall remain in the jurisdiction of this Court provided

that the petitioner deposit with said Commissioner the sum of $100.00 to defray expenses of his maintenance and such other sums as may be necessary when demand is made to do so, pending determination hereof.

Done in open Court this 24th day of February, 1931.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Febr. 24, 1931. Ed. M. Lakin, Clerk. [7]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Wash.—ss.

I hereby certify and return that I served the annexed order to show cause on the therein-named

Luther Weedin, Com. Immigration by handing to and leaving a true and correct copy thereof with Luther Weedin personally at Seattle in said District on the 24th day of February, A. D. 1931.

CHARLES E. ALLEN,
U. S. Marshall.
By FRED A. GROW,
Deputy.

M. F. 2.12.

[Endorsed]: Filed Febr. 25, 1931. Ed. M. Lakin, Clerk. [8]

[Title of Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE.

To the Honorable Jeremiah Neterer, Judge of the District Court of the United States for the Western District of Washington:

Comes now Luther Weedin, United States Commissioner of Immigration at Seattle, Washington, and, for answer and return to the Order to Show Cause entered herein, certifies and shows to the Court that the said alien, Narciso Lucchesi, was duly arrested by an immigrant inspector under authority of a warrant of arrest issued by A. E. Cook, Assistant to the Secretary of Labor, October 18, 1928, charging that the said Narciso Lucchesi, alias Nelson Lucchesi, who landed at the port of New York, N. Y., ex SS "Duillio," on or about the 25th day of August, 1925, had been found in the United

States in violation of the Immigration Act of February 5, 1917, for the following among other reasons: "That he has been found managing a house of prostitution, or music or dance hall or other place of amusement, or resort, habitually frequented by prostitutes; that he has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute; and that he has been found assisting a prostitute"; that the said Narciso Lucchesi was thereafter accorded a hearing before an immigrant inspector, at which time he was afforded ample opportunity to show cause why he should not be deported; that, as a result of the evidence adduced at said hearing, a warrant of deportation was issued December 12, 1929, by P. F. Snyder, Assistant to the Secretary of Labor, commanding that the said Narciso Lucch*ei,* alias Nelson Lucchesi, or Narciso Lucchesi, who "has been found in the United States in violation of the Immigration Act of February 5, 1917, to wit: That he has been found managing a house of prostitution, or music, or dance hall, or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather," be returned to Italy, the country whence he came; that the said Narciso Lucchesi surrendered [9] himself to this respondent February 24, 1931, and, from said date until February 26, 1931, was held and detained by this respondent for deportation to Italy as an alien Italian person not entitled to be and remain in the United States under the laws of the United States, and subject to deportation to Italy

under the laws of the United States; that, on February 26, 1931, the said Narciso Lucchesi was released from the custody of this respondent by order of this Court, and since the said date has not been in the custody of this respondent.

The original record of the Department of Labor relating to the deportation proceedings against the said Narciso Lucchesi is attached hereto and made a part and parcel of this return, as fully and completely as though set forth herein in detail.

WHEREFORE, respondent prays that the petition for a writ of habeas corpus be denied.

LUTHER WEEDIN.

United States of America,
Western District of Washington,
Northern Division.—ss.

Luther Weedin, being first duly sworn, on oath deposes and says: That he is United States Commissioner of Immigration at Seattle, Washington, and the respondent named in the foregoing return; that he has read the foregoing return, knows the contents thereof and believes the same to be true.

LUTHER WEEDIN.

Subscribed and sworn to before me this 28th day of March, 1931.

[Seal] D. L. YOUNG,
Notary Public in and for the State of Washington, residing at Seattle, Washington.

[Endorsed]: Filed Apr. 6, 1931. Ed. M. Lakin, Clerk. [10]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20,470

In the Matter of the Application of

NARCISO LUCCHESI,

for a Writ of Habeas Corpus.

DECISION.

For near three years proceedings to deport petitioner have been pending.

The Immigration officers held hearing and the final determination made October 28, 1928, is that he was "found managing a house of prostitution" in Tacoma.

December, 1929, warrant to deport issued. For various reasons importunities of an assortment of dignitaries, a six months jail sentence for violation of the prohibition law, etc., deportation was deferred and this petition for habeas corpus filed in February, 1931.

It alleges that the alien petitioner has not a fair hearing because (1) witnesses were examined in absence of his counsel of record, and (2) the record "discloses no facts or evidence upon which the Secretary * * * could base the finding" aforesaid.

Altho the second is argumentative and no warrant for review, the record has been examined,

thereupon it appears that the alien's attorney after employed was present at all hearings. Before that, was some inquiry or hearing of the alien and witnesses, and which likely was considered in arriving at the final decision, and properly so. Admissions and statements before arrest and furthering the practices of the house or in relation to management, are competent as of accomplices or co-conspirators.

It is enough to say the evidence suffices in quantity to legally sustain the Secretary's finding and that is the extent of the inquiry by the Court.

The decisions of the Secretary are those of a tribunal vested by law with jurisdiction in this and like cases; and it is settled law that when the Courts are invoked to consider [11] any such tribunal's decision, if the hearing was fair and regular, no prejudicial error of law, and evidence sufficient to legally sustain its findings, they are final, conclusive, and beyond the power of courts to disturb. See Tisi vs. Todd, 264 U. S. 131. Vatjauer vs. Coms., 273 U. S. 103. Accordingly the petition must be and is denied.

BOURQUIN, J.

May 11, 1931.

[Endorsed]: Filed May 12, 1931. Ed. M. Lakin, Clerk. [12]

[Title of Court and Cause.]

ORDER AND DECREE.

This cause having come on duly for hearing before this Court on the 11th day of May, 1931, on the return of the United States Commissioner of Immigration to the order to show cause theretofore issued herein, the respective parties being represented by their attorneys of record, John J. Sullivan and Michael F. Ward for the petitioner, and Anthony Savage and Cameron Sherwood, United States Attorney and Assistant United States Attorney, respectively, for the respondent, and the Court, being fully advised in the premises, having on the 12th day of May, 1931, entered its written opinion directing the denial of the petition for a writ of habeas corpus.

It is now hereby ORDERED, ADJUDGED and DECREED that the writ of habeas corpus as prayed for be, and the same is hereby, DENIED, and the petitioner ordered deported to Italy; PROVIDED, however, that, pending the determination of the petitioner as to the perfection of an appeal from this order and decree, he shall file with the Clerk of this Court a good and sufficient bond in the sum of $1,000, to be approved by the Court, conditioned that, in the event an appeal be taken to the United States Circuit Court of Appeals for the Ninth Circuit, he will at all times, during the pendency of such appeal, hold himself amenable to the orders

of this Court and of the said Circuit Court of Appeals, and will abide by all judgments and orders rendered upon such appeal.

Done in open Court this 16 day of May, 1931.

BOURQUIN, J.

United States District Judge. [13]

Received a copy of the within order and decree this 15th day of May, 1931.

MICHAEL F. WARD,
Attorney for Petitioner.

O. K.

MICHAEL F. WARD,
Attorney for Petitioner.

[Endorsed]: Filed May 16, 1931. Ed. M. Lakin, Clerk. [14]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Narciso Luchessi, petitioner herein, deeming himself aggrieved by the order and decree entered herein on the 12 day of May, 1931, does hereby appeal from said judgment, order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript and record of proceedings and papers upon said order and decree were made, duly authenticated, may be sent

to the United States Circuit Court of Appeals for the Ninth Judicial District of the United States.

JOHN J. SULLIVAN,
LOUIS F. BUTY,
MICHAEL F. WARD,
Attorneys for Petitioner.

Received copy this 3 day of June, 1931.

ANTHONY SAVAGE,
Atty. for Respondent.

[Endorsed]: Filed Jun. 3, 1931. Ed. M. Lakin, Clerk. [15]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Luther Weedin, Commissioner of Immigration, and to Anthony Savage, United States District Attorney:

You, and each of you, are hereby notified that Narciso Luchessi, petitioner above named, hereby and now appeals from that certain order, judgment and decree made herein by the above entitled court on the 12 day of May, 1931, ordering, adjudging and decreeing that the writ of habeas corpus prayed for herein by the above named petitioner, Narciso Luchessi, be denied, and ordering said petitioner deported to Italy, and from the whole thereof, to the

United States Circuit Court of Appeals for the Ninth Circuit.

JOHN J. SULLIVAN,
LOUIS F. BUTY,
MICHAEL F. WARD,
Attorneys for Petitioner.

Received a copy of the within notice of appeal this 3 day of June 1931.

ANTHONY SAVAGE,
Attorney for Respondent.

[Endorsed]: Filed Jun. 3, 1931. Ed. M. Lakin, Clerk. [16]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING BOND OF APPELLANT.

Now, to-wit: on the 9th day of June, 1931, it is hereby

ORDERED that the appeal herein be allowed as prayed for, and it is further

ORDERED that petitioner herein may remain at large pending said appeal upon executing a recognizance or bond to the United States of America to the satisfaction of the Clerk of this Court in the sum of $1000, for the appearance of said petitioner, Narciso Luchessi, to answer the judgment of the Circuit Court of Appeals, and the judgment of this Court.

Done in open Court this 9th day of June, 1931.

COLIN NEBLETT,
Judge United States District Curt.

O. K.

HAMLET P. DODD,
Asst. U. S. Atty.

[Endorsed]: Filed Jun. 9, 1931. Ed. M. Lakin, Clerk. [17]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

1.

The Court erred in holding and deciding that the writ of habeas corpus prayed for by the petitioner should be denied.

2.

The Court erred in ordering the petitioner, Narciso Luchessi, deported to Italy.

JOHN J. SULLIVAN,
LOUIS F. BUTY,
MICHAEL F. WARD,
Attorneys for Appellant.

Received copy this 11 day of June, 1931.

ANTHONY SAVAGE,
U. S. Attorney.

[Endorsed]: Filed Jun. 11, 1931. Ed. M. Lakin, Clerk. [18]

[Title of Court and Cause.]

STIPULATION FOR TRANSMISSION OF ORIGINAL RECORD.

It is hereby stipulated by and between counsel for the petitioner and for the Commissioner of Immigration, that the certified immigration file and other records of the Department of Labor, covering the deportation proceedings against the petitioner herein, which were filed with the return of the Commissioner of Immigration to the order to show cause in this case, may be considered by the Circuit Court of Appeals in lieu of a certified copy of said immigration file and the records of the Department of Labor.

ANTHONY SAVAGE,
United States Attorney,
HAMLET P. DODD,
Assistant United States Attorney,
Attorneys for Respondent.
JOHN J. SULLIVAN,
MICHAEL F. WARD,
LOUIS F. BUTY,
Attorneys for Petitioner.

[Endorsed]: Filed Jun. 9, 1931. Ed. M. Lakin, Clerk. [19]

[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL RECORD.

Upon stipulation of counsel, it is by the Court,

ORDERED, and the Court does hereby order, that the Clerk of the above entitled Court transmit with the appellate record in said cause the original file and records of the Department of Labor, covering the deportation proceedings against the petitioner, which were filed with the return of the Commissioner to the order to show cause, directly to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, in order that said original file and records may be considered by the Circuit Court of Appeals in lieu of a certified copy of the same.

Done in open Court this 9th day of June, 1931.

COLIN NEBLETT,
United States District Judge.

O. K.

HAMLET P. DODD,
Asst. U. S. Atty.

[Endorsed]: Filed Jun. 9, 1931. Ed. M. Lakin, Clerk. [20]

[Title of Court and Cause.]

STIPULATION RE APPEAL BOND.

Whereas, it appearing that the above named petitioner has heretofore furnished cash bonds herein

in the sum of $1000.00, and said bond has heretofore been approved by the Court, and whereas

Petitioner's appeal bond herein has been fixed at the same sum of $1000.00, now therefore

IT IS HEREBY STIPULATED AND AGREED that said undertaking in the sum of $1000.00 now on file herein may remain in effect for the purpose of this appeal, and the same shall have the same force and effect as though re-posted, and that petitioner herein will not be required to furnish further or additional undertaking herein on account of said appeal.

ANTHONY SAVAGE,
United States Attorney.
HAMLET P. DODD,
Asst. United States Attorney,
Attorneys for Respondent.
JOHN J. SULLIVAN,
LOUIS F. BUTY,
MICHAEL F. WARD,
Attorneys for Petitioner.

[Endorsed]: Filed Jun 11, 1931. Ed. M. Lakin, Clerk. [21]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the above entitled Court:

Please prepare and duly authenticate the transcript and following portions of the record in this case for appeal of the petitioner and appellant heretofore allowed, to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Return to order to show cause.
4. Decision dated May 12, 1931.
5. Order and decree, dated 16 day of May, 1931.
6. Petition for appeal.
7. Notice of appeal.
8. Order allowing appeal and fixing bond.
9. Assignments of error.
10. Citation.
11. Stipulation for transmission of original record.
12. Order for transmission of original record.
13. Stipulation relating to bond of appellant.
14. This praecipe.

JOHN J. SULLIVAN,
LOUIS F. BUTY,
MICHAEL F. WARD,
Attorneys for Appellant.

Received copy this 15 day of June, 1931.

ANTHONY SAVAGE,
U. S. Attorney.

[Endorsed]: Filed Jun. 15, 1931. Ed. M. Lakin, Clerk. [22]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 22, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing-entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees and

charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the foregoing cause, to wit:

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 44 folios at 15¢	$ 6.60
Certificate of Clerk to Transcript of Record, with seal	.50
Petition for Appeal (Section 5 of Act)	5.00
Certificate of Clerk to Original Exhibits, with seal	.50
Total	$12.60 [23]

I hereby certify that the above cost for preparing and certifying record, amounting to $12.60, has been paid to me by the attorney for appellant.

I further certify that I attach hereto and transmit herewith the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District this 6th day of July, 1931.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington,
By E. W. PETTIT,
Deputy Clerk. [24]

[Title of Court and Cause.]

CITATION.

The United States of America.—ss.

To Luther Weedin, Commissioner of Immigration, Seattle, Washington, GREETING:

WHEREAS, Narciso Luchessi, petitioner herein, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and order lately, on, to-wit: May 12, 1931, rendered in the United States District Court for the Western District of Washington, Northern Division, made in favor of you, as said commissioner, denying petitioner a writ of habeas corpus, and ordering his deportation to Italy,

YOU ARE THEREFORE CITED TO APPEAR before the United States Circuit Court of Appeals, in the City of San Francisco, State of California, on the 5 day of October, 1931, to do and receive what may obtain to justice to be done in the premises.

Given under my hand in the City of Seattle, Washington, in the Ninth Circuit, this 9th day of June, 1931.

[Seal] COLIN NEBLETT,
United States District Judge.

O. K.

HAMLET P. DODD,
Asst. U. S. Atty.

[Endorsed]: Filed Jun. 9, 1931. Ed. M. Lakin, Clerk. [25]

[Title of Court and Cause.]

CERTIFICATE OF CLERK DISTRICT COURT OF U. S. AS TO ORIGINAL STIPULATION AND NEW CITATION.

United States of America,
Western District of Washington.—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the attached papers are the original "Stipulation" and new "Citation" filed in the above entitled cause, and on request of Counsel are forwarded to the Circuit Court of Appeals for the Ninth Circuit.

Dated this 14th day of July, 1931, at Seattle, Washington.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington.
By E. W. PETTIT,
Deputy.

[Title of Court and Cause.]

STIPULATION.

WHEREAS, it appears that the citation herein signed and entered on June 9, 1931, cites the appellee to appear before the U. S. Circuit Court of Appeals in San Francisco on October 5, 1931 and

WHEREAS, said citation should be for thirty days from the time same was signed and entered

NOW THEREFORE IT IS HEREBY STIPULATED by and between the parties to this action that a new citation may be taken out herein, requiring an appearance of the appellee on a date not less than thirty days after the date of said citation.

Dated this 11 day of July, 1931.

ANTHONY SAVAGE,
U. S. Attorney,
HAMLET P. DODD,
Assistant U. S. Attorney.
JOHN J. SULLIVAN,
MICHAEL F. WARD,
Attorneys for Appellant.

[Endorsed]: Filed Jul. 11, 1931. Ed. M. Lakin, Clerk.

[Title of Court and Cause.]

CITATION.

The United States of America.—ss.

To Luther Weedin, Commissioner of Immigration, Seattle, Washington. GREETING:

WHEREAS, Narciso Luchessi, petitioner herein, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and order lately, on, to-wit: May 12, 1931, rendered in the United States District Court for the Western District of Washington, Northern Division, made in favor of you, as said commissioner, denying

petitioner a writ of habeas corpus, and ordering his deportation to Italy,

YOU ARE THEREFORE CITED TO APPEAR before the United States Circuit Court of Appeals, in the City of San Francisco, State of California on the 13 day of August, 1931, to do and receive what may obtain to justice to be done in the premises.

Given under my hand in the City of Seattle, Washington, in the Ninth Circuit, this 13 day of July, 1931.

[Seal] JEREMIAH NETERER,
United States District Judge.

O. K.

HAMLET P. DODD,
Asst. U. S. Attorney.

[Endorsed]: Filed Jul. 13, 1931. Ed. M. Lakin, Clerk.

[Endorsed]: No. 6523. United States Circuit Court of Appeals for the Ninth Circuit. Narciso Luchessi, Appellant, vs. Luther Weedin, Commissioner of Immigration, Seattle, Washington, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed July 16, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

6523

In the United States Circuit Court of Appeals

For the Ninth Circuit

No. 6523

NARCISSO LUCHESSI,

Appellant,

vs.

LUTHER WEEDIN, Commissioner of Immigration, Port of Seattle, Washington,

Appellee.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellant

L. F. BUTY
JOHN J. SULLIVAN
MICHAEL F. WARD
Attorneys for Appellant

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

No. 6523

NARCISSO LUCHESSI,
Appellant,

vs.

LUTHER WEEDIN, Commissioner of Immigration, Port of Seattle, Washington,
Appellee.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellant

STATEMENT OF THE CASE

The appellant in this case, Narcisso Luchessi, is an Italian, born in Italy. He first came to the United States in 1906, being at that time of the age of eighteen years. With the exception of two trips back to Italy, he has resided continuously in the United States since he first entered the country. He was charged in a warrant of arrest issued by the Secretary of Labor, as follows:

"That he has been found managing a house of prostitution, or a musical dance hall or other place of amusement or resort habitually frequented by prostitutes; that he has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute; that he has been found assisting a prostitute."

That portion of the charge referring to the alien's having been found assisting a prostitute was dismissed by the Department of Labor at the original hearing.

The appellant was given a hearing before a United States Immigration Inspector, and held for deportation by the Immigration authorities.

Thereafter the appellant appealed to the Secretary of Labor from the decision of the inspector at Seattle, but the appeal was dismissed. The appellant then applied for a writ of habeas corpus before Jeremiah Neterer, Judge of the United States District Court, Western District, Washington, Northern Division, at Seattle, Washington, which was denied.

ASSIGNMENTS OF ERROR

1. The Court erred in holding and deciding the writ of habeas corpus prayed for by the petitioner should be denied.

2. The Court erred in ordering the petitioner deported to Italy.

ARGUMENT

The Government in this case relies on evidence produced by the following persons, who testified at the hearing: Immigration Inspectors C. C. Hall and William G. McNamara; one Phemie Novak and one Helen Gilbert, both admittedly prostitutes.

The facts relating to the conduct of the premises in which the appellant is alleged to have been found managing a house of prostitution, are as follows: On September 15, 1925, Mr. Luchessi married a woman by the name of Loie Tucker. The marriage in question took place at Everett, Washington. Prior to the marriage, of Mr. Luchessi and Loie Tucker, the latter had been operating a hotel in Tacoma, known as the Palmer Hotel, located at 1307½ Broadway. The appellant had been occupying a room in this hotel for some time prior to his marriage with Loie Tucker, the lessee of the premises. After their marriage he continued to occupy a room and live at the hotel but had nothing to do with the management of, care, or looking after the hotel at all. The appellant at that time was conducting a cigar stand at 5214 South Union Avenue, South Tacoma, Washington, a distance of at least four miles from the Palmer Hotel.

In the conduct of his cigar business, Mr. Luchessi was in the habit of leaving his hotel at about 8:15 or 8:30 o'clock in the morning, to go to his place of business in South Tacoma, where he would be occupied during the entire day and part of the night, as he kept his cigar stand operating as late as 12 o'clock midnight. This was the occupation of the appellant at the time that he was alleged to have violated the law which led up to the charges preferred by the Labor Department against him. At the particular time that the charges were preferred by the Secretary of Labor, Mr. Luchessi was actually confined to a hospital in Tacoma. That was in October, 1928. The only evidence in this case which allegedly connects the appellant directly as the owner or manager of the place in question is that found given by Inspector William G. McNamara, on page nine of the Immigration records in this case. The following is quoted from the record as the testimony of Mr. McNamara bearing on that point:

"Q. State whether on or about that date you had occasion to go to the place known as the Palmer Hotel, 1307½ Broadway, and if so, what occurred there?

"A. I went to that hotel accompanied by Inspector Yeager. Inspector Yeager represented to the girl he met that we were from Seattle, that he was a real estate dealer and that I wanted to see about buying the place. We saw the girl they call Phemie and then she called Mr. Luchessi. Her exact words were, 'Here is a couple of guys from Seattle who want to

buy the place.' We talked to Mr. Luchessi, told him we understood the place was for sale. He said yes, that he was the owner and he would sell for $2500. We asked if he had a lease. He said yes, he had. As I recall it he said the lease ran for three years, the rental during the first year was $90 per month and a larger sum each succeeding year. Mr. Yeager asked him how many girls they had there. He said he didn't have any at the present time, but see his manager, Phemie. He called Phemie in. She showed us over the place and she mentioned that she didn't have any girls there at the present time.

"During the conversation, however, Inspector Yeager asked her what the girls got and she said $2, but the loggers were all going to Seattle, they would have to cut the price, probably to a dollar and a half."

The evidence of Mr. Hall, Immigrant Inspector, follows, taken from the Immigration record:

"Q. What is your name?

"A. My name is Carl C. Hall, U. S. Immigrant Inspector.

"Q. Were you employed as immigrant inspector on or about October 4, 1928?

"A. I was.

"Q. State whether on or about that date you went to a place known as the Palmer Hotel, 1307½ Broadway, Tacoma, and if so, what occurred there?

"A. I made a visit to that house in Tacoma, the Palmer Hotel, on the evening of the 4th, about midnight, and was met there by a landlady who wanted to know what I wanted. I told her I wanted to see a girl. She said there was no girl—

"Attorney: I object.

"—present at that time, but to come back tomorrow. I asked her what she charged. She said she charged

$2 a trick, so I left her then. I called her up the following day in the afternoon and asked for Luchessi, and she informed me that he met with an automobile accident some time previous and was then stopping at his brother's home. She gave me the address of the brother's home. I called up the home and a girl answered the phone, and while the receiver was down I heard some conversation.

"Attorney: I object to all this.

"I could hear voices conversing in Italian. I waited there a few moments at the end of the receiver. I called from the U. S. Immigration office in Tacoma with Inspector McNamara sitting at the desk when I had the phone call in, so I hung up the receiver before anybody was able to answer. Later on in the evening I made another call to the landlady and told her I hadn't succeeded in getting Luchessi on the phone and she repeated her former statement as to his meeting with an accident, and so forth. Later on in the evening I made a visit up to the house, the Palmer Hotel, around between nine and ten o'clock. The same landlady whom I had met the previous night met me at the door and I informed her what I wanted, I wanted to see a girl. She told me to come in. I entered the hallway there, intending to follow her in. She proceeded to what I took for a front parlor. I saw a man sitting there whom she conversed with and when I proceeded to follow her into the front parlor she said, 'You wait here and I will send a girl out,' and she sent a girl out, whose name later developed as Marian. She came out to the hallway and I engaged her in quite a lengthy conversation as to the prices for the trick and who the lady was that I met there and she informed me that that was the landlady, and also informed me that the price of a trick was $2 and upon being questioned as to how much she received of that $2, she told me she paid half of it over to the landlady. The conversation

apparently developed on too long to suit the landlady because she came out in the hallway.

"Attorney: I object.

"Q. You mean then that you were solicited in the Palmer Hotel on or about the night of October 4th or 5th, 1928, by a girl whom you know now as Marian?

"Attorney: I object.

"A. Yes.

"Q. Did this girl, Marian, solicit you to practice prostitution with you?

"A. She was sent out for that purpose because I asked the landlady specifically for that, for a girl to commit prostitution and she sent Marian out for that purpose. I made my purpose for coming there fully known to the landlady.

"Q. And you state that you inquired of this girl, Marian, what she would charge for an act of prostitution?

"A. Yes.

"Q. What did she say?

"A. $2.

"Q. You testify then that you asked her as to what amount of that $2 was to be hers and whether she divided it with anyone else?

"A. Yes, I did.

"Q. What did she say?

"A. She informed me that she paid half of it over to the landlady."

The foregoing, together with evidence of Phemie Novak, who claimed to be the manager of this hotel, and the evidence of Helen Gilbert, a prostitute, constitutes the entire testimony introduced by the Gov-

ernment to sustain the charges against the appellant.

The evidence as shown by Exhibit "1," in this case, being the lease entered into by Loie Tucker, wife of the appellant, in September, 1926, would surely indicate that the property was leased by the woman and not by Mr. Luchessi. The receipts on file in this case known as Exhibit "2" show that Loie Tucker paid for the water, lights, telephone, etc., after September, 1926. Nowhere in the evidence does it appear that the appellant was in any manner directly or indirectly, interested in the management of the business of this hotel.

"Alien's Exhibit Nos. 1 and 2, show that said hotel was leased to LOIE TUCKER, in September, 1926, and that thereafter during 1926 rent, telephone, electric light and gas bills, etc., were paid by Loie Tucker." (Page "A," Summary of Inspector Joseph H. Gee. Immigration Records of this case.)

At the time of the activities of the Immigrant Inspectors, Mr. Luchessi was incapacitated and laid up in the hospital. It is quite evident that anything that might be going on there while he was confined to the hospital would not be under his personal supervision or with his knowledge. In as much as there was only one woman in the place and she was there visiting Phemie Novak, it does not seem that the Government made out a case from which it could be held the

hotel in question was a house of prostitution, within the meaning of the statute. There is no evidence of any kind or description which shows that the appellant in this case profited directly or indirectly by reason of any prostitution being practiced at this house.

A case almost in point with the case before us was decided in the Tenth Circuit, December 31, 1931, being the case of *Strench vs. Pedaris*, 55 F. (2nd) 597. This case was tried before Judges Cotteral and Phillips of the Circuit Court and Judge Pollock, of the District Court. The decision being rendered by Judge Pollock.

The defendant was tried for deportation on the ground that he had been found an inmate of a house of prostitution. As found on page 597, the evidence established that Francis Pedaris, wife of the defendant, practiced prostitution in a building owned by Pedaris, and a portion of which said building Pedaris conducted as a coffee shop. That Pedaris lived with his wife in this building as man and wife. There was no evidence found in the record that defendant acted as a pimp or in anywise aided his wife in any such practice, or that he in any manner profited from the practice of prostitution by his wife. The statute under which Pedaris was arrested was the Act of

February 20, 1917, c. 1134, 34 Stat. 898, which before amendment read as follows: "Any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections twenty and twenty-one of this Act."

As amended by Act of March 26, 1910, 36 Stat. 263, the Act reads as follows: "Any alien who shall be found an inmate of a house of prostitution, or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, shall be deemed to be unlawfully within the United States."

The question presented to the Court was whether, under this act a man could be held guilty of being an inmate of a house of prostitution, as was the charge made against Pedaris in the warrant issued by the Assistant Secretary of Labor under which deportation was attempted. Quoting from page 598:

"While it is apparent that the act before amendment was limited by its terms to members of the female sex, yet it is entirely plain it was so amended as to include members of the male sex if they inhabited a house of prostitution, and took part in the immoral practice carried on therein, or participated in the profit derived from the practice. As has been

seen the evidence in this case fails to so show, and on this ground alone the judgment in the habeas corpus case appealed from would have to be affirmed."

The evidence in the instant case fails to show that the defendant in this case took part in any immoral practice carried on on the premises, or participated in the profits derived from the practice. The Circuit Court held in the last mentioned case that inasmuch as the evidence failed to show that the defendant in that case took part in any immoral practice or participated in any profits, that the judgment thereupon rendered in favor of the defendant would necessarily have to be affirmed. Applying the rule in that case to the case before us, it would appear that the defendant in this case should have been granted a writ of habeas corpus as prayed for in the District Court.

As stated hereinabove, there is no competent evidence to show that Mr. Luchessi was the owner of the hotel, whereas there was positive evidence to show that his wife was the owner, or lessee. The only evidence at all that indicates that Luchessi might have been the owner of the hotel was the evidence of Phemie Novak, who had no personal knowledge of the fact, and the statements of the inspectors; the documentary testimony clearly shows that Loie Tucker was the owner.

"In the proceedings for the deportation of an alien on the ground that he is sharing in the earnings of a prostitute, proof of his ownership of such house can not be made by proof of general reputation."

Katz vs. Commissioner of Immgiration, 245 F., page 316.

It is held in the same case at page 319 as follows:

"We are aware of the holding of the Supreme Court that the question is for the Commissioner of Immigration, and that the Court is not permitted to look behind his findings, when it is a matter of weighing evidence; but where there is substantially no evidence competent to establish the charge preferred, it then bcomes a question of law for the Court."

The principle involved has been substantially determined by the case of *Backus vs. Owe Sam Goon*, 235 Federal, page 847.

In *Backus vs. Katz*, 245 Federal, page 320, it was held:

"In a proceeding where the deportation of an alien, evidence held insufficient to show that he had received or was receiving the earnings of a prostitute; deportation was improperly ordered."

CONCLUSION

We maintain the Government has failed herein for the following reasons:

I. There is no competent evidence before the court that the defendant was managing a house of prostitution or musical dance hall or other place of amusement or resort habitually frequented by prostitutes.

II. There is no competent evidence establishing the Palmer Hotel as a house of prostitution.

III. There is no competent evidence establishing this place as a musical dance hall, or other place of amusement.

IV. There is no competent evidence establishing that the Palmer House was habitually frequented by prostitutes.

V. That there is no competent evidence establishing that the defendant was found receiving anything of any value whatever from a prostitute.

VI. There is no competent evidence establishing that he shared in or derived any benefit whatever from the earnings of a prostitute.

In view of the fact that the above constitutes the various elements of the charges stated by the Secretary of Labor against the defendant and in view of the fact that the Government has failed to offer competent evidence sustaining any one of these points, we respectfully urge on this Court that the Government has failed to establish its case and that therefore the judgment of the District Court should be reversed.

Respectfully submitted,

L. F. BUTY,
JOHN J. SULLIVAN,
MICHAEL F. WARD,
Attorneys for Appellant.

6523

In the United States Circuit Court of Appeals

For the Ninth Circuit

No. 6523

NARCISO LUCCHESI,

Appellant,

vs,

LUTHER WEEDIN, as United States Commissioner of Immigration at Seattle, Washington,

Appellee.

Upon appeal from the District Court of the United States for the Western District of Washington, Northern Division.

HONORABLE JEREMIAH NETERER, JUDGE

BRIEF OF APPELLEE

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INDEX

STATUTES CITED

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant, NARCISO, alias NELSON, LUCCHESI, alias NARCISO LUCCHESI, was born in Italy January 24, 1888, and is a subject of Italy. He claims that he first came to the United States in 1905 or 1906; that he remained in this country two and one-half years and then returned to Italy; that he next entered the United States in 1911; that he

departed for Italy June 8, 1925, and remained there about two or three months. The record shows that he returned to this country on the steamer "Duilio," landing at the port of New York, August 25, 1925.

Information having been received by the immigration officials that said appellant was running the Palmer Hotel in Tacoma as a house of prostitution, an investigation as to the facts was instituted by the said officials and, in connection therewith, statements were taken by Immigrant Inspector H. G. Yeager at Tacoma, Washington, October 16, 1928, from the appellant and from Helen Alice Wilbert, Mrs. Phemie Novak and Immigrant Inspector William G. McNamara. October 17, 1928, the Commissioner of Immigration at Seattle, Washington, applied to the Secretary of Labor for a warrant for the arrest of the appellant, and such warrant was issued October 18, 1928, by A. E. Cook, Assistant to the Secretary of Labor, charging that said appellant had been found in the United States in violation of the Immigration Act of February 5, 1917, for the following among other reasons:

> "That he has been found managing a house of prostitution, or music or dance hall or other place of amusement, or resort, habitually frequented by prostitutes; that he has been found

receiving, sharing in, or deriving benefits from the earnings of a prostitute; and that he has been found assisting a prostitute."

The appellant was duly arrested by an immigrant inspector under authority of this warrant, and was released under $1,000 bond October 20, 1928, pending further hearing and investigation. January 3, 1929, a hearing under the said warrant was held at the United States Immigration Station at Seattle, Washington, said hearing being conducted by Immigrant Inspector Joseph H. Gee. At this hearing testimony was taken from the appellant and Immigrant Inspectors C. C. Hall and William G. McNamara. September 26, 1929, a further hearing was accorded the appellant at the same place by the same Immigrant Inspector. Thereafter the entire record was forwarded to the Department of Labor at Washington and, on December 12, 1929, a warrant of deportation was issued by P. F. Snyder, Assistant to the Secretary of Labor, commanding that the appellant be returned to Italy, on the finding that he had been found in the United States in violation of the Immigration Act of February 5, 1917, to wit:

"That he has been found managing a house of prostitution, or music, or dance, hall, or other

> place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather."

Before deportation could be accomplished the appellant was convicted of violating the National Prohibition Act and was sentenced to six months imprisonment in the Pierce County Jail. He surrendered to the immigration authorities August 26, 1930, and, on August 27, 1930, filed a Petition for a Writ of Habeas Corpus in the District Court of the United States for the Western District of Washington, Northern Division. He was released by the immigration officials August 30, 1930, by order of said court, having filed therewith a bond of $1,000. After various postponements of the hearing on the Order to Show Cause, which had issued on the filing of the Petition, the habeas corpus proceedings were dismissed without prejudice December 29, 1930, at the request of the appellant, and a petition for a re-hearing was filed with the Department of Labor, pending the result of which the appellant was released under $1,000 bond to that Department. This petition was denied by the Department of Labor and the appellant then filed a petition for a stay of deportation, which also was denied. The appellant again surrendered to the immigration authorities February 24, 1931, and immediately filed another

petition for a Writ of Habeas Corpus in the same court as before. He was admitted to bail by said court February 26, 1931, and was released by the immigration authorities on that date. Subsequently the writ was denied by said court, and the case now comes before this court on appeal from said judgment.

ARGUMENT

The Petition alleged that the petitioner was not granted a fair hearing by the Immigration officials, and cited as reasons for such allegation:

1. "That witnesses were examined in the absence of his counsel of record."

2. "That the record and evidence discloses no facts or evidence upon which the Secretary of Labor and Commissioner of Immigration at Seattle, Washington, could base the finding that your petitioner had violated said Act, as charged."

Immigrant Inspector Carl C. Hall reported October 8, 1928, (pp. 33-32) that, on October 4, 1928, about midnight, he called at the Palmer Hotel and was met at the door by the "landlady"; that the said "landlady" asked him what he wanted, and he replied that he wanted a girl; that the "landlady"

told him to return the following afternoon, as there was no girl there at the time; that he then asked the "landlady" if she wouldn't do, and the "landlady" that she had a "party" and was busy; that he then inquired of the "landlady" the price of a "trick", and she replied that the price was two dollars; that, about 9:30 P. M. October 5, 1928, he again visited the Palmer Hotel and was met at the door by the same "landlady"; that he asked her if he could have a girl; that she sent a girl into the hallway; that said girl, who informed him that her name was "Marion", stated to him that she charged two dollars a "trick", and that she gave the "landlady" half of the money which she received for each "trick"; that, earlier in the evening, he had walked up and down the street in front of the Palmer Hotel, and had seen men go into and come out of, said hotel quite frequently.

Helen Alice Wilbert testified October 16, 1928 at Tacoma, Washington, before Immigrant Inspector H. G. Yeager, (pp. 14-12) that she had been practicing prostitution for four years, in Seattle and Tacoma; that she had been living at the Palmer Hotel since a week ago the preceding Saturday; that a girl named "Marion" had been at the said hotel prior to the time she went there; that Phemie Novak was "running" the Palmer Hotel for Nels Lucchesi.

Mrs. Phemie Novak testified on the same date, at the same place and before the same Inspector, (pp. 12-10) that she was taking care of the Palmer Hotel for Nelson Lucchesi; that he owned the said hotel and that she was just doing the work around there, for which she received her room and board; that she had had girls living at said hotel, among them being "Marion" who had gone to Olympia about three weeks before; that "Marion" must have been at the said hotel about five days altogether, inclusive of October 5, 1928; that "Marion" paid her two dollars a night for her two rooms; and, although denying that she knew for what purpose Immigrant Inspector Hall wanted a girl, when he came to the hotel in the evening of October 5th and asked for one she let him in and sent the girl "Marion" out into the hall to see him, because "Marion" was the only girl there at the time. She denied that, when the said Immigrant Inspector had called at the said hotel about midnight of October 4, 1928, she had told him that the price for prostitution at the said hotel was two dollars, *and claimed that she knew nothing concerning the price, because that was "up to" the girls.*

After Mrs. Novak had testified, Helen Alice Wilbert made a further statement (pp. 10-9) and admitt-

ed that she had practiced prostitution at the Palmer Hotel within the last week, and that she had performed approximately ten such acts. She also stated that Lucchesi never had told her that she could not practice prastitution in the said hotel.

Mrs. Phemie Novak also made an additional statement (pp. 9-8) and testified that she had stopped at the Palmer Hotel for approximately seven months; that, prior to going to the said hotel to stay, she often visited Lucchesi's wife there, and that there were a number of prostitutes there; that, since she had been at the hotel, she had given Helen Wilbert the privilege of "picking up extra change" from men; that, as far as she knew, Helen's statement that she had performed acts of prostitution with approximately ten men during the last week was correct that Helen did not hesitate to accommodate men because Lucchesi happened to be in the building; that Lucchesi had never said anything to her regarding getting the girl, Helen, out of the hotel; that the girl, "Marion", paid her two dollars a night for her room, with the privilege of practicing prostitution, and that the said "Marion" took men to her room.

The appellant, Narciso Lucchesi, also testified on the same date, at the same place, before the same

Inspector, (pp. 8-4) that he was also known as Nelson Lucchesi; that he bought and paid for the Palmer Hotel; that he did not buy it for himself, but for his wife, Loie Tucker; that, after said Loie Tucker had left him and gone to Aberdeen,, he got the woman, Phemie Novak, to take care of it for him until he could sell it; that there were girls staying at the hotel but he did not know what they were doing.

United States Immigrant Inspector William G. McNamara testified on the same date, at the same place, before the same Inspector, (p. 4) that, on the 16th (apparently, from subsequent testimony, should read 4th) of October 1928, he visited the Palmer Hotel; that he saw a girl called "Helen" there; that he also saw a tall girl "running" the place, and Mr. Lucchesi; that he talked with the girl who was running the place and that the said girl, *in the presence of Mr. Lucchesi,* stated that they kept only one girl there because there was no business for more; that this girl (who was running the place) stated to him that the price was two dollars; that the girls did not pay room rent, but "split at the time". When Inspector McNamara concluded his statement, Lucchesi, who appeares to have been present while he was making same, was asked if there was anything he wished to ask the Inspector, and answered, "No". (p. 4)

It will be noted that the report of Immigrant Inspector Hall and the statements, *supra*, were made *prior to* the designation of Mr. C. T. McKinney as attorney for the appellant, notice of Mr. McKinney's authorization to represent the appelant being dated October 17, 1928, (see Exhibit "A"). The appellant had no counsel of record prior to that date. Consequently the allegation that these witnesses (presumably referred to in the Petition) were examined in the absence of the appellant's counsel of record is totally without foundation. The appellant and the witnesses were advised of the object of taking their testimony and there is nothing in the record to show that any one of their statements was other than voluntary. Consequently such statements were admissible in evidence:

Low Wah Suey v. Backus, 225 U. S. 460-469-470.

Ng Kai Ben v. Weedin, 44 F (2nd) 315. (this court).

Ex Parte Kaizo Kamiyama, 44 F (2nd) 503. (this court).

Bilo Kumsky v. Tod, 263 U. S. 149.

Vajtauer v. Commissioner of Immigration, 273 U. S. 103.

October 17, 1928, Phemie Novak and Helen Alice Wilbert again testified before Immigrant Inspec-

tor H. G. Yeager, at Seattle, Washington. The appellant was present at this hearing, together with Attorney C. T. McKinney who participated in the examination of the witnesses.

Phemie Novak testified (pp. 38-37) that she was temporarily managing, or looking after, the Palmer Hotel, and that Lucchesi was the owner of said hotel. She also reaffirmed her statement of October 16th regarding Helen Wilbert's presence in the said hotel and having accorded the said Helen Wilbert the privilege of practicing prostitution there; also as to the presence of the girl "Marion" at the said hotel, although claiming that she did not remember anything regarding having given "Marion" the privilege of practicing prostitution there. On cross examination by Attorney McKinney she testified that she was unable to prove that Lucchesi was the owner of the hotel in question, and knew only that he claimed ownership thereof. She also stated that, as far as she knew, Lucchesi had no knowledge regarding "Marion's" presence there.

Helen Alice Wilbert testified (pp. 36-35) that she was a prostitute by occupation, and reaffirmed her former statements as to having been granted the privilege of practicing prostitution at the Palmer

Hotel, and having practiced prostitution there. She also testified that, during the period of approximately one week she was at the hotel, she saw Lucchesi there, and that he was in the place three or four times and stayed all night once or twice. She claimed, however, that she never talked with Lucchesi about practicing prostitution there, and that she did not know that he had knowledge that she was doing so, and that, while she had no absolute knowledge that Lucchesi was the owner of the hotel, it was her understanding, from what she had heard, that such was the fact.

On re-call Phemie Novak testified (pp. 35-34) that, while Mrs. Lucchesi was at the Palmer Hotel, she had visited there and had seen girls there; that, while she was living at the hotel, Luccesi never had told her to allow girls to practice prostitution there.

At the hearing under the warrent of arrest January 3, 1929, Attorney C. T. McKinney was present and participated in the examination of the witnesses.

At said hearing the appellant (pp. 54-50 and 45-44) repudiated his former statement that he bought the Palmer Hotel for his wife, and claimed that his wife paid for the said hotel with her own money.

He also claimed that he never had any interest in the said hotel, that he never paid any bills for said hotel and never had any voice in the management of same. He stated, however, that he had roomed at the said hotel from 1923 or 1924 until the date which he was testifying, and that *he did not pay any room rent.*

Immigrant Inspector Carl C. Hall testified (pp. 50-47) as to his visit to the Palmer Hotel October 4 and 5, 1928, and his testimony was in substantial agreement with his report of October 8, 1928, referred to above. He stated that, on the occasion of his visit to the Palmer Hotel October 5th,, he made it fully known to the "landlady" that he wanted a girl for the purpose of committing an act of prostitution, and reiterated his statements contained in his report that the girl, "Marion," told him that two dollars was the price of a "trick" and that she paid one-half of that amount to the "landlady".

Immigrant Inspector William G. McNamara testified (pp. 47-45) that, on or about October 4, 1928, he visited the Palmer Hotel in company with Inspector Yeager; that Inspector Yeager represented to the girl they met at the hotel that he was a real estate dealer from Seattle and that the witness wished

to see about buying the hotel; that he and Inspector Yeager saw the girl named "Phemie" and that she called Lucchesi, telling him that he and Inspector Yeager were a couple of "guys" from Seattle who wanted to buy the place; that he and Inspector Yeager talked to Lucchesi, and that Lucchesi stated that he was the owner of the hotel and would sell it for $2,500.00; that Lucchesi stated that he did not have any girls there at the time, but they should see his manager, Phemie; that Lucchesi called Phemie in, and Phemie showed them over the place and mentioned that she did not have any girls there at that time; that, during the conversation between them and Phemie, Phemie stated that the girls, when there, got two dollars but, as the loggers were all going to Seattle, they probably woud have to cut the price to a dollar and a half; that, at all times during their conversation with Lucchesi, Lucchesi represented himself to them as the owner, or proprietor, of the hotel and that he referred to the woman Phemie as his manager; that, during their visit to the hotel, they saw a smaller woman there who was called Helen; that Lucchesi made no claim that he was trying to sell the hotel for any person other than himself.

September 26, 1929 the appellant was accorded a further hearing at the Seattle Immigration Station

by Immigrant Inspector Josheph H. Gee. Paul D. Coles was present as attorney for the appellant and participated in his examination.

The appellant testified (pp. 43-41) that he did not remember whether or not, about February 16, 1925, he made application to the City Light and Water Department of Tacoma to have the light turned on at the Palmer Hotel. He stated that sometimes he paid the rent for the said hotel as the owner thereof sometimes sent him over to pay the rent. When asked if it was not a fact that, February 16, 1925, he signed an application to the Pacific Telephone and Telegraph Company, Tacoma, Washington, for a telephone for the Palmer Hotel, and also an application for a private telephone for his own room at the said hotel, he answered that he did not remember, and that he never had a telephone in his room. On cross-examination by Mr. Coles, he testified that he thought that he leased the Palmer Hotel in 1924 or 1923 and had it probably about fifteen months; that he thought that, when he made application for City Light and Water in February 1925, he signed the said application for Loie Tucker; that, when he paid the rent for the Palmer Hotel, he did so for Loie Tucker; that, if he ever signed for the telephone at the hotel, he did so for Loie

Tucker; that he never got any money from the Palmer Hotel and never had anything to do with the management of same.

Immigrant Inspector Voligny's report of January 19,, 1929 (pp. 31-30), shows that, on February 16, 1925, the appellant signed an application to have the electric light turned on at the Palmer Hotel, and on the same date signed applications of a telephone for the said hotel and for his room therein. However, as the hotel appears to have been in the hands of another person for some months in 1926 prior to its lease by Loie Tucker September 17 of that year these matters do not appear to have any material bearing on the present case.

The record shows that the appellant was married in Italy June 3, 1909, to one Assunta Trinci and had two children by her; that he never was divorced from her; that, on or about September 15, 1925, shortly after his last return from Italy, he bigamously married Loie Beatrice Jacobs, alias Loie Tucker, at Everett, Washington; that he lived with the said woman from that time until about May or June 1928, when she left him and went to Aberdeen, Washington, to live; that he and the said woman lived together at the Palmer hotel from the latter part of

1926 until May or June 1928, and that he continued to make his home at the said hotel after the said woman went to Aberdeen, and until the date on which he testified (January 3, 1929).

It was contended before the Department of Labor that, inasmuch as the appellant had a business a few miles distant from the Palmer Hotel, he could not have been managing said hotel at the time in question. The record shows, however, that he was present at said hotel several times during the period Helen Wilbert was there, and also was present when Immigrant Inspectors McNamara and Yeager called there October 4, 1928. It also was contended that he could not have been the owner, or lessee, of the hotel because the said building had been leased to Loie Tucker September 17, 1926, for a period of three years. There is no reasonable evidence that Loie Tucker complied with the terms of said lease after she went to Aberdeen in May or June 1928, and that the appellant did not take over the hotel on his own account when she left. In fact the evidence shows that, when he offered to sell the hotel to Immigrant Inspectors McNamara and Yeager October 4, 1928, he told the said inspectors that he had a lease on same. As this so-called "hotel" is said to contain only seven bed-rooms, a parlor and a

kitchen, the petitioner's claim that he did not know what the girls were doing there is absurd.

Among various definitions of the term "Manage" contained in Webster's International Dictionary, 1923 Edition, are the following:

> "To have under control and direction;" "to conduct;" "to cotnrol;" "to carry on;" "to have the care of;" "to tend;" "to direct affairs;" "to carry on business or affairs;" "to administer;" also "to admit of being carried on."

Section 19 of the Immigration Act of February 5, 1917 (8 USCA, Section 155) provides as follows:

> "* * * Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who *manages* or is employed by, in, or in connection with *any house of prostitution* or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported; * * * In every case where any person is ordered deported from the United States under the provisions of this act, or of any law or treaty, the decision of the

Secretary of Labor shall be final." (Italics ours)

Section 20 of the same Act (8 USCA, Sec. 156) provides:

> "That the deportation of aliens provided for in this act shall, at the option of the Secretary of Labor, be to the country whence they came or to the foriegn port at which such aliens embarked for the United States; or, if such embarkation was for foriegn contiguous territory, to the foreign port at which they embarked for such territory; or, if such aliens entered foreign contiguous territory from the United States and later entered the United States; or if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their re-entry, or imposes any condition upon permitting reentry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the conutry from which they entered the United States. * * *"

The findings of immigration officials on questions of fact, after a fair hearing, are conclusive:

Vajtauer v. Comis. of Immigration, supra.

Tod v. Walman, 266 U. S. 103.

Tisi v. Tod, 264, U. S. 131.

A Departmental warrant for the deportation of an alien cannot be rightfully issued without evidence to support it, but, *if there is a hearing and some evidence,* the decision of the Secretary of Labor is conclusive:

United States v. Uhl, (CCA), 211 Fed. 628.

It also has been uniformly held that the courts have no power to interfere with decisions of immigration officials unless there was a denial of a fair hearing, or the finding was not supported by evidence, or there was erroneous application of a rule of law:

United States v. Ju Toy, 198 U. S. 253.
Chin Yow v. United States, 208 U. S. 8.
Low Wah Suey v. Backus, supra.
Kwock Jun Fat v. White, 253 U. S. 454.

In reception of evidence immigration officials are not restricted to such evidence as meets the requirements of legal proof, but can receive, and determine the questions before them upon, any evidence which seems to them worthy of credit:

Johnson v. Kock Shing (CCA 1), 3 F (2d) 889.
Moy Said Ching v. Tillinghast (CCA 1), 21 F (2d) 810,811.

In immigration cases neither the hearsay, the best evidence, nor any of the common-law rules of evidence need be observed:

United States ex rel. Smith v. Curran (CCA NY), 12 F (2d) 636.

Ng Mon Tong v. Weedin 43 F (2d) 718. (this court).

The present case differs materially from *Katz v. Commissioner of Immigration*, 245 Fed. 315, and *Backus v. Katz*, 245 Fed. 320, cited by counsel for the appellant. Katz was simply the owner of a house which he was shown to have rented to a woman who apparently used it for a house of prostitution. He did not live there nor have anything whatever to do with the management. In the present case the evidence shows that, after Loie Tucker left him and went to Aberdeen, Washington, to live, the appellant continued to make his home at the Palmer Hotel, #1307½ Broadway, Tacoma; that *he secured* Phemie Novak to act as housekeeper, or "landlady," at said hotel; that Phemie Novak acted as such *for him;* that he claimed to be the owner of the said hotel, and was so regarded by both Phemie Novak and Alice Wilbert. The present case is clearly distinguished from *Strench v. Pedaris*, particularly in that Pedaris was charged with being an "inmate" of a house of pros-

titution. The case of *Backus v. Owe Sam Goon* is not in point here.

The record contains two affidavits dated January 14, 1930 (more than three and one half months subsequent to the last hearing; more than two and one half months after the record of the various hearings had been forwarded to the Department of Labor at Washington, D. C., and more than a month after the warrant of deportation was issued), one of same purporting to have been executed by PHEMIE NOVAK, and the other by LOIE TUCKER (pp. 78-75). The affidavit of PHEMIE NOVAK is to the effect that the appellant never had knowledge of any acts of prostitution committed by HELEN WILBERT, or any other person, in the Palmer Hotel; that, when she was questioned by Inspector Yeager October 17, 1928, she merely *assumed* that the appellant was the owner of said hotel; that, at the time HELEN WILBERT was stopping at said hotel, the appellant was convalescing at the home of his brother from an operation for appendicitis; that the said HELEN WILBERT was staying at the said hotel for the purpose of being a companion to her (the affiant), and did not pay any room-rent at any time to her or to any other person. The affidavit of LOIE TUCKER is to the effect that she was the owner of the Palmer Hotel

and that the appellant never had anything to do with its operation, and never shared in the profits therefrom; that PHEMIE NOVAK was in charge of said hotel and the appellant was living there at her request for the purpose of protecting her interests, and was receiving free rent for his services in her behalf; that, at said time, she was the legal wife of the appellant.

The above-mentioned affidavits apparently were forwarded to the Commissioner-General of Immigration by United States Senator C. C. Dill with his letter of March 10, 1930 (p. 79). The Commissioner-General of Immigration replied to said letter April 21, 1930 (pp. 83-82) to the effect that the appellant was then serving a sentence of six months in the Pierce County Jail, that his deportation was mandatory under the law and would be proceeded with upon the termination of his imprisonment. In the said letter of reply the Commissioner-General also cited some of the testimony which had been adduced, and which has been refered to *supra*. August 19, 1930, telegrams were sent to the Department of Labor by Congressman Albert Johnson and Attorney Louis F. Buty requesting that the petitioner's deportation be stayed (pp. 83½ and 89), which request was denied (See memorandum of the Board of Review, p. 90). Such

stay of deportation was effected, however, by the institution of habeas corpus proceedings. After said proceedings had been dismissed at the request of the petitioner in the latter part of December 1930 (more than a year after the warrent of deportation was issued), a formal Petition for a re-hearing of the case was filed (pp. 130-124), accompanied by affidavits purporting to have been executed by LOIE BEATRICE HART, PHEMIE NOVAK, the appellant, and NEILL M. HEATH, a certificate by Dr. A. L. SCHULTZ, and a letter, or certificate, by E. R. KRONA (pp. 123-107). This Petition was followed up closely by a letter from the Director of the National Catholic Welfare Conference and telegrams from three Catholic clergymen of Tacoma and St. Martin's College (pp. 137-134).

The affidavit of LOIE BEATRICE HART asserts that, at the time in question (October 1928), she and the appellant had been separated for several months, during which period she had been living in Aberdeen; that, prior to leaving the appellant, she had employed PHEMIE NOVAK to act as her agent and manager, and given her instructions to conduct the Palmer Hotel in a proper and legitimate manner, and to make all accountings to her; that she did not at any time authorize the said PHEMIE NOVAK to

operate the said hotel as a house of prostitution; that she had no knowledge of the manner in which the said PHEMIE NOVAK operated the hotel, for the reason that she never visited the hotel after separating from the appellant.

The affidavit of PHEMIE NOVAK contradicts her testimony (pp. 12-8) in most of the essential particulars, as will be noted by perusal of same. That of the appellant amounts to a reiteration of his former claims that he did not own or have anything to do with the management of the Palmer Hotel. It also sets forth that LOIE TUCKER, instead of himself as he testified at first, hired PHEMIE NOVAK to manage the hotel; that, during the period in question, he was making his home with his brother, and had no idea whatever as to the manner in which the said PHEMIE NOVAK was conducting the hotel. The affidavit of NEILL M. HEATH is of a negative character, and is of no value as impeaching any of the testimony. The laudatory telegrams of the clergymen (pp. 136-134) are of no evidential value. It seems evident that the said clergymen did not know that the appellant was a bigamist, and that he had served a sentence of six months in the Pierce County Jail for violation of the prohibition laws only a short time before.

Nearly nine months intervened between the hearings January 3, 1929, and September 26, 1929, and nearly another month elapsed before the record was forwarded to the Department of Labor October 24, 1929. The record of the hearing September 26, 1929, gives no indication that the appellant was not prepared to go forward with same at that time, or that he desired or proposed to introduce any additional evidence later. Had it been desired to introduce anything additional, there was ample opportunity to have done so.

The record shows that, at the hearing January 3, 1929, the appellant was represented by Attorney C. T. McKinney, a former Assistant United States Attorney; that, at the hearing September 26, 1929, he was represented by Attorney Paul D. Coles, another former Assistant United States Attorney, and that the Brief in the appellant's behalf (pp. 27-20) was signed by Thomas P. Revelle, former Uniter States Attorney for the Western District of Washington; also that the appellant was represented before the Department of Labor at Washington, D. C. by Roger O'Donnell, unquestionably one of the ablest attorneys in the United States in immigration matters, whose Brief comprises pages 62-58 of the record. No contention was set up by Mr. O'Donnell that the appel-

lant's rights had been prejudiced in any manner by the change in counsel during the progress of the case, which appears to be the principal basis for the Petition for Re-hearing filed more than a year after the case was closed and the warrant of deportation issued.

Attention is invited to the memorandum of the Board of Review made in connection with the denial of the said petition (pp. 139-138).

The Secretary of Labor was not obliged to believe the statements contained in the affidavits executed and filed after the case was closed, and would not have been obliged to believe such testimony as might have been offered if the petition for a re-hearing had been granted:

Prentis v. Seu Leung (CCA 7), 203 F. 25.

Moy Chee Chong v. Weedin, 28 F. (2d) 263. (this court).

Ghiggeri v. Nagle, 19 F. (2d) 875. (this court).

Ng Kai Ben v. Weedin, supra.

The Secretary of Labor was under no legal obligation to grant the petition for a re-hearing and, under the circumstances, his refusal to do so was not arbitrary or unfair:

Flynn ex rel. v. Jew Yet Wing v. Tillinghast, (CCA 1), 44 F (2d) 789.

While the circumstances in said case were not exactly parallel with those in the present one, it is believed that the opinion is applicable here.

CONCLUSION.

The appellant was accorded a fair hearing by the immigration officials. The action of the Assistant to the Secretary of Labor in issuing the warrant of deportation, and in denying the petition for a rehearing, was not arbitrary, or capricious, or in contravention of any rule of law. There was ample evidence to justify the conclusion that, on or about October 4th and 5th, 1928, the Palmer Hotel, #1307½ Broadway, Tacoma, Washington, was a "house of prostitution," and that the appellant had been found "managing" same. The charge in the warrant of deportation is sustained. The District Court was not in error in denying the Writ of Habeas Corpus and its Judgement should be affirmed.

Respectfully submitted,

ANTHONY SAVAGE,
United States Attorney,

HAMLET P. DODD,
Assistant United States Attorney,
Attorneys for Appellee.

JOHN F. DUNTON,
United States Immigration Service, Seattle, Washington,
On the Brief.

No. 6427

United States

Circuit Court of Appeals

For the Ninth Circuit.

MARY C. YOUNG,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

and

MARY YOUNG MOORE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

[1*] DOCKET No. 39,824.

MARY YOUNG MOORE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES.

For Petitioner: THEO. B. BENSON, Esq.,
For Respondent: W. F. GIBBS, Esq.

DOCKET ENTRIES.

1928.

July 16—Petition received and filed. Taxpayer notified (fee paid).

July 17—Copy of petition served on General Counsel.

Sept. 13—Answer filed by General Counsel.

Sept. 15—Copy of answer served on taxpayer—General Calendar.

1929.

Dec. 6—Hearing set 2/24/30.

1930.

Feb. 24—Hearing had before Mr. Murdock on merits. Submitted on stipulation and record. Ordered consolidated for hearing and decision. Briefs due in 30 days.

*Page-number appearing at the top of page of original certified Transcript of Record.

Feb. 24—Motion to consolidate with 39,825 filed at hearing by taxpayer—granted.

Mar. 3—Transcript of hearing of Feb. 24, 1930, filed.

Mar. 24—Motion for hearing on brief filed by taxpayer, 4/8/30 motion denied.

Mar. 24—Brief filed by taxpayer.

Mar. 24—Brief filed by General Counsel.

Sept. 8—Findings of fact and opinion rendered—Annabel Matthews, Division 13. Judgment will be entered for respondent.

Sept. 10—Decision entered—Annabel Matthews, Division 13.

Dec. 20—Supersedeas bond in the amount of $10,094.96 approved and ordered filed.

1931.

Jan. 13—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

Jan. 13—Proof of service filed.

Jan. 13—Praecipe filed—proof of service thereon.

Jan. 23—Motion for extension of 10 days to file objections to praecipe filed by General Counsel.

Jan. 23—Motion granted.

Now, Feb. 24, 1931, the foregoing Docket Entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[2] DOCKET No. 39,825.

MARY C. YOUNG,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES.

For Petitioner: THEO. B. BENSON, Esq.,
For Respondent: W. F. GIBBS, Esq.

DOCKET ENTRIES.

1928.

July 16—Petition received and filed. Taxpayer notified (fee paid).

July 17—Copy of petition served on General Counsel.

Sept. 13—Answer filed by General Counsel.

Sept. 15—Copy of answer served on taxpayer—General Calendar.

1929.

Dec. 6—Hearing set 2/24/30.

1930.

Feb. 24—Hearing had before John E. Murdock, Division 3, on merits. Submitted on stipulation and record. Ordered consolidated for hearing and decision. Briefs due in 30 days.

Feb. 24—Motion to consolidate with 39,824 filed by taxpayer at hearing—granted.

Mar. 3—Transcript of hearing of Feb. 24, 1930, filed.

Mar. 24—Motion for hearing on brief filed by taxpayer. See 39,824. 4/8/30 denied.

Mar. 24—Brief filed by taxpayer.

Mar. 24—Brief filed by General Counsel.

Sept. 8—Findings of fact and opinion rendered—Annabel Mathews, Division 13. Judgment will be entered for respondent.

Sept. 10—Decision entered—Annabel Matthews, Division 13.

Dec. 20—Supersedeas bond in the amount of $9,833.68 approved and ordered filed.

1931.

Jan. 13—Petition for review by U. S. Circuit Court of Appeals (9th) with assignments of error filed by taxpayer.

Jan. 13—Proof of service filed.

Jan. 13—Praecipe filed—proof of service thereon.

Jan. 23—Motion for 10 days extension to file objections to praecipe filed by General Counsel. Granted.

Now, Feb. 24, 1931, the foregoing Docket Entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[3] Filed Jul. 16, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 39,824.

MARY YOUNG MOORE, 1001 South Hoover Street, Los Angeles, California,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above-named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:AR:B–8–LMM–60D, dated May 16, 1928, and as a basis of its proceeding alleges as follows:

1. The petitioner is an unmarried woman with residence at 1001 South Hoover Street, City of Los Angeles, State of California.

2. The notice of deficiency (a copy of which is attached hereto marked Exhibit "A") was mailed to the petitioner on May 16, 1928, and alleges a deficiency in tax for the calendar years 1924 and 1925 of $2,930.06 and $2,117.42, respectively, and pursuant thereto petitioner's appeal to this Board has been perfected within the period of sixty (60) days, as prescribed by the Revenue Act of 1928.

3. The taxes in controversy are individual income taxes for the calendar years 1924 and 1925, and in an amount of less than $10,000.00.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

For Year 1924.

(a) That the Commissioner of Internal Revenue failed to allow as a deduction in computing net income for the year 1924 the loss sustained by petitioner on account of the voluntary demolition in 1924 of several old buildings owned by the petitioner jointly, petitioner's share of the loss on said demolition being $21,107.50.

[4] (b) That the Commissioner of Internal Revenue failed to allow as a deduction in computing the net income for the year 1924 the sum of $10,750.00, said sum being expended by petitioner as commission to an agent for securing in 1924 a 99-year lease of certain real property jointly owned by petitioner.

(c) That the Commissioner of Internal Revenue failed to allow a deduction in computing the net income for the year 1924 the sum of $2,750.00, said sum being attorneys' fees expended by the petitioner in 1924.

(d) That the Commissioner of Internal Revenue failed to allow as a deduction in computing the net income for the year 1924 the sum of $2,251.43, said sum being expended by petitioner as title costs.

(e) That should the Board sustain petitioner's allegations of error 4(a), (b), (c), and (d) above, and 4(f) below, then the Commissioner of Internal Revenue incorrectly allowed as a deduction in computing the net income for the year 1924 the sum of

$513.59, said sum being so-called amortization of the alleged cost of securing the 99-year lease referred to in (b) above, at the rate of 1% of the amounts expended or sustained as outlined in 4(a), (b), (c), and (d) above, and 4(f) below, but should the Board sustain but a portion of the allegations 4(a), (b), (c), (d) and (f), then that proportionate part thereof at the rate of 1% should be considered as being erroneously allowed as a deduction.

For Year 1925.

(f) That the Commissioner of Internal Revenue failed to allow as a deduction in computing the net income for the year 1925, the sum of $14,500.00, said sum being expended by petitioner in the year 1925 as the balance of commission to an agent for securing in 1924 the 99-year lease of certain real property jointly owned by the petitioner.

(g) That should the Board sustain petitioner's allegations of error 4(a), (b), (c), (d) and (f) above, then the Commissioner of Internal Revenue incorrectly allowed as a deduction in computing the net income for the year 1925 the sum of $513.59, said sum being so-called amortization of the alleged cost of securing the 99-year lease referred to in (b) above, at the rate of 1% per annum of the amount expended or sustained as outlined in 4(a), (b), (c), (d), and (f) above, but should the Board sustain but a portion of the allegations 4(a), (b), (c), (d) and (f), then that proportionate part thereof at the rate of 1% should be considered as being erroneously allowed as a deduction.

5. The facts upon which taxpayer relies as a basis for this proceeding are as follows:

[5] (a–1) Petitioner is the owner in joint of 50% interest with Mary C. Young of certain real and personal property, among which is that real property situated in the City of Los Angeles and located at the Southeast corner of Seventh and Figueroa Streets, extending East on Seventh Street to the Southwest corner of Flower and Seventh Streets.

(a–2) In 1917 and 1918 petitioner and Mary C. Young, co-owners, erected on this real property several brick store buildings which cost of erection of the buildings amounted to $50,000.00.

(a–3) These buildings were rented or were for rent throughout the period from completion until 1924.

(a–4) In the latter part of the year 1924, petitioner voluntarily caused to be demolished and destroyed all of these several store buildings erected in 1917 and 1918 at a cost of $50,000.00.

(a–5) The depreciation sustained on the demolished buildings from date of erection until demolishment in 1924 at the rate of 3% per annum amounts to $7,785.00.

(a–6) The net depreciated cost to petitioner and Mary C. Young, each having a 50% interest of the demolished buildings, as at date of demolishment in 1924, amounts to $42,215.00.

(a–7) Petitioner nor her co-owner never received any insurance money or salvage value on account of the demolition of the buildings.

(a–8) Petitioner claimed as a deduction on her original income tax return for 1924 the amount of $21,107.50 as her one-half of a loss sustained on the demolition of the buildings.

(a–9) The Commissioner disallowed this amount of $21,107.50, and added the same back to net income, and the deficiency determined for 1924 is due in part to the disallowance of this deduction.

(b–1) Petitioner and Mary C. Young on October 1, 1924, ground-leased to the Sun Realty Company, for a period of ninety-nine (99) years, the real property situated at the Southeast corner of Seventh and Figueroa Streets extending East on Seventh Street to Flower Street, as mentioned in statement 5(a–1) above.

(b–2) This lease was obtained for petitioner by an agent, which agent charged petitioner and Mary C. Young a total commission of $50,500.00 for obtaining this lease.

(b–3) Of this $50,500.00 commission for obtaining the lease $21,500.00 was paid in 1924, and $29,000 was paid in 1925.

(b–4) Petitioner paid to the agent her one-half of this commission in cash, as follows:

[6] In Year 1924 .....$10,750.00
In Year 1925 ..... 14,500.00

(b–5) Petitioner claimed as a deduction on her original tax return for 1924 in Schedule A the amount of $10,750.00 as an ordinary and necessary expense in conducting her rental business.

(b–6) The Commissioner of Internal Revenue disallowed this deduction of $10,750.00, and the defi-

ciency determined for 1924 is in part due to the disallowance of this deduction.

(b–7) Petitioner kept her books and rendered her income tax return for the year 1924 on the cash receipts and disbursements basis.

(c–1) Petitioner expended in cash during the year 1924 the amount of $2,750.00, being one-half of a total of $5,500.00, as attorneys' fees paid in connection with the preparation of the lease mentioned in 5(b–1) above.

(c–2) Petitioner claimed as a deduction on her original tax return for 1924 in Schedule A this amount of $2,750.00 as an ordinary and necessary expense in conducting her rental business.

(c–3) The Commissioner of Internal Revenue disallowed this deduction of $2,750.00, and the deficiency determined for 1924 is in part due to the disallowance of this deduction.

(d–1) Petitioner expended in cash during the year 1924 the amount of $2,251.43 (being her one-half of $4,502.85) for obtaining a certificate of title, which was required by the lessee of the lease mentioned in 5(b–1) above.

(d–2) Petitioner claimed as a deduction on her original tax return for 1924 in Schedule A thereof this amount of $2,251.43 as an ordinary and necessary expense in conducting her rental business.

(d–3) The Commissioner of Internal Revenue disallowed this deduction of $2,251.43, and the deficiency determined for 1924 is in part due to the disallowance of this deduction.

(e–1) The Commissioner of Internal Revenue capitalized the deductions and losses referred to in 4(a), (b), (c), (d), and (f), and has allowed a deduction of 1% thereof for the year 1924 as amortization of the cost of the lease.

(f–1) Petitioner expended in cash during the year 1925 the amount of $14,500.00 (being her one-half of $29,000.00) as balance of commission due the agent for obtaining the lease referred to in 5(b–1) to 5(b–4) inclusive, above.

(f–2) Petitioner claimed as a deduction on her original income tax return for the year 1925 in Schedule A thereof this amount of $14,500.00 as an ordinary and necessary expense in [7] conducting her rental business.

(f–3) The Commissioner of Internal Revenue disallowed this deduction of $14,500.00, and the deficiency determined for the year 1925 is in part due to the disallowance of this deduction.

(f–4) Petitioner kept her books and rendered her income tax return for the year 1925 on the cash receipts and disbursements basis.

(g–1) The Commissioner of Internal Revenue allowed as a deduction for 1925 as amortization of cost of a lease 1% of the amounts of the deductions and loss sustained, per 4 (a), (b), (c), (d), and (f) above.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and

(a) Allow as a deduction in computing net income the loss sustained in the year 1924 in the

amount of $21,107.50 on account of demolition of buildings.

(b) Allow as a deduction in computing net income for the year 1924 the amount of $10,750.00, being commission paid in that year.

(c) Allow as a deduction in computing net income for the year 1924 the amount of $2,750.00, being attorneys' fees paid in that year.

(d) Allow as a deduction in computing net income for the year 1924, the amount of $2,251.43, being title costs paid in that year.

(e) Allow the restoration to net income for the year 1924 of the amount of $513.59, amortization of cost of lease, said restoration to be made only upon allowance of (a), (b), (c), (d), and (f).

(f) Allow as a deduction in computing the net income for the year 1925 the amount of $14,500.00, being commissions paid in that year.

(g) Allow the restoration to net income for 1925 the amount of $513.59, amortization of cost of lease, said restoration to be made only upon allowance of (a), (b), (c), (d), and (f),

And such other relief as the premises may justify.

THEODORE B. BENSON,
917 Southern Building, Washington, D. C.,
Counsel for Petitioner.

[8] State of California,
County of Los Angeles,—ss.

Mary Young Moore, hereby duly sworn, says that she is the petitioner above named, that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained

therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true.

MARY YOUNG MOORE.

MARY YOUNG MOORE.

Subscribed and sworn to before me this 11th day of July, 1928.

[Seal] MARY S. ALEXANDER,
Notary Public.

[9] EXHIBIT "A."

TREASURY DEPARTMENT.
Washington.

May 16, 1928.

(Seal)
Office of
Commissioner of Internal Revenue
Address Reply to
Commissioner of Internal Revenue
And Refer to

Mrs. Mary Young Moore,
1001 South Hoover Street,
Los Angeles, California.

Madam:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1924, 1925 and 1926 discloses a deficiency of $5,047.48, as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax

Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the inclosed Form A and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P:–7.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. B. ALLEN,
Deputy Commissioner.

Inclosures:
Statement.
Form A.
Form 882.

[10] STATEMENT.

May 16, 1928.

IT:AR:B–8.
LMM.

In re: Mrs. Mary Young Moore,
1001 South Hoover Street,
Los Angeles, California.

Year.	Deficiency.
1924	$2,930.06
1925	2,117.42
1926	None
Total	$5,047,.48

The report of the Internal Revenue Agent in Charge at San Francisco, California, covering your

income tax liability for the years 1924, 1925 and 1926 has been reviewed and approved by this office.

1924.

Net income reported on return		$ 3,419.56
Add:		
1. Loss disallowed on account of demolition of buildings and expenses with securing 99-year lease		36,345.31
Total		$39,764.87
Deduct:		
2. Additional depreciation on furniture and fixtures	$ 90.00	
3. Increase in contributions	5438.30	5,528.30
Adjusted net income		$34,236.57
Income subject to tax		$34,236.57
Less:		
Dividends	$ 590.00	
Interest on Liberty bonds	1,912.50	
Personal exemption	1,000.00	3,502.50
Income subject to normal tax		$30,734.07

[11]

Mrs. Mary Young Moore	Statement
Normal tax at 2% on $4,000.00	$ 80.00
Normal tax at 4% on $4,000.00	160.00

Normal tax at 6% on $22,734.07	1,364.04
Surtax on $34,236.57	1,346.02
Total tax	$2,950.06
Earned income credit	20.00
Balance	$2,930.06
Tax previously assessed	None
Deficiency in tax	$2,930.06

Explanation of Changes.

1. Since the lease acquired had a difinite life of 99 years, the cost of the buildings less sustained depreciation and the costs of securing the lease, have been amortized over the life of the lease.

The total commission paid for securing the lease of lot was $50,500.00, the amount of $21,500.00 being paid in 1924 and $29,000.00 in 1925.

The following items have been disallowed and spread over the life of the lease:

Depreciated cost of old buildings	$ 42,215.00
Real estate commissions for securing lease	50,500.00
Attorney's fees in connection with lease	5,500.00
Title costs	4,502.85
Total	$102,717.85

1% of $102,717.85 or $1,027.18 is deductible each year during life of lease. One-half of $1,027.18 or $513.59 is your share.

Gross income from business ..... $124,083.69.

[12] Mrs. Mary Young Moore		Statement
Brought forward		$124,083.69
Salaries	$ 2,220.00	
Taxes	38,537.53	
Office rent	1,560.00	
Repairs	790.15	
Office supplies and expenses	495.75	
Water bills	439.60	
Commissions	357.75	
Insurance	1,955.80	
Depreciation hotel building	2,320.00	
Furniture and fixtures	300.00	
Amortization deductible each year over life of lease	1,027.18	50,003.76
Net income from business		$ 74,079.93
One-half to each owner		$ 37,039.97
Net income from business reported		784.66
Additions to income		$ 36,255.31
Included in the amount of $36,255.31 is additional depreciation of $90.00 and shown separately by the agent		90.00
Additions shown by agent		$ 36,345.31

Deductions:

2. Depreciation on office furniture increased from 4% to 10%.

Office furniture and fixtures	$ 3,000.00
10% allowed	$ 300.00
Previously deducted	120.00
Additional allowable	$ 180.00

Your share, one-half.....$ 90.00

3. Additional contributions allowed on account of 15% limitation of net income

1925.

Net income reported on return.....	$38,870.46
Additions:	
1. Real estate commission.....	14,500.00
Total	$53,370.46

[13] Mrs. Mary Young Moore Statement

Brought forward		$53,370.46
Deduct:		
2. Depreciation	$ 90.00	
3. Adjustment of amortization of building and expenses securing lease.....	513.59	
4. Contributions	1,278.01	1,881.60
Adjusted net income.....		$51,488.86
Income subject to tax.....		$51,488.86
Less:		
Dividends	$ 280.00	
Interest on Liberty Bonds.	1,912.50	
Personal exemption	1,500.00	3,692.50
Income subject to normal tax.....		$47,796.36
Normal tax at 1 ½% on $ 4,000.00.....		$ 60.00
Normal tax at 3% on $ 4,000.00.....		120.00
Normal tax at 5% on 39,796.36.....		1,989.82
Surtax on $51,488.86.....		3,173.55
Total tax.....		$ 5,343.37

Earned income credit.....	13.13
Net tax assessable.....	$ 5,330.24
Tax previously assessed.....	3,212.82
Deficiency in tax.....	$ 2,117.42

Explanation of Changes.

1. Real estate commission of $29,000.00 paid in 1925 in connection with securing lease in 1924 has been disallowed and added to other costs of securing lease to be amortized over the life of the lease. See 1924 adjustment of lease. One-half of $29,000.00 or $14,500.00 is your share.

2. 1% of $102,717.85 (total of items disallowed and spread over the life of the lease) or $1,027.18, One-half or $513.59 is your share.

3. Adjustment of contributions on account of 15% limitation of net income.

[14] Mrs. Mary Young Moore Statement

1926.

No tax.

If the above explanations are satisfactory, it is suggested that you execute and return to this office the enclosed agreement waiving the right to appeal and consenting to immediate assessment in order that your case may be closed without delay.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Now, Feb. 24, 1931, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[15] Filed Sep. 13, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 39,824.

MARY YOUNG MOORE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal admits and denies as follows:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Denies the respondent erred in the manner alleged and set forth in paragraphs 4(a), 4(b), 4(c), 4(d), 4(e), 4(f) and 4(g).

5 (a–1) Admits the allegations contained in paragraph 5 (a–1).

5 (a–2) Admits the allegations contained in paragraph 5 (a–2).

5 (a–3) Denies the allegations contained in paragraph 5 (a–3).

5 (a–4) Admits the allegations contained in paragraph 5 (a–4).

5 (a–5) Admits the allegations contained in paragraph 5 (a–5).

5 (a–6) Admits the allegations contained in paragraph 5 (a–6).

5 (a–7) Admits the allegations contained in paragraph 5 (a–7).

5 (a–8) Admits the allegations contained in paragraph 5 (a–8).

5 (a–9) Admits the allegations contained in paragraph 5 (a–9).

5 (b–1) Admits the allegations contained in paragraph 5 (b–1).

5 (b–2) Admits the allegations contained in paragraph 5 (b–2).

[16] 5 (b–3) Admits the allegations contained in paragraph 5 (b–3).

5 (b–4) Admits the allegations contained in paragraph 5 (b–4).

5 (b–5) Admits the allegations contained in paragraph 5 (b–5).

5 (b–6) Admits the allegations contained in paragraph 5 (b–6).

5 (b–7) Admits the allegations contained in paragraph 5 (b–7).

5 (c–1) Admits the allegations contained in paragraph 5 (c–1).

5 (c–2) Admits the allegations contained in paragraph 5 (c–2).

5 (c–3) Admits the allegations contained in paragraph 5 (c–3).

5 (d–1) Admits the allegations contained in paragraph 5 (d–1).

5 (d–2) Admits the allegations contained in paragraph 5 (d–2).

5 (d–3) Admits the allegations contained in paragraph 5 (d–3).

5 (e–1) Admits the allegations contained in paragraph 5 (e–1).

5 (f–1) Admits the allegations contained in paragraph 5 (f–1).

5 (f–2) Admits the allegations contained in paragraph 5 (f–2).

5 (f–3) Admits the allegations contained in paragraph 5 (f–3).

5 (f–4) Admits the allegations contained in paragraph 5 (f–4).

5 (g–1) Admits the allegations contained in paragraph 5 (g–1).

6. Denies generally and specifically each and every allegation contained in taxpayer's petition, not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

(Signed) C. M. CHAREST.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
W. FRANK GIBBS,
Special Atty.,
Bureau of Internal Revenue.

Now, Feb. 24, 1931, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[17] Filed Jul. 16, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 39,825.

MARY C. YOUNG, 1001 South Hoover Street, Los Angeles, California,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above-named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT: AR: B–8–LMM–60D, dated May 16, 1928, and as a basis of its proceeding alleges as follows:

1. The petitioner is a widow with residence at

1001 South Hoover Street, City of Los Angeles, State of California.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit "A") was mailed to the petitioner on May 16, 1928, and alleges a deficiency in tax for the calendar years 1924 and 1925 of $2,825.63 and $2,091.21, respectively, and pursuant thereto petitioner's appeal to this Board has been perfected within the period of sixty days, as prescribed by the Revenue Act of 1928.

3. The taxes in controversy are individual income taxes for the calendar years 1924 and 1925, and in an amount of less than $10,000.00.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

For Year 1924.

(a) That the Commissioner of Internal Revenue failed to allow as a deduction in computing net income for the year 1924 the loss sustained by petitioner on account of the voluntary demolition in 1924 of several old buildings owned by the petitioner jointly, petitioner's share of the loss on said demolition being $21,107.50.

(b) That the Commissioner of Internal Revenue failed to allow as a deduction in computing the net income for the [18] year 1924 the sum of $10,750.00, said sum being expended by petitioner as commission to an agent for securing in 1924 a 99-year lease of certain real property jointly owned by petitioner.

(c) That the Commissioner of Internal Revenue failed to allow as a deduction in computing the

net income for the year 1924 the sum of $2,750.00, said sum being attorneys' fees expended by the petitioner in 1924.

(d) That the Commissioner of Internal Revenue failed to allow as a deduction in computing the net income for the year 1924 the sum of $2,251.43, said sum being expended by petitioner as title costs.

(e) That should the Board sustain petitioner's allegations of error 4(a), (b), (c), and (d) above, and 4(f) below, then the Commissioner of Internal Revenue incorrectly allowed as a deduction in computing the net income for the year 1924 the sum of $513.59, said sum being so-called amortization of the alleged cost of securing the 99-year lease referred to in (b) above, at the rate of 1% of the amounts expended or sustained as outlined in 4(a), (b), (c), and (d) above, and 4(f) below, but should the Board sustain but a portion of the allegations 4(a), (b), (c), (d), and (f), then that proportionate part thereof at the rate of 1% should be considered as being erroneously allowed as a deduction.

For Year 1925.

(f) That the Commissioner of Internal Revenue failed to allow as a deduction in computing the net income for the year 1925, the sum of $14,500.00, said sum being expended by petitioner in the year 1925 as the balance of commission to an agent for securing in 1924 the 99-year lease of certain real property jointly owned by the petitioner.

(g) That should the Board sustain petitioner's allegations of error 4(a), (b), (c), (d), and

(f) above, then the Commissioner of Internal Revenue incorrectly allowed as a deduction in computing the net income for the year 1925 the sum of $513.59, said sum being so-called amortization of the alleged cost of securing the 99-year lease referred to in (b) above, at the rate of 1% per annum of the amount expended or sustained as outlined in 4(a), (b), (c), (d), and (f) above, but should the Board sustain but a portion of the allegations 4(a), (b), (c), (d), and (f), then that proportionate part thereof at the rate of 1% should be considered as being erroneously allowed as a deduction.

[19] 5. The facts upon which taxpayer relies as a basis for this proceeding are as follows:

(a–1) Petitioner is the owner in joint 50% interest with Mary Young Moore of certain real and personal property, among which is that real property situated in the City of Los Angeles and located at the Southeast corner of Seventh and Figueroa Streets, extending East on Seventh Street to the Southwest corner of Flower and Seventh Streets.

(a–2) In 1917 and 1918 petitioner and Mary Young Moore, co-owners, erected on this real property several brick store buildings which cost of erection of the buildings amounted to $50,000.00.

(a–3) These buildings were rented or were for rent throughout the period from completion until 1924.

(a–4) In the latter part of the year 1924, petitioner voluntarily caused to be demolished and de-

stroyed all of these several store buildings erected in 1917 and 1918 at a cost of $50,000.00.

(a–5) The depreciation sustained on the demolished buildings from date of erection until demolishment in 1924 at the rate of 3% per annum amounts to $7,785.00.

(a–6) The net depreciated cost to petitioner and Mary Young Moore, each having a 50% interest of the demolished buildings, as at date of demolishment in 1924, amounts to $42,215.00.

(a–7) Petitioner nor her co-owner never received any insurance money or salvage value on account of the demolition of the buildings.

(a–8) Petitioner claimed as a deduction on her original income tax return for 1924 the amount of $21,107.50 as her one-half of a loss sustained on the demolition of the buildings.

(a–9) The Commissioner disallowed this amount of $21,107.50, and added the same back to net income, and the deficiency determined for 1924 is due in part to the disallowance of this deduction.

(b–1) Petitioner and Mary Young Moore on October 1, 1924, ground-leased to the Sun Realty Company, for a period of ninety-nine (99) years, the real property situated at the Southeast corner of Seventh and Figueroa Streets extending East on Seventh Street to Flower Street, as mentioned in statement 5(a–1) above.

(b–2) This lease was obtained for petitioner by an agent, which agent charged petitioner and Mary Young Moore [20] a total commission of $50,-500.00 for obtaining this lease.

(b–3) Of this $50,500.00 commission for obtaining the lease, $21,500.00 was paid in 1924, and $29,000.00 was paid in 1925.

(b–4) Petitioner paid to the agent her one-half of this commission in cash, as follows:

In Year 1924.....$10,750.00
In Year 1925.....14,500.00

(b–5) Petitioner claimed as a deduction on her original tax return for 1924 in Schedule A the amount of $10,750.00 as an ordinary and necessary expense in conducting her rental business.

(b–6) The Commissioner of Internal Revenue disallowed this deduction of $10,750.00, and the deficiency determined for 1924 is in part due to the disallowance of this deduction.

(b–7) Petitioner kept her books and rendered her income tax return for the year 1924 on the cash receipts and disbursements basis.

(c–1) Petitioner expended in cash during the year 1924 the amount of $2,750.00, being one-half of a total of $5,500.00, as attorneys' fees paid in connection with the preparation of the lease mentioned in 5(b–1) above.

(c–2) Petitioner claimed as a deduction on her original tax return for 1924 in Schedule A this amount of $2,750.00 as an ordinary and necessary expense in conducting her rental business.

(c–3) The Commissioner of Internal Revenue disallowed this deduction of $2,750.00, and the deficiency determined for 1924 is in part due to the disallowance of this deduction.

(d–1) Petitioner expended in cash during the

year 1924 the amount of $2,251.43 (being her one-half of $4,502.85) for obtaining a certificate of title, which was required by the lessee of the lease mentioned in 5(b–1) above.

(d–2) Petitioner claimed as a deduction on her original tax return for 1924 in Schedule A thereof this amount of $2,251.43 as an ordinary and necessary expense in conducting her rental business.

(d–3) The Commissioner of Internal Revenue disallowed this deduction of $2,251.43, and the deficiency determined for 1924 is in part due to the disallowance of this deduction.

[21] (e–1) The Commissioner of Internal Revenue capitalized the deductions and losses referred to in 4(a), (b), (c), (d), and (f), and has allowed a deduction of 1% thereof for the year 1924 as amortization of the cost of the lease.

(f–1) Petitioner expended in cash during the year 1925 the amount of $14,500.00 (being her one-half of $29,000.00) as balance of commission due the agent for obtaining the lease referred to in 5(b–1) to 5(b–4) inclusive, above.

(f–2) Petitioner claimed as a deduction on her original income tax return for the year 1925 in Schedule A thereof this amount of $14,500.00 as an ordinary and necessary expense in conducting her rental business.

(f–3) The Commissioner of Internal Revenue disallowed this deduction of $14,500.00, and the deficiency determined for the year 1925 is in part due to the disallowance of this deduction.

(f–4) Petitioner kept her books and rendered

her income tax return for the year 1925 on the cash receipts and disbursements basis.

(g–1) The Commissioner of Internal Revenue allowed as a deduction for 1925 as amortization of cost of a lease 1% of the amounts of the deductions and loss sustained, per 4(a), (b), (c), (d), and (f) above.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and

(a) Allow as a deduction in computing net income the loss sustained in the year 1924 in the amount of $21,107.50 on account of demolition of buildings.

(b) Allow as a deduction in computing net income for the year 1924 the amount of $10,750.00, being commission paid in that year.

(c) Allow as a deduction in computing net income for the year 1924 the amount of $2,750.00, being attorneys' fees paid in that year.

(d) Allow as a deduction in computing net income for the year 1924 the amount of $2,251.43, being title costs paid in that year.

(e) Allow the restoration to net income for the year 1924 of the amount of $513.59, amortization of cost of lease, said restoration to be made only upon allowance of (a), (b), (c), (d), and (f).

[22] (f) Allow as a deduction in computing the net income for the year 1925 the amount of $14,500.-00, being commissions paid in that year.

(g) Allow the restoration to net income for 1925 the amount of $513.59, amortization of cost

of lease, said restoration to be made only upon allowance of (a), (b), (c), (d), and (f).

And such other relief as the premises may justify.

THEODORE B. BENSON,
917 Southern Building, Washington, D. C.
Counsel for Petitioner.

[23] State of California,
County of Los Angeles,—ss.

Mary C. Young, hereby duly sworn, says that she is the petitioner above named, that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true,

MARY C. YOUNG.
MARY C. YOUNG.

Subscribed and sworn to before me this, 11th day of July, 1928.

[Seal] MARY S. ALEXANDER,
Notary Public.

[24] EXHIBIT "A."

TREASURY DEPARTMENT.
Washington.

May 16, 1928.

(Seal)
Office of
Commissioner of Internal Revenue.
Address Reply to
Commissioner of Internal Revenue.
And Refer to

Mrs. Mary C. Young,
1001 South Hoover Street,
Los Angeles, California.

Madam:

In accordance with Section 274 of the Revenue Act of 1926 you are are advised that the determination of your tax liability for the years 1924, 1925 and 1926 discloses a deficiency of $4,916.84, as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the inclosed Form A and forward it to the Commissioner

of Internal Revenue, Washington, D. C., for the attention of IT:C:P–7.

Respectfully,
D. H. BLAIR,
Commissioner.
By C. B. ALLEN,
Deputy Commissioner.

Inclosures:
Statement.
Form A.
Form 882.

[25] STATEMENT.

IT:AR:B–8. May 16, 1928.
LMM–60D.
In re: Mrs. Mary C. Young,
1001 South Hoover Street,
Los Angeles, California.

Year.	Deficiency.
1924	$2,825.63
1925	2,091.21
1926	None
Total	$4,916.84

The report of the Internal Revenue Agent in Charge, San Francisco, California, covering your income tax liability for the years 1924, 1925 and 1926 has been reviewed and approved by this office.

1924.

Net income reported		$ 2,783.35
Add:		
1. Loss disallowed on account of demolition of building and expenses with securing 99-year lease		$36,345.31
Total		$39,128.66
Deduct:		
2. Additional depreciation on furniture and fixtures	$ 90.00	
3. Contributions	5,438.30	5,528.30
Adjusted net income		$33,600.36
Income subject to tax		$33,600.36
Less:		
Dividends	$ 594.62	
Liberty bond interest	1,912.50	
Personal exemption	1,000.00	3,507.12
Income subject to normal tax		30,093.24
Normal tax at 2% on $4,000.00		$ 80.00
Normal tax at 4% on $4,000.00		160.00
Normal tax at 6% on $22,093.24		1,325.59
Surtax on $33,600.36		1,280.04
Total tax		$2,845.63

[26] Mrs. Mary C. Young. Statement.

Brought forward	$2,845.63
Earned income credit	20.00
	$2,825.63
Tax previously assessed	None
	$2,825.63

Explanation of Changes.

1. Since the lease acquired had a definite life of 99 years the cost of the buildings less sustained depreciation and the costs of securing the lease have been amortized over the life of the lease.

The total commission paid for securing the lease of lot was $50,500.00, the amount of $21,500.00 being paid in 1924 and $29,000.00 in 1925.

The following items have been disallowed and spread over the life of the lease:

Depreciated cost of old buildings	$42,215.00
Real estate commissions for securing lease	50,500.00
Attorney's fees in connection with lease	5,500.00
Title costs	4,502.85
Total	$102,717.85

One per cent of $102,717.85 or $1,027.18 is deductible each year during the life of the lease. One-half of $1,027.18 or $513.59 is your share.

Gross income from business	$124,083.69
Salaries	$ 2,220.00
Taxes	38,537.53
Office rent	1,560.00

Repairs	790.15	
Office supplies and expenses	495.75	
Water bills	439.60	
Commissions	357.75	
Insurance	1,955.80	
Depreciation hotel building	2,320.00	
Furniture and fixtures	300.00	
Amortization deductible each year over life of lease	$ 1,027.18	50,003.76

Net income from business.....$74,079.93

[27] Mrs. Mary C. Young. Statement.

One-half to each owner	$37,039.97
Net income from business reported	784.66
Additions to income	$36,255.31
Included in the amount of $36,255.31 is additional depreciation of $90.00 and shown separately by the agent	90.00
Additions shown by the agent	$36,345.31

Deductions:

2. Depreciation on office furniture increased from 4% to 10%.

Office furniture and fixtures	$ 3,000.00
10% allowed	$ 300.00
Previously allowed	120.00
Additional allowable	$ 180.00
Your share, one-half	$ 90.00

3. Additional contributions allowed on account of 15% limitation of net income.

1925.

Net income reported on return		$38,446.03
Add:		
1. Real estate commission		14,500.00
Total		$52,946.03
Deduct:		
2. Depreciation	$ 90.00	
3. Adjustment amortization of building and securing lease	513.59	
4. Contributions	1,352.91	1,956.50
Adjusted net income		$50,989.53
Income subject to tax		$50,989.53
Less:		
Dividends	$ 289.36	
Interest on Liberty Bonds	1,912.50	
Personal Exemption	1,500.00	3,701.86
Income subject to normal tax		$47,287.67

[28] Mrs. Mary C. Young. Statement.

Normal tax at 1½% on $ 4,000.00	$ 60.00
Normal tax at 3 % on $ 4,000.00	120.00
Normal tax at 5 % on $39,287.67	1,964.38
Surtax on $50,989.53	3,108.64
Total	$5,253.02

Earned income credit	13.13
Balance	$5,239.89
Tax previously assessed	3,148.68
Deficiency in tax	$2,091.21

Explanation of Changes.

1. Real estate commission of $29,000.00 paid in 1925 in connection with securing lease in 1924 has been disallowed and added to other costs of securing lease, to be amortized over the life of the lease. See 1924 adjustment of lease. One-half of $29,000.00 or $14,500.00 is your share.

2. One per cent of $102,717.85 (total of items disallowed and spread over the life of the lease) or $1,027.18. One-half or $513.59 is your share.

3. Adjustment of contributions on account of 15% limitation of net income.

1926.

No Tax.

If the above explanations are satisfactory, it is suggested that you execute and return to this office the enclosed agreement waiving the right to appeal and consenting to immediate assessment in order that your case may be closed without delay.

Payment of the deficiency in tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Now, Feb. 24, 1931, the foregoing Petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[29] Filed Sep. 13, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 39,825.

MARY C. YOUNG,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Denies the respondent erred in the manner

alleged and set forth in paragraphs 4(a); 4(b); 4(c); 4(d); 4(e); 4(f); and 4(g).

5(a–1) Admits the allegations contained in paragraph 5(a–1).

5(a–2) Admits the allegations contained in paragraph 5(a–2).

5(a–3) Denies the allegations contained in paragraph 5(a–3).

5(a–4) Admits the allegations contained in paragraph 5(a–4).

5(a–5) Admits the allegations contained in paragraph 5(a–5).

5(a–6) Admits the allegations contained in paragraph 5(a–6).

5(a–7) Admits the allegations contained in paragraph 5(a–7).

5(a–8) Admits the allegations contained in paragraph 5(a–8).

5(a–9) Admits the allegations contained in paragraph 5(a–9).

5(b–1) Admits the allegations contained in paragraph 5(b–1).

5(b–2) Admits the allegations contained in paragraph 5(b–2).

[30] 5(b–3) Admits the allegations contained in paragraph 5(b–2).

5(b–4) Admits the allegations contained in paragraph 5(b–4).

5(b–5) Admits the allegations contained in paragraph 5(b–5).

5(b–6) Admits the allegations contained in paragraph 5(b–6).

5(b–7) Admits the allegations contained in paragraph 5(b–7).

5(c–1) Admits the allegations contained in paragraph 5(c–1).

5(c–2) Admits the allegations contained in paragraph 5(c–2).

5(c–3) Admits the allegations contained in paragraph 5(c–3).

5(d–1) Admits the allegations contained in paragraph 5(d–1).

5(d–2) Admits the allegations contained in paragraph 5(d–2).

5(d–3) Admits the allegations contained in paragraph 5(d–3).

5(e–1) Admits the allegations contained in paragraph 5(e–1).

5(f–1) Admits the allegations contained in paragraph 5(f–1).

5(f–2) Admits the allegations contained in paragraph 5(f–2).

5(f–3) Admits the allegations contained in paragraph 5(f–3).

5(f–4) Admits the allegations contained in paragraph 5(f–4).

5(g–1) Admits the allegations contained in paragraph 5(g–1).

6. Denies generally and specifically each and every allegation contained in taxpayer's petition, not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

(Signed) C. M. CHAREST.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
W. FRANK GIBBS,
Special Atty.,
Bureau of Internal Revenue.

Now, Feb. 24, 1931, the foregoing Answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[31] Filed at Hearing Feb. 24, 1930. U. S. Board of Tax Appeals.

The United States Board of Tax Appeals.

DOCKET No. 39,825.

MARY C. YOUNG, 1001 South Hoover Street, Los Angeles, California,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET No. 39,824.

MARY YOUNG MOORE, 1001 South Hoover Street, Los Angeles, California,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION TO CONSOLIDATE CAUSES FOR HEARING.

Come now the petitioners in the above-entitled causes, by their attorney, and move the Board to enter an order consolidating the two causes and setting them for hearing at the same time and on the basis of the same evidence, and as grounds therefor set forth the following:

Granted Feb. 24, 1930.

A. MATTHEWS,

G.

Member U. S. Board of Tax Appeals.

[32] 1. Mary C. Young is a widow and Mary Young Moore is her daughter and they are joint owners of certain real estate in connection with which expenditures, involved in these proceedings, were made.

2. The same facts are involved in both proceedings.

3. This motion has been discussed with counsel for respondent and it is understood will not be opposed.

WHEREFORE, the petitioners pray that the two causes be consolidated and heard at the same time and on the basis of the same evidence.

THEODORE B. BENSON,
917 Southern Building,
Washington, D. C.,
Attorney for Petitioners.

Now, Feb. 24, 1931, the foregoing Motion to Consolidate and Order Granting same certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[33] Filed at Hearing Feb. 24, 1930. U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 39,825.

MARY C. YOUNG, 1001 South Hoover St., Los Angeles, California,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET No. 39,824.

MARY YOUNG MOORE, 1001 South Hoover Street, Los Angeles, California,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION OF FACTS.

Counsel for petitioners and counsel for respondent hereby stipulate and agree to the following facts in this proceeding:

1. The petitioner, Mary C. Young, is a widow and resides at 1001 South Hoover Street, Los Angeles, California.

2. Under date of May 16, 1928, the respondent mailed a notice of deficiency to the said Mary C. Young and asserted deficiencies in the amounts of $2,825.63 and $2,091.21, for the years 1924 and 1925 respectively. The said Mary C. Young, within the time prescribed by law, duly filed her petition to this Board.

3. The petitioner, Mary Young Moore, is the daughter of the said Mary C. Young, and also resides at 1001 South Hoover Street, Los Angeles, California.

[34] 4. Under date of May 16, 1928, the respondent mailed a notice of deficiency to the said Mary Young Moore and asserted deficiencies in the amounts of $2,930.06 and $2,117.42, for the years 1924 and 1925 respectively. The said Mary Young Moore, within the time prescribed by law, duly filed her petition to this Board.

5. The petitioners, the said Mary C. Young and the said Mary Young Moore, are joint owners of certain lands in the City of Los Angeles, California, and located at the Southeast corner of Seventh and Figueroa Streets, extending East on Seventh Street

to the Southwest corner of Flower and Seventh Streets. The petitioners are equal owners.

6. During the years 1917 and 1918 the petitioners erected on the said land several brick store buildings at a cost of $50,000.00.

7. The said brick store buildings were rented or were for rent throughout the period from the date or dates of completion until that of demolition during the year 1924 as hereinafter mentioned.

8. In 1924 a lease for the term of ninety-nine years was entered into with the Sun Realty Company, whereby the brick buildings erected during 1917 and 1918 should be demolished and a new building to be occupied by Barker Brothers should be erected and pursuant thereto the said buildings were demolished in 1924.

[35] 9. The depreciation sustained on the said brick store buildings from the time of erection to the time of demolition in 1924 should be determined at the rate of 3% per annum and it is stipulated and agreed that the full amount thereof is $7,785.00.

10. It is further stipulated and agreed that the net depreciated cost of the said brick store buildings to the petitioner at the time demolished in 1924 is $42,215.00.

11. The petitioner received no insurance or other compensation on the demolition of the buildings. The buildings were not salvaged or otherwise disposed of and the petitioner received no compensation whatever from the demolition of the said buildings.

12. Each of the petitioners in her income tax

return for the calendar year 1924 claimed a deduction in the amount of $21,107.50, representing her one-half of the undepreciated lost.

13. The respondent audited the income tax return of each of the petitioners and disallowed the said deduction claimed by each in the amount of $21,107.50 and added the same back to income and the said sum is included in and constitutes a part of the total addition to the income of each of the petitioners in the amount of $36,345.31, as appears on page 1, of the statement attached to the notice of deficiency.

14. The petitioners on October 1, 1924, granted a ground-lease of the said premises at Seventh and Figueroa Streets to the Sun Realty Company for the period of ninety-nine years, and on the basis of a monthly rental of $10,000.00 from October 1, 1924 to June 30, 1926 and of the monthly [36] rental of $20,000.00 thereafter and until the end of the term of the lease.

15. The lease to the said premises was obtained for the petitioners by a real estate agent who charged as his commission therefor the sum of $50,500.00.

16. The commission charged by the said real estate agent was paid during the years 1924 and 1925. During the year 1924 there was paid $21,500.00, and during the year 1925, $29,000.00. The said amounts were paid by the petitioners in equal sums and each paid $10,750.00 during the year 1924 and $14,500.00 during the year 1925.

17. Each of the petitioners claimed as a deduction in her income tax return for the year 1924, the

amount actually paid by her during such year in the said sum of $10,750.00.

18. The respondent in his audit of the return of each of the petitioners disallowed the said deduction in the amount of $10,750.00, which is included in and constitutes part of the said sum of $36,345.31 above mentioned.

19. In addition to the commission paid the real estate agent the petitioners were required to pay attorneys' fees in the amount of $5,500.00 and expense of obtaining certificate of title in the amount of $4,502.85.

20. In the income tax returns filed by the said petitioner each claimed a deduction in the amount of $2,750.00, being one-half of the said attorneys' fees and $2,251.43 being one-half of the cost of obtaining the said certificate of title.

[37] 21. The respondent in his audit of the return of each of the petitioners disallowed the full amount of said deductions in the amounts of $2,750.00 and $2,251.43, and the said sums are included in and constitute a part of the said sum of $36,345.31.

22. The respondent considered the said losses sustained on the demolition of the said brick buildings to be a capital loss and further considered the said sums expended by the petitioners as commissions, attorneys' fees, and cost of obtaining certificate of title to be capital expenditures to be amortized and deducted over the term of the lease, and as a result thereof allowed a deduction to each of the petitioners for the year 1924 in the amount of $513.59.

23. In the income tax returns filed by the petitioner for the year 1925 each claimed a deduction in the amount of $14,500.00, being the amount paid by each as commission to the real estate agent as above mentioned.

24. The respondent disallowed the said deduction to each of the petitioners as appears at page 3 of the statement attached to the notices of deficiency.

25. In his adjustment of the income of each of the petitioners for the year 1925 the respondent allowed a deduction for amortization of the cost of the lease in the said amount of $513.59.

26. Each of the petitioners kept her books and rendered her income [38] tax returns for the years 1924 and 1925 on the basis of cash receipts and disbursements.

(Signed) THEODORE B. BENSON,
Counsel for Petitioners.
(Signed) C. M. CHAREST,
Counsel for the Respondent.

Now, Feb. 24, 1931, the foregoing Stipulation of Facts certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[39] A true copy.

[Seal] Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

20 B. T. A. ——.

United States Board of Tax Appeals.

DOCKET Nos. 39,825, 39,824.

Promulgated September 8, 1930.

MARY C. YOUNG,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MARY YOUNG MOORE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

1. Where a 99 year lease is made with the purpose of erecting a new building the unextinguished cost of the old buildings is not deductible by lessor as a loss in the year of their demolition but should be exhausted over the term of the lease.

2. A commission and fees paid by the petitioners to procure a 99 year lease *held* not to constitute deductible expenses in the years in which paid but capital expenditures to be ratably deducted over the term of the lease.

THEODORE B. BENSON, Esq., for the Petitioners.

W. FRANK GIBBS, Esq., for the Respondent.

These proceedings, which were consolidated for hearing and decision, are for the redetermination of deficiencies in income taxes asserted by the respondent against Mary C. Young of $2,825.63 for [40] 1924 and $2,091.21 for 1925, and against Mary Young Moore of $2,930.06 for 1924 and $2,-117.42 for 1925. The facts were stipulated, from which we make the following:

FINDINGS OF FACT.

Mary Young Moore is the daughter of Mary C. Young. They both reside at 1001 South Hoover Street, Los Angeles, California. They are joint owners of certain land in the City of Los Angeles, California, and located at the Southeast corner of Seventh and Figueroa Streets, extending East on Seventh Street to the Southwest corner of Flower and Seventh Streets. The petitioners are equal owners.

During the years 1917 and 1918 the petitioners erected on this land several brick store buildings at a cost of $50,000. These buildings were rented or for rent until their demolition.

In 1924 a lease for the term of ninety-nine years was entered into by the petitioners with the Sun Realty Company, whereby the brick buildings erected during 1917 and 1918 should be demolished and a new building erected to be occupied by Bar-

ker Brothers. The buildings were demolished in 1924.

The full amount of the depreciation sustained on the brick store buildings, from the time of erection to the time of demolition in 1924, was $7,785, and the undepreciated cost thereof to the petitioners at the time of demolition was $42,215.

The buildings were not salvaged or otherwise disposed of, and [41] the petitioners received no insurance or other compensation on the demolition of the buildings.

Each of the petitioners, in her income tax return for the year 1924, claimed a deduction in the amount of $21,107.50, representing her one-half of the undepreciated cost. These deductions were disallowed by the respondent and the sum of $21,107.50 was added back to the income of each of the petitioners.

On October 1, 1924, the petitioners granted a ground lease of the premises at Seventh and Figueroa Streets to the Sun Realty Company for a period of ninety-nine years, on the basis of a monthly rental of $10,000 from October 1, 1924, to June 30, 1926, and of a monthly rental of $20,000 thereafter until the end of the term of the lease. This lease was obtained for the petitioners by a real estate agent who charged as his commission therefor the sum of $50,500, which commission was paid during the years 1924 and 1925. During the year 1924 there was paid $21,500, and the sum of $29,000 was paid during the year 1925. These amounts were paid by the petitioners

in equal sums and each paid $10,750 in 1924 and $14,500 in 1925.

Each of the petitioners claimed as a deduction in her income tax return for 1924 the sum of $10,750, representing the amount actually paid by her to the real estate agent during that year. These deductions were disallowed by the Commissioner.

In addition to the commission paid to the real estate agent, [42] the petitioners were required to pay attorneys' fees in the amount of $5,500, and the expense of obtaining certificate of title in the amount of $4,502.85.

Each petitioner, in her income tax return for 1924, claimed a deduction in the amount of $2,750, being one-half of the attorneys' fees, and a deduction in the amount of $2,251.43, being one-half of the cost of obtaining certificate of title. These deductions were disallowed by the respondent.

The respondent considered the loss sustained on the demolition of the brick buildings to be a capital loss and further considered the sums expended by the petitioners as commissions, attorneys' fees and cost of obtaining certificate of title, to be capital expenditures to be amortized and deducted over the term of the lease, and as a result thereof allowed a deduction to each of the petitioners for the year 1924 in the amount of $513.59.

In his adjustment of the income of the petitioners for the year 1925, the respondent disallowed the deduction claimed by each in the amount of $14,500, representing the sum paid by each as commission to the real estate agent in 1925, and allowed a deduc-

tion for amortization of the cost of the lease in the amount of $513.59.

Each of the petitioners kept her books and rendered her income tax returns for the years 1924 and 1925 on the basis of cash receipts and disbursements.

[43] OPINION.

MATTHEWS.—The petitioners assert that the respondent erred in two particulars. First, in refusing to allow as a deduction in 1924 the unextinguished cost of the brick store buildings which were demolished in order that a new building might be erected on the premises. Second, in refusing to allow as deductions in 1924 and 1925 the amounts paid by the petitioners in those years in connection with the negotiation of a 99 year lease on the property owned by petitioners, such amounts representing the commission paid to a real estate agent, attorneys' fees, and the expense of obtaining a certificate of title.

The first issue is governed by our decision in Charles N. Manning, 7 B. T. A. 286, in which we held that the unextinguished cost of buildings removed in order to obtain a 99 year lease upon the land represented the cost to the lessor of such lease and should be exhausted over the term of the lease. This decision was followed in William Ward, 7 B. T. A. 1107, in which case the same question was presented. See, also, Liberty Baking Company vs. Heiner, 37 Fed. (2) 703; Anahma Realty Corporation vs. Commissioner, decided on May 5, 1930, by the Circuit Court of Appeals for the Second Cir-

cuit, —— Fed. (2d) ——, affirming our decision in this case, 16 B. T. A. 749.

With respect to the second issue, the petitioners take the [44] position that the amounts paid in connection with the procuring of the 99 year lease do not constitute capital expenditures but represent necessary expenses and that, since they were on a cash receipts and disbursements basis, they are entitled to deduct from income the amounts paid in cash in 1924 and 1925. The respondent contends that the expenditures in question resulted in the acquisition of a capital asset and that any deduction allowable is by way of amortization over the life of the lease.

In Bonwit-Teller & Company, 17 B. T. A. 1019, and Julia Stow Lovejoy, 18 B. T. A. 1179, this question was considered at length. These decisions were cited and followed in James M. Butler, 19 B. T. A. 718, in which it was held that the commission paid by a lessor to procure a long term lease does not constitute a deductible expense in the year paid, but is a capital expenditure to be ratably deducted as the lease is exhausted. See, also, Evalena M. Howard, 19 B. T. A. 865, and Central Bank Block Association, 19 B. T. A. 1183. On authority of these decisions, the respondent's action in prorating the expenditures over the term of the lease is approved.

Judgment will be entered for the respondent.

Now, Feb. 24, 1931, the foregoing Findings of Fact and Opinion certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[45] United States Board of Tax Appeals,
Washington.

DOCKET No. 39,824.

MARY YOUNG MOORE,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the Board's findings of fact and opinion, promulgated September 8, 1930, it is ORDERED AND DECIDED: That there are deficiencies of $2,930.06 and $2,117.42 for the years 1924 and 1925, respectively.

ANNABEL MATTHEWS,
MR.
Member, United States Board of Tax Appeals.

Entered Sep. 10, 1930.
A true copy.
[Seal] Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now, Feb. 24, 1931, the foregoing Decision certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[46] United States Board of Tax Appeals,
Washington.

DOCKET No. 39,825.

MARY C. YOUNG,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the Board's findings of fact and opinion, promulgated September 8, 1930, it is ORDERED AND DECIDED: That there are deficiencies of $2,825.63 and $2,091.21 for the years 1924 and 1925, respectively.

ANNABEL MATTHEWS,
MR.
Member, United States Board of Tax Appeals.
Entered Sep. 10, 1930.

A true copy.

[Seal] Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now, Feb. 24, 1931, the foregoing Decision certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[47] Filed Jan. 13, 1931. United States Board of Tax Appeals.

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

DOCKET No. 39,825.

MARY C. YOUNG,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

and

DOCKET No. 39,824.

MARY YOUNG MOORE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR THE REVIEW OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Mary C. Young, and Mary Young Moore, in support of this their separate and joint petition, filed in pursuance of the provisions of Section 1001 of the Act of Congress of February 26, 1926, entitled the Revenue Act of 1926, for the review of the decision of the United States Board of Tax Appeals rendered on September 8, 1930, and from the final orders of the said Court entered on September 10, 1930, approving a deficiency in income and profits taxes of the Petitioner Mary C. Young for the calendar year 1924 in the sum of Two Thousand Eight Hundred Twenty-five Dollars and Sixty-three Cents ($2,825.63) and for the calendar year 1925 in the sum of Two [48] Thousand Ninety-one Dollars and Twenty-one Cents ($2,091.21), and of the Petitioner, Mary Young Moore, for the calendar year 1924 in the sum of Two Thousand Nine Hundred Thirty Dollars and Six Cents ($2,930.06) and for the calendar year 1925 in the sum of Two Thousand One Hundred Seventeen Dollars and Forty-two Cents ($2,117.42), respectively, show to this Honorable Court as follows:

I.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

On July 16, 1928, the Petitioners filed with the United States Board of Tax Appeals, in pursuance of the Revenue Act of 1926, their separate petitions requesting the re-determination of deficiencies and income and excess profits taxes for the calendar years 1924 and 1925, as shown by the final notices

of deficiency previously mailed by the Respondent to the Petitioners under date of May 16, 1928. Said notices of deficiency asserted in the case of Mary C. Young a deficiency of Two Thousand Eight Hundred Twenty-five Dollars and Sixty-three Cents ($2,825.63) for the year 1924 and Two Thousand Ninety-one Dollars and Twenty-one Cents ($2,-091.21) for the year 1925, and in the case of Mary Young Moore a deficiency of Two Thousand Nine Hundred Thirty Dollars and Six Cents ($2,930.06) for 1924 and Two Thousand One Hundred Seventeen Dollars and Forty-two Cents ($2,117.42) for 1925. The issues to be determined by the United States Board of Tax Appeals were identical in both cases. By an order of the United States Board of Tax Appeals the proceedings in both appeals were consolidated for hearing and decision. A stipulation of facts was entered into by the Petitioners and the Respondent and said stipulation was filed with the United States Board of Tax Appeals. Said appeals so consolidated duly came on for hearing on February 24, 1930. No evidence was introduced other than that contained in the [49] stipulation of facts filed. On September 8, 1930, the United States Board of Tax Appeals promulgated its findings of fact, which findings of fact are in substantial accord with the stipulation of facts filed and with the allegations contained in the Petitions filed with the United States Board of Tax Appeals and with the Answers thereto filed by the Respondent. Said findings of fact are as follows:

FINDINGS OF FACT.

"Mary Young Moore is the daughter of Mary C. Young. They both reside at 1001 South Hoover Street, Los Angeles, California. They are joint owners of certain land in the City of Los Angeles, California, and located at the southeast corner of Seventh and Figueroa Streets, extending East on Seventh Street to the southwest corner of Flower and Seventh Streets. The petitioners are equal owners.

"During the years 1917 and 1918 the petitioners erected on this land several brick store buildings at a cost of $50,000. These buildings were rented or for rent until their demolition.

"In 1924 a lease for the term of ninety-nine years was entered into by the petitioners with the Sun Realty Company, whereby the brick buildings erected during 1917 and 1918 should be demolished and a new building erected to be occupied by Barker Brothers. The buildings were demolished in 1924.

"The full amount of the depreciation sustained on the brick store buildings, and from the time of erection to the time of demolition in 1924, was $7,785, and the undepreciated cost thereof to the petitioners at the time of demolition was $42,215.

"The buildings were not salvaged or otherwise disposed of, and the petitioners received no insurance or other compensation on the demolition of the buildings.

[50] "Each of the petitioners, in her income tax return for the year 1924, claimed a deduction

in the amount of $21,107.50, representing her one-half of the undepreciated cost. These deductions were disallowed by the respondent and the sum of $21,107.50 was added back to the income of each of the petitioners.

"On October 1, 1924, the petitioners granted a ground lease of the premises at Seventh and Figueroa Streets to the Sun Realty Company for the period of ninety-nine years, on the basis of a monthly rental of $10,000 from October 1, 1924, to June 30, 1926, and of a monthly rental of $20,000 thereafter until the end of the term of the lease. This lease was obtained for the petitioners by a real estate agent who charged as his commission therefore the sum of $50,500, which commission was paid during the years 1924 and 1925. During the year 1924 there was paid $21,500, and the sum of $29,000 was paid during the year 1925. These amounts were paid by the petitioners in equal sums and each paid $10,750 in 1924 and $14,500 in 1925.

"Each of the petitioners claimed as a deduction in her income tax return for 1924 the sum of $10,750, representing the amount actually paid by her to the real estate agent during that year. These deductions were disallowed by the Commissioner.

"In addition to the commission paid to the real estate agent, the petitioners were required to pay attorneys' fees in the amount of $5,500, and the expense of obtaining certificate of title in the amount of $4,502.85.

"Each petitioner, in her income tax return for 1924, claimed a deduction in the amount of $2,750, being one-half of the attorneys' fees, and a deduction in the amount of $2,251.43, being one-half of the cost of obtaining certificate of title. These deductions were disallowed by the respondent.

[51] "The respondent considered the loss sustained on the demolition of the brick buildings to be a capital loss and further considered the sums expended by the petitioners as commissions, attorneys' fees and cost of obtaining certificate of title, to be capital expenditures to be amortized and deducted over the term of the lease, and as a result thereof allowed a deduction to each of the petitioners for the year 1924 in the amount of $513.59.

"In his adjustment of the income of the petitioners for the year 1925, the respondent disallowed the deduction claimed by each in the amount of $14,500, representing the sum paid by each as commission to the real estate agent in 1925, and allowed a deduction for amortization of the cost of the lease in the amount of $513.59.

"Each of the petitioners kept her books and rendered her income tax returns for the years 1924 and 1925 on the basis of cash receipts and disbursements."

On September 8, 1930, the United States Board of Tax Appeals promulgated its opinion in said causes in which it held as a matter of law that the petitioners were not entitled to deduct from their gross income for the year 1924 the undepreciated cost of the buildings demolished in that year. Said

opinion further held as a matter of law that the petitioners were not entitled to deduct in the year 1924 the amount paid by them in that year to a real estate agent as his commission for obtaining the ninety-nine year lease on petitioners' property, and said opinion further held as a matter of law that petitioners were not entitled to deduct from their gross income for the year 1925 the balance of said commission actually paid by them to the real estate agent in the year 1925. Said opinion further held that the petitioners were not entitled to deduct [52] from the gross income for the year 1924 the amounts paid by them in that year for attorneys' fees and for a certificate of title, both of which amounts were expended in effecting said ninety-nine year lease. Said board in its opinion held all of said amounts to be capital expenditures to be amortized and deducted over the term of said lease and allowed to each of the petitioners for each of the years 1924 and 1925 a deduction of $513.59.

On September 10, 1930, the said Board entered its final orders approving the deficiencies as determined by the respondent.

II.

DESIGNATION OF COURT OF REVIEW.

The petitioners being aggrieved by the said opinion, decision and orders, and being individuals who have at all times herein mentioned resided in the City of Los Angeles, California, and who filed their income tax returns for the calendar years

1924 and 1925 with the Collector of Internal Revenue at Los Angeles, California, desire a review of said opinion, decision and orders by the United States Circuit Court of Appeals for the Ninth Circuit.

III.

ASSIGNMENT OF ERRORS.

The petitioners as a basis for review make the following assignments of error:

(1) The Board of Tax Appeals erred in holding that each of the petitioners was not entitled to deduct from her gross income for the year 1924 the amount of Twenty-one Thousand One Hundred and Seven Dollars and Fifty Cents ($21,107.50) representing one-half of the undepreciated cost of their buildings demolished in that year.

[53] (2) The Board of Tax Appeals erred in holding that each of the petitioners was not entitled to deduct from her gross income for the year 1924 the sum of Ten Thousand Seven Hundred Fifty Dollars ($10,750.00) actually paid by each of the petitioners in that year as a commission to the real estate agent who obtained said ninety-nine year lease.

(3) The Board of Tax Appeals erred in holding that each of the petitioners was not entitled to deduct from gross income for the year 1925 the sum of Fourteen Thousand Five Hundred Dollars ($14,500.00) actually paid by each of the petitioners in that year as a commission to the real estate agent who obtained said ninety-nine year lease.

(4) The Board of Tax Appeals erred in holding that each of said petitioners was not entitled to deduct from gross income for the year 1924 the sum of Two Thousand Seven Hundred Fifty Dollars ($2,750.00) actually paid by each of said petitioners in that year to an attorney for his services in effecting said ninety-nine year lease.

(5) The Board of Tax Appeals erred in holding that each of said petitioners was not entitled to deduct from her gross income for the year 1924 the sum of Two Thousand Two Hundred Fifty-one Dollars and Forty-three Cents ($2,251.43) actually paid by each of said petitioners in said year for a certificate of title necessary in effecting said ninety-nine year lease.

(6) The findings of fact made by said Board are insufficient to support the decision and order of said Board.

(7) The Board erred in rendering decision for the respondent.

(8) The Board erred in entering its final orders on September 10, 1930, approving the deficiencies determined by the respondent.

[54] WHEREFORE, your petitioners pray that the Honorable Court may review said decision, opinion and orders and reverse and set aside the same, and that the Clerk of the United States Board of Tax Appeals be directed to transmit and deliver to the Clerk of the said Court certified copies of all and every of the documents necessary and material to the presentation and consideration of the foregoing Petition for Review, and as required

by the rules of said Court and statutes made and provided.

MRS. MARY C. YOUNG.
MARY C. YOUNG.
MRS. MARY YOUNG MOORE.
MARY YOUNG MOORE.

M. F. MITCHELL.
M. F. MITCHELL,
Petroleum Securities Building,
Los Angeles, California.
GEORGE G. WITTER.
GEORGE G. WITTER,
Petroleum Securities Building,
Los Angeles, California.
THEODORE B. BENSON.
THEODORE B. BENSON,
Southern Building,
Washington, D. C.,
Attorneys for Petitioners.

[55] State of California,
County of Los Angeles,—ss.

Personally appeared before me, John B. Horbach, a Notary Public in and for the County and State aforesaid, the above-named petitioners, Mary C. Young and Mary Young Moore, and each for herself does depose and say: That she signed the foregoing petition; that she has read the same; and that the facts set forth therein are true to the best of her knowledge and belief; and that said petition is filed in good faith.

JOHN B. HORBACH,
Notary Public, in and for the County of Los Angeles, State of California.

[56] Filed Jan. 13, 1931. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 39,825.

MARY C. YOUNG,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

and

DOCKET No. 39,824.

MARY YOUNG MOORE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

NOTICE OF FILING PETITION FOR REVIEW.

To the General Counsel, Bureau of Internal Revenue, Attorney for Respondent:

You are hereby notified that on the 13th day of January, 1931, a petition for Review of the decision of the United States Board of Tax Appeals was filed with the Clerk of the Board in the cases of Mary C. Young, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 39,825, and Mary Young Moore, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No.

39,824, and a true copy of said Petition is herewith served upon you.

M. F. MITCHELL.
M. F. MITCHELL,
Petroleum Securities Building,
Los Angeles, California.
GEORGE G. WITTER.
GEORGE G. WITTER,
Petroleum Securities Building,
Los Angeles California.
THEODORE B. BENSON.
THEODORE B. BENSON,
Southern Building,
Washington, D. C.
Attorneys for Petitioners.

[57] Receipt of the above petition acknowledged this 13th day of January, 1931.

C. M. CHAREST,
General Counsel Bureau of Internal Revenue,
Attorney for Respondent.

Now, Feb. 24, 1931, the foregoing Petition for Review and Notice of Filing certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[58] Filed Jan. 13, 1931. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 39,825.

MARY C. YOUNG,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

and

DOCKET No. 39,824.

MARY YOUNG MOORE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and within sixty (60) days and such additional times as has been granted by the Board from the date of the filing of Petition for Review in the above-stated case, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit certified copies of the following documents:

1. Documentary entries of proceedings before the United States Board of Tax Appeals in the above-entitled causes.

2. Pleadings before the Board in said causes.

(a) Petitions.

(b) Answers.

3. Petitioners' Motion to consolidate the above-entitled causes for hearing and decision.

4. Order of the Board of Tax Appeals granting said motion to consolidate.

[59] 5. Stipulation of facts filed in said causes.

6. Findings of fact, opinion and decision of the Board.

7. Two Board orders of redetermination dated September 10, 1930.

8. Petition for review.

9. Notice of filing petition for review.

10. This praecipe.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Court of Appeals for the Ninth Circuit.

M. F. MITCHELL.
M. F. MITCHELL,
Petroleum Securities Building,
Los Angeles, California.
GEORGE G. WITTER.
GEORGE G. WITTER,
Petroleum Securities Building,
Los Angeles, California.
THEODORE B. BENSON.
THEODORE B. BENSON,
Southern Building, Washington, D. C.
Attorneys for Petitioners.

Service of a copy of the foregoing is hereby acknowledged this 13th day of January, 1931.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

No objection.

C. M. CHAREST,
General Counsel for Commissioner of Internal Revenue.

Now, Feb. 24, 1931, the foregoing praecipe certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 6427. United States Circuit Court of Appeals for the Ninth Circuit. Mary C. Young, Petitioner, vs. Commissioner of Internal Revenue, Respondent, and Mary Young Moore, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed March 30, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

C127

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Mary C. Young, *Petitioner,* vs. Commissioner of Internal Revenue, *Respondent.*	Docket No. 39825.
and Mary Young Moore, *Petitioner,* vs. Commissioner of Internal Revenue, *Respondent.*	Docket No. 39824.

APPELLANTS' OPENING BRIEF.

M. F. MITCHELL,
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Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Mary C. Young, *Petitioner,* vs. Commissioner of Internal Revenue, *Respondent.*	Docket No. 39825.
and Mary Young Moore, *Petitioner,* vs. Commissioner of Internal Revenue, *Respondent.*	Docket No. 39824.

STATEMENT OF THE CASE.

This is an appeal from a decision of the United States Board of Tax Appeals. The appeals of Mary C. Young and Mary Young Moore were consolidated before the Board of Tax Appeals, and are consolidated for the purpose of this appeal. The issues in the two cases are identical although there is a slight variation in the amount of tax.

STATEMENT OF FACTS.

The appellants are mother and daughter. They reside in Los Angeles. For many years they have been the joint owners of valuable lots located at the corner of

Seventh and Figueroa streets, Los Angeles, California. During 1917 they erected brick buildings on these lots at a cost of $50,000. The buildings were rented until 1924 when a lease was entered into for the period of 99 years. This lease was made with the Sun Realty Company in behalf of Barker Brothers and provided that the brick buildings then standing on the lots should be demolished and new buildings be erected by the lessee. This lease was obtained for the appellants by a real estate agent who charged as his commission therefor the sum of $50,500, which was paid during the years 1924 and 1925.

Each of the petitioners file their income tax returns on cash receipts and disbursements basis. Each of the petitioners actually paid to the real estate agent as commission in the year 1924 the sum of $10,750 and in the year 1925 the sum of $14,500. They deducted these amounts as expense on their income tax returns for the years 1924 and 1925. The Board of Tax Appeals disallowed the deduction of the amounts as expenses and treated them as capital expenditures to be amortized over the 99-year period of the lease. The petitioners assign this as error.

Likewise and for the same purpose the petitioners were required to pay and actually did pay in 1924 $5,500 in attorneys fees in procuring said lease, and $4,502.85 for obtaining certificate of title in connection with said lease. Each petitioner in her income tax return for 1924 claimed a deduction in the amount of $2,750, being one-half of the attorneys fees, and a deduction in the amount of $2,251.43, being one-half of the cost of obtaining certificate of title. These deductions were likewise disallowed by the Board of Tax Appeals and treated as capital ex-

penditures to be amortized over the period of the lease. The petitioners assign this as error.

In the year 1924 in accordance with the terms of the lease the brick buildings, erected by the petitioners in 1917, were demolished. Depreciation sustained on the brick buildings from the date of their erection to the time of demolition was $7,785, which left an undepreciated cost thereof to the petitioners at the time of demolition of $42,215. Each of the petitioners in her income tax return for the year 1924 claimed a deduction of $21,107.50, representing her one-half of the undepreciated cost of these buildings, on the ground that the same was a realized loss in the year 1924. These deductions were disallowed by the Board of Tax Appeals, and the sum of $21,107.50 added back to the income of each of the petitioners to be amortized over the 99-year period of the lease. The petitioners assign this as error.

As a result of the decision the petitioners have each been allowed a deduction of $513.59 per year instead of the amounts claimed.

ARGUMENT.

I.

The Commissions Paid to Real Estate Agent, the Fees Paid the Attorney, and the Premium Paid on Title Insurance Should Be Allowed as Deductions in the Years in Which Paid.

This question has been the subject of several conflicting decisions by the Board of Tax Appeals. In the early decision of Crompton Building Corporation, found in 2 B. T. A. 1056, the Board made a holding with respect to

a 5-year lease which would be contrary to the contentions of the taxpayer in this case. In the case of Robert McNeill, found in 16 B. T. A. 479, the Board reconsidered the precise question which arises in this appeal and decided squarely in favor of the taxpayers contentions, and expressly reversed its earlier decision. In its opinion in the McNeill case the Board spoke as follows:

> "Petitioner testified that the lease of his Maryland land to the Government was for a term of two years, at an annual rental of $25,000, and that he paid certain agents the amount of $3,000 for services in procuring said lease. We have frequently and consistently held that expenses incurred by a *lessee* in connection with the acquisition of a leasehold or other capital asset, such as bonds having a definite income-producing life, are capital expenditures and that for each taxable year ending within such term the lessee is entitled to deduct a ratable part of such expenditures from his gross income. D. N. and E. Walter & Co., 4 B. T. A. 142; Lincoln L. McCandless, 5 B. T. A. 1114; C. M. Nusbaum, 10 B. T. A. 664; Marjorie Post Hutton, 12 B. T. A. 265. In these and similar cases the *lessee* or the purchaser was the moving party claiming the right to deduct such expenditures from income as ordinary and necessary expenses. The disallowance in each instance was based on the theory *that the expense was incurred in the acquisition of assets* that became fused into the capital structure of the petitioner for income-producing purposes through a term of years and should be pro-rated against the income realized in each year of such term.
>
> "It appears, however, that in at least one case, Crompton Building Corporation, 2 B. T. A. 1056, we have held that brokers' commissions paid for procuring or selling leases to property owned by the taxpayer are capital expenditures which should be spread over the term of the lease. In our opinion in that proceeding we said:

'The leases were to run for a period of five years, and amounts paid out in acquiring them are just as much capital expenditures to be returned over the life of the leases as if they had been paid out by the tenant in acquiring a leasehold estate. The lease of property running for a period of years is just as much property in the hands of the owner as a leasehold is property in the hands of a tenant. As such the acquisition thereof by the owner of the property is capital.'

"If the Crompton decision is sound law, it follows that it is immaterial whether expense in connection with the creation of a leasehold interest in property is incurred by the lessor or the lessee and that case and those above cited establish a principle that makes it impossible for us to allow the deduction here claimed as an ordinary and necessary expense incurred or paid in the taxable year and requires us to find that the amount in question is a capital expenditure amortizable over the term of the lease.

"*After careful consideration, however, we are convinced that there is a readily distinguishable difference between the situations of the lessor and lessee in connection with expenses incident to the creation of a leasehold. The lessor acquires nothing that can be taken into his accounts as a capital asset. On the contrary he parts with something when he severs the lessor or leasehold interest from the greater or fee interest of the estate. In effect he sells the right to use his property for a limited term and the commission which he pays may very properly be regarded as expense incident thereto.* On the other hand the lessee acquires something which he can take into his asset accounts. He has more than he owned before the transaction and the fee owner has less. In exchange for income, all of which may be taxable, the lessor has parted with the right to use a certain part of his capital. *The lessee* has acquired a capital asset at a cost which he is entitled to recover free from tax within the period of its useful life to him, which is the term of the lease. *The lessor merely makes a sale*

> *and has no capital investment to recover.* If he incurs any cost in the creation of the leasehold estate, he may be entitled to deduct the amount thereof from his gross income, but *certainly not ratably over the term of the lease, since such expense is for a service in connection with a transaction which is closed when the leasehold is created. The lessor is, therefore, in the situation of one who pays a commission for a service rendered and in this case is within the rule established in Olinger Corporation,* 9 B. T. A. 170, *which is based on American National Co. v. United States,* 274 U. S. 99. We conclude, therefore that this petitioner is entitled to deduct the amount of $3,000 from his gross income for 1922 as commission for services rendered to him in that year and that in view of the conclusion here reached and of our opinion in the Olinger proceeding, *supra,* it is necessary to reverse our opinion in Crompton Building Corporation, *supra.*" (Italics added.)

In the case of *Bonwit Teller and Company v. Commissioner,* 17 B. T. A. 1019, the Board refused to allow as a deduction a brokerage fee paid by a lessee to secure a sub-tenant from whom it received a substantially larger rental. We see nothing in this holding inconsistent with the Board's holding in the McNeill case. In the McNeill case the Board had already distinguished between the position of lessor and lessee. Likewise, the case of *Evelena M. Howard,* 19 B. T. A. 865 (cited by the Board) is a case of a lessee obtaining a sub-tenant at a substantially higher rental.

In the case of *Julius Stowe Lovejoy v. Commissioner,* 18 B. T. A. 1179, (cited by the Board) the taxpayer had paid a commission for obtaining a loan which was to run over a long period of years, the loan to be used in the construction of a building. The Board refused to permit

the deduction in the year in which the commission was paid. That case is clearly distinguishable from the instant case for in the Lovejoy case the petitioner did obtain the use of capital over a period of years. However, in the Lovejoy case a strong dissenting opinion was written in which four members of the Board joined. The dissenting opinion is set out below:

> "The petitioner made her income-tax returns upon the basis of cash receipts and disbursements. In such returns she could deduct from gross income as ordinary and necessary expenses only amounts actually paid out. In Olinger Corporation, 9 B. T. A. 170, we held that a note given for securing a loan was deductible as an expense in the year given where the petitioner was on the accrual basis. In Robert H. McNeill, 16 B. T. A. 479, involving the same point as is involved in this proceeding, we held that amounts paid out in obtaining leases are deductible expenses of the year in which paid. The decision in the McNeill case was followed by the United States District Court, Southern District of New York, in Daly v. Anderson, decided January 29, 1930, in which the court held that a commission paid in 1923 to a broker for obtaining a 21-year lease on the taxpayer's property to begin in 1931 was deductible in 1923 by the taxpayer where on a cash receipts and disbursements basis. *Those decisions are, I think, in line with American National Co. v. United States,* 274 U. S. 99, and *United States v. Anderson,* 269 U. S. 422. *It is not to be presumed that Congress contemplated the spread of an expense of the nature of that paid out by the petitioner in 1924 over a series of years. Such a method of charging off the expense is entirely foreign to the petitioner's method of keeping her books of account and making her tax returns.* It needlessly complicates the administration of the income-tax law. *If the petitioner were on an accrual basis it might be proper to treat the amount as a deferred expense and then to spread the charge. But*

the petitioner was not on an accrual basis. The income tax is levied not on economic income but on net income to be determined in the manner prescribed by the taxing statutes. In years subsequent to 1924, the petitioner is not entitled to deduct any part of the amount expended by her in 1924 in securing the money borrowed. The expense paid in 1924 is a legal deduction from income of 1924." (Italics added.)

The Board's decision in *Central Bank Block Association,* 19 B. T. A. 1183 (also cited in Board's opinion), is based on its holding in *Bonwit Teller and Company, supra,* and *Julius Stowe Lovejoy,* both of which we have discussed above and distinguished from the instant appeal.

The only Board decisions that we find in point with the instant appeal where the Board has discussed the reasons for its opinion are the McNeill case, and the appeal of *James M. Butler,* 19 B. T. A. 730. The reasoning in the McNeill case has been set out above. To our minds it is both thorough and convincing. We believe it correctly states the law. Below we set out the reasoning in the Butler case holding *contra*:

"The petitioner relies upon Robert H. McNeill, 16 B. T. A. 479, in which we held that the cost, to the lessor, of securing a lease is deductible from the gross income to the lessor in the year in which the expenditure is made. However, the principle laid down in Robert H. McNeil, *supra,* has been overruled in two recent Board decisions. Donwit Teller & Co., 17 B. T. A. 1019, and Julia Stowe Lovejoy, 18 B. T. A. 1179.

In the instant proceeding the $980 which petitioner expended to secure the lease was not an ordinary and necessary expense. The expenditure in question resulted in the *securing of an asset from which income was to be derived for 99 years.* Such an expenditure is, beyond a doubt, of a capital nature and may be

> allowed as a deduction only as the benefit is realized. The respondent has allowed petitioner a deduction from income of 1923 calculated in accordance with our decision and upon the basis of a larger expenditure than petitioner has here shown. In this circumstance the holding of the respondent will be approved."

The only material statement in the Butler opinion is the one italicized. The Board's own opinions, the decision of the courts, and common reason all deny the truth and accuracy of the statement. The lease was not a *new asset purchased* by the taxpayers nor was it *the income producer.*

This whole question was squarely presented to the District Court in the Southern District of New York in the case of *Daly v. Anderson,* 37 Fed. (2nd) 728. In that case the owner of land paid in the year 1923 a commission of $8,500 to his broker for obtaining a 21-year lease, whose term was to commence to run in 1931. Having kept his books on the cash basis the petitioner claimed the $8,500 as a deduction in the year 1923. The court held that the taxpayer was entitled to the deduction in the year 1923, and spoke as follows:

> "I think that the first question must be answered in the negative. *The taxpayer did not invest in anything when he paid the real estate broker for services in securing a lease for him. What he did was to pay some one for services in connection with the use to which was lawfully putting his land.* Cf. McNeill v. Commissioner of Internal Revenue, 16 B. T. A. 479; Evalena M. Howard v. Commissioner of Internal Revenue, decided by the Board of Tax Appeals on November 30, 1929, Docket No. 25,749, and not yet reported.

> The taxpayer when the transaction was over had his estate in his land, minus the leasehold estate. It is true that ultimately he was to be paid rent, but that would be merely a periodic recognition by his tenant of the surrender the taxpayer has made by carving the lease out of his freehold, and would be taxable as income to the taxpayer in the year when paid." (Italics added.)

The court further in its opinion emphasizes the fact that the taxpayer is on the cash basis and that, therefore, the *only* years in which the taxpayer is entitled to the deductions under the law are those in which the payments were actually made.

The Board's theory is that when the taxpayers leased their land they *bought* something, and that this something they bought is the *income-producing factor.* To the contrary, and in line with the court's decision in *Daly v. Anderson* and the Board's decision in the McNeill case, we say the taxpayers bought nothing when they leased their land, but, in fact, they sold, or at least parted with something, namely, the right to use their land. As the Board states in the McNeill case, the fees and commissions were expenses incident to the sale, or, as the court puts it, they were amounts paid by the petitioners for services rendered in connection with the use to which they were lawfully putting their land. As either they are deductible expenses in the year in which paid.

The Board's decision assumes that the *lease* is the income producing factor. We deny this. *The land itself is the income producing factor.* The lease is merely the agreement through which income from the land is fixed and realized. Presumably the bargain made in 1924 was

a fair one, and that being so, then the lease within itself at the date made had no value. It was only the land that was valuable. The terms of the lease represent the fair market rental value of the land on a 99-year basis. The only way the lease could take on value within itself would be because of changing conditions and changing values so that the payments stipulated under the lease would be in excess of the fair rental value of the land. Instead of the lease proving to be an asset it might just as easily and frequently does prove to be a loss; that is, the land in a few years after the execution of the lease might have a rental value substantially higher than the payments provided for in the lease.

II.

The Undepreciated Cost of the Old Building Amounting to $42,215 Should Be Allowed as a Deductible Loss in the Year 1924.

It is agreed that the undepreciated cost of the old buildings is $42,215 and that, if there is a loss and it is deductible it is deductible in this amount.

The Commissioner of Internal Revenue has frequently disallowed a loss from the demolition of buildings by reason of the provisions of article 142 of Treasury Department regulations. That article reads as follows:

> "Voluntary removal of buildings. Loss due to the voluntary removal or demolition of old buildings, the scrapping of old machinery, equipment, etc., incident to renewals and replacements will be deductible from gross income. *When a taxpayer buys real estate upon which is located a building, which he proceeds to raze with a view to erecting thereon another*

> *building,* it will be considered that the taxpayer has sustained no deductible loss by reason of the demolition of the old building, and no deductible expense on account of the cost of such removal, the value of the real estate, exclusive of old improvements, being presumably equal to the purchase price of the land and buildings plus the cost of removing the useless building."

We think it very clear that this article means that when a person buys real estate on which is located a building with the intent and purpose *at the time he buys* of demolishing the old building and erecting a new one that he shall not be entitled to any loss, but that such unextinguished cost of the old building shall become part of the cost of the new building. The words *"which he proceeds to raze"* clearly indicate this. If this be the correct interpretation then the article has no application to the present case where the petitioners had owned the land for many years, erected the brick buildings in 1917 and rented them continuously until 1924, when not the owners themselves but others erected a new building.

The Board of Tax Appeals denied the loss in the instant case on the ground that the issue was controlled by the Board's decision in the appeal of *Charles N. Manning,* 7 B. T. A. 286. The facts in that case are that the petitioners invested in certain real estate having buildings upon it in the year 1920 and in the year 1921 executed a 99-year lease which provided for the erection of new buildings and the consequent demolition of the old buildings. The Board held that the case did not come within the scope of article 142 set out above, but quoted section 214 (a) (5) of the Revenue Act of 1921, which provides for the deduction of the following losses:

"Losses sustained during taxable year and not compensated for by insurance, or otherwise, if incurred in any transaction entered into for profit though not connected with the trade or business."

The Board admitted the loss but held that the petitioners had received compensation for the loss. Following is the most pertinent portion of the Board's opinion.

"Prior to the execution of the lease the petitioners had land and buildings from which they were deriving income in the form of rent, and also land. After the execution of the lease, they had only the land and were lessors under a more advantageous lease than they formerly had. Did they part with the buildings, without receiving compensation therefor, *quid pro quo?* That the lease in question was a favorable one is admitted by the petitioners and that they improved their position thereby is shown by the fact that their rentals were substantially greater under the new lease than those being received prior to October 31, 1921, from the old buildings. But the petitioners say that they could not have been compensated in 1921 under the lease for the loss since they did not begin to receive rentals thereunder until 1922. We are not impressed by the logic of this argument. The acquisition of something from which income will be derived *in futuro* has a value in money's worth in the same sense as something which will produce income *in praesenti.* The value may differ on this account, but this does not alter the fact that each has a compensating value which may be recognized as having money's worth.

"*Taken by itself, the petitioners undoubtedly would be said to have sustained a loss* in the demolition of their buildings, but when considered in connection with the entire transaction entered into on October 31, 1921, the Board is of the opinion that the removal of the buildings was *fully compensated* for in the rights acquired under the lease and that the cost of the buildings, less sustained depreciation, is properly allocable to the cost of securing the lease. In other words, there was in this instance what amounted to

a substitution of assets; instead of an asset in the form of buildings, the petitioners now have another asset, viz., a lease, the giving up or voluntary destruction of the buildings being a necessary incident to the acquisition of the lease.

"Since, however, the lease acquired had a definite life of 99 years, cost of the buildings, less sustained depreciation, which entered into securing the lease, are properly amortizable over the life of the lease, and a deduction from gross income should be allowed under the provisions of section 214 (a) (8) of the Revenue Act of 1918, for the exhaustion of this asset over a 99-year period from the date the lease was signed. Appeal of Grosvenor Atterbury, 1 B. T. A. 169 (1925 C. C. H., B. T. A. 2117).

It will be seen from the above that the theory of the Board is that although the demolition of the buildings represents within itself a loss yet the rental money to be obtained from the lease must be regarded as compensation for such loss. We believe this theory to be entirely erroneous. On what ground and for what reason does the Board say that a portion of the rent must be allocated to compensation for the old buildings which the lessee never used? Is it reasonable to infer that the lessee paid *more than the fair rental value of the land* on account of buildings which it couldn't use? Why should the Board say that the lessee paid more than the land was worth in order to compensate for old buildings rather than to say that the owners, two women, were willing to take a loss on the buildings in order to place their land on a definite income paying basis for 99 years and relieve them of cares and responsibilities. If the land had been clear of buildings in 1924, there is no reason to think the lessee would not have entered into the same lease on

the same terms. The lessee was only interested in what it was *getting* for its money. The lease names the monthly income as *rent,* not compensation for old buildings.

If the petitioners could have made the lease on the same terms without the buildings being on the land, and this we say, is the only reasonable view to take, then the undepreciated cost of the old buildings can represent nothing but a loss to them for which they have received no compensation.

Could the petitioners have foreseen in 1917 what was to happen in 1924 it is hardly reasonable that they would have invested $50,000 in brick structures. What happened in 1924 was unforeseen and while *on the whole* it was advantageous, specifically there was a loss. Revenue laws operate specifically, not generally. They operate on specific items of property and income regardless of the general betterment or detriment of the taxpayer's condition. For example, suppose a man who had constructed a factory was offered a ten year salary contract elsewhere which would pay him substantially more than he could hope to realize in profit from his factory. He accepts the contract, thereby necessitating the complete abandonment of his factory. Would this mean that the factory was not a loss to him? It is true his economic situation has improved, but has there been any specific compensation for his loss? Of course, if he had built the factory with the view to obtaining the contract the situation would have been quite different. The abandonment of the factory was a necessary incident in the acceptance of the contract, and likewise the demolition of the old buildings in the instant case was an incident necessary to the execution of

a long-term lease. But in neither case was the new contract procured nor influenced by the abandoned or destroyed asset. In fact, the Board states in its findings that "the petitioners received no insurance or other compensation on the demolition of the buildings", but since it has based its opinion upon the decision in the Manning case, which turns almost entirely upon compensation, we thought it necessary to discuss the issue more fully.

Section 202 of the Revenue Act of 1924 provides in part as follows:

> "(a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and the loss shall be the excess of *such basis* over the *amount realized*.
>
> * * * * * * * *
>
> (c) The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received."

"Such basis" in the instant case means cost which is agreed to be $42,215. The "amount realized" under the Board's theory would be the cost of the property, the taxpayers waiting, however, 99 years to get such cost, that being paid at the rate of $426.41 per year without interest. Paid in a lump sum in the year 1924, this would mean approximately the sum of $7,000.00. In other words, what the Board's decision allows to these petitioners is the equivalent of $7,000.00 paid to them in the year 1924, which means a direct loss to these petitioners of approximately $35,000.00. This is the result even under the Board's theory of the case, and we submit that it can

hardly be called full compensation. Under our view, there was no amount realized for the old buildings, all payments made being for rent of the land itself, and the full $42,215 was a realized loss in 1924. Section 203 provides as follows:

> "(a) Upon the sale or *exchange* of property the entire amount of the gain or loss, determined under section 202, *shall be recognized,* except as hereinafter provided in this section.
>
> (b) (1) No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is *exchanged solely for property of a like kind* to be held either for productive use in trade or business or for investment, or if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation. * * *"

(The remaining sub-sections are not pertinent.) The Board says that the old buildings are a part of the cost of the lease. If so, the building being physical property, the transaction cannot be a purchase, so it must be an *exchange.* In fact, the Board terms it a substitution of assets, expressly stating that "instead of an asset in the form of buildings, the petitioners now have another asset, namely, a lease". Section 203 (a) and (b) above quoted clearly provides that the gain or loss from each exchange of property shall be recognized unless "property held for productive use for trade or business or for investment is exchanged solely for property *of a like kind*". It can hardly be contended that brick buildings and a 99-year

lease are of a like kind. It, therefore, follows that the loss to which the petitioners are entitled must be recognized in the year 1924.

The Board in its opinion cites two court decisions, the first is that of the *Liberty Baking Company v. Heiner,* 37 Fed. (2nd) 703. The facts in that case are that the taxpayers bought land for the purpose of enlarging their plant and contemplated the demolition of the buildings already on the land at the time of the purchase. The case, therefore, comes squarely within article 142, above quoted, and furnishes no precedent for the instant case. The other case, is that of *Anahma Realty Corporation v. Commissioner,* 42 Fed. (2nd) ..... In that case the taxpayers bought the land with the old buildings thereon on January 30, 1920, and in May, 1920 executed a 21-year lease which was renewable, and pursuant to said lease the old buildings were destroyed in June and July, 1920. The court (1) quoted article 142 (above set out) and held it a valid regulation and applicable to the case; (2) it referred to section 215 (b) of the Revenue Act of 1918 providing that there may be no deduction of *amounts* paid out for permanent improvements to property and that no deduction could be allowed in the case for that reason; (3) the court held that the "long-term lease of the land with the rentals as stated was a valuable asset to take the place of the demolished buildings".

As to the first ground, we have already observed that article 142 has no application to the instant case. As to the second ground, the statute says "any *amount* paid out for new buildings". This could not refer to physical properties but only to money, or its equivalent. As to

the third ground, the court clearly states that the demolished buildings were exchanged for the long-term lease. As already pointed out, the only exchanges that are not taxable under the statute are those of like properties.

The Board admits that the demolition of the old buildings taken by itself represents a loss. What its decision does then is to spread this loss over a period of 99 years. There is no provision in the Revenue law for so spreading a loss. The statute says a loss shall be allowed in the year in which sustained.

III.

It Is Important to Consider That the Petitioners Were Filing Their Returns on a Cash Basis.

There is no contention by the respondent in this case that the cash basis is not a proper one to be used by the petitioners. Both the decisions of the courts and of the Board of Tax Appeals have been very strict in not permitting taxpayers reporting on a cash basis to deduct any amounts or losses in a given year except those actually paid out or sustained during that year. They have been equally strict in requiring all amounts received to be included in the income of the given year. *Eckert v. Commissioner,* 42 Fed. (2nd), 9 C. C. A. *Fidelity Title and Trust Company v. Heiner,* 34 Fed. (2nd) 350. *Osterlich v. Lucas,* 37 Fed. (2nd) 277 (9 C. C. A.). *Appeal of Seaboard Oil Company,* 1 B. T. A. 1259. It follows that the courts and the Board of Tax Appeals should be equally strict in permitting taxpayers on a cash basis to deduct amounts actually paid out and losses actually sustained in the year of payment or loss, and the more so, because

the taxpayers' right to deduct such amounts or losses in other years may very properly be questioned. This was emphasized by the court in its opinion in *Daly v. Anderson, supra,* in the following language:

> "Coming to the second question, the taxpayer had the right under the laws to keep his books on a cash basis. He did so.
>
> Section 214 (a) of the Tax Law of 1921 (42 Stat. 239) provides in part:
>
> 'That in computing net income there shall be allowed as deductions:
>
> '(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business'.
>
> Section 200 of the same law says:
>
> '* * * The terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under section 212 * * *'.
>
> Section 212 (b) of the same law says:
>
> 'The net income shall be computed * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer * * *'.
>
> (3) What the government is entitled to tax is the true net income computed as the law allows.
>
> (4) In the case of taxpayers on a cash basis, that is reflected by deducting, from all money receipts during the year, all expenditures incurred in business, not to mention other deductions not here involved. Decisions involving taxpayers on an accrual basis, such as American Can Co. v. Bowers, 35 Fed. (2d) 832, decided by the Circuit Court of Appeals for this Circuit, on November 4, 1929, are beside the mark. In those cases, of course, accrued deductions must march with the taxable year.

The government's complaint, aside from the question of the payment being a capital expenditure above disposed of, is, as I understand it, that it is dislocated in time, so to speak, and bears no relation to the plaintiff's 1923 income.

In that contention the government is trying to change the reading of section 214 (a) of the act so that it would read in effect that deductions could only be allowed for expenses paid 'for carrying on any trade or business during the taxable year'.

But that is distortion of the meaning of the clause. The section in question says: 'Paid * * * during the taxable year in carrying on any trade or business'.

(5) The taxpayers on a cash basis, therefore, could not deduct an expense, except in the year when it was paid.

(6) Mr. Daly cannot pro-rate the commission and deduct it yearly from the rent for 21 years after 1931, because he will not have paid it in those years. If he made such a deduction, the government would properly meet such a claim by saying to him, 'You should have deducted it in 1923 when you paid it'.

But the government can and will tax the whole rent as income during the period of the lease.

It may be that those years will be years of low taxes, but, if so, it will be a legitimate incidental advantage to Mr. Daly.

It may be that those years will be high tax years. If so, that will be a legitimate incidental advantage to the government.

As to the present question, however, the government cannot have a right to refuse this deduction

now and tax the full rent hereafter. That is what their reading of section 214 (a) means.

The United States cannot have it both ways."

In the McNeill case the Board "after careful consideration" flatly said:

> "If he (owner) incurs any cost in the creation of the leasehold estate, he may be entitled to deduct the amount thereof from his gross income, *but certainly not ratably over the term of the lease since such expense is for a service in connection with the transaction which is closed when the leasehold is created.* The lessor is, therefore, in the situation of one who pays a commission for a service rendered and in this case is within the rule established in Olinger Corporation, 9 B. T. A. 170, which is based on American National Company v. U. S., 274 U. S. 99."

In the dissenting opinion of the Lovejoy case, four members of the Board, speaking of taxpayers on a cash basis, who had paid our commissions, spoke as follows:

> "It is not to be presumed that Congress contemplated the spread of an expense of the nature of that paid out by the petitioners in 1924 over a series of years. Such a method of charging off the expense is entirely foreign to the petitioner's method of keeping her books of account and making her tax returns. It needlessly complicates the administration of the income tax law. If the petitioner were on an accrual basis it might be proper to treat the amount as deferred expense and then to spread the charge. But the petitioner was not on the accrual basis. The income tax is levied not on economic income but on net income, to be determined by the manner prescribed in the taxing statutes. In years subsequent to 1924 the petitioner is not entitled to deduct any part of the amount paid by her in 1924 in securing the money borrowed."

In reaching its opinion in the instant case the Board seems to be persuaded that unless the commissions and other expenses paid are spread over the 99-year period that the result will not reflect the petitioner's true net income. Such an argument is very effectively answered by the opinion of the Ninth Circuit in the case of *Osterloh v. Lucas,* 37 Fed. (2d) 277. We quote below a portion of the opinion:

> "* * * The method of accounting regularly employed by the petitioner is a recognized one within the meaning of the act, and should be accepted as controlling unless such method does not clearly reflect the income. And it is conceded that the deduction claimed does not appear on the books of the petitioner because of the method of accounting adopted, and that for the same reason an unpaid gain or profit would not appear. The method of accounting thus adopted and recognized will be of little value to either the taxpayer or the government, if the former is at liberty to go outside of the books to show unpaid losses and the latter to show uncollected gains or profits. We do not think that either course is permissible. The case turns largely upon what is meant by the requirement that the method of accounting shall clearly reflect the income. *If this requirement is absolute, it is safe to say that books kept on the basis of cash received and disbursed will rarely, if ever, reflect the true income, because nearly always at the end of a tax year accounts due the taxpayer will remain uncollected and some of his own obligations will remain unpaid.* But we do not think that any such literal construction was contemplated. In our opinion, all that is meant is that the books shall be kept fairly and honestly; and when so kept they reflect the true income of the taxpayer within the meaning of the law. In other words, the books are controlling, unless there has been an attempt of some sort to evade the tax. This construction may work to the disadvantage of the taxpayer or

> the government at times, but if followed out consistently and honestly year after year the result in the end will approximate equality as nearly as we can hope for in the administration of a revenue law."

The purpose of the accrual basis is to enable each period to reflect its true income, but this is not the purpose and only rarely the result of the cash receipts and disbursements method. Although, as the court states, when the latter method is followed out consistently and honestly year after year the result will approximate equality as nearly as can be hoped for. The two methods, however, are distinct and separate. There is no reason or justification for merging the two methods, and any tendency to do so should be discouraged, for this would only result in confusion and inequality. Both methods are recognized by the revenue laws and the Commissioner of Internal Revenue has found no fault with the use by these petitioners of the cash basis. Possibly the cash basis works to the advantage of these petitioners in the years 1924 and 1925, but doubtless it has worked to their disadvantage in other years and will do so in some future years. If payment of rent had been expedited so that petitioners received two years in advance they would be required to report the entire amount in the year in which such rent was received. Why should not the same rule apply where payment of expenses is expedited? They actually paid out in cash in the years 1924 and 1925 for services rendered the amounts they are claiming as deductions, and they actually sustained in 1924 the loss which they claim, and the same should be allowed to them in conformity with the cash basis provided for by statute.

Conclusion.

The commission, attorney's fees and title insurance premium should be allowed as expenses in 1924 and 1925, for the petitioners paid them out not to purchase a capital asset but as an ordinary and necessary expense in the management of their land. The land and not the lease is the real income-producing factor.

II.

The unextinguished cost of the brick buildings is deductible as a loss in the year 1924 for the following reasons:

(1) The case is clearly not within the provisions of Article 142.

(2) Even though the Board were correct in saying that the old buildings were part of the cost of the lease the transaction was nevertheless an exchange of unlike properties and the statute compels recognition of the loss in the year in which such an exchange is made.

(3) Even though the Board were correct, waiting 99 years to get back the cost without any interest is not full compensation.

(4) The stipulation of facts and the findings of the Board establish that the petitioners sustained a loss of $42,215 invested in their buildings for which they have received no compensation.

III.

The petitioners filed their returns on a cash basis. There is no contention that that was not a proper basis for them. To those on a cash basis the law allows the deduction of amounts paid for services *only* in the year

in which paid and of losses only in the year in which actually sustained. Petitioners paid the amounts claimed in 1924 and 1925 and sustained their loss on buildings in 1924 and should be allowed the deductions in those years and not in years in which no payment was made and no loss sustained.

Respectfully submitted,

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Ingle vs. Gage, U.S.D.C. W.D. Ky
decided Sept. 29, 1931.
Reverses Bd. of Tax Appeals
and allows loss for
Demolition of Building.

[illegible]

No. 6427

In the United States Circuit Court of Appeals for the Ninth Circuit

MARY C. YOUNG, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

and

MARY YOUNG MOORE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UPON PETITION TO REVIEW ORDERS OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

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UPON PETITION TO REVIEW ORDERS OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

PREVIOUS OPINION

The only previous opinion in the present cases is that of the United States Board of Tax Appeals (R. 54-55), which is reported in 20 B. T. A. 692.

JURISDICTION

The appeal in the above-entitled cases involves deficiencies in income taxes of Mary C. Young for

the years 1924 and 1925 in the amounts of $2,825.63 and $2,091.21, respectively, and deficiencies in income taxes of Mary Young Moore for the years 1924 and 1925 in the amounts of $2,930.06 and $2,117.42, respectively, and is taken from decisions of the United States Board of Tax Appeals entered September 10, 1930. (R. 56–57.) These cases are brought to this court by petitions for review filed January 13, 1931 (R. 58–68), pursuant to the Revenue Act of 1926, c. 27, Sections 1001, 1002, and 1003, 44 Stat. 9, 109, 110.

QUESTIONS PRESENTED

1. Whether petitioners may deduct in 1924 as a loss the net depreciated cost of buildings voluntarily demolished in that year in order to effect a ninety-nine year lease of land on which they stood, or whether the net depreciated cost of such demolished buildings should be treated as a part of the cost of such lease to be amortized over the entire period thereof.

2. Whether petitioners may deduct as ordinary and necessary expenses (a) an amount paid to a real-estate agent as a commission for effecting a ninety-nine year lease, (b) amounts paid to an attorney as fees for legal services in effecting said lease, and (c) amounts paid for a certificate of title necessary to effect said lease, or whether said amounts are capital expenditures to be ratably deducted as the lease is exhausted.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 214. (a) In computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *.

* * * * *

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; * * *.

* * * * *

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence; * * *.

SEC. 215. (a) In computing net income no deduction shall in any case be allowed in respect of—

* * * * *

(2) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;

(3) Any amount expended in restoring property or in making good the exhaustion

thereof for which an allowance is or has been made; * * *.

Treasury Department Regulations 65, promulgated under the Revenue Act of 1924:

ART. 141. *Losses.*—Losses sustained during the taxable year and not compensated for by insurance or otherwise are fully deductible * * * if (a) incurred in a taxpayer's trade or business, or (b) incurred in any transaction entered into for profit, or (c) arising from fires, storms, shipwreck, or other casualty, or theft. They must usually be evidenced by closed and completed transactions. The basis for determining the amount of the deduction for losses is the same as is provided in section 204 for determining the gain or loss from the sale or other disposition of property. See articles 1591–1603. Proper adjustment must be made in each case for expenditures properly chargeable to capital account, and for items of loss, depreciation, obsolescence, amortization, or depletion, previously allowed with respect to the property. Moreover, the amount of the loss must be reduced by the amount of any insurance or other compensation received, and by the salvage value, if any, of the property. See articles 1579 and 1580. A loss on the sale of residential property is not deductible unless the property was purchased or constructed by the taxpayer with a view to its subsequent sale for pecuniary profit. * * *

ART. 142. *Voluntary removal of buildings.*—Loss due to the voluntary removal or

demolition of old buildings, the scrapping of old machinery, equipment, etc., incident to renewals and replacements will be deductible from gross income. When a taxpayer buys real estate upon which is located a building, which he proceeds to raze with a view to erecting thereon another building, it will be considered that the taxpayer has sustained no deductible loss by reason of the demolition of the old building, and no deductible expense on account of the cost of such removal, the value of the real estate, exclusive of old improvements, being presumably equal to the purchase price of the land and building plus the cost of removing the useless building.

ART. 161. *Depreciation.*—A reasonable allowance for exhaustion, wear and tear, and obsolescence of property used in the trade or business may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. The proper allowance for such depreciation of any property used in the trade or business is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the property in the business, equal the basis

of the property determined in accordance with section 204 and articles 1591–1603. Due regard must also be given to expenditures for current upkeep.

ART. 162. *Depreciable property.*—The necessity for a depreciation allowance arises from the fact that certain property used in the business gradually approaches a point where its usefulness is exhausted. The allowance should be confined to property of this nature. In the case of tangible property, it applies to that which is subject to wear and tear, to decay or decline from natural causes, to exhaustion, and to obsolescence due to the normal progress of the art, as where machinery or other property must be replaced by a new invention, or due to the inadequacy of the property to the growing needs of the business. It does not apply to inventories or to stock in trade, nor to land apart from the improvements or physical development added to it. * * * The deduction of an allowance for depreciation is limited to property used in the taxpayer's trade or business. * * *

ART. 163. *Depreciation of intangible property.*—Intangibles, the use of which in the trade or business is definitely limited in duration, may be the subject of a depreciation allowance. Examples are patents and copyrights, licenses, and franchises. Intangibles, the use of which in the business or trade is not so limited, will not usually be a proper subject of such an allowance. If,

however, an intangible asset acquired through capital outlay is known from experience to be of value in the business for only a limited period, the length of which can be estimated from experience with reasonable certainty, such intangible asset may be the subject of a depreciation allowance, provided the facts are fully shown in the return or prior thereto to the satisfaction of the Commissioner.

ART. 164. *Capital sum recoverable through depreciation allowances.*—The capital sum to be replaced by depreciation allowances is the cost or other basis of the property in respect of which the allowance is made. See article 1602. To this amount should be added from time to time the cost of improvements, additions, and betterments, the cost of which is not deducted as an expense in the taxpayer's return, and from it should be deducted from time to time the amount of any definite loss or damage sustained by the property through casualty, as distinguished from the gradual exhaustion of its utility which is the basis of the depreciation allowance. In the case of the acquisition on or after March 1, 1913, of a combination of depreciable and nondepreciable property for a lump price, as, for example, buildings and land, the capital sum to be replaced is limited to an amount which bears the same proportion to the lump price as the value of the depreciable property at the time of acquisition bears to the value of entire property at that time. Where the lessee of real

property erects buildings, or makes permanent improvements which become part of the realty and income or loss has been returned by the lessor as a result thereof, as provided in article 48, the capital sum to be replaced by depreciation allowances is held to be the same as though no such buildings had been erected or such improvements made. * * *

ART. 165. *Method of computing depreciation allowance.*—The capital sum to be replaced should be charged off over the useful life of the property, either in equal annual installments or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production. Whatever plan or method of apportionment is adopted must be reasonable and must have due regard to operating conditions during the taxable period. While the burden of proof must rest upon the taxpayer to sustain the deduction taken by him, such deductions must not be disallowed unless shown by clear and convincing evidence to be unreasonable. The reasonableness of any claim for depreciation shall be determined upon the conditions known to exist at the end of the period for which the return is made.

ART. 292. *Capital expenditures.*—Amounts paid for increasing the capital value or for making good the depreciation (for which a deduction has been made) of property are

not deductible from gross income. See section 214 (a) (8) of the statute and article 161. * * * The cost of defending or perfecting title to property constitutes a part of the cost of the property and is not a deductible expense. The amount expended for architect's services is part of the cost of the building. Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities are an offset against the selling price. * * *

STATEMENT OF FACTS

Upon motion of petitioners' attorney these cases were consolidated for hearing before the United States Board of Tax Appeals (R. 43), and the facts were stipulated and agreed to by counsel (R. 45–49), from which stipulation the Board found the facts to be as follows (R. 51–54):

Mary Young Moore is the daughter of Mary C. Young. They both reside at 1001 South Hoover Street, Los Angeles, California. They are joint owners of certain land in the City of Los Angeles, California, and located at the Southeast corner of Seventh and Figueroa Streets, extending East on Seventh Street to the Southwest corner of Flower and Seventh Streets. The petitioners are equal owners.

During the years 1917 and 1918 the petitioners erected on this land several brick

store buildings at a cost of $50,000. These buildings were rented or for rent until their demolition.

In 1924 a lease for the term of ninety-nine years was entered into by the petitioners with the Sun Realty Company, whereby the brick buildings erected during 1917 and 1918 should be demolished and a new building erected to be occupied by Barker Brothers. The buildings were demolished in 1924.

The full amount of the depreciation sustained on the brick store buildings, from the time of erection to the time of demolition in 1924, was $7,785, and the undepreciated cost thereof to the petitioners at the time of demolition was $42,215.

The buildings were not salvaged or otherwise disposed of, and the petitioners received no insurance or other compensation on the demolition of the buildings.

Each of the petitioners, in her income-tax return for the year 1924, claimed a deduction in the amount of $21,107.50, representing her one-half of the undepreciated cost. These deductions were disallowed by the respondent and the sum of $21,107.50 was added back to the income of each of the petitioners.

On October 1, 1924, the petitioners granted a ground lease of the premises at Seventh and Figueroa Streets to the Sun Realty Company for a period of ninety-nine years, on the basis of a monthly rental of $10,000 from October 1, 1924, to June 30, 1926, and

of a monthly rental of $20,000 thereafter until the end of the term of the lease. This lease was obtained for the petitioners by a real estate agent who charged as his commission therefor the sum of $50,500, which commission was paid during the years 1924 and 1925. During the year 1924 there was paid $21,500, and the sum of $29,000 was paid during the year 1925. These amounts were paid by the petitioners in equal sums and each paid $10,750 in 1924 and $14,500 in 1925

Each of the petitioners claimed as a deduction in her income-tax return for 1924 the sum of $10,750, representing the amount actually paid by her to the real estate agent during that year. These deductions were disallowed by the Commissioner.

In addition to the commission paid to the real estate agent, the petitioners were required to pay attorneys' fees in the amount of $5,500, and the expense of obtaining certificate of title in the amount of $4,502.85.

Each petitioner, in her income tax return for 1924, claimed a deduction in the amount of $2,750, being one-half of the attorneys' fees, and a deduction in the amount of $2,251.43, being one-half of the cost of obtaining certificate of title. These deductions were disallowed by the respondent.

The respondent considered the loss sustained on the demolition of the brick buildings to be a capital loss and further considered the sums expended by the petitioners

as commissions, attorneys' fees and cost of obtaining certificate of title, to be capital expenditures to be amortized and deducted over the term of the lease, and as a result thereof allowed a deduction to each of the petitioners for the year 1924 in the amount of $513.59.

In his adjustment of the income of the petitioners for the year 1925, the respondent disallowed the deduction claimed by each in the amount of $14,500, representing the sum paid by each as commission to the real estate agent in 1925, and allowed a deduction for amortization of the cost of the lease in the amount of $513.59.

Each of the petitioners kept her books and rendered her income tax returns for the years 1924 and 1925 on the basis of cash receipts and disbursements.

The Board held that the petitioners were not entitled to deduct the unextinguished cost of the buildings demolished in order to obtain a ninety-nine year lease upon the land upon which they were erected, and that such extinguished cost should be exhausted over the term of the lease. The Board also held that the amount paid as a commission to a real estate agent for his services in effecting a ninety-nine year lease of the property, amounts paid to an attorney as fees for legal services in connection with said lease, and amounts paid for a certificate of title which was necessary to effect

said lease were capital expenditures, to be ratably deducted as the lease is exhausted. (R. 54–55.)

The Board entered separate orders of redetermination against the petitioners (R. 56–58), from which orders of redetermination this petition for review has been filed (R. 58–68).

SUMMARY OF ARGUMENT

Petitioners owned land with brick buildings thereon and in 1924 demolished the buildings as a necessary incident to the acquisition of a long-term lease. Under these circumstances, the undepreciated cost of the demolished buildings is not a deductible loss. The result of the transaction was merely that the taxpayers had a new building on their land in lieu of the old buildings and in addition had secured a valuable lease on terms which otherwise would have been impossible. There was merely a substitution of assets and no loss has been shown, because of such substitution. The undepreciated cost of the old building constitutes a part of the cost of securing the lease; that is, a capital expenditure which should be recovered through annual deductions spread over the term of the lease.

The various amounts expended by the petitioners were paid in connection with the procuring of a ninety-nine year lease, which is a capital asset, and, therefore, are not deductible in computing net income.

ARGUMENT

I

No deductible loss was sustained by reason of the destruction of the petitioners' buildings, demolished in order to secure a ninety-nine year lease of the land on which they stood; their undepreciated cost became a part of the cost of securing the lease and may be recovered through annual deductions for exhaustion

The petitioners were the owners of certain real estate in the City of Los Angeles, California, and during 1917 and 1918 they erected thereon several brick store buildings at a cost of $50,000. (R. 51.) In 1924 they entered into an agreement with the Sun Realty Company wherein it was agreed that these buildings were to be demolished and a new building was to be erected which was to be leased to Barker Brothers for ninety-nine years at an agreed rental. The brick store buildings were demolished in 1924 and each petitioner claims one-half of the depreciated cost, which in 1924 amounted to $42,215. In other words, each petitioner claims a loss of $21,107.50 in 1924 on account of the demolition of the brick store buildings.

Respondent urges that the removal of the buildings was a part of the cost of acquiring a lease and that the cost of acquiring an asset cannot be regarded as a loss. The statute expressly provides that in computing net income no deduction shall in any case be allowed in respect of any amount paid out for new buildings or for permanent im-

provements or betterments made to increase the value of any property or estate. Section 215, *supra.*

The case of *Anahma Realty Corporation* v. *Commissioner* (C. C. A. 2nd), 42 F. (2d) 128, certiorari denied, 282 U. S. 854, is directly in point. The court said (p. 130):

> Under the provisions of the lease, appellant's lessee, at its own expense, was obliged to replace the buildings demolished with a new office building which became the property of the appellant at the end of the term. While section 234 (a) of the Revenue Act of 1918 permits the deduction of losses sustained during the taxable years, the appellant did not sustain a loss. *Pelican Bay Lumber Co.* v. *Blair* (C. C. A. 1929), 31 F. (2d) 15. The removal of the buildings was a part of the cost of acquiring the lease, and with it came the obligation of the tenant to pay the rent. The cost of acquiring an asset can not be regarded as deductible as a loss or business expense for the year in which it is paid or incurred. Moreover, section 215 (b) of the Revenue Act of 1918 provides that there may be no deduction for any amount paid out for new buildings or for permanent improvements or betterments to increase the value of any property or estate, and, as the asset acquired was a long-term lease, which provided an obligation to pay stipulated rentals and erect a new building in

> place of the building demolished, there may be no deduction allowed. There was necessarily contained in the lease permission on the part of the appellant to permit the lessee to destroy the old buildings. The acquisition of something from which income will be derived in the future has a value in money's worth in the same sense as something which will produce income in praesenti; there was a compensating value for the loss of the buildings which must be recognized as having money's worth. There was a substitution of assets rather than a loss sustained in the destruction of the buildings.

The case of *Pelican Bay Lumber Co.* v. *Blair,* cited by the Circuit Court of Appeals for the Second Circuit, was decided by this Court. The situation in that case, while not identical, is analogous in principle to the instant case. This Court held that where an amount of the taxpayer's lumbering plant constructed at a cost of $124,641.25 was destroyed by fire, and the taxpayer collected insurance in the sum of $164,832.64, realized salvage in the sum of $1,267.68, and constructed a new unit substantially a duplication of the old at a cost of $315,816.95, there was no deductible loss sustained but that the difference between the insurance received and the cost of the new mill should be capitalized.

Had petitioners voluntarily demolished the buildings without obtaining in substitution a

valuable asset, they undoubtedly would have sustained a deductible loss. Article 142, Regulations 65, *supra; Citrus Soap Co. of California* v. *Lucas* (C. C. A. 9th), 42 F. (2d) 372; *Appeal of First National Bank of Goodland, Kansas,* 5 B. T. A. 1174. Of course if land and buildings thereon are purchased with the purpose of demolishing the buildings to erect in their place another building, no loss is sustained on account of the demolition of the old buildings. *Liberty Banking Co.* v. *Heiner* (C. C. A. 3d), 37 F. (2d) 703; *Lansburgh & Brother, Inc.,* v. *Commissioner,* 23 B. T. A. 66. In such cases the true test is the intention of the taxpayer. *Union Bed & Spring Co.* v. *Commissioner* (C. C. A. 7th), 39 F. (2d) 383; *Watson* v. *Commissioner,* 15 B. T. A. 422; *Southern Amusement Co., Inc.* v. *Commissioner,* 14 B. T. A. 300; *Louis Pizitz Dry Goods Co.* v. *Commissioner,* 22 B. T. A. 161. Here the result of the transactions was that the petitioners had erected on their land a new office building, and that they leased the property for a ninety-nine year lease on terms which could not have been made so long as the old brick store buildings remained thereon. In other words, the demolition and removal of the buildings were a part of the cost of acquiring the ninety-nine year lease and with it the obligation of the tenant to pay the rent provided in the lease. The removal of the old buildings and the erection of a new building was made a

part of the lease agreement. (R. 46.) Before the new building was to be erected and the tenant was to assume the obligation to pay rent, there was an obligation upon these petitioners to demolish the old buildings, and, therefore, the unextinguished cost of the old buildings at the time of their destruction constituted a part of the cost of securing a tenant on advantageous terms, and is not deductible as a loss sustained. The Board of Tax Appeals has consistently so held. In *Manning* v. *Commissioner,* 7 B. T. A. 286, the Board said (pp. 289–290):

> While no provision was made in the lease as to the buildings then on the land, the very nature of the building to be erected made it necessary for the existing structures to be torn down. The razing of the buildings was agreed upon at the time of the execution of the lease. The petitioners gave the lessee the option of tearing down the old buildings and retaining the salvage as compensation for its work in their destruction, or the petitioners agreed to demolish them and keep the salvage. The lessee agreed to demolish and remove the buildings on the terms offered. The cost to petitioners allocable to these structures which were demolished was $26,000. The question is whether a deductible loss of this cost less depreciation was sustained through demolition.
>
> Prior to the execution of the lease the petitioners had land and buildings from which

they were deriving income in the form of rent, and also land. After the execution of the lease, they had only the land and were lessors under a more advantageous lease than they formerly had. Did they part with the buildings, without receiving compensation therefore, *quid pro quo?* That the lease in question was a favorable one is admitted by the petitioners and that they improved their position thereby is shown by the fact that their rentals were substantially greater under the new lease than those being received prior to October 31, 1921, from the old buildings. But the petitioners say that they could not have been compensated in 1921 under the lease for the loss since they did not begin to receive rentals thereunder until 1922. We are not impressed by the logic of this argument. The acquisition of something from which income will be derived *in futuro* has a value in money's worth in the same sense as something which will produce income *in praesenti.* The value may differ on this account, but this does not alter the fact that each has a compensating value which may be recognized as having money's worth.

Taken by itself, the petitioners undoubtedly would be said to have sustained a loss in the demolition of their buildings, but when considered in connection with the entire transaction entered into on October 31, 1921, the Board is of the opinion that the removal of the buildings was fully

> compensated for in the rights acquired under the lease and that the cost of the buildings, less sustained depreciation, is properly allocable to the cost of securing the lease. In other words, there was in this instance what amounted to a substitution of assets; instead of an asset in the form of buildings, the petitioners now have another asset, viz, a lease, the giving up or voluntary destruction of the buildings being a necessary incident to the acquisition of the lease.

See also *Ward* v. *Commissioner,* 7 B. T. A. 1107; *Eysenbach* v. *Commissioner,* 10 B. T. A. 716; *Pig & Whistle Co.* v. *Commissioner,* 9 B. T. A. 668; *Spinks Realty Co.* v. *Commissioner,* 21 B. T. A. 674.

The contention that there was an exchange of the demolished buildings for the lease is without merit. No exchange occurred. The buildings were demolished to clear the land so as to enable the petitioners to grant a ground-lease of the premises to the Sun Realty Company. The demolition of the buildings was a necessary incident in this transaction and whatever value remained in the buildings represented what petitioners were willing to pay to secure the lease.

In view of the foregoing, it is our contention that these petitioners sustained no deductible loss when the old buildings were removed.

II

A commission paid to a real-estate broker, a fee paid to an attorney, and an expenditure made for a certificate of title, all made in connection with the effecting of a ninety-nine year lease, are not deductible in the year when made as ordinary and necessary business expenses, but such expenditures should be treated as a part of the cost of securing said lease, to be deducted ratably over the life of the lease, and, in any event, these items are not deductible as ordinary and necessary expenses since these petitioners have failed to show they were made in connection with the carrying on of a trade or business

The petitioners advance the argument that since they kept their books and rendered their income-tax returns for the years 1924 and 1925 on the basis of cash receipts and disbursements, these expenditures are deductible in the years when paid as ordinary and necessary business expenses.

It is obvious that while Section 212 (b) recognizes different systems of accounting and provides that the tax shall be computed in accordance with the method of accounting regularly employed by the taxpayer in keeping its books, if such method clearly reflects the income, that provision does not authorize a taxpayer to take any deductions not authorized by law. This section does not undertake to provide the deductions which may be allowed, but simply prescribes generally the method to be used in taking deductions which are allowable from gross income. The deductions allowable in computing net income are enumerated elsewhere in

the statute and Section 212 (b) merely provides the method of computation. If a taxpayer deducts from gross income items which are not allowable deductions under the Act, even though his doing so may be in accordance with his method of accounting regularly employed in keeping books, the net income would not be clearly reflected, and in accordance with the provisions of Section 212 (b) the Commissioner would be required to determine it in accordance with a method which does clearly reflect income. Bookkeeping entries are not conclusive. *Douglas* v. *Edwards,* 298 Fed. 229; *Southern Pac. R. Co.* v. *Muenter,* 260 Fed. 837; *United States* v. *Block & Kohner Mercantile Co.,* 33 F. (2d) 196.

In the instant case the right to claim a deduction for a commission paid to a real-estate broker, attorney fees and fees for securing a certificate of title, all made to secure a ninety-nine year lease, is predicated upon the claim that they constitute "ordinary and necessary expenses paid * * * in carrying on * * * business" within the meaning of Section 214 (a) (1) of the Revenue Act of 1924, *supra.* This particular section makes specific provisions for the deduction of ordinary and necessary expenses paid or incurred in carrying on a business, but makes no provision for the deduction of capital expenditures. These taxpayers do not prove their right to deduct these expenditures merely by showing that they kept their books and

made their income-tax returns upon the basis of cash received and disbursements made during the taxable years in question. That fact is not relevant for the method of keeping accounts does not go to the question whether an outlay is an expense or a capital item.

Article 292 of Regulations 65, *supra,* adopted for the enforcement of the Revenue Act of 1924, enumerates several examples where specific expenditures are not deductible since they represent capital expenditures. It being practically impossible to set forth the entire field of capital expenditures in a Treasury Regulation, yet a sufficient number are enumerated to show that any expenditure made in connection with the acquisition of a capital asset is not deductible. For instance, this Article provides that "amounts expended for securing a copyright and plates, which remain the property of the person making the payments, are investments of capital. The cost of defending or perfecting title to property constitutes a part of the cost of the property and is not a deductible expense. The amount expended for architect's services is part of the cost of the building. Commissions paid in purchasing securities are a part of the cost price of such securities." This same construction of the statute with reference to the deduction of such items from gross income has been given by the Commissioner in the Regulations promulgated under each revenue act since the adoption

of the income tax amendment. See Paragraph 108, Regulations 33; Article 293, Regulations 45; Article 292, Regulations 65; Article 292, Regulations 69; Article 282, Regulations 74. And again, attention is called to the well-settled rule of statutory construction that where a statute has been construed for a long period of time as having a certain meaning, a reenactment of that statute without change indicates legislative sanction of such construction. It is equally well settled that the construction of a doubtful statute adopted and long enforced by the officers charged with its administration will be given great weight by the courts. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342; *National Lead Co.* v. *United States,* 252 U. S. 140.

The distinction drawn by the Treasury Regulations between business expenses and expenditures incurred in the acquisition of a capital asset has been upheld in the Federal courts. A case directly in point is *Bonwit-Teller & Co.* v. *Commissioner* (C. C. A. 2nd), decided August 25, 1931, in which it was held that a $20,000 fee paid as a commission to a real estate broker for securing a sub-tenant for a long term was a capital expenditure. The court said:

> In effect the lessor exchanges the leasehold estate for the lessee's obligations, and pays a broker a fee for negotiating the exchange. Whether the fee be deemed part of the cost of acquiring an exhaustible capital asset, or

> be deemed a business "expense" to be allocated to the appropriate year (the taxpayer keeping its books on the accrual basis) it would seem that truly to reflect annual income such a fee should be spread over the term of the lease rather than charged against the first year's income.

By payment of the commission petitioners acquired a new productive asset in the form of a lease, an income-producing asset. It is settled law that any expenditure to acquire an asset which is income-producing over a number of years is a capital expenditure.

The payments here are very similar to commissions paid to brokers in connection with the purchase of securities, and attention is called to the case of *Hutton* v. *Commissioner* (C. C. A. 5th), 39 F. (2d) 459. The court said (p. 460):

> The petitioner can derive no right to charge the commissions to expenses from her method of keeping books, unless they clearly reflect the income. It has been a settled rule of the Treasury Department that commissions paid in purchasing securities are a capital expenditure as part of the cost price of the securities. This ruling has uniformly been approved by the Board of Tax Appeals. We are not referred to any controlling decision to the contrary nor to any decision that is persuasive. The rule is fair and reasonable. It is clear that the taxpayer suffers no hardship by the rule, as the com-

> mission paid in purchasing the securities may be deducted from the profits or added to the losses when the securities are eventually sold.

See also *Simmons Co.* v. *Commissioner* (C. C. A. 1st), 33 F. (2d) 75, certiorari denied, 280 U. S. 588; *Corning Glass Works* v. *Lucas,* 37 F. (2d) 798; *Duffy* v. *Central R. R.,* 268 U. S. 55; *George H. Bowman Co.* v. *Commissioner* (App. D. C.), 32 F. (2d) 404; *Laemmle* v. *Eisner,* 275 Fed. 504; *National City Bank of Seattle* v. *United States,* 64 Ct. Cls. 236, certiorari denied, 276 U. S. 620.

The Board has not been consistent in its decisions but it has recently in a number of cases adhered to the position contended for by the respondent. See cases cited in *Bonwit-Teller & Co., supra,* and *Central Bank Block Association* v. *Commissioner,* 19 B. T. A. 1183; *Pembroke* v. *Commissioner,* 23 B. T. A. 1175.

Respondent concedes that the decision of the District Court in *Daly* v. *Anderson,* 37 F. (2d) 728, is to the contrary. The court decided the case on the authority of *McNeill* v. *Commissioner,* 16 B. T. A. 479, and *Howard* v. *Commissioner,* 19 B. T. A. 865. But these cases the Board subsequently overruled. Furthermore the *Daly case* was referred to by the Circuit Court of Appeals for the Second Circuit in the *Bonwit-Teller case* and was there disregarded. Aside from this reference it has not been cited in any other Federal court decision.

Finally, these amounts are not deductible in any event under the provisions of Section 214 (a) (1) of the Revenue Act of 1924, since they were not made in connection with the carrying on of a trade or business. The Board of Tax Appeals made no finding that these petitioners were engaged in a trade or business, these petitioners do not allege they were carrying on a trade or business, the answers filed do not admit this essential fact, the stipulation of facts make no reference to it, and no error set forth in this petition that the Board failed to find they were carrying on a trade or business. The record only shows that these petitioners in 1917 or 1918 erected several brick store buildings on the land, and in 1924 entered into a lease agreement which called for the demolition of these buildings and the erection of a new building to be leased for ninety-nine years. These events are isolated transactions and are not sufficient to base a finding that these petitioners were engaged in a trade or business. *United States* v. *Emery,* 237 U. S. 28; *McCoach* v. *Minehill Railway Co.,* 228 U. S. 295; *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503; *White* v. *Hornblower* (C. C. A. 1st), 27 F, (2d) 777; *United States* v. *Nipissing Mines Co.* (C. C. A. 2nd), 206 Fed. 431; *Lane Timber Co.* v. *Hynson* (C. C. A. 5th), 4 F. (2d) 666.

As the court pointed out in the *Hutton case,* these petitioners suffer no hardship and the amounts ex-

pended will be amortized over the life of the lease, or in case of a sale of the property will be added to the cost of the property. Each year as the lease is exhausted these amounts will be ratably deducted, or in case of sale, the amount of profit will be lessened or a deductible loss will be increased since these amounts would be added to the basic cost of the property.

CONCLUSION

In view of the fact that the determination of the Board of Tax Appeals is in accord with regulations of the Treasury Department which are based upon a reasonable construction of the statute and have received the implied approval of Congress, it is submitted the decision of the Board should be affirmed.

G. A. YOUNGQUIST,
Assistant Attorney General.
SEWALL KEY,
JOHN G. REMEY,
Special Assistants to the Attorney General.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.
W. FRANK GIBBS,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

NOVEMBER, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

No. 6545

United States

Circuit Court of Appeals

For the Ninth Circuit.

7

In the Matter of the Application of VICTORIA WARD to Register and Confirm Title to Certain Land Situate at Kewalo, Honolulu, Oahu, Territory of Hawaii.

HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD,

Appellants,

vs.

CITY AND COUNTY OF HONOLULU, a Municipal Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the Supreme Court of the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Filed 9:30 o'clock A. M., Aug. 20, 1930. [6*]

In the Land Court of the Territory of Hawaii.

APPLICATION No. 670.

In the Matter of the Application of VICTORIA WARD to Register and Confirm Title to Certain Land Situate at Kewalo, Honolulu, Oahu, Territory of Hawaii.

PETITION FOR ISSUANCE OF CERTIFICATE OF TITLE UPON FINAL ORDER OF CONDEMNATION.

Comes now the City and County of Honolulu, a municipal corporation, by L. P. Scott, Deputy City and County Attorney, petitioner herein, and respectfully alleges and avers as follows:

I.

On March 19, 1928, the City and County of Honolulu, petitioner herein, instituted a suit in eminent domain in the Circuit Court, First Judicial Crcuit, against Victoria Ward, defendant, to condemn certain parcels of land described in the petition filed in said suit, being Lots F and G of Land Court Application No. 670, covered by Original Certificate of Title No. 5773. That summons in said suit was issued March 19, 1928, and returned served on said Victoria Ward on March 20, 1928. On July 26, 1928, Victoria Ward, through her attorneys Peters & O'Brien, filed her answer to the petition in said

*Page-number appearing at the foot of page of original certified Transcript of Record.

suit, admitting amongst other things, that she was the sole owner of the premises sought to be condemned, that it appears, however, that on July 18, 1928, and during the pendency of the said suit, Victoria Ward aforesaid, defendant and owner of said parcels of land, executed a deed conveying the said parcels together with [7] other adjacent lands to her daughters, as joint tenants with her, reserving to herself the joint use and occupation of the said land, a copy of which said deed is attached hereto, marked Exhibit "A" and made a part hereof, that Transfer Certificate of Title No. 7250 was issued to the above-named grantees upon said deed of conveyance.

II.

Petitioner herein further alleges that said suit in eminent domain was tried in the First Circuit Court beginning October ~~12~~ 1, 1928, and continuing thereafter until a verdict was rendered by the jury on October 12, 1928, and judgment thereon was entered condemning the said Lots F and G and fixing compensation therefor October 23, 1928; that final order of condemnation was entered ~~December 31, 1929,~~ January 7, 1930, which said final order was recorded in the office of the Registrar of Conveyances February 13, 1930, as document No. 20,898, as required by Sec. 824, Revised Laws of Hawaii, 1925, vesting title to said Lots F and G in the City and County of Honolulu.

Amendment allowed by consent.—A. E. S.

III.

Petitioner herein further alleges that during all the time in which the aforesaid condemnation suit was being tried, either one or all of the aforesaid daughters of Victoria Ward, joint tenants with her in the said Lots F and G, were in attendance daily upon said trial, and had actual notice of all the proceedings had herein, and that neither they nor any of them, nor anyone appearing in their behalf, intervened in the said suit as provided for under the terms of Sec. 819, Revised Laws of Hawaii, 1925.

WHEREFORE your petitioner prays:

1. That an order to show cause be issued out of this court, requiring Victoria Ward, Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, to appear and show cause, if any they [8] have, why the petition of petitioner herein should not be granted.

2. That upon hearing of this petition an order issue out of this court, directing Victoria Ward, Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward to surrender to the Registrar of this court, Transfer Certificate of Title No. 7250, and further directing the said Registrar, upon such surrender, to cancel Transfer Certificate of Title No. 7250, and to issue a new Certificate of Title to the City and County of Honolulu for Lots F and G aforementioned, and for such other and further relief as to this court may seem meet.

Dated at Honolulu, T. H., this 18th day of August, A. D. 1930.

(Sgd.) L. P. SCOTT,
Deputy City and County Attorney.

City and County of Honolulu,
Territory of Hawaii,—ss.

L. P. Scott, being first duly sworn on oath deposes and says:

That he is the duly appointed, qualified and acting Deputy City and County Attorney of the City and County of Honolulu; that he has been duly and regularly authorized to bring this action for and on behalf of the City and County of Honolulu by the Board of Supervisors of the City and County of Honolulu and by James F. Gilliland, the duly elected, qualified and acting City and County Attorney of said City and County of Honolulu, that he has read the foregoing petition, knows the contents thereof and that the facts therein stated are true to the best of his information, knowledge and belief.

(Sgd.) L. P. SCOTT.

Subscribed and sworn to before me this 18th day of August, A. D. 1930.

[Seal] (Sgd.) LEON K. STERLING,
Notary Public, First Judicial Circuit, Territory of Hawaii. [9]

EXHIBIT "A."

KNOW ALL MEN BY THESE PRESENTS that I, Victoria Ward of Honolulu, City and County

of Honolulu, Territory of Hawaii, in consideration of the love and affection which I have for my daughters, Hattie Kulamanu Ward, Lucy Kaiaka Ward, and Victoria Kathleen Ward—all of whom are unmarried, and whose place of residence and post office address are 959 South King Street, in Honolulu aforesaid—do hereby, subject to the reservation hereinafter made by me, give, grant, and convey unto the said Hattie Kulamanu Ward, Lucy Kaiaka Ward, and Victoria Kathleen Ward that piece of land, containing an area of 36.254 acres, situated between, and bordering upon, the southwest side of King Street and the northeast side of Waimanu Street, at Koula, Kewalo, in Honolulu aforesaid, and being portions of R. P. 7516, L. C. A. 10605, Apana 7 to Piikoi, a portion of R. P. 1807, L. C. A. 3169, Apana 1 to Koalele, a portion of R. P. 85, L. C. A. 200, Apana 1 to Kaina, and the whole of R. P. 306, L. C. A. 274 to J. Booth and R. P. 581, L. C. A. 213 to J. Vowles, the said piece of land being more particularly described as comprising Lots A, B, C, D, E, F and G, as shown on a plan accompanying Land Court Application No. 670, and being the same piece of land so designated by lot numbers in Original Certificate of Title No. 5773 issued to me by the Land Court of the Territory of Hawaii, which certificate of title has been registered in the Office of the Assistant Registrar of the said court, in Book 58, Page 291;

TO HAVE AND TO HOLD THE same unto the said Hattie Kulamanu Ward, Lucy Kaiaka Ward, and Victoria Kathleen Ward, as joint tenants with

me, the heirs of the survivor of them, and unto their assigns, forever.

RESERVING, HOWEVER, to myself the right to jointly use and occupy the said piece of land during my life together [10] with the said Hattie Kulamanu Ward, Lucy Kaiaka Ward, and Victoria Kathleen Ward.

IN WITNESS WHEREOF, I hereunto subscribe my name, at Honolulu aforesaid, this 17th day of July, 1928.

VICTORIA WARD.

Territory of Hawaii,
First Judicial Circuit.

On this 17th day of July, 1928, before me personally appeared Victoria Ward—to me known to be the person described in and who executed the foregoing instrument—and acknowledged that she executed the same as her free act and deed.

[Notarial Seal]

JOHN ALBERT MATTHEWMAN,
Notary Public, First Judicial Circuit, Territory of Hawaii. [11]

[Title of Court and Cause—No. 670.]

ORDER TO SHOW CAUSE.

Territory of Hawaii to Victoria Ward, Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward:

Upon reading and filing the petition of the City and County of Honolulu, a municipal corporation,—

You and each of you are hereby ordered to appear

on Saturday, the 30th day of August, A. D. 1930, at the hour of 9 o'clock A. M. of said day in the courtroom of the undersigned Judge in the Judiciary Building, City and County of Honolulu, Territory of Hawaii, then and there to show cause why an order of the Court should not issue in accordance with the prayer of the petition, directing you and each of you to surrender to the Registrar of this court, Transfer Certificate of Title No. 7250, and further directing the said Registrar to issue to the City and County of Honolulu, a new Certificate of Title for Lots F and G in the petition mentioned.

Dated at Honolulu, T. H., this 19th day of August, A. D. 1930.

[Seal] (Sgd.) A. E. STEADMAN,
Judge of the Land Court, Territory of Hawaii.

Filed 10:00 o'clock A. M., Aug. 20, 1930. [12]

Service is hereby accepted this 5th day of September, 1930.

(Sgd.) L. P. SCOTT,
Deputy City and County Attorney.

Filed 9:05 o'clock A. M., Sept. 6, 1930. [13]

[Title of Court and Cause—No. 670.]

ANSWER AND RETURN OF HATTIE KULAMANU WARD, LUCY KAIAKA WARD AND VICTORIA KATHLEEN WARD.

Now comes Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, by their attor-

ney, Charles B. Dwight, and for answer and return to the order to show cause heretofore issued herein, aver as follows:

I.

These respondents admit the allegations contained in Paragraph I of the petition.

II.

In answer to Paragraph II, these respondents aver that the trial of the condemnation proceedings was started in the Circuit Court on October 1st, 1928, and that a verdict was rendered by the jury in said cause, on October 12th, 1928, and that judgment thereon was entered on October 23d, 1929; that final order of condemnation was entered January 7th, 1930, which said final order was recorded in the office of the Registrar of Conveyances as Document No. 20,898.

III.

These respondents deny that they were present during all of the trial of the proceedings for the condemnation of the parcels herein described, but aver that the respondents Lucy Kaiaka Ward and Victoria Kathleen Ward did [14] attend the hearings on various and divers occasions, and aver that the respondent Hattie Kulamanu Ward did not attend any of the hearings of said condemnation suit.

IV.

And further answering, these respondents aver that they are the owners with the respondent Victoria Ward, as joint tenants, of Lots F and G of Land Court Application No. 67, and were such owners at

the time of the trial of the condemnation suit. That they were not joined as defendants in the eminent domain proceedings, notwithstanding the fact that Transfer Certificate of Title No. 7250 had been issued to them and notwithstanding the fact that the records of the Land Court showed such to be the fact. That no summons as required by law was served upon them in said proceedings.

That no compensation was offered or given to *them respondents* by the City and County of Honolulu.

That in compelling them to produce the Certificate of Title, the City and County of Honolulu would take from these respondents property without just compensation and would deprive them of property without due process of law.

That they were not bound by any judgment of any competent court of this Territory, and that their interests in Lots F and G were not determined and compensation was not paid for their interests, as required by law.

That there is no provision under the statutes of this Territory upon which a petition or an order to show cause may issue to compel these respondents to produce their Certificate of Title.

WHEREFORE, these respondents pray that the petition be [15] denied and the order to show cause dismissed.

Dated at Honolulu, T. H., this 5th day of September, A. D. 1920.

HATTIE KULAMANU WARD,
LUCY KAIAKA WARD and
VICTORIA KATHLEEN WARD,
Respondents.

(Sgd.) By CHARLES B. DWIGHT,
Their Attorney.

Terr*u*tory of Hawaii,
City and County of Honolulu,—ss.

Victoria Kathleen Ward, being first duly sworn on oath, deposes and says:

That she is one of the respondents above named; that she makes this verification for and on behalf of the respondents; that she has read the foregoing answer and return, knows the contents thereof and that the allegations therein contained are true to the best of her knowledge and belief.

(Sgd.) VICTORIA KATHLEEN WARD.

Subscribed and sworn to before me this 5th day of September, 1930.

[Seal] (Sgd.) HENRY C. HAPAI,
Notary Public, First Judicial Circuit, Territory of Hawaii. [16]

Filed 2:30 o'clock P. M., Sept. 12, 1930. [17]

[Title of Court and Cause—No. 670.]

DEMURRER TO ANSWER AND RETURN OF HATTIE KULAMANU WARD, LUCY KAIKA WARD AND VICTORIA KATHLEEN WARD.

Comes now the City and County of Honolulu, petitioner herein, and hereby demurs to the answer and return of Hattie Kulamanu Ward, Lucy Kaika Ward and Victoria Kathleen Ward, respondents herein, and more particularly to the allegations contained in Paragraph IV thereof, and for ground of demurrer alleges:

I.

That this Honorable Court, sitting as a Court of Land Registration, is without jurisdiction to hear and/or determine any question relative to the joinder or nonjoinder of the aforesaid respondents as parties defendants in the eminent domain proceedings referred to in the petition and in Paragraph II of the answer and return, as alleged in Section 1 of Paragraph IV of said answer.

II.

That this Honorable Court is without jurisdiction to hear and/or determine any questions relative to the service or nonservice of summons upon the aforesaid respondents in the aforementiond condemnation suit, as alleged in Section II of Paragraph IV of said answer. [18]

III.

That this Honorable Court is without jurisdiction to hear and/or determine any questions relative to the payment or nonpayment of compensation in the aforementioned condemnation suit, as alleged in Section III of Paragraph IV of said answer.

IV.

That this Honorable Court is without jurisdiction to hear and/or determine any questions relative to the deprivation of respondents' property without just compensation and without due process of law by compelling them to produce their Certificate of Title, as alleged in Section IV of Paragraph IV of said answer.

V.

That this Honorable Court is without jurisdiction to hear and/or determine any questions relative to the binding validity upon the respondents of the judgment of the Circuit Court of the First Circuit Court in the eminent domain suit above mentioned, in so far as it affected the determination of their interest or right to compensation if any in the aforesaid suit, as alleged in Section V of Paragraph IV of said answer.

VI.

That this Honorable Court has ample authority under the express provisions of Section 3226 of the Revised Laws of Hawaii, 1925, to issue an order to show cause in this proceeding.

VII.

That the allegations contained in Paragraph IV

of the answer and return of the respondents hereinabove referred to as Sections I to V, constitute a collateral attack upon a judgment and a final order of condemnation heretofore entered in a court of competent jurisdiction, to wit, the Circuit Court of the [19] First Judicial Circuit, which said judgment has been affirmed by the Supreme Court of the Territory of Hawaii, and that as a further and final ground of demurrer to the aforesaid answer and return, this Honorable Court sitting as a Court of Land Registration, is without jurisdiction to hear and/or determine any questions relative to the validity of the aforesaid judgment and the final order of condemnation.

WHEREFORE petitioner herein prays that the prayer of the petition be granted.

Dated at Honolulu, T. H., this 12th day of September, A. D. 1930.

(Sgd.) L. P. SCOTT,
Deputy City and County Attorney.

Service of within demurrer is admitted this 12th day of September, A. D. 1930.

(Sgd.) CHARLES B. DWIGHT,
Attorney for Respondents.
(Sgd.) S. G. FISKE. [20]

Filed 3:25 o'clock P. M. Oct. 17, 1930.

L. P. SCOTT, Esq., Deputy City and County Attorney, Attorney for Petitioner.

CHAS. B. DWIGHT, Esq., Attorney for Respondents.

Honorable A. E. STEADMAN, Judge of the Land Court.

Receipt of a certified copy of the within decision is hereby acknowledged this 17 day of October, 1930.

CITY AND COUNTY OF HONOLULU,
Petitioner.
By (Sgd.) L. P. SCOTT.
(Sgd.) CHARLES B. DWIGHT,
Attorney for Respondents. [21]

[Title of Court and Cause—No. 670.]

DECISION ON SHOW CAUSE ORDER.

This cause came on for hearing upon the petition and order to show cause of petitioner, and the answers and returns of respondents thereto, and upon the demurrers of the petitioner to the said answers and returns, L. P. Scott, Esquire, Deputy City and County Attorney, appearing for petitioner, and Charles B. Dwight, Esquire, appearing for respondents. The Court overruled the aforesaid demurrers and subsequently heard arguments of counsel and considered the petition and order to show cause and the answers and returns thereto, and all the other records and files and the evidence adduced herein. The Court finds that the allega-

tions of the petition are established by the evidence and the record herein, and that the petitioner is entitled to the relief prayed for in the prayer of its petition.

The evidence shows that Lucy Kaika Ward and Victoria Kathleen Ward, two of the daughters of Victoria Ward and grantees *pendente lite* of Lots F and G, together with other lands of aforesaid Victoria Ward, who with Hattie Kulamanu Ward, were her attorneys-in-fact at the time of the filing of the aforesaid condemnation suit, were at various times [22] present at and participated in the trial of said condemnation suits mentioned in Paragraphs I and II of the petition.

It further appears from the pleadings and evidence and more particularly from the admissions made in open court upon the hearing of this matter, that Lucy Kaika Ward, Victoria Kathleen Ward and Hattie Kulamanu Ward, the three daughters and grantees *pendente lite* and attorneys-in-fact of said Victoria Ward, had full, complete and actual notice of the pendency of the condemnation suit against Victoria Ward as sole owner of Lots F and G, at the time of the conveyance of the aforesaid property to them, and of all the subsequent proceedings in said suit culminating in the final order of condemnation filed January 7, 1930.

And it further appears that neither Lucy Kaika Ward, nor Victoria Kathleen Ward, nor Hattie Kulamanu Ward, nor anyone appearing in their behalf, intervened in the said suit, nor made any claim for the compensation awarded in the afore-

said suit at any time during the pe*de*ncy of the aforesaid suit.

NOW, THEREFORE, the Court finds that the petitioner herein is entitled to the relief prayed for in the petition, and that a decree should be entered directing Lucy Kaika Ward, Victoria Kathleen Ward and Hattie Kulamanu Ward to surrender to the Assistant Registrar of this Court Transfer Certificate of Title No. 7250, now in their possession, and further directing the said Assistant Registrar, upon such surrender, to cancel said Transfer Certificate of Title and issue to the City and County of Honolulu a new Certificate of Title for Lots F and G aforementioned.

Let a decree be entered accordingly.

Dated: Honolulu, T. H., October 17, 1930.

[Seal] (Sgd.) A. E. STEADMAN,
Judge of the Land Court. [23]

Filed 4:00 o'clock P. M., Nov. 7, 1930. [24]

In the Land Court of the Territory of Hawaii.

APPLICATION No. 670.

In the Matter of the Application of VICTORIA WARD to Register and Confirm Title to Certain Land Situate at Kewalo, Honolulu, Oahu, Territory of Hawaii.

DECREE.

This cause having come on for hearing upon the petition and order to show cause of petitioner, and

the answers and returns of respondents thereto, and upon the demurrers of the petitioner to the said answers and returns, L. P. Scott, Esq., Deputy City and County Attorney, appearing for petitioner, and Charles B. Dwight, Esq., appearing for respondents, and the Court having overruled the aforesaid demurrers and subsequently heard arguments of counsel and considered the petition and order to show cause and the answers and returns thereto, and all the other records and files and the evidence adduced herein, and the Court having filed its written decision herein finding that the allegations of the petition are established by the evidence and the record herein, and that the petitioner is entitled to the relief prayed for in the prayer of its petition.

Further, the Court having found in its written decision that the evidence shows that Lucy Kaika Ward and Victoria Kathleen Ward, two of the daughters of Victoria Ward and grantees *pendente lite* of Lots F and G, together with other lands of aforesaid Victoria Ward, who with Hattie Kulamanu Ward, were her attorneys-in-fact at the time of the [25] filing of the aforesaid condemnation suit, were at various times present at and participated in the trial of said condemnation suits mentioned in *Paragraph* I and II of the petition.

And the Court having found that from the pleadings and evidence and more particularly from the admissions made in open court upon the hearing of this matter, that Lucy Kaika Ward, Victoria Kathleen Ward and Hattie Kulamanu Ward, the three daughters and grantees *pendente lite* and attorneys-in-fact of said Victoria Ward, had full, complete

and actual notice of the pendency of the condemnation suit against Victoria Ward as sole owner of Lots F and G, at the time of the conveyance of the aforesaid property to them, and of all the subsequent proceedings in said suit culminating in the final order of condemnation filed January 7, 1930.

And the Court further having found that neither Lucy Kaika Ward, nor Victoria Kathleen Ward, nor Hattie Kulamanu Ward, nor anyone appearing in their behalf, intervened in the said suit, nor made any claim for the compensation awarded in the aforesaid suit at any time during the pendency of the aforesaid suit.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the petitioner herein is entitled to the relief prayed for in its petition, and that Lucy Kaika Ward, Victoria Kathleen Ward and Hattie Kulamanu Ward be and they hereby are directed to surrender to the Assistant Registrar of this Court, Transfer Certificate of Title No. 7250, now in their possession, and the Assistant Registrar be and he hereby is directed, upon such surrender to cancel said Transfer Certificate of Title No. 7250 and issue to the City and County of Honolulu, a municipal corporation, petitioner herein, a new Certificate of Title for [26] *Lot* F and G in the petition aforementioned.

Dated at Honolulu, T. H., this 7th day of November, A. D. 1930.

[Seal] (Sgd.) P. H. MULHOLLAND,
Registrar of the Land Court.

Approved:

[Seal] (Sgd.) A. E. STEADMAN,
Judge of the Land Court. [27]

[Title of Court and Cause—No. 670.]

MINUTES.

Land Court—Saturday, August 30, 1930, 9:00 A. M.

Hon. A. E. STEADMAN, Judge.
H. R. JORDAN, Reporter.
A. W. AKANA, Asst. Regr.

Present: L. P. SCOTT, Deputy City and County Attorney for City and County of Honolulu, Petitioner.
CHARLES B. DWIGHT, Esq., for Victory Ward, Hattie K. Ward, Lucy K. Ward, and Victoria K. Ward, Respondents.

HEARING ON ORDER TO SHOW CAUSE ON PETITION OF THE CITY AND COUNTY OF HONOLULU FOR ISSUANCE OF CERTIFICATE OF TITLE UPON FINAL ORDER OF CONDEMNATION.

The Assistant Registrar called the case by its title and number. Mr. Dwight who appeared and noted his appearance for the above respondents, requested the continuance of this matter for one week. Mr. Scott offered no objections.

The Court so ordered.

The court adjourned at 9:20 o'clock A. M.

By the Court:

(Sgd.) ABRAHAM W. AKANA,
Assistant Registrar. [28]

MINUTES OF COURT—HEARING (CONTINUED).

Land Court—Saturday, September 6, 1930, 9:00 A. M.

Hon. A. E. STEADMAN, Judge.
JAMES L. HORNER, Reporter.
A. W. AKANA, Asst. Regr.

Present: L. P. SCOTT, Deputy City and County Attorney for the City and County of Honolulu, Petitioner.
CHAS. B. DWIGHT, Esq., Attorney for Victoria Ward, Hattie K. Ward, Lucy K. Ward and Victoria K. Ward, Respondents.

Mr. Dwight filed with the Court, the answers and returns of the respondents, a copy of which was handed to Mr. Scott.

Mr. Scott requested that this matter be continued for one week.

After due consideration, the Court granted the continuance.

The court adjourned at 9:15 o'clock A. M.

By the Court:

(Sgd.) ABRAHAM W. AKANA,
Assistant Registrar. [29]

MINUTES OF COURT—HEARING (CONTINUED).

Land Court—Saturday, September 13, 1930, 9:15 A. M.

Hon. A. E. STEADMAN, Judge.
JAMES L. HORNER, Reporter.
A. W. AKANA, Asst. Regr.

APPLICATION No. 670.

Present: L. P. SCOTT, Deputy City and County Attorney for the City and County of Honolulu, Petitioner.
CHAS. B. DWIGHT, Esq., Attorney for Victoria Ward, Hattie K. Ward, Lucy K. Ward and Victoria K. Ward, Respondents.

On motion of Mr. Scott, the Court allowed the following amendments to the petition, to wit: Paragraph 2, line 3, "October 12, 1928" to read "October 1, 1928"; line 4, insert "12" between "October" and "1928," line 7, "December 31, 1929" to read "January 7, 1930." Counsel for the respondent offered no objection to said amendments.

Mr. Scott opens his argument.

Mr. Dwight waives the forty-eight hours notice and elects to proceed herewith.

Mr. Dwight replies.

The Court held that this matter is within its jurisdiction.

Mr. Dwight notes an exception.

Mr. Scott offers in evidence, records filed in the Clerk's Office of the First Judicial Circuit, in Law

No. 11946, *when* is received and marked Applicant's Exhibit "A."

Further hearing on this matter is continued until Monday, September 15th at 9:00 o'clock A. M.

The court adjourned at 10:05 o'clock A. M.

By the Court:

(Sgd.) ABRAHAM W. AKANA,
Assistant Registrar. [30]

MINUTES OF COURT — HEARING (CONTINUED).

Land Court—Monday, September 15, 1930, 9:00 A. M.

Hon. A. E. STEADMAN, Judge.
JAMES L. HORNER, Reporter.
A. W. AKANA, Ass't Regr.

APPLICATION No. 670.

Present: L. P. SCOTT, Deputy County Attorney for City and County of Honolulu, Petitioner.

CHAS. B. DWIGHT, Esq., for Respondents, Victoria Ward, Hattie K. Ward, Lucy K. Ward, and Victoria K. Ward.

Mr. Scott argues on the demurrer as filed.

The Court overruled the demurrer.

Counsel stipulates that the respondents had actual notice in the eminent domain proceedings.

The Court suggests that future reference be made to Mrs. Victoria Ward, as the "Mother" and the other respondents as the "Daughters" to distinguish between them.

Counsel stipulates that the mother is bound by the judgment.

Mr. Dwight raises the following issues: First, are the proceedings in the condemnation suit binding on the daughters? Second, the daughters are not bound by the judgment, not having received compensation.

Mr. Scott moves for an order directing the respondents to surrender Transfer Certificate of Title No. 7250, and directing the Assistant Registrar of this court to issue a new certificate of title to the City and County of Honolulu for Lots F and G, as prayed for in the petition.

The Court grants the prayer of the petitioner.

Mr. Dwight takes exception to the decision of the Court and requests twenty days within which to file a written exception.

The Court advised Mr. Dwight that a written decision will have to be filed first, when a written exception will be allowed.

The Court adjourned at 9:40 o'clock A. M.

By the Court:

(Sgd.) ABRAHAM W. AKANA,
Assistant Registrar. [31]

Filed February 27, 1931, at 10:07 o'clock A. M.
[32]

In the Supreme Court of the Territory of Hawaii.
October Term, 1930.

No. 1989.

In the Matter of the Application of VICTORIA WARD to Register and Conform Title to Certain Land Situate at Kewalo, Honolulu, Oahu, Territory of Hawaii.

Error to Land Court.

Hon. A. E. STEADMAN, Judge.

Argued February 24, 1931.
Decided February 27, 1931.

PERRY, C. J., BANKS and PARSONS, JJ.

Lis Pendens—Purchase *pendente lite*—Operation and effect.

A purchaser *pendente lite* is bound by the result of the suit.

One who during the pendency of the action purchases from the respondent in a statutory action for condemnation of land for public purposes and who does not enter an appearance in the action and makes no claim to the compensation awarded to the owner by the verdict and judgment, is bound by the result of the action for condemnation and cannot in the Land Court successfully resist a petition for the cancellation of an outstanding certificate of title and for the issuance of a new certificate relating to the land condemned.

Courts—Land Court—Procedure—Petition for cancellation of certificate.

The Land Court of this Territory has power to bear and to [33] determine a petition to compel the holders of an outstanding certificate of title to surrender the same for cancellation and for the issuance to the City and County of Honolulu of a new certificate of title relating to parts of the land which have been duly condemned by judicial proceedings. [34]

OPINION OF THE COURT BY PERRY, C. J.

Under the title of the above-entitled court and cause the City and County of Honolulu presented to the Land Court of this Territory a petition to the effect that Victoria Ward and her three daughters, Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, be required to appear and show cause, if any they had, why they should not surrender Land Court Transfer Certificate No. 7250 for cancellation and further asking for the issuance of a new certificate of title to the petitioner for lots "F" and "G" being portions of the land described in certificate No. 7250. The four respondents above named answered. Demurrers to the answer were overruled and subsequently upon the admissions contained in the answer and upon other admissions made orally at the hearing, the Land Court granted the prayer of the petition and entered a decree in conformity therewith. Thereupon the respondents other than Victoria Ward sued out a writ of error to review that decree.

On March 19, 1928, the City and County of Honolulu instituted a statutory action for the condemnation of Lots "F" and "G," above referred to, for road purposes. Thereafter, and before answer was filed, the respondent Victoria Ward executed and delivered a deed conveying to her three daughters above named a certain tract of land including lots "F" and "G." The conveyance was to the three "as joint tenants with me, the heirs of the survivor of them, and unto their assigns, forever," with the reservation to the grantor of "the right to jointly use and occupy the said piece of land during my life together with the said three." It was expressly admitted in the Land Court in the proceeding now under review that at the time of the receipt of said conveyance the three grantees "had full, [35] complete and actual notice of the pendency of the condemnation suit against Victoria Ward as sole owner of" the two lots. After the date of this deed an answer was filed by Victoria Ward in the action for condemnation in which it was averred *inter alia* that she was the owner of the land sought to be condemned. It further appears from the record that two at least of the three daughters attended frequently at the trial, which continued for about ten days, and were perfectly familiar with the details of the proceeding.

Section 819, R. L. 1925, which is a part of chapter 61 relating to eminent domain, provides that: "Any person in occupation of or having any claim or interest in any property sought to be condemned or in the damages for the taking thereof though not named in the complaint, may appear,

plead, and defend in respect to his own property or interest, in like manner as if named in the complaint." No appearance was entered in the condemnation suit by any of the three daughters and no attempt was made by them to defend in their own names. A verdict having been rendered and a judgment entered assessing the damages payable to Victoria Ward as owner of the land, the City and County of Honolulu thereafter paid the amount required by the judgment to the Clerk of the Circuit Court in which the judgment had been entered and later still the money was paid by the Clerk to the attorney for Victoria Ward. No claim was presented by any of the three daughters to the Clerk or to the court for the compensation awarded by the verdict and no effort was made in that action for the establishment of the right on their part as owners of the land to the compensation or to any part thereof.

The three daughters purchased during the pendency of the action for condemnation. It is well established in this [36] jurisdiction that a purchaser *pendente lite* is bound by the result of the suit. Watson vs. Watson, 9 Haw. 389, 391; Spresels vs. Macfarlane, 9 Haw. 412; Bertelman vs. Lucas, *ante,* pp. 71, 73, 74, United States vs. Merriam, 161 Fed. 303, is not an authority to the contrary. The question now under consideration was not discussed or decided in that case. Moreover, the three daughters, as shown by their admission in open court, had at the time of receiving the deed actual knowledge of the existence of the action for condemnation. They are bound by the

judgment rendered in the proceeding against their grantor.

Section 823, R. L. 1925, reads as follows: "The plaintiff must within two years after final judgment pay the amount assessed as compensation or damages; and upon failure *as* to do all rights which may have been obtained by such judgment shall be lost to the plaintiff; and if such payment shall be delayed more than thirty days after final judgment, then interest shall be added at the rate of seven per cent per annum. Such payment shall be made to the clerk of the court rendering the judgment, who shall distribute the same in accordance with the order of the court." Section 824 reads: "When all payments required by the final judgment have been made, the court shall make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation, a certified copy of which must be filed and recorded in the office of the register of conveyances; and thereupon the property described shall vest in the plaintiff."

The City and County of Honolulu made the payment of the amount of the judgment to the Clerk of the court as was required by the statute, and made that payment within the two years named in the same section. Thereafter, pursuant to the [37] statute, the final order of condemnation was made by the court and recorded in the office of the register of conveyances. Thereupon the title to the property described in the final order became vested in the City and County of

Honolulu. Section 3269, R. L. 1925, which is a part of chapter 186 relating to the court of land registration, provides: "No writ of entry * * * and no judgment or decree * * * shall have any effect upon registered land as against persons other than the parties thereto unless a full memorandum thereof, containing also a reference to the number of the certificate of title of the land affected, and the volume and page of the registration book where it is entered, shall be filed and registered." In effect this provision is entirely consistent with that of section 824 above quoted. Title vested upon recording of the final order of condemnation.

There has been no taking without due process of law or without just compensation. The person, Victoria Ward, who was the sole owner of the land at the time the action was instituted, was duly summoned, was given notice and an opportunity to be heard and made vigorous contest at the trial. The hearing and the determination was by a jury, the tribunal authorized by law to hear and determine cases of that nature. The three daughters had ample notice, both constructive and actual, of the institution of the suit, even before the filing of any answer. The statute expressly gave them an opportunity to appear in the action and to present their claims. Of this opportunity they did not care to avail themselves. Compensation was awarded and paid to the owner of the land,—compensation admeasured by the jury after a complete and adequate trial. That the compensation was paid wholly to the mother and not

partly to the daughters must be deemed to be due entirely to the failure of the daughters [38] to appear and to present their claim when they had the opportunity to do so. As to the daughters, and the mother as well, the constitutional provisions invoked have not been violated.

The jurisdiction of the Land Court to hear and to pass upon such a petition as was filed in this case for the surrender of an old certificate in order to procure the issuance of a new one, in the case of a transfer of the title of a whole or a part of the land described in the original certificate, is attacked by the appellants. We are of the opinion that the procedure followed was in conformity with and was authorized by the statute relating to registration of land in the Land Court. It is true that while under section 3268 in chapter 186 new certificates are specifically authorized in cases of sales on execution or for the enforcement of liens, there is in the statute no specific provision relating to the issuance of a new certificate upon the acquisition by the Territory or any subdivision thereof, by condemnation, of land for public purposes. It is obvious, however, from the statute as a whole, and particularly from section 3237, that the certificates of title issued by the Land Court are intended to represent the truth and that when they cease to represent the truth they are intended to be cancelled or modified so as to conform to the new facts. Section 3237 provides that "the original certificate in the registration book, any copy thereof duly certified under the signature of the registrar * * * and also the owner's duplicate certificate,

shall be received as evidence in all the courts of the Territory, and shall be conclusive as to all matters contained therein, except so far as otherwise provided in this chapter." Section 3226 provides that: "The land court shall have power to make and award all such judgments, decrees, orders and mandates; to issue all such executions, right of possession and other processes, and to take all other [39] steps necessary for the promotion of justice in matters pending before it, and to carry into full effect all powers which are, or may be given to it by law." In cases of voluntary transfers of land provision is made for the surrender of old certificates and the issuance of new ones to conform to the facts. In case of a transfer of a part or parts only of registered land, described in a given certificate, the provision is that the old certificate shall be surrendered and a new one issued to the grantee for the part or parts that are sold and a new certificate to the grantor for the part that is not sold. It was undoubtedly the intention of the legislature that when a part of registered land has been judicially condemned and fully paid for, any certificate theretofore issued by the Land Court shall be cancelled or corrected so as to show the taking by the Government and the transfer of the title. To hold otherwise would be to say that it was the intention of the legislature to permit certificates of the Land Court to continue in existence after they, through changes in the facts, become misleading and instruments of error or fraud. This we cannot do.

The decree of the Land Court is affirmed.

(Sgd.) ANTONIO PERRY.
(Sgd.) JAS. J. BANKS.
(Sgd.) CHARLES F. PARSONS.

C. B. DWIGHT (also on the Briefs), for Plaintiff in Error.

L. P. SCOTT, Deputy City and County Attorney (also on the Brief), for Defendant in Error, [40]

Filed March 2, 1931, at 11:56 o'clock A. M. [41]

In the Supreme Court of the Territory of Hawaii.

No. 1989.

Error to Land Court, Territory of Hawaii.

Hon. A. E. STEADMAN, Judge.

In the Matter of the Application of VICTORIA WARD, to Register and Confirm Title to Certain Land Situate at Kewalo, Honolulu, Oahu, Territory of Hawaii.

JUDGMENT ON WRIT OF ERROR.

In the above-entitled cause pursuant to the opinion of the above-entitled court rendered and filed on the 27th day of February, A. D. 1931, the decree of the Land Court of the Territory of Hawaii, dated November 7, 1930, is affirmed. Costs amounting to $13.25 to be paid by the defendants-plaintiffs in error.

Dated: Honolulu, T. H., March 2, 1931.

By the Court:

(Sgd.) J. A. THOMPSON,
Clerk, Supreme Court.

Approved:

(Sgd.) ANTONIO PERRY,
Chief Justice. [42]

[Title of Court and Cause—No. 1989.]

NOTICE OF JUDGMENT ON WRIT OF ERROR.

To the Honorable the Judge of the Land Court of the Territory of Hawaii:

YOU WILL PLEASE TAKE NOTICE that in the above-entitled cause the Supreme Court has entered the following judgment on writ of error:

"JUDGMENT ON WRIT OF ERROR.

In the above entitled cause pursuant to the opinion of the above entitled court rendered and filed on the 27th day of February, A. D. 1931, the Decree of the Land Court of the Territory of Hawaii, dated November 7, 1930, is affirmed. Costs amounting to $13.25 to be paid by the defendants-plaintiffs-in-error."

Dated: Honolulu, T. H., March 2, 1931.

By the Court:

[Seal] (Sgd.) J. A. THOMPSON,
Clerk, Supreme Court.

The form of the foregoing notice is hereby approved and IT IS ORDERED that the same issue forthwith.

Dated: Honolulu, T. H., March 2, 1931.

[Seal] (Sgd.) ANTONIO PERRY,
Chief Justice. [43]

MINUTES OF SUPREME COURT — HEARING.

Tuesday, February 24, 1931.

Court convened at 10:00 o'clock, A. M.
Present on the Bench:

Hon. ANTONIO PERRY, C. J., Hon. JAMES J. BANKS and Hon. CHARLES F. PARSONS, JJ.

1989.

Error to Land Court.

In the Matter of the Application of VICTORIA WARD to Register and Confirm Title to Certain Land Situate at Kewalo, Honolulu, Oahu, Territory of Hawaii.

2002.

Original Petition for Injunction and Proceedings from Circuit Court First Circuit.

HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD,

vs.

THE CITY AND COUNTY OF HONOLULU, a Municipal Corporation.

ARGUMENT.

APPEARANCES.

C. B. DWIGHT, for the Appellants.
L. P. SCOTT, Deputy City and County Attorney, for Appellee.

The above-entitled causes having been ordered set for this day for argument, when the court convened, Mr. Dwight addressed the Court and proceeded to state the facts in the above-entitled causes and then followed with his argument concluding at 11:20 A. M.

At 11:21 A. M. Mr. Scott commenced with his argument and called the Court's attention to Lewis Eminent Domain, Volume 1, Section 65, page 56 (what constitutes a taking), and also the provisions of Section 823 of the Revised Laws of Hawaii 1925, concluding at 11:50 A. M.

At 11:51 A. M. Mr. Dwight replied concluding at 11:59 A. M.

Case submitted and taken under advisement.

At 12:00 noon the court adjourned until to-morrow morning at 10:00 o'clock, Wednesday, February 25, 1931.

(Sgd.) ROBERT PARKER, Jr.,
Assistant Clerk. [44]

MINUTES OF SUPREME COURT—HEARING (CONTINUED).

Friday, February 27, 1931.

1989.

Error to Land Court.

In the Matter of the Application of VICTORIA WARD to Register and Confirm Title to Certain Land Situate at Kewalo, Honolulu, Oahu, Territory of Hawaii.

At 10:07 o'clock A. M., this day the court handed down its written opinion in the above-entitled cause affirming the decree of the Land Court.

(Sgd.) ROBERT PARKER, Jr.,
Assistant Clerk.

MINUTES OF SUPREME COURT—HEARING (CONTINUED).

2002.

Original Petition for Injunction and Proceedings from Circuit Court First Circuit.

HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD,

vs.

THE CITY AND COUNTY OF HONOLULU, a Municipal Corporation.

At 10:08 o'clock A. M. this day the court handed down its written opinion in the above-entitled cause affirming the decree appealed from.

(Sgd.) ROBERT PARKER, Jr.,
Assistant Clerk. [45]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,
Deputy City and County Attorney for Plaintiff.
[46]

[Title of Court and Cause—No. 1989.]

PETITION FOR APPEAL.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the Territory of Hawaii:

Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, Respondents-Plaintiffs in error herein, deem themselves aggrieved by the judgment of the above-entitled court in the above-entitled matter, which judgment of the Supreme Court of the Territory of Hawaii, was made and entered on the 2d day of March, 1931, and hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from said judgment, for the reasons specified in the assignment of errors hereto attached, and they pray that this appeal may be allowed, and that a transcript of the record and proceedings upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that said judgment may be reversed. [47]

Dated at Honolulu, Hawaii, this 1st day of June, A. D. 1931.

HATTIE KULAMANU WARD,
LUCY KAIAKA WARD and
VICTORIA KATHLEEN WARD,
Respondents-Plaintiffs in Error.
By (S.) CHARLES B. DWIGHT,
Their Attorney. [48]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,
Deputy City and County Attorney for Plaintiff.

[49]

[Title of Court and Cause—No. 1989.]

ASSIGNMENT OF ERRORS.

Now come Hattie Kulamanu Ward, Lucy Kaiaka Ward and Kathleen Victoria Ward, respondents-plaintiffs in error, and file the following assignment of errors, upon which they will rely in the prosecution of their appeal in the above-entitled cause, from the judgment entered herein on the 2d day of March, A. D. 1931, in the Supreme Court of the Territory of Hawaii:

I.

That the Supreme Court of the Territory of Hawaii erred in holding that the petitioner, the City and County of Honolulu, was entitled to the relief prayed for in its petition, to wit, to compel these respondents-plaintiffs in error, to deliver their Transfer Certificate of Title No. 7250 to the Registrar of the Land Court.

II.

That the Supreme Court of the Territory of Hawaii erred in holding that these respondents-petitioners in error were bound by the final order of condemnation made and entered on the 7th day of January, 1930, in that certain cause entitled

[50] "The City and County of Honolulu vs. Victoria Ward," docketed and numbered Law No. 11946.

III.

That the Supreme Court of the Territory of Hawaii erred in failing to hold and decide that it was without jurisdiction to grant the prayer of the petition.

IV.

That the Supreme Court of the Territory of Hawaii erred in failing to hold and decide that there was and is no provision of law upon which the petition herein could be based, or an order to show cause issued, or the prayer of the petitioner granted.

V.

That the Supreme Court of the Territory of Hawaii erred in failing to hold and decide that these respondents-petitioners in error, would be deprived of property without due process of law by granting the relief prayed for in said petition.

VI.

That the Court erred in failing to hold and decide that the property of these respondents-petitioners in error would be taken for public use without just compensation by granting the prayer of the petitioner.

WHEREUPON, the said Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, respondents-petitioners in error, pray that said opinion and decision and judgment be reversed and that the Supreme Court

of the Territory of Hawaii be ordered to enter a judgment reversing the decree of the Land Court, made and entered the 7th day of November, A. D. 1930. [51]

Dated at Honolulu, Hawaii, this 1st day of June, A. D. 1931.

HATTIE KULAMANU WARD,
LUCY KAIAKA WARD, and
VICTORIA KATHLEEN WARD,
Respondents-Plaintiffs in Error.
By CHARLES B. DWIGHT,
Their Attorney. [52]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,
Deputy City and County Attorney,
For Plaintiff. [53]

[Title of Court and Cause—No. 1989.]

NOTICE OF APPEAL.

Now comes Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, Respondents-plaintiffs in error herein, by their attorney, Charles B. Dwight, and gives notice of appeal from the judgment of the Supreme Court of the Territory of Hawaii, dismissing the appeal of the respondents-plaintiffs in error from the decision of the Judge of the Land Court, of the Territory of Hawaii, and

sustaining the decree of the said Judge of the Land Court, to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Honolulu, Hawaii, this 1st day of April, A. D. 1931.

HATTIE KULAMANU WARD,
LUCY KAIAKA WARD and
VICTORIA KATHLEEN WARD,
Respondents-Plaintiffs in Error.
By CHARLES B. DWIGHT,
Their Attorney. [54]

ORDER ALLOWING APPEAL.

Upon filing by the respondents-petitioners in error, Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, of a bond in the sum of Five Hundred Dollars ($500), with good and sufficient sureties, the appeal in the above-entitled cause is hereby allowed.

[Seal] ANTONIO PERRY,
Chief Justice. [55]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

(Sgd.) L. P. SCOTT,
Deputy City and County Attorney for Plaintiff.
[56]

OK.—L.P.S., Deputy City and Cty. Atty.

[Title of Court and Cause—No. 1989.]

COST BOND.

The United States of America,
District of Hawaii.

We, Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, as principals and New York Indemnity Company of New York, as surety, jointly and severally acknowledge ourselves indebted to the United States of America in the sum of Five Hundred no/100 Dollars ($500.00) to be levied on our goods, and chattels, lands and tenements, upon this condition:

WHEREAS, the above-named respondents-plaintiffs in error have taken an appeal from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment dated and entered in said cause on the 2d day of March, A. D. 1931,—

NOW, THEREFORE, if the above-bounded respondents-plaintiffs in error, shall prosecute their appeal without delay and shall answer all costs if they fail to make good their [57] plea, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, we have hereunto set out hands and seals this 1st day of June, A. D. 1931.

HATTIE KULAMANU WARD,
By CHARLES B. DWIGHT,
LUCY KAIAKA WARD,
KATHLEEN VICTORIA WARD,
By CHARLES B. DWIGHT,
Her Attorney,
Principals.

NEW YORK INDEMNITY COMPANY,
(Sgd.) H. A. TRUSLOW,
Agent and Attorney-in-fact,
Sureties.

Reaffirmed.

NEW YORK INS. CO.,
By Agent H. A. TRUSLOW,
Agent and Atty.-in-fact.

June 1, 1931.

Taken and acknowledged before me the day and year first above written.

(Sgd.) SIZANNE G. FISKE,
Notary Public, First Judicial Circuit, Territory of Hawaii.

The foregoing bond is approved as to amount and sufficiency of sureties.

[Seal] (Sgd.) ANTONIO PERRY,
Chief Justice, Supreme Court.

The foregoing bond i*d* approved as to f*i*rm.

(Sgd.) P. L. SCOTT,
Deputy City and County Attorney.

Reaffirmed 3:45 P. M. June 1, 1931.

LUCY K. WARD.
HATTIT KULAMANU WARD.
KATHLEEN VICTORIA WARD.
By (Sgd.) CHARLES B. DWIGHT,
Th*e*re Attorney. [58]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,
Deputy City and County Attorney for Plaintiff.
[59]

[Title of Court and Cause—No. 1989.]

CITATION ON APPEAL.

The United States of America,—ss.

The President of the United States of America to the City and County of Honolulu, a Municipal Corporation, and James F. Gilliland, City and County Attorney, Its Attorney, GREETINGS:

You are hereby cited and admonished to be and appear at the *Ninth Circuit,* to be held at the City and County of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to an order allowing appeal, filed in the office of the Clerk of the Supreme Court of the Territory of Hawaii, wherein Hattie Kulamanu Ward,

Lucy Kaiaka Ward and Victoria Kathleen Ward are the respondents-plaintiffs in error, and you are petitioner, to show cause, if any there be, why the judgment in such appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf. [60]

WITNESS, the Honorable CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States of America, this 1st day of June, A. D. 1931, and of the Independence of the United States the 15*th*.

ANTONIO PERRY,
Chief Justice.

[Seal] Attest: J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

Received a copy of the within citation June 1st, 1931.

L. P. SCOTT,
Deputy City and County Attorney.

Let the within citation issue.

[Seal] ANTONIO PERRY,
Chief Justice. [61]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

(Sgd.) L. P. SCOTT,
Deputy City and County Attorney,
For Plaintiff. [62]

[Title of Court and Cause—No. 1989.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Petition and order to show cause.
2. Answer and return of the respondents, Hattie Kulamanu Ward, Lucy Kaiaka Ward, and Victoria Kathleen Ward.
3. Demurrer to the answer and return.
4. Decision of the court.
5. Decree.
6. Transcript of the evidence had and taken of the proceedings herein, and all original exhibits.
7. Minutes of the registrar of the Land Court of the proceedings had and taken herein.
8. Opinion and decision of the Supreme Court of the Territory of Hawaii, dated February 27th, 1931. [63]
9. Judgment on appeal of the Supreme Court of the Territory of Hawaii.
10. All minute entries in the above-entitled cause.
11. Petition for appeal.
12. Notice of appeal and order allowing appeal.
13. Assignment of errors.
14. Citation on appeal.

15. Bond for costs on appeal.
16. This praecipe.
17. Clerk's certificate to transcript.

Said transcript to be prepared as required by law, and the rules of this court, and the rules of the United States Circuit Court of Appeals, at San Francisco, in the State of California, before the 1st day of July, A. D. 1931.

Dated at Honolulu, Hawaii, this 1st day of June, A. D. 1931.

HATTIE KULAMANU WARD,
LUCY KAIAKA WARD and
VICTORIA KATHLEEN WARD,
Respondents-Plaintiffs in Error.
By (Sgd.) CHARLES B. DWIGHT,
Their Attorney. [64]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,
Deputy City and County Attorney,
For Plaintiff. [65]

[Title of Court and Cause—No. 1989.]

ORDER EXTENDING TIME TO AND INCLUDING JULY 1, 1931, TO PREPARE TRANSCRIPT AND RECORD ON APPEAL.

IT IS HEREBY ORDERED that the time in which to prepare and file the record on appeal in

the above-entitled cause be extended up to and including the 1st day of July, A. D. 1931.

Dated at Honolulu, this 1st day of June, A. D. 1931.

[Seal] ANTONIO PERRY,
Chief Justice. [66]

Received and filed in the Supreme Court June 24, 1931 at 2:09 o'clock A. M. [67]

[Title of Court and Cause—No. 1989.]

ORDER EXTENDING TIME TO AND INCLUDING JULY 31, 1931, TO PREPARE TRANSCRIPT AND RECORD ON APPEAL.

IT IS HEREBY ORDERED that the time in which to prepare and file the record on appeal in the above-entitled cause be extended up to and including the 31st day of July, A. D. 1931.

Dated at Honolulu, Hawaii, this 24th day of June A. D. 1931.

[Seal] ANTONIO PERRY,
Chief Justice.

Approved:

L. P. SCOTT,
Deputy City and Cty. Atty. [68]

[Title of Court and Cause—No. 1989.]

CERTIFICATE OF CLERK OF THE SUPREME COURT OF THE TERRITORY OF HAWAII TO TRANSCRIPT OF RECORD.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, Robert Parker, Jr., Assistant Clerk of the Supreme Court of the Territory of Hawaii, DO HEREBY CERTIFY, that the documents hereto attached and enumerated hereunder, viz.:

1. Fly-leaf and index to transcript of record.
2. Petition for issuance of certificate of title upon final order of condemnation and order to show cause.
3. Copy answer and return of Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, dated and filed September 6, 1930.
4. Copy demurrer to answer and return of Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, dated and filed September 12, 1930.
5. Copy decision of Hon. A. E. Steadman, Judge of the Land Court, on order to show cause, dated and filed October 17, 1930.
6. Copy decree entered in the Land Court, dated and filed November 7, 1930.
7. Copy minutes of the Registrar of the Land Court.

8. Copy opinion of the Supreme Court, Territory of Hawaii, filed February 27, 1931.
9. Copy judgment on writ of error and notice of judgment on writ of error, filed March 2, 1931.
10. Clerk's minutes of the Supreme Court, Territory of Hawaii.
11. Original petition by the respondents for appeal to the United States Circuit, Court of Appeals for the Ninth Circuit, dated June 1, 1931.
12. Original assignment of errors, dated June 1, 1931.
13. Original notice of appeal and order allowing appeal, dated and filed June 1, 1931. [69]
14. Copy cost bond, dated June 1, 1931, for the sum of $500.00, Hattie Kulamanu Ward, Lucy Kaiaka Ward, and Victoria Kathleen Ward, Principals; New York Indemnity Company of New York, Surety, and United States of America, Obligee, and approval thereof.
15. Original citation on appeal, etc., dated June 1, 1931.
16. Copy praecipe for transcript of record, dated June 1, 1931.
17. Original order extending time to July 1, 1931, to prepare transcript and record on appeal, dated June 1, 1931.
18. Original order granting petitioners-appellant to and including July 31, 1931, in which to prepare and file record on appeal,

are full, true and accurate copies of the original documents, filed in the above-entitled cause and now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

I FURTHER CERTIFY that the

19. Original transcript of evidence, filed December 5*m,* 1930, and
20. Petitioner's Exhibit "A," being Original Law Record No. 11946, Circuit Court First Judicial Circuit, Territory of Hawaii, in a cause entitled "The City and County of Honolulu, Plaintiff, vs. Victoria Ward, Respondent,"

are the originals, and are herewith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California; excepting number 11—Petition by the respondent for appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit, dated June 1, 1931; number 12—Assignment of errors, dated June 1, 1931; number 13—Notice of appeal and order allowing appeal, dated and filed June 1, 1931; number 15—Citation on appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit, dated June 1, 1931; number 17—Order extending time to prepare transcript and record on appeal, filed June 1, 1931, and number 18—Order extending time to prepare transcript and record on appeal, filed June 24, 1931, are the originals, and are herewith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California. [70]

In pursuance to the praecipe filed June 1, 1931, in the above-entitled cause, the foregoing are here-

with transmitted to the Circuit Court of Appeals for the Ninth Circuit.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the above-entitled court, at Honolulu, City and County of Honolulu, Territory of Hawaii, this 22d day of July, A. D. 1931.

[Seal] ROBERT PARKER, Jr.,
Assistant Clerk of the Supreme Court of the Territory of Hawaii. [71]

[Endorsed]: No. 6545. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Application of Victoria Ward to Register and Confirm Title to Certain Land Situate at Kewalo, Honolulu, Oahu, Territory of Hawaii. Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, Appellants, vs. City and County of Honolulu, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the Supreme Court of the Territory of Hawaii.

Filed July 29, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Frank H. Schmid,
Deputy Clerk.

Nos. 6545-6546

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Application of VICTORIA WARD to Register and Confirm Title to Certain Land Situate at Kewalo, Honolulu, Oahu, Territory of Hawaii.

HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD,

Appellants,

vs.

CITY AND COUNTY OF HONOLULU, a Municipal Corporation,

Appellee.

HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD,

Appellants,

vs.

CITY AND COUNTY OF HONOLULU, a Municipal Corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

BRIEF OF APPELLANT

CHARLES B. DWIGHT,
Attorney for Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, Appellants.

Filed this.....day of....., 1931

PAUL P. O'BRIEN, *Clerk.*

By.....

Deputy Clerk.....

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Nos. 6545-6546

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Application of VICTORIA WARD to Register and Confirm Title to Certain Land Situate at Kewalo, Honolulu, Oahu, Territory of Hawaii.

HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD,

Appellants,

vs.

CITY AND COUNTY OF HONOLULU, a Municipal Corporation,

Appellee.

HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD,

Appellants,

vs.

CITY AND COUNTY OF HONOLULU, a Municipal Corporation,

Appellee.

BRIEF OF APPELLANTS

These proceedings have come to this Court upon the appeals of HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATH-

LEEN WARD, from the judgments of the Supreme Court of the Territory of Hawaii, made and entered on the 2nd day of March, 1931. As the issues involved in both causes are similar, by stipulation, approved by this Court, the causes were consolidated for briefing and argument.

FACTS

Cause No. 6545

This cause was instituted in the Land Court of the Territory of Hawaii by a petition of the City and County of Honolulu, praying for the issuance to it of a certificate of title covering Lots "F" and "G" of Land Court Application No. 670.

The Petitioner alleged in its petition that on March 19, 1928, the City and County of Honolulu instituted a suit in eminent domain in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, against Victoria Ward to condemn the parcels above named; that the summons in the condemnation suit were issued on the 19th day of March, 1928, and that service was made on March 20th, 1928; that on July 26th, 1928, Victoria Ward, through her attorneys, filed an answer; that prior thereto and on to-wit, the 18th day of July, 1928, during the pendency of the eminent domain suit, Victoria Ward executed a deed conveying parcels "F" and "G" and other lands to her daughters, HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD as joint tenants with herself, and that pursuant thereto Transfer Certificate of Title No. 7250 was issued

out of the Land Court of the Territory of Hawaii to HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD.

The petition further alleged that the trial of the eminent domain proceeding began in the Circuit Court of the First Judicial Circuit on October 1st, 1928, and continued to and including October 12th, 1928, when a verdict was rendered; that judgment was entered on October 23rd, 1928, and that the final order of condemnation was entered on January 7th, 1930, which order was recorded in the office of the Registrar of Conveyances as Document No. 20898. The petition also alleged that during the trial of the condemnation suit either one or all of the grantees of Mrs. Ward were in attendance and had notice of the proceedings and that neither of them entered an appearance or intervened in said suit. An order to show cause was issued upon the petition, addressed to Victoria Ward, Lucy Kaiaka Ward, Hattie Kulamanu Ward and Victoria Kathleen Ward.

Victoria Ward separately filed an answer and return and the cause was dismissed as to her. Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward filed their answer and return and in the answer and return admitted that the eminent domain proceeding was commenced in the Circuit Court on October 1st, 1928; that a verdict was rendered on October 12th, 1928, and that judgment thereon was entered on October 23rd, 1928. They also admitted that the final order of condemnation was entered on January 7th, 1930, and was recorded in the Office of the Registrar of Conveyances as Docu-

ment No. 20898. They denied that they were present during all of the trial, but admitted that they had notice of the condemnation proceedings and further averred that they were the owners, as joint tenants, of Lots "F" and "G" of Land Court Application No. 670, subject to a life estate in Victoria Ward, and were such owners at the time of the trial of the condemnation suit; that they were not joined as defendants; that no summons was served upon them in the eminent domain proceedings; that no compensation was offered or paid to them by the City and County of Honolulu, or the Territory of Hawaii. The respondents set up other grounds in their answer which will not be considered here.

A demurrer was interposed to the return of the respondents and overruled.

The facts, having been admitted by the pleadings, the cause was argued and the Land Court of the Territory of Hawaii granted the prayer of the petition.

An appeal upon Writ of Error was taken to the Supreme Court of the Territory of Hawaii.

The Supreme Court of the Territory of Hawaii on the 27th day of February, 1931, entered its Opinion and Decision sustaining the Decree of the Land Court. A Judgment pursuant to the Opinion and Decision of the Land Court of the Territory of Hawaii was made and entered on the 2nd day of May, 1931, from which Judgment these respondents have appealed to this Court.

FACTS

Cause No. 6546

This cause has come to this Court upon an appeal

taken by the Petitioners from the Judgment of the Supreme Court of the Territory of Hawaii made and entered on the 2nd day of ~~May~~ March, 1931, pursuant to the Opinion and Decision of the Supreme Court of the Territory of Hawaii made and entered on the 27th day of February, 1931, which opinion and decision sustained the decree of the Circuit Judge of the First Judicial Circuit, Territory of Hawaii.

On December 5th, 1930, the Appellants herein filed their bill in equity praying for an injunction to restrain the respondent, The City and County of Honolulu, its officers, agents and servants, from in any manner trespassing upon Lots "E", "F" and "G" of Land Court Application No. 670 and committing irreparable injury to the homestead of the petitioners. A temporary restraining order was issued, which was modified by stipulation of counsel, and the respondent was temporarily restrained from trespassing on Lot "G" of Land Court Application No. 670 and from committing irreparable injury to the homestead of the petitioners.

The respondent demurred to the bill, which demurrer was overruled.

The cause was heard before the Circuit Judge at Chambers and a decision was entered dismissing the petition for injunction.

Pursuant to the decision of the Circuit Judge a Decree was duly entered, from which an appeal was taken to the Supreme Court of the Territory of Hawaii, and as hereinbefore stated, on March 2nd, 1931, the Supreme Court of the Territory of Hawaii dismissed the appeal.

The petition for injunction alleged that the peti-

tioners were the owners in fee simple, and as joint tenants with Victoria Ward, of Lots "E", "F" and "G" of Land Court Application No. 670; that on July 18th, 1928, there was issued to them Transfer Certificate of Title No. 7250 out of the Land Court of the Territory of Hawaii; that Lots "E", "F" and "G" are a portion of the lands constituting the family homestead of the petitioners, which homestead had been maintained as such for more than fifty years; that the grounds of the said homestead were planted to valuable trees and the plants and trees were set out and cultivated with great care by the petitioners and Victoria Ward; that Lots "E", "F" and "G" constitute the proposed right-of-way for the Kapiolani Boulevard, a proposed public highway of the City and County of Honolulu and that the proposed right-of-way constituted a strip running over and across the homestead of the Petitioners, dividing the same into two parts.

The petition further alleged that the City and County of Honolulu had threatened and was threatening to trespass upon Lots "E", "F" and "G" and to break down the family fence of the homestead and enter upon said Lots "E", "F" and "G" and trespass thereon; that the respondent threatened to fill in the right-of-way to a grade considerably higher than the remaining portion of the homestead lying mauka (the direction toward the mountains and away from the sea); that if the respondent had carried out its threat to enter upon the strip and trespass upon the property of the petitioners, the petitioners would suffer irreparable injury in that by filling in the proposed strip the natural flow of surface waters, off the

homestead of the petitioners, would be obstructed and that the flood waters would back up over and upon the homestead of the petitioners, damaging the property of the petitioners and that the back waters would kill and injure the plants and trees planted by the petitioners and their mother and that the stoppage of the flow of surface waters would seriously affect the homestead and make insanitary, unhealthful and uninhabitable the premises occupied by the petitioners as their home.

The petition further alleges that no compensation had been paid to the petitioners by the City and County of Honolulu, or the Territory of Hawaii, for Lots "E", "F" and "G" notwithstanding the fact that the respondent proposes to use the property for public purposes, to-wit, for a public highway.

The petition further alleged actual threats by the agents of the City and County of Honolulu to enter upon and trespass over the above described lots.

Other allegations in the petition need not be inserted here as those allegations are immaterial to a decision by this Court.

The answer of the respondent averred that as to Lot "E", the petitioners had only a bare legal title, subject to a binding agreement between the predecessor in interest of the Petitioners and the Territory of Hawaii. As to Lots "F" and "G" the respondent claimed title pursuant to a proceeding in condemnation instituted by the City and County of Honolulu against Victoria Ward.

The answer also admitted the threats to enter upon Lots "E", "F" and "G" by the agents of the City and County of Honolulu but denied that the

petitioners were suffering, or did suffer, any irreparable injury. To which answer the petitioners filed their replication denying that they owned a bare legal title to Lot "E", but reasserted their claim to title in fee simple to Lots "E", "F" and "G".

In the hearing before the Circuit Judge the petitioners offered in evidence Transfer Certificate of Title No. 7250, which certified that title in fee simple to Lots "E", "F" and "G" was in the petitioners, as joint tenants with Victoria Ward.

It was stipulated by counsel in the Circuit Court, that neither of the petitioners were made parties-defendant in the suit in condemnation, but that the petitioners did have notice of the suit.

Kathleen Ward, one of the petitioners, testified that she was one of the owners in fee simple of Lots "E", "F" and "G"; that she received no compensation for her interest in the property from the City and County of Honolulu, nor was any compensation ever offered to her. She further testified that one Oliveira, purporting to act as the agent of the City and County of Honolulu, threatened to break down the family fence and that the County engineer had addressed a communication to her conveying the intention of the City and County of Honolulu to enter upon Lots "E", "F" and "G", which letter was introduced in evidence. She further testified that a partial fill had been put upon Lot "G" and that as a result the surface waters had backed up and into their homestead and made a portion of the homestead low, marshy and insanitary. That because of the backing up of the water a number of choice trees had died.

Miss Lucy Ward, one of the petitioners, testified that she was the owner of Lots "E", "F" and "G" with her sisters and mother; that no compensation had been paid to her, nor offered by the City and County of Honolulu, nor anyone in its behalf; that a portion of Lot "G" had been filled by the City and County of Honolulu and as a result thereof the surface waters had backed up and a portion of the homestead had become insanitary, low and marshy causing several choice trees planted many years prior to the time that she testified, to die.

The City and County of Honolulu by way of defense offered in evidence the record in the case of "City and County of Honolulu vs. Victoria Ward" and a portion of the record in Land Court Application No. 670. It also offered in evidence a letter signed by E. H. Wodehouse, attorney in fact for Victoria Ward, and the reply thereto signed by James H. Boyd, Superintendent of Public Works, both letters being dated in the year 1902, all of which exhibits are now before this Court.

The City and County of Honolulu then proceeded to prove through its witnesses that it had partially complied with the conditions set forth in the letter of Mrs. Ward.

The Petitioners were then recalled and testified that the Territory of Hawaii had failed to comply with the conditions set forth in the letter of 1902. That the petitioners and their mother at their own expense, were compelled to put in fences on both sides of Lot "E"; that Lot "E" was never paved until 1916; that no curbs were laid and that an attempt to lay curbs was being made by the City and County

of Honolulu after the filing of the suit; that the petitioners were compelled at their own expense to fill in a large portion of the area Ewa (westerly side) of Lot "E".

The petitioners also put in evidence the entire record in Land Court Application 670.

The Court entered its decision dismissing the bill. Pursuant thereto a decree was entered, from which decree an appeal was taken to the Supreme Court.

The Supreme Court of the Territory sustained the Circuit Judge and the matter is now before this Court upon appeal.

ASSIGNMENTS OF ERROR

No. 6545

I

That the Supreme Court of the Territory of Hawaii erred in holding that the petitioner, the City and County of Honolulu, was entitled to the relief prayed for in its petition, to-wit, to compel these respondents to deliver their Transfer Certificate of Title No. 7250 to the Registrar of the Land Court.

II

That the Supreme Court of the Territory of Hawaii erred in holding that these respondents were bound by the final order of condemnation made and entered on the 7th day of January, 1930, in that certain cause entitled "The City and County of Honolulu vs. Victoria Ward," docketed and numbered Law No. 11946.

III

That the Supreme Court of the Territory of Hawaii erred in failing to hold and decide that it was without jurisdiction to grant the prayer of the petition.

IV

That the Supreme Court of the Territory of Hawaii erred in failing to hold and decide that there was and is no provision of law upon which the petition herein could be based, or an order to show cause issued, or the prayer of the petitioner granted.

V

That the Supreme Court of the Territory of Hawaii erred in failing to hold and decide that these respondents, would be deprived of property without due process of law by granting the relief prayed for in said petition.

VI

That the Court erred in failing to hold and decide that the property of these respondents would be taken for public use without just compensation by granting the prayer of the petitioner.

No. 6546

I

That the Supreme Court of the Territory of Hawaii erred in overruling the appeal of the petitioners and affirming the decision of the Circuit Court of the

First Judicial Circuit, Territory of Hawaii, made and entered on the 5th day of February, 1931.

II

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the petitioners were not entitled to the relief prayed for in their petition.

III

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the petitioners were bound by the judgment in the eminent domain proceeding entitled "The City and County of Honolulu vs. Victoria Ward."

IV

That the Supreme Court of the Territory of Hawaii erred in failing to grant the relief prayed for by the petitioners in their petition.

V

That the Supreme Court of the Territory of Hawaii erred in failing to hold and find that the petitioners would be deprived of their private property without just compensation if the prayer of the petitioners was not granted.

VI

That the Supreme Court of the Territory of Hawaii erred in failing to hold and find that the petitioners were not bound by the Final Order of Con-

demnation in the eminent domain proceeding entitled "The City and County of Honolulu vs. Victoria Ward."

ARGUMENT

The assignments of error in both causes raise but one main issue—whether, the City and County of Honolulu, under the power of eminent domain, can take private property for public use without first paying just compensation therefor, to the owner at the time of taking. For this reason all of the assignments of error will be argued together.

It will be remembered that these appellants were purchasers *pendente lite* of Lots "F" and "G" of Land Court Application No. 670; that said lots were condemned for public purposes in a proceeding against their predecessor in interest, and a judgment fixing the damage for the taking had been entered, but that the compensation fixed by the judgment to be paid to the owner was not paid to these appellants but to their predecessor in interest, notwithstanding the prior issuance to them of a Certificate of Title out of the Land Court of the Territory of Hawaii, certifying that these appellants were the owners in fee.

While it is contended by these appellants, that they were not bound by the judgment in the eminent domain proceeding, we will assume for the purposes of this argument that they are, that is, that as to them, it has been judicially determined that Lots "F" and "G" of Land Court Application No. 670, could be taken for public purposes upon the payment of the award fixed in the judgment. It is, however,

respectfully contended that the Final Order of Condemnation was void and of no effect as to them and was ineffectual to divest them of their fee simple title because of the failure of the City and County of Honolulu to pay to them the compensation fixed by the judgment for their interest in the land. It would violate the constitution of the United States to hold otherwise for their private property would be taken for public use, without just compensation.

As hereinbefore stated, the Final Order of Condemnation involves Lots "F" and "G". The evidence before the Circuit Court was conclusive that the Petitioners, Lucy Kaiaka Ward, and her sisters, the appellants herein, were the owners in fee simple, as joint tenants with their mother, prior to the entering of the judgment fixing the compensation. Transfer Certificate of Title No. 7250, had already been issued to them by the Land Court of the Territory. The Certificate, on its face, shows these appellants to be the owners and under our statute a transfer certificate of title is conclusive evidence of the statements contained therein.

> "Sec. 3237. Certificate as Evidence. The original certificate in the registration book, any copy thereof duly certified under the signature of the registrar or assistant registrar, and the seal of the Court, and also the owners duplicate certificate, shall be received as evidence in all the courts of the Territory, *and shall be conclusive as to all matters therein contained,* except so far as otherwise provided in this chapter."
>
> Revised Laws of Hawaii, 1925.

The evidence also conclusively showed that no

part of the compensation fixed by the judgment was ever paid to these appellants. This fact was not only proven, but admitted by the City and County of Honolulu. The compensation was not paid to these appellants notwithstanding the fact that a year and a half elapsed between the issuance of the Transfer Certificate and the filing of the Final Order of Condemnation.

There can be no question but that the award of damages set forth in the eminent domain proceeding should be payable to the owner or owners at the time the title passes to the government.

The authorities are uniform in that regard. They all hold that the owner at the time that the title passes to the government is the person to whom the award is payable.

"When land is condemned, the damages belong to the owner at the time of taking."
Spencer vs. Comm. River Co. 101 A. 528.

"He from whom the title of the condemned property is taken is entitled to the compensation."
Van Etten vs. C. of N. Y. 124 N. E. 201.
See also 99 A 64 and 106 A. 65.

"The right of compensation for land taken for public use occurs when the land is taken."
East San Mateo Land Co. v. S. P. Ry. Co.
157 P. 634.

"Damages for the taking of land for a highway belong to the one who owns the land at the time of taking."
Canoe v. Davis, 121 S. E. 601.

"Grantee entitled to damages caused by laying out of road."

Johnson vs. Washington Co.
20 S. W. (2) 179.

"Vendee is entitled to damages suffered where right to condemnation proceeds, accrues after conveyance."

Russakox vs. McCarthy, 275 Pac. 808.

"It is the divesting of title which entitles to the compensation."

Van Etten vs. C. of N. Y. 124 N. E. 201.

"Damages for appropriation of land by either public or private corporation belong to the owner of land when appropriation is made."

Safe Deposit & Title Guaranty Co.
vs. Lenton, 100 A. 831.

It is provided in Section 824, Revised Laws of Hawaii, 1925, that the owners are divested of their title when the final order of condemnation is entered and recorded. This Court in the case of U. S. vs. Marriam, 161 Fed. 303, in construing this section has so held. It said:

"The direct language of this provision makes it plain that the judgment must be filed and recorded before the property vests in the plaintiff. By the use of the adverb 'thereupon' the law fixes the time when the title shall vest, that is when the act of filing and recording the certified copy of the judgment is done and not until then. The reason for requiring such registry must also lie in the general rule that the judgment, unless filed and recorded, would not create a lien upon the realty involved, or *conclude any who were not parties to the con-*

demnation proceedings." Lindsay v. Kanaina, 4 Haw. 165; Baker v. Morton, 79 U. S. 150; 20 L. Ed. 262.

It will be noted that our statute is silent as to whom the compensation should be payable. It is a matter of general knowledge, and it is not uncommon that owners of lands about to be condemned who do not feel that they can bear the burden of the cost of the improvement sell their lands to others who can bear the burden and that the owner at the time when the Final Order is entered is the person to whom the payments provided by the judgment should be made, and to no other.

The Petitioners therefore, being the owners of Lots "F" and "G", were entitled to the compensation. The evidence conclusively shows that they did not receive it. Certainly under the law and the conclusive evidence there could be no justification for the conclusion of the Supreme Court of Hawaii that the "Compensation was awarded and paid to the owner of the land" (Tr. No. 6545, p. 29). Furthermore Section 823, Revised Laws of Hawaii, 1925, provides that the payments must be made within two years and Section 824 of the Revised Laws, 1925, provides:

> "When all payments required by the final judgment have been made the Court shall make a final order of condemnation and until then no final order can be made."

It is submitted that the requirements of Section 824 were not complied with by the City and County

of Honolulu and that the final order of condemnation was therefore void. The title to Lots "F" and "G" therefore remained in the appellants, and the appellants who were not parties to the condemnation proceedings are not concluded.

It is fundamental that private property cannot be taken for public use without compensation. It is a constitutional right guaranteed to every citizen and no legislature or court can deprive a citizen of that right.

> "Private property cannot be taken unless compensation be first made, a constitutional provision which the legislature cannot abrogate."
> Weieke v. Chic. M. & St. P. Ry. 178 N. W. 1009.

The conclusion of the Supreme Court of Hawaii that these appellants' constitutional rights were not violated, even though their private property was taken for public use without paying just compensation therefor, is manifestly error.

The attempt of the City and County of Honolulu to enter upon and take possession of these appellants' private property violates the Constitution. *The question as to whom the compensation is to be paid is just as vital as the amount which is to be paid,* when constitutional rights are concerned, in an eminent domain proceeding.

While a purchaser *pendente lite,* may be bound by the judgment, still and notwithstanding that fact, the Owner's subsequent conveyance does affect the question as to whom the compensation should be paid. (See Department of Public Works v. Ingall, 146 N. E. 521, and Chicago vs. Messler et al, 38 Fed.

302 at 303.) And, as the law clearly indicates that these appellants should have been paid the compensation as they were the owners at the time of the taking the Supreme Court of Hawaii erred, and should be reversed.

The Supreme Court also erred in failing to grant injunctive relief.

The threatened acts of the City and County of Honolulu to take and injure the property of these Appellants is sufficient ground, in itself, for the issuance of an injunction to restrain such acts.

> "Property owner has right to enjoin acts of damages to his property by municipality where there is an attempt to take or injure his property for public use without compensation."
> City of Troy v. Watkins, 78 So. 50.

> "Citizens may enjoin municipality from taking or injuring his property without first making compensation without regard to the fact that adequate damages at law can be recovered."
> Id.

See also

Stall vs. Bremer, 118 N. E. 1087.

Rockaway Pacific Corp. v. Stotesburg et al, 255 Fed. 345.

Uvalde Rock Asphalt Co. v. Asphalt Belt Ry. Co. et al. 103 So. 40.

Hargett v. Franklin County et al, 267 S. W. 688.

The Supreme Court of Hawaii in its opinion and decision found that as to Lot "E" these Appellants had an adequate remedy at law, to-wit, a suit against the City and County of Honolulu in ejectment. Lot "E" is a highway. To arrive at the conclusion that

the Supreme Court did, it must of necessity also arrive at the conclusion that the fee to Lot "E" was in the Territory.

Section 1892 of the Revised Laws of Hawaii, 1925, defines public highways as roads, etc., dedicated to the public as a highway, and Section 1893 of the Revised Laws provides that:

> "The ownership of all public highways and the land, real estate and property of the same shall be in the government in fee simple."

In other words, once a way becomes a public highway by dedication the fee therein is in the Territory.

If the fee is in the Territory then the conclusion of the Supreme Court is clearly error, for the Supreme Court has in the case of Bush vs. Territory, 13 Hawaii 1, held:

> "That ejectment does not lie against the Territory."

As to the power of a court in equity to restrain a trespass the Supreme Court of Hawaii has in the case of Yee Hop v. Colburn, 24 Hawn. 658, set down the rule as follows:

> "In the present case we have a petition addressed to a court of equity by the owner in possession of the property to restrain parties who have trespassed upon the property and caused destruction of a part thereof and who threaten future trespasses and acts of destruction. Upon two recognized principles equity would afford relief in such a case. *First, because the threatened acts of the respondents, if carried into effect, might tend to*

the destruction of the property, and second, the repeated acts of trespass would result in a multiplicity of suits."

The evidence before the circuit court also showed that the City and County of Honolulu had trespassed upon Lots "E", "F" and "G" and had caused damage to a portion of these Appellants homestead by making the same low, marshy and insanitary, resulting in the death of several choice trees. These facts entitle the appellants to equitable relief.

> "Equity may enjoin the destruction of or injury to trees when the inadequacy of the remedy at law is because of the value of the trees as a part of the estate, the destruction of which would be irreparable injury to the owner of the land."
> Cowan v. Skinner, 42 So. 730.

And in the case of German Evangelical Cong. v. Hoessle, 13 Wis. 348, at page 358, that Court, in speaking of the rule said:

> "But in cases of a peculiar nature which damages could not compensate, or where the injury reached the very substance and value of the estate and went to the destruction of it *in the character in which it was enjoyed* then Courts of Equity would grant an injunction to prevent the injury complained of."

How can money compensate the Appellants for the damage suffered? How can money replace the trees and shrubs that have been killed? How can money replace the security of the Appellants in their enjoyment in the tropical beauty and splendor of their home grounds, a portion of which already has

been taken away? How can money place in status quo that portion of "Old Plantation" that has become low, marshy and insanitary—a swamp? The injury suffered is irreparable. This, it is submitted, has been clearly proven by the evidence. The circuit court in its decision found that the damage set forth above had been suffered.

The Appellants having proved that they had suffered and were suffering irreparable injury, the Supreme Court erred in not granting the relief prayed for.

> "It is well settled that if the bill shows that irreparable injury will result from a trespass, a sufficient ground for the interference of equity by injunction to restrain its commission or continuance is made out."
>
> 32 C. J. 136.

Or, to put the rule, in another form:

> "Where the injury is of such a nature that it cannot be fully compensated in damages by any pecuniary standard, it is irreparable and the trespass may be enjoined."
>
> 32 C. J. 137.

CONCLUSION

It is the respectful contention of the Appellants, in view of the law, that the Supreme Court of Hawaii erred in the manner and form set forth in the Specifications of Error. The Appellants herein under the law and facts were entitled to the relief prayed for by them and for these reasons the Judgments of the Supreme Court of Hawaii should be reversed.

Dated at Honolulu, Hawaii, this ..... day of November, A. D. 1931.

CHARLES B. DWIGHT,
Attorney for HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD,
Appellants.

No. 6546

United States

Circuit Court of Appeals

For the Ninth Circuit.

9

HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD,

Appellants,

vs.

CITY AND COUNTY OF HONOLULU, a Municipal Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the Supreme Court of the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Filed at 2:45 o'clock P. M., Dec. 5, 1930.

Returned at 8:42 o'clock A. M., Dec. 8, 1930.

[4*]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Bill for Injunction.

HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD,

Petitioners,

vs.

THE CITY AND COUNTY OF HONOLULU, a Municipal Corporation,

Respondent.

PETITION.

To the Honorable, the Presiding Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers, in Equity:

Now comes Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, petitioners above named, and complaining of the city and county of Honolulu, a municipal corporation, respondent above named, respectfully shows and presents as follows:

I.

That the petitioners above named, were and at all of the times herein mentioned are residents of

*Page-number appearing at the foot of page of original certified Transcript of Record.

Honolulu, City and County of Honolulu, Territory of Hawaii. [5]

II.

That the respondent, The City and County of Honolulu, was and at all of the times herein mentioned is a municipal corporation.

III.

That heretofore and on, to wit, the 18th day of July, 1928, the petitioners herein, together with Victoria Ward, became the owners, in fee simple and as Joint Tenants, of Lots E, F and G, of Land Court Application No. 670, subject to a life estate in Victoria Ward; that on said date Transfer Certificate of Title No. 7250 was issued to them out of the Land Court of the Territory of Hawaii.

IV.

That said Lots E, F and G of Land Court Application No. 67 are a part and parcel of the family home of the petitioners herein and Victoria Ward. That the family homestead of the petitioners has been maintained as such for a period of more than fifty (50) years. That the grounds of said homestead have been planted to trees and *has* been set out and cultivated with great care by the petitioners and the said Victoria Ward.

V.

That said Lots E, F and G of said homestead constitute the proposed right of way for the Kapiolani Boulevard, a proposed public highway of the City and County of Honolulu. [6]

VI.

That the said Lots E, F and G are adjacent to each other and constitute a strip running over and across the said homestead of the petitioners, dividing the homestead of the petitioners into two parts.

VII.

That the respondent, The City and County of Honolulu, has threatened, and is now threatening, to trespass upon the said Lots E, F and G, and have threatened, and are now threatening to break down the family fence of the homestead of your petitioners, and enter in and upon said Lots E, F and G.

VIII.

That the respondent, The City and County of Honolulu, has threatened, and is now threatening, to trespass upon the said Lots E, F and G, the property of the petitioners, and then and there fill in the said Lots E, F and G, to a grade considerably higher than the remaining portion of the homestead of your petitioners lying on the mauka side of said Lots E, F and G.

LX.

That if the respondent, The City and County of Honolulu, proceeds to carry out its threat and trespass upon the property of your petitioners, your petitioners will suffer irreparable injury in that the proposed fill which the respondent threatens to place upon said Lots E, F and G, will obstruct the natural flow of surface waters off [7] of the homestead of your petitioners and

would back the flood waters over and upon the homestead of your petitioners, damaging the property of your petitioners lying on the mauka side of said Lots E, F and G, and will kill and injure the plants and trees planted by your petitioners and the said Victoria Ward, and cared for and nurtured for many years. That the stoppage of the flow of surface waters, as aforesaid, will seriously affect the sanitary condition of the petitioners' homestead, and make unsanitary and unhealthful and uninhabitable the premises now occupied by your petitioners as their home.

X.

That your petitioners will suffer irreparable injury by the proposed and threatened action of the respondent, in that their homestead will be divided into two parts; that the security of their home will be threatened and that the remaining portion of their homestead situated makai of the said Lots E, F and G, will have to be abandoned and their homestead area curtailed.

XI.

That no compensation has been awarded or paid to your petitioners by the respondent, The City and County of Honolulu, for the said Lots E, F and G, and that the said respondent, The City and County of Honolulu, proposes to use said Lots E, F and G, and does now threaten to use the same for public purposes, to wit, for a public highway. [8]

XII.

That the respondent, The City and County of Honolulu through its agents and servants, has threatened and has trespassed upon, and is now threatening to continue to trespass upon the said Lots E, F and G, and that on, to wit, the 1st day of December, 1930, one Oliveira, whose full and true name your petitioners ask leave to insert at the hearings hereof, purporting to act as the agent of the respondent, The City and County of Honolulu, proceeded to instruct your petitioners to tear down a portion of the boundary fence surrounding your petitioners' homestead, and has informed your petitioners that if the request is not complied with that as the agent of the respondent, he would proceed to break down said fence and to enter upon said Lots E, F and G, and that on, to wit, the 2d day of December, 1930, L. M. Whitehouse, purporting to act as Chief Engineer of the respondent, The City and County of Honolulu, and on behalf of said respondent, threatened to enter upon and break down and demolish said structure, the property of the petitioners, upon the said Lots E, F and G, and grade and roll said Lots E, F and G, and that the said respondent has informed your petitioners that they will proceed and carry out said threat on the 8th day of December, 1930.

XIII.

That by reason of the acts complained of herein, [9] your petitioners have suffered and are now suffering and will continue to suffer irreparable injury unless restrained by this court.

XIV.

That your petitioners are without an adequate remedy at law.

XV.

That it is necessary that a temporary restraining order issue herein, restraining the respondent, its officers, agents and servants, from in any manner trespassing upon the said Lots E, F and G, and committing irreparable injury to the homestead of your petitioners.

WHEREFORE, petitioners pray:

1. That the process of this Court do issue as provided by law summoning said respondent to appear and answer this petition (answer under oath being hereby waived) and to stand to, perform and abide by such orders, directions and decrees as may be made and entered herein.

II. That a temporary restraining order issue restraining said respondent, its officers, agents and servants, from in any manner trespassing upon the said Lots E, F and G, and committing irreparable injury to the homestead of your petitioners.

III. That upon a hearing hereof, a permanent injunction issue out of this court restraining the said respondent, its officers, agents and servants, from in any [10] manner trespassing upon the said Lots E, F and G, and committing irreparable injury to the homestead of your petitioners.

IV. And for such other and further relief in the premises as may be just and equitable.

Dated at Honolulu, Hawaii, this 5th day of December, A. D. 1930.

HATTIE KULAMANU WARD,
LUCY KAIAKA WARD and
VICTORIA KATHLEEN WARD,
Petitioners.

By (S.) CHARLES B. DWIGHT,
Their Attorney.

Territory of Hawaii,
City and County of Honolulu,—ss.

Lucy Kaiaka Ward, being first sworn, on oath deposes and says:

That she is one of the petitioners above named; that she makes this verification for and on behalf of the petitioners; that she has read the foregoing petition, knows the contents thereof and that the *allegation* therein contained are true to the best of her knowledge and belief.

(S.) LUCY KAIKA WARD.

Subscribed and sworn to before me this 5th day of December, 1930.

[Seal] (S.) HENRY C. HAPAI,
Notary Public, First Judicial Circuit, Territory of Hawaii. [11]

No. ———. Reg. ———. Pg. ———.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

At Chambers.

HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD,

Petitioners,

vs.

THE CITY AND COUNTY OF HONOLULU, a Municipal Corporation,

Respondent.

CHAMBERS SUMMONS.

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy, or Any Police Officer in the Territory of Hawaii:

YOU ARE COMMANDED to summon The City and County of Honolulu, to appear ten days after service hereof, if it reside in the City and County of Honolulu, otherwise twenty days after service, before such Judge of the Circuit Court of the First Circuit as shall be sitting at Chambers in the court-room of said Judge, in the Judiciary Building in Honolulu, City and County of Honolulu, to answer the annexed petition of Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, and have you then there this writ with full return of your proceedings thereon.

WITNESS the Honorable Presiding Judge of the Circuit Court of the First Circuit, at Honolulu aforesaid, this 5th day of December, 1930.

[Seal] (S.) JOHN LEE KWAI,
Clerk.

SECTION 2394 REVISED LAWS 1925. The time within which an act is to be done * * * shall be computed by excluding the first day and including the last. If the last day be Sunday, or a legal holiday, it shall be excluded. [12]

Served the within chamber summons, petition, order allowing issuance of temporary restraining order, temporary restraining order, order of service and order to show cause on James F. Gilliland, Honolulu, City and County of Honolulu, T. H., this 5th day of Decembrr, 1930, by delivering to him a certified copy thereof and of the petition or complaint hereto annexed, and at the same time showing him the original.

Dated Honolulu, December 8th, 1930.

ANTONE MANUEL,
Deputy Sheriff, Police Officer,
Deputy High Sheriff, Territory of Hawaii.

[Title of Court and Cause.]

ORDER ALLOWING ISSUANCE OF TEMPORARY RESTRAINING ORDER.

Upon reading the verified petition herein filed and the prayer of the petitioners for a temporary restraining order,—

IT IS HEREBY ORDERED that a temporary restraining order issue forthwith restraining the above-named respondent, its officers, agents and servants, from in any manner trespassing upon the said Lots E, F and G of Land Court Application No. 67, and committing irreparable injury to the homestead of the petitioners.

Dated at Honolulu, T. H., this 5th day of December, A. D. 1930.

[Seal] (S.) A. E. STEADMAN. [Seal]
Judge of the Above-entitled Court.

Dec. 6, 1930.

Above order vacated by consent.

(S.) A. R. WHITMORE,
Clerk. [13]

[Title of Court and Cause.]

TEMPORARY RESTRAINING ORDER.

The Territory of Hawaii, to the City and County of Honolulu, a Municipal Corporation, Respondent.

Pursuant to the order allowing the issuance of a temporary restraining order heretofore entered herein, you and your officers, agents and servants, are hereby ordered, enjoined and restrained from in any manner trespassing upon the said Lots E, F and G, of Land Court Application No. 67, and committing irreparable injury to [14] the homestead of the petitioners.

This order and injunction shall be and remain in full force and effect until the further order of this court.

Dated at Honolulu, T. H., this 5th day of December, A. D. 1930.

[Seal] (S.) A. E. STEADMAN,
Judge, Circuit Court, First Judicial Circuit, Territory of Hawaii.

[Seal] Attest: (S.) JOHN LEE KWAI,
Clerk.

Dec. 6, 1930.

Above order vacated by consent.

(S.) A. R. WHITMORE,
Clerk. [15]

Filed at 9:15 o'clock A. M., Jan. 10, 1931.

Service of a copy of the above and foregoing answer is hereby acknowledged this 10th day of January, 1931.

(S.) CHARLES B. DWIGHT,
Attorney for Petitioners. [16]

[Title of Court and Cause—No. E.–3121.]

ANSWER.

Comes now the City and County of Honolulu, a municipal corporation, by L. P. Scott, Esq., Deputy City and County Attorney, and for answer to the petition of petitioners herein, alleges and avers as follows:

I.

That it admits the allegations contained in Paragraph I of the said petition.

II.

That it admits the allegations contained in Paragraph II of the said petition.

III.

That it denies the allegations contained in Paragraph III of said petition, but on the contrary alleges the true facts to be that prior to July 18, 1928, Victoria Ward [17] was the sole owner of Lots E, F and G of Land Court Application No. 670 in said paragraph mentioned; that Victoria Ward held the bare legal title to Lot E, subject to an offer dated January 20, 1902, and an acceptance thereof, constituting a binding agreement to deed the same to the Territory of Hawaii upon the completion by the Territory of certain conditions therein named, a copy of which offer is hereto attached, marked Exhibit "A," and made a part hereof; that said offer was accepted by the aforesaid Territory of Hawaii through its duly authorized Superintendent of Public Works by letter dated February 7, 1902, a copy of which said letter is attached hereto, marked Exhibit "B," and made a part hereof; that under the terms of said agreement the Territory of Hawaii and its successor in interest, the City and County of Honolulu, entered into and took possession of said Lot E, and constructed a road thereon and thereover, which said road ever since for a period of well over twenty (20) years has been a public highway of the City and County of Honolulu, known as Ward Avenue; that the City and County of Honolulu has completed and fulfilled all the terms of the above-mentioned agreement and now

awaits a conveyance of the said Lot E to it. It is further alleged that whatever interest the petitioners obtained by the conveyance to them by Victoria Ward of July 18, 1928, of the various properties therein described of which Lot E was one, was obtained subject to the agreement hereinabove set forth.

Respondent further alleges and avers that as to Lots F and G in the Paragraph III referred to, that prior to [18] July 18, 1928, Victoria Ward was the sole owner of said lots. That on March 19, 1928, a suit in eminent domain was instituted by the City and County of Honolulu against Victoria Ward, which said suit is numbered Law No. 11946 in the records and files of the Circuit Court of the First Judicial Circuit and which said records and files are incorporated in this answer by references and will be offered in evidence upon the hearing of this cause, to condemn the aforesaid Lots F and G for a public use, to wit, for the construction of the Kapiolani Boulevard. On July 26, 1928, Victoria Ward, through her attorneys Peters & O'Brien, filed her answer to the petition in said suit, admitting amongst other things, that she was the sole owner of the premises sought to be condemned; that it appears, however, that on July 18, 1928, and during the pendency of the said suit, Victoria Ward aforesaid, defendant and owner of said parcels of land, executed a deed conveying the said parcels together with other adjacent lands to her daughters, as joint tenants with her, reserving to herself the joint use and occupation of the said

land, that Transfer Certificate of Title No. 7250 was issued to the above-named grantees upon said deed of conveyance.

Respondent herein further alleges that said suit in eminent domain was tried in the First Circuit Court beginning October 1st, 1928, and continuing thereafter until a verdict was rendered condemning the said Lots F and G and fixing compensation therefor October 23, 1928; that Final Order of Condemnation was entered January 7, 1930, which said Final [19] Order was recorded in the office of the Registrar of Conveyances February 13, 1930, as Document No. 20,898, as required by Section 824, Revised Laws of Hawaii, 1925, vesting title to said Lots F and G in the City and County of Honolulu.

Respondent further alleges that on October 29, 1928, in and as a part of the proceedings in the aforesaid condemnation suit, an order was issued out of the Circuit Court of the First Judicial Circuit placing the City and County of Honolulu in possession of said Lots F and G pending appeal pursuant to the terms of Section 825, Revised Laws of Hawaii, 1925, together with full right to use the same for the purpose of constructing a public highway thereon, a copy of which said order is hereto attached, marked Exhibit "C," and made a part hereof, and that the City and County of Honolulu since that time has been and is now in possession of the said Lots F and G, and has been and is now constructing the aforesaid highway across said lots under the terms of said order.

Respondent further alleges that all of the mat-

ters and things in the petition alleged relative to the ownership of the aforesaid subject matter, Lots F and G, have been litigated before the Land Court of the Territory of Hawaii in an action, or cause, or petition, entitled "In the Matter of the Application of Victoria Ward, Application No. 670, etc., Application for Issuance of Certificate of Title upon Final Order of Condemnation," which said petition was brought by the City and County of Honolulu as petitioner, wherein an order to show cause was issued directing Victoria Ward and the present petitioners herein, Hattie Kulamanu Ward, Lucy [20] Kaiaka Ward and Victoria Kathleen Ward, to appear and show cause why the prayer of the petitioner should not be granted, and a Certificate of Title to said Lots F and G should not be issued to it. That the within petitioners appeared upon the hearing of said petition and entered their defense, but that upon a full hearing, the aforesaid Judge of the Land Court entered his decision and decree in favor of the petitioner, the City and County of Honolulu, and against the respondents, Victoria Ward, Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, upon all the matters and things above alleged relative to the same subject matter, Lots F and G, and directing that a Certificate of Title issue to the City and County of Honolulu for said Lots F and G, and that the aforesaid suit in the Land Court is now pending upon appeal before the Supreme Court of the Territory of Hawaii as Supreme Court Docket No. 1989, which record is herein incorpo-

rated by reference and will be produced and offered in evidence upon the hearing in this matter. Respondent further alleges that the decree of the Land Court above mentioned is *res adjudicata* as to all matters alleged in the petition herein relative to Lots F and G and constitutes a bar to any further proceedings herein relative thereto.

IV.

Respondent herein denies so much of Paragraph *L*V of said petition as alleges that Lots E, F and G of Land Court Application No. 670 are a part and parcel of the family home of the petitioners herein and Victoria Ward, but alleges [21] the true facts to be as alleged in Paragraph III hereinabove set forth. That as to the remaining allegations contained in Paragraph IV respondent neither admits nor denies the same but leaves petitioners to their proof thereof.

V.

Respondent denies that Lots E, F and G constitute the proposed right of way for the Kapiolani Boulevard, but on the contrary alleges the true facts to be (1) that Lot E constitutes a public highway of the City and County of Honolulu, and has been such for upwards of twenty (20) years; (2) that Lot F is owned by and in the possession of the City and County of Honolulu and constitutes a portion of the completed Kapiolani Boulevard at the point where it enters Ward Avenue aforesaid, and has been and now is in use as a public highway; (3) that Lot G is owned by and in the possession of the City and County of Honolulu as set out

in Paragraph III herein, and is now in the process of construction as a part of the extension of Kapiolani Boulevard from Ward Avenue to Sheridan Street.

VI.

That respondent denies so much of Paragraph VI as alleges that Lots E, F and G constitute a strip running over or across the homestead of petitioners but admits that they are adjacent to each other and divide the homestead of petitioners into two parts.

VII.

Respondent denies the allegations contained in Paragraph VII of said petition. [22]

VIII.

Respondent denies the allegations contained in Paragraph VIII of said petition.

IX.

Respondent denies specifically and categorically all of the matters and things alleged in Paragraph IX of the petition herein, and for answer thereto and as a special defense herein alleges that all the matters and things in said Paragraph IX alleged, and more particularly the allegation that the "proposed fill which the Respondent threatens to place upon said Lots E, F and G, will obstruct the natural flow of surface waters off of the homestead of your petitioners and would back the flood waters over and upon the homestead of your petitioners, damaging the property of your petitioners lying on the mauka side of said Lots E, F and G, and will in-

jure the plants and trees planted by your petitioners and the said Victoria Ward, and cared for and nurtured for many years. That the stoppage of the flow of surface waters, as aforesaid will seriously affect the sanitary condition of the petitioners' homestead, and make unsanitary and unhealthful and uninhabitable the premises now occupied by your Petitioners as their home," have been adjudicated in the condemnation suit above-mentioned entitled "The City and County of Honolulu, a municipal corporation, vs. Victoria Ward, Law No. 11946" in the Circuit Court of the First Judicial Circuit, the judgment wherein was affirmed by the Supreme Court of the Territory of Hawaii as appears in 31 Haw. 184, which said judgment is binding upon the petitioners herein as grantees *pendente lite* and [23] and as privies of Victoria Ward, defendant in the aforesaid suit. Respondent further alleges that no injury, irreparable or otherwise, will result to petitioners' property as a result of the construction of the Kapiolani Boulevard, the im*r*povement complained of.

X.

Respondent denies specifically and categorically the allegations contained in Paragraph X of said petition.

XI.

Respondent denies the allegations contained in Paragraph XI of said petition, and more particularly as to that portion of said paragraph which alleges that "the City and County of Honolulu proposes to use said Lots E, F and G, and does now

threaten to use the same for public purposes, to wit, for a public highway," but on the contrary respondent avers the true facts to be that Lot E is now and has been for upward of twenty (20) years a public highway; that Lot F is now owned by and in the possession of the City and County of Honolulu and for upwards of one (1) year has been a public highway; and that Lot G is owned by and in the possession of the City and County of Honolulu and is in the process of construction as a public highway.

Further, and as a special defense to the allegation "that no compensation has been paid to your petitioners by the respondent * * * for the said Lots E, F and G," respondent avers that this question has been settled and determined in the Land Court of the Territory of Hawaii in the petition brought by the City and County of [24] Honolulu entitled "In the Matter of the Application of Victoria Ward to Register and Confirm Her Title, etc., Application No. 670, Application for Issuance of Certificate of Title upon Final Order of Condemnation," the record of which said cause will be produced by respondent and offered in evidence at the hearing of this matter, wherein the same controversy involving the same parties, and the same subject matter, was heard and determined by the aforesaid court, which said cause is now pending on appeal before the Supreme Court of the Territory of Hawaii, being Supreme Court Docket No. 1989, and which record is more particularly referred to in Paragraph III of this answers and the de-

cree entered in said cause is a bar to any further proceedings in this court between the parties hereto upon the question of compensation above referred to.

XII.

Respondent denies specifically and categorically all the allegations contained in Paragraph XII of said petition and alleges the true facts to be as follows:

That on or about December 1, 1930, one John C. Oliveira, an employee of the City and County Engineers' Department, was directed to orally notify Mrs. Victoria Ward and the petitioners herein to remove the fence at present extending along the Waikiki side of Ward Avenue where it crossed the projected line of Kapiolani Boulevard, which said fence the City and County of Honolulu had permitted to remain in the position it then and now occupies, as the [25] City was desirous of opening up free access to Lot G, to which it has title and of which it is in possession, and proceeding with the further construction of Kapiolani Boulevard. That Mrs. Ward and her privies in interest, the petitioners herein, have been duly compensated in full for the replacement of said fence, and have received from the City and County of Honolulu the money therefor. That subsequently, on December 2, 1930, L. M. Whitehouse, then City and County Engineer, addressed a written communication to Mrs. Victoria Ward and petitioners herein, confirming the matters orally communicated by Oliveira. Respondent further alleges, however, that respond-

ents herein have contumaciously and defiantly refused the said request of the aforesaid City and County Engineer, and are here endeavoring by this suit to restrain the City and County of Honolulu from the proper and necessary use of its own property in the furtherance of a great public project.

WHEREFORE, your respondent prays that the order to show cause be quashed, that the prayer for an injunction be denied, and that this bill be dismissed with costs.

Dated: Honolulu, T. H., this 10th day of January, A. D. 1931.

THE CITY AND COUNTY OF HONOLULU,
Respondent.
By L. P. SCOTT,
Deputy City and County Attorney. [26]

Territory of Hawaii,
City and County of Honolulu,—ss.

L. P. Scott, being first duly sworn on oath, deposes and says: That he is the duly appointed, qualified and acting deputy city and county attorney of the City and County of Honolulu; that he has been duly and regularly authorized to prepare, subscribe to and file this answer for and on behalf of the City and County of Honolulu by the Board of Supervisors of the City and County of Honolulu and by James F. Gilliland, the duly elected, qualified and acting city and county attorney of the said City and County of Honolulu; that he has read the foregoing answer, knows the contents thereof and

that the facts therein stated are true to the best of his information, knowledge and belief.

(S.) L. P. SCOTT.

Subscribed and sworn to before me this 10th day of January, A. D. 1931.

(S.) EMELIA L. KRAMER,

Notary Public, First Judicial Circuit, Territory of Hawaii. [27]

EXHIBIT "A."

Honolulu, January 29th, 1902.

James H. Boyd, Esq.,
Superintendent of Public Works.
Honolulu.

Dear Sir:

Your favor of the 11th inst., addressed to Mrs. V. Ward, is to hand, and the contents have my careful attention.

In reply thereto I have to state as follows:—

Reverting to the conversation which I had with you some days since, in which this matter was fully discussed, I now beg to put in writing the final proposition which I agreed to submit and to which I ask your usual careful consideration.

On behalf of Mrs. Ward I agree to deed to the Government in fee the following lands for the construction of a proper macadamized road;

1. Starting at a point 125 feet from the Ewa boundry of the premises known as the "Old Plantation," a strip 56 feet wide running the entire length of the aforementioned

premises to the street called "Waimanu," as shown on the tracing hereunto attached.

2. Commencing near the junction of "Laniwai" street and the mauka boundary of Kukuluaeo, a strip 56 feet wide running through said Kukuluaeo to Ala Moana; also shown on tracing above referred to. [28]

In consideration of the above, the Government to properly fence the property bounded by the proposed street, curb the sidewalk and fill to street grade such portion of the strip of the "Old Plantation" premises on the Ewa side of the proposed road as is at present below said grade, and as indicated on map heretofore mentioned.

The Government further to abandon the present storm ditch from King Street, held by mutual agreement, replacing same under the sidewalk of the proposed street with a properly covered cement drain.

Awaiting your consideration of this matter, I remain,

Yours faithfully,

(S.) E. H. WODEHOUSE,
Attorney for Victoria Ward. [29]

EXHIBIT "B."

February 7, 1902.

E. H. Wodehouse, Esq.,
Attorney for Victoria Ward,
Honolulu.

Sir:

I have to acknowledge receipt of your favor of the

11th inst., in regard to the application made by the Territory for a roadway and ditch line through the property of Mrs. Victoria Ward on King Street, to the beach, and to say in reply that I cordially agree with you in that had the Board of Health declined to grant their permission for the opening up or selling of lots in Kewalo until the swamp lands had been reclaimed the nuisance would not have occurred.

Your final proposition submitted, namely, on behalf of Mrs. Ward you agreed to deed to the Government in fee the following lands for the construction of a proper macadamized road:

1. Starting at a point 125 feet from the Ewa boundary of the premises known as the "Old Plantation," a strip 56 feet wide, running the entire length of the aforementioned premises to the Street called "Waimanu," as shown on the tracings hereto attached.
2. Commencing near the junction of "Laniwai" street and the mauka boundary at Kukuluaeo, a strip 56 feet wide running through said Kukuluaeo to Ala Moana; also shown [30] on tracing above referred to.

In consideration of the above, the Government to properly fence the property bounded by the proposed street, curb the sidewalk and fill to street grade such portion of the strip of the "Old Plantation" premises on the Ewa side of the proposed road, as is at present below said grade, and as indicated on map heretofore mentioned.

The Government further to abandon the present storm ditch on Queen Street, held by mutual agreement, replacing same under the sidewalk of the proposed street with a properly covered cement drain.

In reply I have to state that in accepting this proposition I am directed to express to you a hearty appreciation of the Territory of Hawaii for this noble concession on your part, by which means you enable this Department to undertake the work of relieving the District of Kewalo and vicinity from its present insanitary condition.

The deeds of transfer for the above property for the purpose stated in your proposition will be prepared by this Department and submitted to you for approval, the same to be executed upon the fulfillment by the Government of the conditions above above enumerated.

Very respectfully,
(S.) JAS. H. BOYD,
Superintendent of Public Works. [31]

EXHIBIT "C."

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.
January Term, 1928.

PROCEEDINGS IN EMINENT DOMAIN.

LAW No. 11,964.

THE CITY AND COUNTY OF HONOLULU,
a Municipal Corporation,
Plaintiff,

vs.

VICTORIA WARD,
Defendant.

ORDER PUTTING PLAINTIFF INTO POSSESSION OF LANDS IN THE ABOVE-ENTITLED CAUSE SOUGHT TO BE CONDEMNED.

The Court having read the foregoing Petition for an Order Putting Plaintiff into Possession of Lands in the above-entitled cause sought to be condemned, together with certified copy of judgment herein, thereto attached, and affidavit of Henry Smith, Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, thereto attached and based upon all of the files, records and proceedings in the above-entitled cause and pursuant to the power and authority vested in the Court by Section 825, Revised Laws of Hawaii, 1925; [32]

IT IS HEREBY ORDERED that the City and County of Honolulu, a municipal corporation,

plaintiff in the above-entitled cause, be and hereby is vested with the right to peaceable possession of the lands in this proceedings sought to be condemned, herein generally designated as Parcel 19, and Parcel 21, more particularly described as follows, to wit:

PARCEL 19.

BEING Lot F of Land Court Application No. 670, situated on the northwest side of Ward Avenue, at Kewalo, Honolulu, Oahu, T. H.

BEGINNING at the south corner of this lot, being also the East corner of Lot C of Land Court Application No. 670 and the proposed west corner of Ward Avenue and Kapiolani Boulevard, the coordinates of said point of beginning referred to a Government Survey Street Monument near the east corner of King and Victoria Streets being 949.18 feet south and 1400.06 feet west; said street monument is set on an offset of 10.0 feet to the northeast side of King Street and on an offset of 10.00 feet to the southeast side of Victoria Street and the coordinates of said Street Monument referred to Government Survey Triangulation Station "Punchbowl" being 3876.59 feet south and 139.29 feet east, and running by true azimuths: [33]

1. 143° 50′ 150.62 feet along Lot C of Land Court Application No. 670 along the proposed southwest side of Kapiolani Boulevard;
2. 212° 07′ 107.64 feet along fence to the proposed northeast side of Kapiolani Boulevard;

3. 323° 50′ 160.58 feet along Lot B of Land Court Application No. 670 along the proposed northeast side of Kapiolani Boulevard;
4. 37° 12′ 104.37 feet along the northwest side of Ward Avenue to the point of beginning and Containing an area of 15,560 square feet.

PARCEL 21.

BEING Lot G of Land Court Application No. 670. Situated on the southeast side of Ward Avenue, Honolulu, Oahu, T. H.

BEGINNING at the west corner of this lot, being also the north corner of Lot D of Land Court Application No. 670, on the southeast side of Ward Avenue, the coordinates of said point of beginning referred to a Government Survey Street Monument near the east corner of King and Victoria [34] Streets being 996.37 feet south and 1365.57 feet west: said street monument is set on an offset of 10.0 feet to the northeast side of King Street and on an offset of 10.0 feet to the southeast side of Victoria Street, and the coordinates of said Street Monument referred to Government Survey Triangulation Station "Punchbowl" being 3875.49 feet south and 139.29 feet east, and running by true azimuths:

1. 217° 12′ 104.37 feet along the southeast side of Ward Avenue to the proposed northeast side of Kapiolani Boulevard;
2. 323° 50′ 495.43 feet along Lot A of Land Court Application No. 670 along the proposed northeast side of Kapiolani Boulevard;

3. Thence on a curve to the left having a radius of 1608.0 feet along Lot A of Land Court Application No. 670 along the proposed northeast side of Kapiolani Boulevard, the direct azimuth and distance being 318° 08′ 39″ 318.81 feet;
4. 29° 45′ 67.30 feet along the McKinley High School lot; [35]
5. 29° 45′ 35.05 feet along the remainder of L. C. A. 3169, Apana 1, to Koalele to the proposed southeast side of Kapiolani Boulevard;
6. Thence on a curve to the right having a radius of 1708.0 feet along Lot D of Land Court Application No. 670, along the proposed southwest side of Kapiolani Boulevard, the direct azimuth and distance being 137° 45′ 59″ 361.02 feet;
7. 143° 50′ 465.56 feet along Lot D of Land Court Application No. 670, along the proposed southwest side of Kapiolani Boulevard to the point of beginning and containing an area of 82,118 square feet, together with full right to use the same for the purpose of constructing a public highway thereon during the pendency of and until the final conclusion of the above entitled cause. [36]

Dated: Honolulu, T. H., October 29th, 1928.

(S.) E. K. MASSEE,

Third Judge, Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Service of a copy of the foregoing order putting plaintiff into possession of lands in the above-en-

titled cause sought to be condemned, is hereby admitted and accepted this 1st day of November, 1928.

(S.) PETERS & O'BRIEN,
Attorneys for Defendant. [37]

Filed at 10:31 o'clock A. M., Jan. 13, 1931.

Service is hereby accepted this 13th day of January, 1931.

(S.) L. P. SCOTT,
Deputy City and County Attorney for Respondent. [38]

[Title of Court and Cause—No. E.-3221.]

REPLICATION.

Now comes Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, petitioners above named, and by way of replication to the answer of the City and County of Honolulu, Respondent above named, allege as follows:

I.

Replying to Paragraph III of said answer, petitioners admit that prior to July 18, 1928, Victoria Ward was the sole owner of Lots E, F and G of Land Court Application No. 670, and deny that Victoria Ward held the bare legal title to Lot E. Further replying petitioners aver that on January 20th, 1902, E. H. Wodehouse, attorney for Victoria Ward, made an offer to convey Lot E to the Territory of Hawaii in consideration of certain covenants on the part of the Territory of Hawaii

[39] to be fully observed and performed. The petitioners admit that Exhibit "A" and Exhibit "B" attached to the answer of the respondent, is a copy of the offer and acceptance referred to by the respondent.

The petitioners deny that the City and County of Honolulu entered into and took possession of said Lot E and constructed a road thereon and thereover, and deny that the said Lot E is a public highway and has been used as such by the City and County of Honolulu for more than twenty (20) years, but aver that the use by the Territory of Hawaii, or by the City and County of Honolulu, was permissive, and petitioners further aver that in that certain application before the Land Court of the Territory of Hawaii entitled "In the Matter of the Application of Victoria Ward," the Territory of Hawaii filed its answer and claim, claiming Lot E as a public highway; that the claim of the Territory of Hawaii was rejected and the Land Court confirmed the title of Victoria Ward in and to the said Lot E; that the Territory of Hawaii made no claim in said Land Court Application under the terms of the alleged agreement of 1902, and the City and County of Honolulu is not estopped from in any manner making a claim to said highway pursuant to said agreement of 1902.

Further replying to said Paragraph, petitioners admit that Victoria Ward, prior to July 18th, 1928, was the sole owner of Lots F and G. They further admit that on March 19th, 1928, a suit in eminent domain was instituted [40] by the City and

County of Honolulu against Victoria Ward to condemn the said Lots F and G for a public highway. Petitioners further admit that on July 20th, 1928, Victoria Ward filed her answer, through her attorneys of record, to the petition admitting ownership of the premises, but aver that prior thereto and on, to wit, July 18th, 1928, the said Victoria Ward, by deed, conveyed said Lots F and G to the petitioners herein as joint tenants, subject to a life estate in the said Victoria Ward; that Transfer Certificate of Title No. 7250 was thereupon issued to the above-named petitioners.

Petitioners further aver that on July 20th, 1928, they were the owners in fee simple of the said Lots F and G, subject to a life estate in the said Victoria Ward.

Petitioners admit that on October 1st, 1928, the trial of the eminent domain suit above referred to, was commenced and that thereafter on the 23d day of October, 1928, a verdict was entered, and that thereafter on January 7th, 1930, a final order of condemnation was entered pursuant to Section 824 of the Revised Laws of Hawaii, 1925, but petitioners aver that they were not made parties—defendant in the eminent domain proceedings; that no summons as required by law was served upon them; that no compensation was offered or given to these petitioners by the City and County of Honolulu, or by anyone on its behalf. That no evidence was adduced at the hearing in the condemnation suit as to the true ownership of Lots F and G; and that [41] the said Victoria Ward was not awarded just compensation as required by the Constitution of the

United States and was deprived of property without just compensation.

Petitioners neither deny nor admit that on October 29th, 1928, an order was issued out of the Circuit Court granting to the respondent the right to use Lots F and G, but aver that they were not bound by such order, not being parties to the said eminent domain proceeding and not having been compensated for the taking of their property.

Petitioners admit that the ownership of Lots F and G was litigated before the Land Court in the "Matter of the Application of Victoria Ward" upon *a* order to show cause based upon a petition of the City and County of Honolulu, but aver that the Land Court was without jurisdiction to issue the said order to show cause, or to entertain the petition of the City and County of Honolulu, and further aver that the Court was without jurisdiction to enter its order.

Petitioners further aver that the matter has not been disposed of by any court of competent jurisdiction, and that the matter is pending before the Supreme Court of the Territory of Hawaii.

Petitioners further aver that the proceedings before the Land Court of the Territory of Hawaii, last referred to herein, deprived them of their private property without just compensation as guaranteed by the Constitution of the United States.

Replying to Paragraph V of the answer petitioners deny that Lot E is a public highway of the City and County of [42] Honolulu, or that Lot F is owned by and in the possession of the City

and County of Honolulu, or that Lot G is owned by and in the possession of the City and County of Honolulu.

Replying to Paragraph VI, petitioners reallege that Lots E, F and G constitute a strip over and across the homestead of petitioners.

Replying to Paragraph IX of said answer, petitioners deny that they are bound by the judgment in the case of the "City and County of Honolulu vs. Victoria Ward" as set forth in 31 Hawaii, 184, but aver that the decision of the Supreme Court of the Territory of Hawaii in 31 Hawaii, 184, conclusively and affirmatively shows that Victoria Ward was deprived of her private property without just compensation as required by the Constitution of the United States.

Replying to Paragraph XI of said answer, petitioners deny that Lot E is, or ever was, a public highway, or that Lot F is owned by and in possession of the City and County of Honolulu, or that Lot G is owned by and in possession of the City and County of Honolulu. And further replying to Paragraph XI, petitioners aver that the Land Court was without jurisdiction to entertain the petition, or to issue the order or decree referred to in said paragraph.

Answering Paragraph XII of said answer, petitioners admit that on December 1st, 1930, John C. Oliveira ordered and directed the petitioners to remove the fence along the Waikiki side of Ward Avenue, or Lot E, where the same crossed the projected line of Kapiolani Boulevard, and deny that these petitioners have been compensated for

said fence. [43] Petitioners further admit that L. M. Whitehouse, City and County Engineer, demanded that the fence be removed, and these petitioners ask leave to insert at the hearing hereof a copy of said letter. Petitioners further admit that they refused the request of the City and County Engineer.

Dated at Honolulu, T. H., this 12th day of January, 1931.

HATTIE KULAMANU WARD,
LUCY KAIAKA WARD and
VICTORIA KATHLEEN WARD,
Petitioners.

By (S.) CHARLES B. DWIGHT,
Their Attorney.

Territory of Hawaii,
City and County of Honolulu,—ss.

Charles B. Dwight, being first duly sworn, on oath deposes and says:

That he is the attorney for the above-named petitioners and makes this verification for and on their behalf; that he has read the foregoing replication, knows the contents thereof and that the matters and things therein set forth are true to the best of his knowledge and belief.

(S.) CHARLES B. DWIGHT.

Subscribed and sworn to before me this 12th day of January, A. D. 1931.

(S.) SUZANNE G. FISKE,
Notary Public, First Judicial Circuit, Territory of Hawaii. [44]

Filed at 12:10 o'clock P. M., Feb. 4, 1931. [45]

[Title of Court and Cause—No. E.–3121.]

DECISION.

The petitioners above named bring their bill for injunction against the City and County. They allege in the petition that they are owners in fee simple of certain lots designated Lots E, F and G of Land Court Application No. 670, and that the City and County is threatening to trespass on these lots, break down the family fence, fill said lots to a grade higher than remaining portions of petitioners' land and thereby backing up surface drainage upon the remaining property of petitioners, rendering that property unsanitary and killing and injuring trees and plants. [46]

The answer of the respondent alleges that the City and County has been using Lot E for a public highway known as Ward Avenue for more than twenty (20) years under dedication and consent from Victoria Ward, the predecessor in title to the petitioners. The answer further alleges that the City and County began a suit in eminent domain on March 19, 1928, against Victoria Ward, who on that date was the sole owner of Lots F and G, and duly served summons upon Victoria Ward, carried said proceedings in eminent domain to judgment and paid the judgment to Victoria Ward, getting a final order of condemnation against Victoria Ward; that under said final order and under an order of possession the City and County entered upon and com-

pleted a highway over Lot F and entered upon and filled Lot G to the proposed grade; and that all matters of compensation for the strips taken, including elements of damage to the remaining property were litigated in said eminent domain proceedings for which payment was made. The respondent further denies any irreparable or other damage.

The case being at issue a hearing was had. At said hearing the evidence showed that for more than twenty (20) years the City and County had been using, repairing and improving Lot E as Ward Avenue"; that, altho petitioners had the record title in fee simple to Lot E, there had never been any interference with the use of Lot E as a part of the public highway system until this proceeding was filed. There was no evidence of any new or other entry upon Lot E (Ward Avenue) than had been [47] so continuously maintained for more than twenty (20) years without interference. There was also no evidence that the use of Ward Avenue (Lot E) had any reference to the present elements of damage complained of by petitioners.

The evidence further showed that after the City and County had properly commenced the proceeding in eminent domain in March 1928 involving Lots F and G, the then owner, Victoria Ward, *pendente lite* in July, 1928, executed a conveyance of gift to the three petitioners in this proceeding, granting a joint tenancy with herself in the fee to the premises known as the Homestead and including the area known as Lots E, F and G, to the

petitioners in this suit. The petitioners, at the time of this deed of gift, knew that their mother, Victoria Ward, was the party defendant in the condemnation proceedings; were acquainted with the subsequent proceedings and hearings, verdict and judgment against Victoria Ward; and at no time sought to intervene either to protect what interest they may have or to secure any part of the payment for the taking of the Lots F and G in question.

Also under the evidence adduced at the hearing the elements of claimed damage, other than removing a strip of fence separating Lot G from Ward Avenue, involve solely the question of whether or not the fill already on Lot G obstructed surface waters so as to result in intermittent flowage upon the remaining portions of petitioners' lands and thereby creating unsanitary conditions and affecting some of the trees and plants. [48]

In other words the sole question relied by the pleadings and the evidence so far as Lot E (Ward Avenue) is concerned is one of title and right of continued user of the same character that has been allowed without interference for more than twenty (20) years. This question of disputed title and right of continued user subject to the fee presents no equity supporting the purposes of the Bill. Under guise of injunction proceeding it is sought to accomplish an ejectment.

The evidence as to Lot F also shows that this parcel has no connection with the claim of irreparable damage forming the background of the purposes of

the bill. The evidence shows in that connection that a completed highway has been constructed by the City and County under claim of title derived from eminent domain proceedings. The inclusion of Lot F in this proceeding is in no way connected up with the claim of irreparable damage affecting surface waters or destroyed trees, but solely involves the question as to whether or not petitioners' land *have* heretofore been properly condemned. Whether or not petitioners were or are entitled to any part of the compensation ordered in that proceeding is a matter that either should have been litigated therein or pressed now against the grantor of petitioners' title.

As to Lot G the evidence shows also that the City had filled said Lot to the approximate proposed grade in connection with the contemplated improvement forming the background of the eminent domain proceedings against Victoria Ward. [49] Assuming that the petitioners are right that this fill to grade does back up surface flow at intermittent times so as to destroy some of the trees formerly grown upon the lower homestead, such result would be the inevitable consequence of changing conditions. It would be the kind of damage referred to in Section 821, Revised Laws of Hawaii 1925, being ". . . . damages which will accrue to the portion not sought to be condemned by reason of . . . . the construction of the improvements in the manner proposed by the plaintiff . . . ." In that respect the damages complained of, if petitioners are entitled to compensation, are the kind of damages assessable and recoverable in an action at

law, which should either have been litigated by intervention in the eminent domain proceeding or pressed against petitioners' grantor.

In other words under the evidence and pleadings the Court is unable to find any equity in the bill supporting injunctive relief as distinct from adequate remedies at law. Especially is this true in relation to the allegation and evidence affecting the petitioners in connection with Lots E and F. If by some stretch of the imagination, the use by the city of Lot G could be construed as creating a kind of damage that might have been considered in this kind of proceeding, the record shows a complete bar against petitioners.

The city acquired its title to Lots F and G under an eminent domain proceeding properly served upon Victoria Ward while she was the sole owner and the only proper defendant. The subsequent deed of gift to the present petitioners [50] in this suit created no more than a right in these petitioners to intervene if they so desired to secure an adjustment between themselves and Victoria Ward in the compensation thereafter found to be due and owing.

Even if the petitioners had been *bona fide* purchasers for value *pendente lite* they would be bound by the judgment against the prior grantor with whom they were in privity of interest. Drinkhouse vs. Spring Valley Waterworks, 87 Cal. 253, 25 Pacific, 420; City of Chicago vs. Messler et al., 38 Federal, 302; 2 Lewis, Eminent Domain (Third ed.), section 537, page 965; Trogden vs. Winoua, 22 Minn. 198; Board of Education vs. Van Der Veen,

169 Mich. 470, 135 N. W. 241; 20 C. J. 925, also 1065, 1067.

Indeed, the principle is concisely stated in a case cited on behalf of petitioners.

> "In a condemnation proceeding the rights of the parties are fixed at the time the petition is filed." (A conveyance *pendente lite* would only affect the question as to whom compensation should be paid.) Dept. of Public Works vs. Engel, 146 N. E. 521, 522.

For the foregoing reasons the bill herein will be dismissed for want of equity.

Dated at Honolulu, Hawaii, this 4 day of February, 1931.

(S.) ALBERT M. CRISTY. (Seal)
Second Judge, 1st Judicial Circuit, Territory of Hawaii. [51]

$17.00—46/67.

Filed at 9:50 o'clock A. M., Feb. 6, 1931. [52]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

Bill of Injunction.

HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLEEN WARD,
Petitioners,

vs.

THE CITY AND COUNTY OF HONOLULU, a Municipal Corporation,
Respondent.

DECREE.

This cause having come on for hearing before the Honorable A. M. Cristy, Judge of the above-entitled court, sitting at Chambers, in Equity, on Tuesday the 27th day of January, A. D. 1931, on the bill or petition and order to show cause of petitioners, and the answer and return of respondent, and the replication of petitioners thereto, Charles B. Dwight, Esq., appearing for petitioners, and L. P. Scott, Esq., Deputy City and County Attorney, appearing for respondent, and the Court having considered all the evidence adduced upon said hearing and having heard argument of [53] counsel and having considered the petition or bill and order to show cause and the answer and return and replication thereto, and all the other records and files and the evidence adduced herein, and being advised in the premises, and the Court having found all the allegations of the answer to be true and that the petitioners are not entitled to the relief prayed for in the prayer of their petition, for the reason that the bill or petition shows a want of equity in the premises, and having found that the prayer of the answer that the bill or petition be dismissed, should be granted,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the prayer of the answer herein, be granted, and that the order to show cause be quashed; that the prayer of the bill for an injunction be denied; that all restraining orders or agreements hereinbefore entered into, be set aside,

and the bill for injunction be dismissed with costs against petitioners.

Dated at Honolulu, T. H., this 5 day of February, A. D. 1931.

(S.) A. M. CRISTY, (Seal)
Judge of the Above-entitled Court.

Approved as to form.

(S.) CHARLES B. DWIGHT,
Attorney for Petitioners. [54]

[Title of Cause—No. E.-3121]

At Chambers—11:00 o'clock A. M., Saturday, December 6, 1930.

Present: Hon. A. E. STEADMAN, First Judge, Presiding.
A. R. WHITMORE, Clerk.
J. L. HORNER, Reporter.
Counsel:
CHAS. B. DWIGHT, Esq., for Petitioners.
L. P. SCOTT, Esq., Deputy C. & C. Attorney, for Respondents.

MINUTES OF COURT—DECEMBER 6, 1930—ORDER ALLOWING ISSUANCE OF TEMPORARY RESTRAINING ORDER.

By consent of respective counsel the above two orders were this day by the Court vacated.

By order of the Court:
A. R. WHITMORE,
Clerk. [55]

At Chambers—10:00 o'clock A. M., Monday, December 15, 1930.

Present: Hon. A. E. STEADMAN, First Judge, Presiding.
A. R. WHITMORE, Clerk.
Respondent's Counsel:
CHAS. B. DWIGHT, Esq., for Petitioners.
L. P. SCOTT, Esq., Deputy C. & C. Attorney, for Respondent.

MINUTES OF COURT—DECEMBER 15, 1930—ORDER OVERRULING DEMURRER.

After argument by counsel the Court overruled respondent's demurrer, and respondent was given ten (10) days within which to answer or otherwise plead. Counsel for respondent noted his exception to the Court's ruling.

By order of the Court:
A. R. WHITMORE,
Clerk. [56]

Tuesday, January 20, 1931. At Chambers—9:00 o'clock A. M.

Present: Hon. A. M. CRISTY, Second Judge, Presiding.
L. R. HOLT, Clerk.
H. R. JORDAN, Reporter.

[Title of Cause—No. E-3121.]

MINUTES OF COURT—JANUARY 20, 1931—MOTION TO STRIKE REPLICATION.

Counsel: CHARLES B. DWIGHT, Esq., for Petitioners.
LESLIE P. SCOTT, Esq., for Respondent.

Counsel for respondent argued on the merits of his motion to strike the replication filed by counsel for petitioners argued.

The Court, after listening to the argument of counsel, granted the motion to strike over objection of counsel for petitioners. The case was set for Tuesday, January 27, 1931, at 9:00 A. M. for hearing.

By the Court:
(S.) L. R. HOLT,
Clerk. [57]

At Chambers—9:00 o'clock A. M. Tuesday, January 27, 1931.

Present: The COURT.
H. R. JORDAN, Reporter.
Counsel: Same.

MINUTES OF COURT—JANUARY 27, 1931—HEARING.

Counsel being ready to proceed with the hearing on the bill for injunction, counsel for petitioners moved to amend Paragraph 3 of the petition by striking out the numericals "#67" on line 4 and in-

serting in lieu thereof the numericals "#670" and also moved to add after the figures 670 the following insert "subject to a life estate in Victoria Ward." The amendments were granted by the Court, entered and initialed in the petition.

Counsel for respondent made a statement to the Court.

Counsel for petitioners acquainted the Court with the facts of the case and called as a witness (1) Abraham V. Akana, who, upon being duly sworn, testified.

No cross-examination.

Counsel for petitioners offered in evidence, A map of Land Court Application #670, which was received by the Court without any further numerical identification.

At 9:25 A. M. counsel for petitioners called as a witness (2) Victoria K. Ward, who, upon being duly sworn, testified.

Counsel for petitioners offered in evidence [58] Owner's Transfer Certificate of Title #7250, issued out of the Land Court of the Territory of Hawaii, and was received by the Court without any further markings.

At 9:52 A. M. cross-examination.

At 10:00 A. M. redirect examination.

At 10:02 A. M. recross-examination.

At 10.10 A. M. the Court took a recess.

At 10:20 A. M. the Court reconvened whereupon counsel for petitioners called as a witness (3) Lucy K. Ward, who, upon being sworn, testified.

At 10:24 A. M. cross-examination.

Counsel for petitioners offered in evidence, Proceedings in Land Court Application #670, and by order of the Court was received and made a part of this record.

Counsel for respondent offered the following documents in evidence,—

> The entire record in Law No. 11946, being the case of the City and County of Honolulu vs. Victoria Ward in Eminent Domain Proceedings: Certified Copy #3114—Judgment and Final Order of Condemnation in L.–#11946; certified to by A. A. Dunn, Acting Commissioner of Public Lands—(Exhibit "I")

and by order of the Court was received and made a part of the record. [59]

At 10:35 A. M. counsel for respondent called as a witness (4) John H. Wilson, who, upon being duly sworn, testified.

At 10:41 A. M. cross-examination.

At 10:30 A. M. redirect examination.

At 10:54 A. M. recross-examination.

At 10:55 A. M. counsel for respondent called as a witness (5) Louis M. Whitehouse, who upon being duly sworn testified.

At 11:20 A. M. cross-examination.

At 11:30 A. M. redirect examination.

At 11:35 A. M. recross-examination.

At 11:40 A. M. counsel for respondent called as a witness (6) Daniel F. Balch, who, upon being duly sworn testified.

At 12:01 P. M. the Court took a recess.

At 1:45 P. M. the Court reconvened whereupon

Mr. Balch resumed the witness-stand on further direct examination.

At 1:46 P. M. cross-examination.

At 2:00 P. M. redirect examination.

At 2:05 P. M. counsel for respondent rested.

At 2:06 P. M. counsel for petitioners recalled Miss Lucy K. Ward in rebuttal.

At 2:20 P. M. cross-examination.

At 2:40 P. M. counsel for petitioners rested.

At 2:41 P. M. counsel for petitioners delivered his opening argument to the Court. [60]

At 3:55 P. M. the Court suggested that counsel supply him with a memorandum of authorities in lieu of further argument. This suggestion being agreeable to counsel, the Court continued the matter until said briefs are submitted.

By the Court:

(S.) L. R. HOLT,
Clerk.

At Chambers—10:00 o'clock A. M., Wednesday, February 4, 1931.

MINUTES OF COURT—FEBRUARY 4, 1931—DECISION.

On the above day and hour, the Court rendered a written decision in favor of the respondent and against the petitioners and dismissed the petition for "want of Equity."

By the Court:

(S.) L. R. HOLT,
Clerk. [61]

Filed February 27, 1931, at 10:08 o'clock A. M.
[62]

In the Supreme Court of the Territory of Hawaii.
October Term, 1930.

No. 2002.

HATTIE KULAMANU WARD, LUCY KAIAKA WARD and VICTORIA KATHLENE WARD,

vs.

THE CITY AND COUNTY OF HONOLULU, a Municipal Corporation.

Appeal from Circuit Judge First Circuit.

Hon. A. M. CRISTY, Judge.
Argued February 24, 1931.
Decided February 27, 1931.

PERRY, C. J., BANKS and PARSONS, JJ.

Equity—Jurisdiction—Adequate remedy at law—Ejectment.

When the City and County of Honolulu is in possession of a piece of land as a public highway, claiming the title thereto, a suit in equity presenting no equitable features and the sole purpose of which is to obtain an injunction to restrain the further possession and use by the city and county of the land as a highway, will not lie, the remedy by an action of ejectment being adequate to try the title.

Lis Pendens—Purchase *pendente lite*—Operation and effect.

A purchaser *pendete lite* is bound by the result of the suit.

Eminent Domain—Action for condemnation—Damages to accrue to adjacent land not condemned.

Damages caused, as by the overflowing of lands, by the construction of a roadway over a piece of land judicially [63] condemned after trial by jury, are recoverable under our statute in the action for condemnation; and if a claim for such damages is not presented or adjudicated in the action for condemnation the injury cannot be made the ground of a subsequent suit in equity to restrain the continued use and occupation by the Government of the land condemned for road purposes. [64]

OPINION OF THE SUPREME COURT BY PERRY, C. J.

This is a suit in equity in which the complainants pray for an injunction restraining the respondent from in any manner trespassing upon land described as "lots 'E,' 'F' and 'G,' of land court application No. 670," which are included in the land described in transfer certificate of title No. 7250 issued by the Land Court of this Territory. After trial, a decree was entered by the Circuit Judge refusing the relief prayed for and dismissing the bill. From that decree the case comes to this court by appeal.

Lot "E" was originally a part of a larger tract of land owned by Victoria Ward. It is now a part of what is known as Ward Street, leading from King Street in a southerly direction towards the

ocean. The City and County of Honolulu was at the date of the commencement of the suit in possession of lot "E" as a public highway and it and its predecessor in interest, the Territory of Hawaii, have been in possession of it for a period of more than twenty years last past, using it at all times as a public highway. The claim now advanced by the complainants is that lot "E" first came into the possession of the Territory under a conditional contract and that the Territory and the city and county did not comply with the terms of the contract and therefore did not acquire the title. On the other hand it is claimed by the respondent that the terms were complied with in part and waived in part and that in any event there has been a statutory dedication of the land for highway purposes. The merits of this controversy we need not consider. The respondent is in possession and the complainants are out of possession. Their purpose in securing the injunction is to eject the respondent [65] from the land. This can be adequately accomplished in an action of ejectment. No equitable features are presented in the petition. Irreparable damage is not alleged, as to this lot. Jurisdiction in equity is therefore not maintainable.

The further claim is made that certificate No. 7250, issued by the Land Court prior to the verdict in the condemnation case, is an adjudication to the effect that the city and county has no title to lot "E" as a highway. We do not so understand it. The certificate is silent on the subject of roadways, but under section 3229, R. L. 1925, a successful applicant in whose favor a certificate of title is issued holds

it subject to the possible encumbrance of "any highway * * * laid out under the provisions of law, when the certificate of title does not state that the boundary of such way has been determined," as this certificate does not. In other words, if there is a highway running over registered land, the existence of the highway may be proven, even though it is not noted in the certificate as an encumbrance, when as in this case there has been no express adjudication on the subject. In any event, if the certificate of title can be properly construed as claimed by the present complainants that claim will be equally available to them in an action of ejectment.

The same is true in substance of lot "F." That lot is now a part of the recently constructed Kapiolani Boulevard and is in the possession of the respondent. It was awarded to the city and county in condemnation proceedings brought against Victoria Ward, the grantor of the three complainants. As held in the Land Court case entitled "*In re* Application No. 670 of Victoria Ward to Register Title to Land," *ante,* p. 781, the present complainants who received a deed of certain interests from Victoria Ward during the pendency of the action for condemnation [66] of lot "F" and other lands are bound by the results of that action. No irreparable damage or other equitable features are alleged.

Lot "G" likewise is one of the pieces of land condemned in the action brought against Victoria Ward. As held in the Land Court case above referred to, *ante,* p. 781, the present complainants are bound by the judgment rendered in the action for condemnation. The alleged irreparable damage is

that the construction of the road over lot "G" caused an overflow of water upon other lands of the complainants (acquired from their mother and not condemned) and the destruction of trees which had been planted and cared for by the complainants and their mother, The respondent denies that the injuries complained of were caused by the construction of the roadway and contends that they were temporary in their nature and were the result of the acts of a dredging company which was making a fill of marshy lands either in lot "G" or elsewhere in the vicinity. Section 821, R. L. 1925, of the chapter on eminent domain, provides that "If the property sought to be condemned constitutes only a portion of a larger tract, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvements in the manner proposed by the plaintiff shall also be assessed." If the overflowing of the uncondemned land of the complainants was caused by the acts of the dredging company or even if those acts were attributable to the respondent, damages therefor could be recovered in an action at law or, conceivably (but we do not decide), it might, with equitable circumstances, justify an injunction to restrain the nuisance; [67] but certainly would not justify the relief prayed for in this suit which is that the respondent be restrained from "trespassing" upon lot "G,"—the equivalent in effect of a writ of possession. On the other hand, if the injuries complained of resulted from the construction of the road on lot "G," the claim for damages in that respect should

have been presented, under the statutory provision just quoted, in the action for condemnation. If through neglect or for any other reason the owners of the land failed to include that element of damages in their claims for compensation when the action for condemnation was being tried before the jury, the defect cannot be remedied in a new proceeding, whether at law or in equity. The owners have had their day in court. There must be an end to litigation.

The decree appealed from is affirmed.

(Signed) ANTONIO PERRY.

(Signed) JAS. J. BANKS,

(Signed) CHARLES F. PARSONS,

C. B. DWIGHT (also on the briefs), for Petitioners.

L. P. SCOTT, Deputy City and County Attorney (also on the brief), for Respondent. [68]

Filed March 2, 1931, at 11:56 o'clock A. M. [69]

In the Supreme Court of the Territory of Hawaii.

No. 2002.

Appeal from Circuit Court, First Judicial Circuit, Hon. A. M. CRISTY, Presiding.

HATTIE KULAMANU WARD, LUCY KAIAAKA WARD and VICTORIA KATHLENE WARD,

Petitioners-Appellants,

vs.

THE CITY AND COUNTY OF HONOLULU, a Municipal Corporation,

Respondent-Appellee.

JUDGMENT ON APPEAL.

In the above-entitled cause pursuant to the opinion of the above-entitled court rendered and filed on the 27th day of February, A. D. 1931, the temporary restraining order issued in this court and cause on the 10th day of February, A. D. 1931, is hereby vacated and set aside and the judgment of the Circuit Court of the First Judicial Circuit, dated February 5, 1931, is affirmed. Costs amounting to $14.00 to be paid by the petitioners-appellant.

Dated: Honolulu, T. H., March 2, 1931.

By the Court:

[Seal] (Sgd.) J. A. THOMPSON,
Clerk, Supreme Court.

Approved:

A. PERRY,
Chief Justice. [70]

[Title of Court and Cause—No. 2002.]

NOTICE OF JUDGMENT ON APPEAL.

To the Honorable the Judges of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

YOU WILL PLEASE TAKE NOTICE that in the above-entitled cause the Supreme Court has entered the following judgment on appeal:

"JUDGMENT ON APPEAL.

In the above-entitled cause pursuant to the opinion of the above-entitled court rendered and filed on the 27th day of February, A. D. 1931, the temporary restraining order issued in this Court and cause on the 10th day of February, A. D. 1931, is hereby vacated and set aside and the judgment of the Circuit Court of the First Judicial Circuit, dated February 5, 1931, is affirmed. Costs amounting to $14.00 to be paid by the Petitioners-Appellant."

Dated: Honolulu, T. H., March 2, 1931.

By the Court:

[Seal] (Sgd.) J. A. THOMPSON,
Clerk, Supreme Court. [71]

The form of the foregoing notice is hereby approved and it is ordered that the same issue *for-*with.

Dated: Honolulu, T. H., March 2, 1931.

[Seal] (Sgd.) ANTONIO PERRY,
Chief Justice. [72]

Wednesday, February 11, 1931.

Court convened at 10:00 o'clock A. M.

Present in Chambers:

Hon. ANTONIO PERRY, C. J., Hon. JAMES J. BANKS, and Hon. CHARLES F. PARSONS, JJ.

MINUTES OF SUPREME COURT—FEBRUARY 11, 1931—HEARING UPON MOTION BY APPELLEE TO SET ASIDE RESTRAINING ORDER.

Appearances:

L. P. SCOTT, Deputy City and County Attorney, for the Motion.

CHARLES B. DWIGHT, *contra.*

In the above-entitled matter, counsel for the respective parties appeared this day at 10:00 o'clock A. M. at the Chambers of the Chief Justice *re* hearing of the above-entitled motion. When said matter was called, Mr. Scott proceeded to read the motion and then followed with his argument in support thereof.

Mr. Dwight addressed the Court stating, that the record on appeal be filed in this court Friday morning; and after discussion between the Court

and counsel, the Court rendered its oral ruling—ordered the restraining order stay.

(Sgd.) ROBERT PARKER, Jr.,
Assistant Clerk. [73]

Tuesday, February 24, 1931.
Court convened at 10:00 o'clock, A. M.

Present on the Bench: Hon. ANTONIO PERRY, C. J., Hon. JAMES J. BANKS and Hon. CHARLES F. PARSONS, JJ.

1989.

Error to Land Court.

In the Matter of the Application of VICTORIA WARD to Register and Confirm Title to Certain Land Situate at Kewalo, Honolulu, Oahu, Territory of Hawaii.

2002.

Original Petition for Injunction and Proceedings from Circuit Court First Circuit.

HATTIE KULAMANU WARD, LUCY KAIKA WARD and VICTORIA KATHLEEN WARD,

vs.

THE CITY AND COUNTY OF HONOLULU, a Municipal Corporation.

MINUTES OF SUPREME COURT—FEBRUARY 24, 1931—HEARING.

Appearances:

C. B. DWIGHT, for the Appellants.

L. P. SCOTT, Deputy City and County Attorney for Appellee.

The above-entitled causes having been ordered set for this day for argument, when *the convened,* Mr. Dwight addressed the court and proceeded to state the facts in the above-entitled causes and then followed with his argument concluding at 11:20 A. M.

At 11:21 A. M. Mr. Scott commenced with his argument and called the court's attention to Lewis Eminent Domain, Volume 1, Section 65, page 56 (what constitutes a taking), and also the provisions of Section 823 of the Revised Laws of Hawaii 1925, concluding at 11:50 A. M.

At 11:51 A. M. Mr. Dwight replied concluding at 11:59 A. M.

Case submitted and taken under advisement.

At 12:00 Noon the Court adjourned until tomorrow morning at 10:00 o'clock, Wednesday, February 25, 1931.

(Sgd.) ROBERT PARKER, Jr.,
Assistant Clerk. [74]

Friday, February 27, 1931.

[Title of Cause—No. 1989.]

MINUTES OF SUPREME COURT—FEBRUARY 27, 1931—HEARING (CONTINUED.)

At 10:07 o'clock A. M. this day the Court handed down its written opinion in the above-entitled cause affirming the decree of the Land Court.

(Sgd.) ROBERT PARKER, Jr.,
Assistant Clerk.

[Title of Cause.—No. 2002.]

MINUTES OF SUPREME COURT—FEBRUARY 27, 1931—HEARING (CONTINUED.)

At 10:08 o'clock A. M. this day the court handed down its written opinion in the above-entitled cause affirming the decree appealed from.

(Sgd.) ROBERT PARKER, Jr.,
Assistant Clerk. [75.]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,
Deputy City and County Attorney,
Attorney for Respondents-Appellee. [76]

[Title of Court and Cause—No. 2002.]

PETITION FOR APPEAL.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the Territory of Hawaii:

Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, petitioners-appellant herein, deem themselves aggrieved by the judgment of the above-entitled court in the above-entitled matter, which judgment of the Supreme Court of the Territory of Hawaii, was made and entered on the 2d day of March, 1931, and hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from said judgment, for the reasons specified in the assignment of errors hereto attached, and they pray that this appeal may be allowed, and that a transcript of the record and proceedings upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that said judgment may be reversed. [77]

Dated at Honolulu, Hawaii, this 1st day of June, A. D. 1931.

HATTIE KULAMANU WARD,
LUCY KAIAKA WARD and
VICTORIA KATHLEEN WARD,
Petitioners-Appellants.
By CHARLES B. DWIGHT,
Their Attorney. [78]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,
Deputy City and County Attorney,
For the Respondents-Appellee. [79]

[Title of Court and Cause—No. 2002.]

ASSIGNMENT OF ERRORS.

Now come Hattie Kulamanu Ward, Lucy Kaiaka Ward and Kathleen Victoria Ward, petitioners-appellant, and file the following assignment of errors, upon which they will rely in the prosecution of their appeal in the above-entitled cause from the judgment entered herein on the 2d day of March, A. D. 1931, in the Supreme Court of the Territory of Hawaii.

I.

That the Supreme Court of the Territory of Hawaii erred in overruling the appeal of the petitioners-appellant and affirming the decision of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, made and entered in the 5th day of February, 1931.

II.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the petitioners-appellant were not entitled to the relief prayed for in their petition.

III.

That the Supreme Court of the Territory of Ha-

waii [80] erred in holding and finding that the petitioners-appellant were bound by the judgment in the eminent domain proceeding entitled "The City and County of Honolulu vs. Victoria Ward."

IV.

That the Supreme Court of the Territory of Hawaii erred in failing to grant the relief prayed for by the petitioners-appellant in their petition.

V.

That the Supreme Court of the Territory of Hawaii erred in failing to hold and find that the petitioners-appellant would be deprived of their private property without just compensation if the prayer of the petitioners-appellant was not granted.

VI.

That the Supreme Court of the Territory of Hawaii erred in failing to hold and find that the petitioners-appellant were not bound by the final order of condemnation in the eminent domain proceeding entitled "The City and County of Honolulu vs. Victoria Ward."

WHEREFORE, the said Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, petitioners-appellant, pray that said opinion and decision and judgment be reversed and that the Supreme Court of the Territory of Hawaii be ordered to enter a judgment sustaining the appeal of petitioners-appellant from the decree of the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Dated at Honolulu, Hawaii, this 1st day of June, A. D. 1931.

HATTIE KULAMANU WARD,
LUCY KAIAKA WARD and
VICTORIA KATHLEEN WARD,
Petitioners-Appellant.
By CHARLES B. DWIGHT,
Their Attorney. [81]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,
Deputy City and County Attorney, Attorney for Respondent-Appellee. [82]

[Title of Court and Cause—No. 2002.]

NOTICE OF APPEAL.

Now comes Hattie Kulamanu Ward, Lucy Kaiake Ward and Victoria Kathleen Ward, petitioners-appellant above named, by their attorney, Charles B. Dwight, and gives notice of appeal from the judgment of the Supreme Court of the Territory of Hawaii, dismissing the appeal of the petitioners from the decision of the Circuit Judge of the First Circuit, of the Territory of Hawaii, and sustaining the decree of the said Circuit Judge, to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Honolulu, Hawaii, this 1st day of June, A. D. 1931.

HATTIE KULAMANU WARD,
LUCY KAIAKA WARD and
VICTORIA KATHLEEN WARD,
Petitioners-Appellant.
By CHARLES B. DWIGHT,
Their Attorney. [83]

ORDER ALLOWING APPEAL.

Upon filing by the petitioners-appellant, Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, of a bond in the sum of Five Hundred Dollars ($500), with good and sufficient sureties, the appeal in the above-entitled cause is hereby allowed.

[Seal] ANTONIO PERRY,
Chief Justice. [84]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,
Deputy City and County Attorney,
Attorney for Respondent-Appellee. [85]

[Title of Court and Cause—No. 2002.]

COST BOND.

The United States of America,
District of Hawaii.

We, Hattie Kulamanu Ward, Lucy Kaiaka Ward

and Victoria Kathlene Ward, as principals, and New York Indemnity Company of New York, as surety, jointly and severally acknowledge ourselves indebted to the United States of America, in the sum of *Five Hundred and/100* ($500.00), to be levied on our goods, and chattels, lands and tenements, upon this condition:

WHEREAS, the above-named petitioners-appellant have taken an appeal from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment dated and entered in said cause on the 2d day of March, A. D. 1931,—

NOW, THEREFORE, if the above-bounded petitioners-appellant shall prosecute their appeal without delay and shall [86] answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 1st day of June, A. D. 1931.

(Signed) HATTIE KULAMANU WARD,
By CHARLES B. DWIGHT,
Her Attorney.
LUCY KULAMANU WARD,
VICTORIA KATHLENE WARD,
By CHARLES B. DWIGHT,
Her Attorney,
Principals.

Reaffirmed.

NEW YORK INS. CO.
H. A. TRUSLOW,
Agent: Atty.-in-fact.

June 1, 1931.

NEW YORK INDEMNITY COMPANY,
H. A. TRUSLOW,
Agent and *Agency*-in-fact,
Sureties.

Taken and acknowledged before me the day and year first above written.

SUZANNE G. FISKE,
Notary Public, First Judicial Circuit, Territory of Hawaii.

The foregoing bond is approved as to amount and sufficiency of sureties.

(Signed) ANTONIO PERRY,
Chief Justice, Supreme Court.

The foregoing bond is approved as to form.

(Signed) L. P. SCOTT,
City and County Attorney.

Reaffirmed 3:45 P. M., June 1st, 1931.

LUCY K. WARD.
HATTIE KULAMANU WARD,
KATHLENE VICTORIA WARD.
By CHARLES B. DWIGHT,
Their Attorney. [87]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,
Deputy City and County Attorney. [88]

[Title of Court and Cause—No. 2002.]

CITATION ON APPEAL.

The United States of America,—ss.
The President of the United States of America to the City and County of Honolulu, a Municipal Corporation, and James F. Gilliland, City and County Attorney, Its Attorney, GREETINGS:

You are hereby cited and admonished to be and appear at the Ninth Circuit, to he held at the City and County of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to an order allowing appeal, filed in the office of the Clerk of the Supreme Court of the Territory of Hawaii, wherein Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward are the petitioners and you are respondent, to show cause, if any there be, why the judgment in such appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf. [89]

WITNESS, the Honorable CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States of America, this 1st day of June,

A. D. 1931, and of the Independence of the United States the *15*th.

ANTONIO PERRY,
Chief Justice.

[Seal] Attest: J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

Received a copy of the within citation June 1st, 1931.

L. P. SCOTT,
Deputy City and County Attorney.

Let the within citation issue.

[Seal] ANTONIO PERRY,
Chief Justice. [90]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

(S.) L. P. SCOTT,
Deputy City and County Attorney,
Attorney for Respondent-Appellee. [91]

[Title of Court and Cause—No. 2002.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Petition and chamber summons, order allowing issuance of temporary restraining order. Temporary restraining order.
2. Answer of the City and County of Honolulu.
3. Replication.
4. Decree.
5. Transcript of the evidence had and taken of the proceedings herein, and all original exhibits.
6. Minutes of the Clerk of the Circuit Court of the proceedings had and taken herein.
7. Opinion of the Supreme Court of the Territory of Hawaii, dated February 27th, 1931. [92]
8. Judgment on appeal of the Supreme Court of the Territory of Hawaii.
9. All *minute* in the above-entitled cause.
10. Petition for appeal.
11. Notice of appeal and order allowing appeal.
12. Assignment of errors.
13. Citation on appeal.
14. Bond for costs on appeal.
15. This p*are*cipe.
16. Clerk's certificate to transcript.

Said transcript to be prepared as required by law, and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of said Circuit Court of Appeals, at San Francisco, in the State of California, before the 1st day of July, A. D. 1931.

Dated this 1st day of June, A. D. 1931.

HATTIE KULAMANU WARD,
LUCY KAIAKA WARD and
VICTORIA KATHLEEN WARD,
Petitioners-Appellant.
By CHARLES B. DWIGHT,
Their Attorney. [93]

Filed June 1, 1931, at 4:05 o'clock P. M.

Service is hereby accepted this 1st day of June, 1931.

L. P. SCOTT,
Deputy City and County Attorney,
Attorney for Respondent-Appellee. [94]

[Title of Court and Cause—No. 2002.]

ORDER EXTENDING TIME TO AND INCLUDING JULY 1, 1931, TO PREPARE TRANSCRIPT AND RECORD ON APAPPEAL.

IT IS HEREBY ORDERED that the time in which to prepare and file the record on appeal in the above-entitled cause be extended up to and including the 1st day of July, A. D. 1931.

Dated at Honolulu, T. H., this 1st day of June, A. D. 1931.

[Seal] ANTONIO PERRY,
Chief Justice. [95]

Received and filed in the Supreme Court June 24, 1931, at 2:10 o'clock P. M. [96]

[Title of Court and Cause—No. 2002.]

ORDER EXTENDING TIME TO AND INCLUDING JULY 31, 1931, TO PREPARE TRANSCRIPT AND RECORD ON APPEAL.

IT IS HEREBY ORDERED that the time in which to prepare and file the record on appeal in the above-entitled cause be extended up to and including the 31st day of July, A. D. 1931.

Dated at Honolulu, Hawaii, this 24th day of June, A. D. 1931.

[Seal] ANTONIO PERRY,
Chief Justice.

Approved.

L. P. SCOTT,
Deputy City and Cty. Atty. [97]

[Title of Court and Cause—No. 2002.]

CERTIFICATE OF CLERK OF SUPREME COURT OF TERRITORY OF HAWAII TO TRANSCRIPT OF RECORD.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, Robert Parker, Jr., Assistant Clerk of the Supreme Court of the Territory of Hawaii, DO

HEREBY CERTIFY, that the documents hereto attached and enumerated hereunder, viz.:

1. Fly-leaf and index to transcript of record;
2. Copy of petition, dated December 5, 1930;
3. Copy chambers summons, issued December 5, 1930, with return of service;
4. Copy of order allowing issuance of temporary restraining order, dated December 5, 1930;
5. Copy temporary restraining order, dated December 5, 1930;
6. Copy answer of City and County of Honolulu, a municipal corporation, by L. P. Scott, Deputy City and County Attorney, and attached thereto as exhibits thereof are the following, viz.: Exhibit "A," copy letter from James H. Boyd, Esq., Superintendent of Public Works, dated January 29th, 1902; Exhibit "B," copy of letter from James H. Boyd, Superintendent of Public Works to E. H. Wodehouse, Esq., Attorney for Victoria Ward, dated February 7, 1902, and Exhibit "C," copy of order putting plaintiff into possession of lands in the above-entitled cause sought to be condemned, dated and filed Jan. 13, 1931;
7. Copy petitioners' replication, dated and filed Jan. 13, 1931;
8. Copy decision of Hon. Albert M. Cristy, Second Judge, First Judicial Circuit, Territory of Hawaii, filed Feb. 4, 1931;
9. Copy decree entered in the Circuit Court, First Judicial Circuit, filed Feb. 6, 1931; [98]

10. Copy clerk's minutes of the Circuit Court, First Judicial Circuit;
11. Copy opinion of the Supreme Court, Territory of Hawaii, dated and filed Feb. 27, 1931;
12. Copy judgment on appeal, filed March 2, 1931;
13. Copy notice of Judgment on appeal, dated March 2, 1931;
14. Copy clerk's minutes of the Supreme Court;
15. Original petition by petitioners-appellant for appeal to the United States Circuit Court of Appeals for the Ninth Circuit, filed June 1, 1931;
16. Original assignment of errors, filed June 1, 1931;
17. Original notice of appeal and order allowing appeal, filed June 1, 1931;
18. Cost bond on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, dated June 1, 1931, for the sum of $500.00; Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, Principals; New York Indemnity Company of New York, Surety, and United States of America, obligee;
19. Original citation on appeal, filed Jan. 1, 1931, with acknowledgement of service of a copy thereof by L. P. Scott, Deputy City and County Attorney;
20. Copy praecipe for transcript of record, dated and filed June 1, 1931;
21. Original order granting petitioners-appellant to and including July 1, 1931, within which

to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, record on appeal, dated June 1, 1931;

22. Original order granting petitioners-appellant to and including July 31, 1931, within which to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, record on appeal, dated June 24, 1931,—

are all full, true and accurate copies of the original documents, filed in the above-entitled cause and now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

I FURTHER CERTIFY that the

23. Original transcript of evidence, volume 1, numbered 695, filed February 13, 1931;
24. Petitioners' Exhibit "A," Letter from L. M. Whitehouse, Chief Engineer, to Mrs. Victoria Ward et al., dated December 2, 1930, and
25. Respondent's Exhibit "1," certified copy of judgment and final order of condemnation in the Circuit Court First Judicial Circuit, Territory of Hawaii, in a cause entitled Law No. 11946, The City and County of Honolulu, a Municipal Corporation, Plaintiff, vs. Victoria Ward, Defendant; [99]
26. Original Land Court Record, No. 670, Three (3) Volumes,—

are the originals, and are herewith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California; excepting number 15—petition for appeal, number 16—assignment of errors, number 17—notice of appeal and order allowing appeal, number 19—citation on appeal, number 21—order extending time to prepare transcript and record on appeal, dated June 1, 1931, and number 22—order extending time to prepare transcript and record on appeal, dated June *June* 24, 1931, are the originals and are herewith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California,

In pursuance to the praecipe filed June 1, 1931, in the above-entitled cause, the foregoing are herewith transmitted to the Circuit Court of Appeals for the Ninth Circuit.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the above-entitled Court, at Honolulu, City and County of Honolulu, Territory of Hawaii, this 22d day of July, A. D. 1931.

[Seal] ROBERT PARKER, Jr.,
Assistant Clerk of the Supreme Court of the Territory of Hawaii. [100]

[Endorsed]: No. 6546. United States Circuit Court of Appeals for the Ninth Circuit. Hattie Kulamanu Ward, Lucy Kaiaka Ward and Victoria Kathleen Ward, Appellants, vs. City and County of Honolulu, a Municipal Corporation, Ap-

pellee. Transcript of Record. Upon Appeal from the Supreme Court of the Territory of Hawaii.

Filed July 29, 1931.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Frank H. Schmid,

Deputy Clerk.

No. 6564

United States

Circuit Court of Appeals

For the Ninth Circuit.

LUMBERMENS TRUST COMPANY, a Corporation,

Appellant,

vs.

THE TOWN OF RYEGATE, a Municipal Corporation,

Appellee.

Transcript of Record.

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

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6564

United States

Circuit Court of Appeals

For the Ninth Circuit.

LUMBERMENS TRUST COMPANY, a Corporation,

Appellant,

vs.

THE TOWN OF RYEGATE, a Municipal Corporation,

Appellee.

Transcript of Record.

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

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

S. V. STEWART and JOHN G. BROWN, Helena, Montana,
Attorneys for Plaintiff and Appellant.

Messrs. JOHNSTON, COLEMAN and JAMESON, Billings, Montana,
Attorneys for Defendant and Appellee.
[1*]

In the District Court of the United States in and for the District of Montana.

No. 224.

LUMBERMENS TRUST COMPANY, a Corporation,
Plaintiff,

vs.

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

BE IT REMEMBERED, that on December 31st, 1926, a complaint was duly filed herein, being in the words and figures following to wit: [2]

---

*Page-number appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana, Billings Division.

LUMBERMENS TRUST COMPANY, a Corporation,

Plaintiff,

vs.

THE TOWN OF RYEGATE, MONTANA, a Municipal Corporation,

Defendant.

COMPLAINT.

The plaintiff for cause of action against the defendant complains and alleges:

I.

That the plaintiff was at all of the times herein mentioned and referred to, and yet is, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and a compliance therewith, having its principal place of business in the city of Portland in said state.

II.

That the defendant, the Town of Ryegate was at all the times herein mentioned and referred to and yet is a municipal corporation and body politic, situated in Golden Valley County, Montana, and duly organized and existing under and by virtue of the laws of the State of Montana and a compliance therewith.

III.

That on or about December 30, 1919, the Town

Council of the Town of Ryegate, for the purpose of supplying the town and its residents with water for municipal and private use, passed a resolution of intention to create a special improvement district known as Special Improvement District No. 4, which said resolution is designated as Resolution No. 10 of said town, a copy of which is hereunto attached, marked Exhibit "A" and [3] hereby made a part of this complaint.

IV.

That on January 1st, 1920, the notice set out in and required to be published by said resolution of intention, was published in the said Town of Ryegate, as required by said resolution and the laws of the State of Montana.

V.

That thereafter, and on or about February 11, 1920, a resolution known as Resolution No. 14 of said Town, was passed by the Town Council thereof, creating said Special Improvement District No. 4, which improvement district was to all intents and purposes coextensive with the boundaries of said town, and that in said Resolution No. 14, the general character of the improvement to be made is described in the same words as in Exhibit "A" hereto attached.

VI.

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 waterworks, and a complete waterworks

system, consisting of reservoir, pumping plant, mains, and all other connections and appliances necessary for a complete system for the supplying of water for municipal purposes to said town and water to the inhabitants thereof, all within the powers of said town.

VII.

That when the said town of Ryegate called for bids for the construction of said waterworks system, all in manner and form as required by law, the Security Bridge Company, a corporation was the successful bidder therefor, and said town prepared to and later did enter into a written contract with said Security Bridge Company for the construction of said waterworks system [4] as contemplated by the creation of the Special Improvement District and the plans of the defendant town's engineer.

VIII.

That in connection with said resolution and proceedings it was intended and contemplated that the said Town of Ryegate should issue negotiable evidence of the debt in the form of Special Improvement District Bonds to evidence the obligation to pay for the construction of said waterworks system, and after due and legal proceedings had been had to authorize the issuance of the same, an issue of such negotiable bonds in single bonds of the par value of five hundred dollars each, and in the total sum of $45,602.42 was accomplished. That hereto attached and made a part hereof, being marked Exhibit "B," is a true and correct copy of one of said bonds, which save and except as to amounts and

dates of maturity is a true and correct copy of all of said bonds.

IX.

That prior to the time the town entered into its contract for the construction of said waterworks system the officers and councilmen of said town deemed it to be the best interest of the town and its taxpayers and inhabitants to endeavor to persuade said contractor to accept the special improvement bonds that were authorized and would be issued under the proceedings before herein referred to as payment on said contract, and said defendant town and its officers and inhabitants being desirous of completing the installation of said waterworks importuned and prevailed upon said Security Bridge Company to take and accept said special improvement district bonds for the construction of said waterworks system, and in payment on said contract as the work would be completed and accepted and the said Security Bridge Company did upon such request and importuning take and [5] accept the defendant town's special improvement district bonds aforesaid as an evidence of the payments due on its construction contract. Said bonds were thereafter duly signed and sealed by the proper officers of said defendant town and by them issued and delivered to the Security Bridge Company from time to time upon the defendant town's engineer's estimates as the work was completed and accepted.

X.

That the said Security Bridge Company was a

construction company with no facilities or capacity for handling bonds in lieu of cash and it was necessary for said Security Bridge Company to at once arrange for the sale of said bonds in order to obtain the money to purchase supplies and materials and pay the labor necessary for the construction of the said waterworks desired by the defendant town, all of which facts were well known to the defendant town and its officers.

XI.

That the Security Bridge Company, as plaintiff is informed and believes and therefore alleges, with the knowledge of the defendant town and its officers, did negotiate with this plaintiff for the sale of said bonds, and plaintiff did become the purchaser thereof, and as such holder became possessed of all the rights, privileges and claims which the Security Bridge Company might have, or hold, or be entitled to, under and by virtue of its contract with the said defendant town and its faithful performance of the terms and conditions thereof and acceptance of the work therein contemplated by said defendant.

XII.

That in accordance with its agreement of purchase this plaintiff did, from time to time as the same were issued for completed and accepted work, purchase the said bonds from the [6] Security Bridge Company, and did thus furnish all of the money that was used to build and furnish to the defendant town and its inhabitants the waterworks

plant which was constructed in and for the said defendant town. That by purchase plaintiff became and yet is the owner and holder before maturity and for value and without notice of any imperfection in said bonds, or any thereof, or claims against the same of the bonds issued by the defendant town covering this Special Improvement District No. 4, all in the total sum of $45,602.42, together with 6% interest thereon according to the terms and conditions of said bonds and each thereof.

That said bonds were duly issued and delivered to this plaintiff on the dates and of the number and in the amounts as follows: May 29, 1920, all the general bonds referred to in the amount of $15,000.00.

July 28th, 1920, Bonds No. 1 to 6, inclusive, in the amount of $3,000.00

August 11th, 1920, Bonds No. 7 to 19, inclusive, in the amount of $6,500.00

August 25th, 1920, Bonds No. 20 to 27, inclusive, in the amount of $4,000.00

September 8th, 1920, Bonds No. 28 to 53, inclusive, in the amount of $13,000.00

October 13th, 1920, Bonds No. 54 to 78, inclusive, in the amount of $12,500.00

November 24th, 1920, Bonds No. 79 to 91, inclusive, in the amount of $6,602.42.

XIII.

That said waterworks system was constructed, received and accepted and is now and has been used by the defendant town and the inhabitants

thereof continuously since its completion and acceptance. That said defendant town and the inhabitants thereof now have and are using and receiving the income and benefits from valuable property totally and wholly built and constructed from moneys of this plaintiff had and received, and used by said [7] defendant town and its officers for such public purpose, all of which moneys so had and used being evidenced by said bonds before herein referred to.

XIV.

That the defendant paid the interest maturing and becoming due upon said bonds on January 1st, 1922, but thereafter refused and still continues to refuse to pay any interest thereon or on account thereof, and has totally and wholly failed to pay and has declared its intentions 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, so that there is now due, owing and unpaid on the same the total sum of $45,602.42 on account of principal thereof, and the further sum equivalent to 6% interest thereon from January 1st, 1922, unto this date, being the interest at the rate agreed to and which plaintiff alleges is a reasonable rate of interest in the State of Montana for moneys had, received and used. That the defendant continues to refuse to pay said claim and has repudiated said debt and obligation *in toto* notwithstanding repeated demand has been made for payment thereof.

XV.

That this action is an action entirely between a citizen and resident of the State of Oregon and a citizen and resident of the State of Montana and the amount involved exceeds the sum of $3,000.00 exclusive of interest and costs.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of $45,602.42, together with interest thereon at the rate of 6% per annum from this date until paid, and for the further sum of $13,680.72, being accrued interest on said principal obligation from January 1st, 1922, until this time, and for its costs of suit herein expended.

STEWART & BROWN,
Attorneys for the Plaintiff,
Helena, Montana. [8]

State of Montana,
County of Lewis and Clark,—ss.

John G. Brown, being first duly sworn according to law, deposes and says:

That he is one of the attorneys for the plaintiff in the above-entitled action and that he makes this verification for and on behalf of the plaintiff by reason of the fact that there is no officer or agent of said corporation in the county of Lewis and Clark wherein affiant resides and this complaint is verified. I have read the foregoing complaint, know the contents thereof and the matters and things therein stated are true to the best of my knowledge, information and belief as such attorney.

JOHN G. BROWN.

Subscribed and sworn to before me this 31st day of December, 1926.

[Seal] R. L. HILLIS,

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires 1–5–1927. [9]

EXHIBIT "A."

RESOLUTION No. 10.

A RESOLUTION DECLARING IT TO BE THE INTENTION OF THE TOWN COUNCIL OF THE TOWN OF RYEGATE, MONTANA, TO CREATE SPECIAL IMPROVEMENT DISTRICT No. 4 IN THE TOWN OF RYEGATE, MONTANA, FOR THE PURPOSE OF CONSTRUCTING PIPES, HYDRANTS AND HOSE CONNECTIONS FOR IRRIGATING APPLIANCES AND FIRE PROTECTION WITHIN THE TOWN OF RYEGATE, MONTANA.

BE IT RESOLVED BY THE COUNCIL OF THE TOWN OF RYEGATE, MONTANA:

Section 1. That the public interest and convenience require, and it is deemed necessary to order and create, and the Town Council of the Town of Ryegate, Montana, intends to order and create, a Special Improvement District, with the number, the boundaries and the character of the improvements to be made as hereinafter set forth:

Section 2. That it is the intention of the Town Council of the Town of Ryegate, Montana, to create and establish in said town a special improvement dis-

trict for the purpose of making special improvements upon and along that portion of Railway Avenue, Second Avenue and the alley between Third and Fourth Avenues, and the Alley between Fourth Avenue and the avenue next north of Fourth Avenue, from Harkins Street on the West and the street next east of Second Street on the East, including all avenues, streets and alley intersections.

Section 3. That the number of said Special Improvement District is hereby designated as "Special Improvement District No. 4 of the Town of Ryegate, Montana."

Section 4. That the boundaries of said Special Improvement District are hereby declared to be as follows:—

> Beginning at the intersection of the center line of Harkins Street with the center line of the avenue next north of Fourth Avenue, running thence southerly along said center line of Harkins Street to its intersection with the center line of the alley lying between Railway Avenue and Second Avenue, and running through Blocks 23, 24 and 12 in said Town of Ryegate, running thence easterly along the center line of said alley with the west line extended of Lots 1 and 12, in Block 12, of said Town of Ryegate, running thence southerly along the west line extended of said Lots 1 and 12, in said Block 12, to its intersection with the southern boundary of the right-of-way of the Chicago, Milwaukee and St. Paul

Railway Company, running thence easterly along said southern boundary of the right-of-way of the Chicago, Milwaukee and St. Paul Railway Company to its intersection with the center line of the street next east of Second Street extended, running thence northerly along the center line extended of the street next east of Second Street to its intersection with the center line of Fourth Avenue, running thence westerly along the center line of Fourth Avenue to its intersection with the east line extended of Lots 7 and 6, in Block 14, of said Town of Ryegate, running thence northerly along said east line extended of Lots 7 and 6 in Block 14, of said Town of Ryegate, to the intersection of said line with the center line of the [10] avenue next north of Fourth Avenue, running thence westerly along the center line of the avenue next north of Fourth Avenue to the point of beginning.

The above described area embraces lots 1 to 12 inclusive, in Block 18; Lots 1 to 12 inclusive in Block 17, Lots 1 to 12 inclusive in Block 16; Lots 1 to 12 inclusive in Block 15; Lots 6 and 7 in Block 14; Lots 1 to 12 inclusive in Block 19; Lots 1 to 12 inclusive in Block 20; Lots 1 to 12 inclusive in Block 10; Lots 1 to 12 inclusive in Block 9; Lots 1 to 12 inclusive in Block 8; Lots 1 to 12 inclusive in Block 7; Lots 1 to 6 inclusive in Block 22; Lots 1 to 6 inclusive in Block 21; Lots 1 to 6 inclusive in Block 3; Lots 1 to 6 inclusive in Block 2; Lots 1 to 6 inclu-

sive in Block 1; Lots 1 to 6 inclusive in Block 23; Lots 1 to 6 inclusive in Block 24; Lots 1 to 6 inclusive and Lot 12 in Block 12; Lots 1 to 18 inclusive in Block 4; Lots 1 to 14 inclusive in Block 5; Lots 1 to 18 inclusive in Block 6; and all of the Chicago, Milwaukee and St. Paul Railway Company's right-of-way between the west line extended of Lots 1 and 12, in Block 12, and the center line extended of the street next east of Second Street; all of the school block and Park site.

Section 5. That the Town Council hereby finds and determines that the contemplated improvement is of more than local or ordinary public benefit and that all real estate situated in said district will be especially benefited and affected by such improvement, and the property included within the boundaries of said district it is hereby declared to be the property to be assessed for the cost and expense of making said improvement.

Section 6. That the character of the improvements to be made in said Special Improvement District is hereby declared to be as follows: The construction of pipes, hydrants and hose connections for irrigating appliances and fire protection; all of which improvements are to be made in accordance with the plans and specifications to be prepared by the Engineer of the Town of Ryegate and to be adopted by the Council of said town, and which plans and specifications will then be on file in the office of the Town Clerk, and to which reference is hereby made and by such reference are made a part

hereof to all intents and purposes the same as though said plans and specifications were fully set forth and incorporated at length in this Resolution.

Section 7. That the approximate estimate of the cost and expenses of constructing said improvements is the sum of Twenty-eight Thousand Three Hundred Fifty Dollars ($28350.00) for the entire district.

Section 8. That all the cost and expense incurred in the construction and making of such improvements shall be paid by Special Improvement District Bonds, with interest coupons attached; such bonds shall be drawn in substantially the form provided by law in such cases and shall be drawn against "Special Improvement District Fund No. 4," hereafter to be ordered and created, and that the entire cost and expense of said improvement shall be paid by said Special Improvement District. The entire ~~district,~~ cost of said improvements shall be assessed against the entire district, each lot or parcel of land within said improvement district to be assessed for that part of the whole cost of said improvements which its area bears to the entire area of said district, exclusive of streets, avenues, alleys [11] and public places.

Section 9. That said assessments shall be paid in equal annual installments and are hereby extended over a period of ten years and said payments shall constitute a fund to be known as "Fund of Special Improvement District No. 4" and it is hereby ordered that said Special Improvement District Bonds shall be issued against such fund, the

denomination and maturity dates of such bonds to be fixed by a Resolution to be hereafter adopted.

Section 10. That on Wednesday, the 11th day of February, 1920, at the regular place of meeting of the Town Council, the Farmers and Merchants State Bank, in the Town of Ryegate, Montana, at eight o'clock P. M., the Council of the Town of Ryegate, Montana, will hear objections and protests, at which time and place any person or persons who are owners, or agents of owners, of any lot or parcel of land within said Special Improvement District, who shall, within fifteen days after the first publication of the notice of the passage of this Resolution, have delivered to the Town Clerk of the Town of Ryegate a protest in writing against the proposed work or improvements, or against the extent or creation of the district to be assessed, or both, shall have the right to appear in person or by counsel and show cause, if any there be, why said district should not be created or why the improvements herein mentioned should not be made.

Section 11. The following notice of the adoption of this Resolution shall be published in the Ryegate Weekly Reporter, a weekly newspaper published in the Town of Ryegate, Montana, on the 1st day of January, 1920, to-wit:

(Here appears notice in full, a true printed copy of which is annexed to the affidavit of Charles H. Allan at Page 7 of this transcript.)

The Clerk is hereby directed to mail a copy of the foregoing notice to every person, firm or corporation, or to the agent of such person, firm or corporation, having property within the proposed district,

at his last known address, upon the date of the first publication of said notice.

PASSED by the Council of the Town of Ryegate, Montana, and APPROVED By the Mayor, this 30th day of December, 1919.

R. C. CURRIE,
Mayor.

Attest: J. A. BROWN,
Town Clerk. [12]

EXHIBIT "B."

DISTRICT No. 4.

UNITED STATES OF AMERICA,
STATE OF MONTANA.

BOND.

Bond No. —— $500.00

Interest 6 per cent. per annum, Payable Annually.

Special Improvement District Coupon Bond Issued by the Town of Ryegate, Montana.

THE TREASURER OF THE TOWN OF RYEGATE, MONTANA, will pay to the bearer on the 1st day of January, 1930, the sum of Five Hundred ($500.00) Dollars, as authorized by Resolution No. 14, as passed on the 17th day of February, 1920, creating Special Improvement District No. 4, for the construction of the improvements and the work performed as authorized by said Resolution to be done in said District, and all laws, resolutions and ordinances relating thereto, in payment of the contract in accordance therewith.

The principal and interest of this bond are payable at the office of the Town Treasurer of Ryegate,

Montana. This bond bears interest at the rate of six per cent. (6%) per annum from the date of its maturity as expressed herein until the date called for redemption by the Town Treasurer. The interest on this bond is payable annually, on the 1st day of January in each year, unless paid previous thereto, and as expressed by the interest coupons hereto attached, which bear the engraved facsimile signature of the Mayor and Town Clerk.

This bond is payable from the collection of a special tax and assessment, which is a lien against the real estate within said Improvement District as described in said Resolution No. 14 as well as in Resolution No. 10 passed and adopted December 30th, 1919.

This bond is redeemable at the option of the Town of Ryegate at any time there are funds to the credit of said Special Improvement District Fund for the redemption thereof, and in the manner provided for the redemption of the same; provided, however, that the date of payment shall not be later than the maturity date hereinabove contained.

IT IS HEREBY CERTIFIED AND RECITED, That all things required to be done precedent to the issuance of this bond have been properly done, happened and been performed in the manner prescribed by the laws of the State of Montana relating to the issuance thereof.

Dated at Ryegate, Montana, this —— day of ————, 1920.

TOWN OF RYEGATE, MONTANA,
By W. H. NORTHEY,
Mayor.
Attest: J. A. BROWN,
Town Clerk. [13]

Registered at the office of the Town Treasurer of Ryegate, Montana, this —— day of ————, 1920.

————————————,
Town Treasurer.

COUPON.

$30.00 Coupon No. ——

On the first day of January, 192—, the Treasurer of the Town of Ryegate, Montana, will pay to the bearer the sum of Thirty Dollars, at the office of said Treasurer in Ryegate, Montana, out of the funds of Special Improvement District No. 4, being the interest then due on Bond No. —— of said Special Improvement District; provided, however, that if said bond, together with accrued interest thereon to the date called for its redemption, has theretofore been paid under the option reserved in said bond, then this coupon shall be null and void.

W. H. NORTHEY,
Mayor.
J. A. BROWN,
Town Clerk.

Filed Dec. 31, 1926. [14]

THEREAFTER, on August 10th, 1927, answer was duly filed herein in the words and figures following, to wit: [15]

[Title of Court and Cause.]

ANSWER.

Defendant makes this its answer to the complaint of plaintiff herein:

1. Admits the allegations of Paragraphs I and II of said complaint.

2. Admits that resolution number ten of the Town of Ryegate was passed on December 30, 1919; denies that it was passed for the purpose of supplying the Town of Ryegate and its residents with water for municipal or private use; alleges that said resolution was passed for the purpose of construction of pipes, hydrants and hose connection with irrigating appliances and fire protection, as set out in section six of said resolution; admits that Exhibit "A," attached to said complaint, is a correct copy of said resolution number ten except that the words "to the intersection of said center line of said alley" were omitted after the words "center line of said alley" in section four of said resolution, and before the words "with the west line extended of Lots 1 and 12."

3. Admits the allegations of Paragraph IV of said complaint.

4. Admits that on February 17, 1920, a resolution known as number fourteen of said town was passed by the Town Council [16] thereof, creating said special improvement district number four;

admits that the general character of the improvements to be made is described in said resolution in the same words as in Exhibit "A" attached to the complaint herein; denies that said improvement district number four was, to all intents or purposes, coextensive with the boundaries of the Town of Ryegate.

5. Denies that the true object or purpose of each or all of said proceedings was the establishment or installation in or for the Town of Ryegate of a complete waterworks or a complete waterworks system consisting of reservoir, pumping plant, mains or all other connections or appliances necessary for a complete system for the supplying of water for municipal purposes to said town, or water to the inhabitants thereof; alleges that about the time said improvement district was so created the Town of Ryagate issued and sold bonds of said town for the par value of $15,000.00, for the purpose of securing the money necessary to pay a part of the cost of installation of a water system for said town.

6. Admits that when said town called for bids for the construction of a waterworks system and the improvements for which said special improvement district number four was created, as hereinbefore alleged, the Security Bridge Company was the successful bidder therefor, and that in fact it was the only bidder for such work; admits that a written contract was entered into with said Security Bridge Company for the construction of said waterworks system, and the improvements for which said special improvement district number four was created.

7. Denies that it was intended or contemplated that defendant should issue negotiable evidence of the debt in the form of special improvement district bonds to evidence the obligation to pay for the construction of said waterworks system; alleges that it was intended and contemplated by defendant and said Security Bridge Company that the proceeds derived from the sale of the aforesaid [17] bonds of the Town of Ryegate of the par value of $15,000.00, would be used in payment of cost of construction of said waterworks system, and that the balance of said cost of construction of said system, and of the improvements to be constructed in said special improvement district number four, as set out in the aforesaid resolutions numbered ten and fourteen, was to be paid by the issuance and delivery to said contractor, the said Security Bridge Company, or bonds of said special improvement district number four, which, it was agreed between defendant and said Security Bridge Company, would be accepted by it, at the par value of said bonds, in payment of balance due on such work; admits that bonds of said district in the sum of $45,602.42 were so issued and alleges that the same were delivered by the defendant to said contractor, Security Bridge Company, and that they were by it accepted in full settlement and payment of the balance due it under its said contract with the Town of Ryegate, after allowing said town credit for proceeds of sale of the aforesaid general bonds of said town paid by it to said contractor; admits that Exhibit "B" attached to said complaint is a true and correct copy of one of said improvement district bonds, and that except

as to amounts and dates of maturity, it is a true and correct copy of all of said improvement district bonds.

8. Alleges that at and prior to the time said contract was entered into between defendant and said Security Bridge Company, it was known by both said town and said contractor that the bonds of said special improvement district could not be sold for a discount of not more than ten per cent, as required by the laws of Montana, and it was then known and understood between said town and said contractor that said special improvement district bonds would be issued by said town and accepted by said contractor at par value in payment of work done under said contract; denies that said town, or any of its officers or inhabitants, ever importuned said Security Bridge Company to take or accept said special improvement district [18] bonds, as alleged in Paragraph IX of the complaint, but alleges in that connection that said Security Bridge Company solicited said work and was anxious to do the same, and to accept in payment thereof, said special improvement district bonds, in so far as the proceeds of sale of said general bonds would not pay for such construction; denies that said Security Bridge Company, upon request or importuning of the Town of Ryegate, or any of its officials, or otherwise, accepted said special improvement district bonds as an evidence of the payments due on said construction contract, but alleges that said special improvement district bonds were issued by defendant, and accepted by said contractor, in payment of the

amounts due under said contract; admits that said special improvement district bonds were issued by the proper officials of defendant and delivered to Security Bridge Company from time to time upon estimates of the defendant's engineer, and alleges that, as so issued and delivered, they were accepted by said Security Bridge Company as actual payment of said estimates.

9. Defendant denies that it has any knowledge or information sufficient to form a belief as to whether said Security Bridge Company had no facilities or capacity for handling bonds in lieu of cash, or that it was necessary for said Security Bridge Company to at once arrange for the sale of said bonds in order to obtain the money to purchase supplies or materials or to pay the labor necessary for the construction of said waterworks system, and denies that the defendant, or any of its officers, knew that said Security Bridge Company would have to arrange for sale of said improvement district bonds, as alleged in Paragraph X of said complaint.

10. Denies that the defendant, or any of its officers, had any knowledge, until long after said contract was completed, that said Security Bridge Company did negotiate with plaintiff for the sale of said bonds, or that plaintiff did become the purchaser thereof; denies that plaintiff ever became possessed of any rights, privileges [19] or claims, which the Security Bridge Company might have or hold, or be entitled to under or by virtue of its said contract with the defendant, or of its faithful performance of the terms or conditions thereof, or acceptance of the work therein contemplated by said defendant.

11. Denies that it has any knowledge or information sufficient to form a belief as to whether there was any agreement of purchase between plaintiff and said Security Bridge Company of the bonds in question, or that the plaintiff did purchase the same from time to time, as the same were issued, or that plaintiff did furnish all, or any part, of the money that was used to build or furnish to the defendant town, or its inhabitants, the said waterworks system, or the improvements for which said special improvement district was created; denies that it has any knowledge or information sufficient to form a belief as to whether plaintiff became, or is, the owner or holder of any of said special improvement district bonds, before maturity, or for value; denies that plaintiff ever became the holder or owner of any of said bonds without notice of any imperfection in said bonds or any of them; admits that said bonds were issued and delivered to Security Bridge Company approximately upon the dates and of the numbers and in the amounts as alleged in Paragraph XII of said complaint; save and except as hereinbefore admitted, qualified or specifically denied, defendant denies each and every allegation of Paragraph XII of said complaint.

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

of the inhabitants thereof; denies that said defendant, or its inhabitants, now have or are using or receiving the income or benefits from valuable property [20] totally and wholly built or constructed from moneys had or received from plaintiff, or that were built or constructed in whole or in part from any moneys had or received from plaintiff; denies that this defendant used any moneys had or received by it from plaintiff for the construction of said waterworks system, or the improvements contemplated in, or provided for by the creation of said special improvement district number four; and denies that defendant ever had or received or used any moneys from plaintiff evidenced by the aforesaid bonds.

13. Denies that the defendant ever paid any interest maturing or becoming due upon any of said special improvement district bonds; alleges that the interest thereon to January 1, 1922, was paid out of assessments levied upon the property included in said special improvement district number four, and not otherwise; denies that defendant has ever refused to pay any interest on said special improvement district bonds for the reason that the defendant is not liable thereon and has never been requested to pay the same; admits that the defendant has not paid any part of the interest or principal of said special improvement district bonds, and does not intend to ever pay the same or any part thereof; denies that said bonds are a debt of defendant, or that there is any obligation on the part of defendant to pay the same or any part thereof; denies that there

is now due or owing from defendant to plaintiff the said sum of $45,602.42, or any part thereof, or interest thereon at six per cent per annum from January 1, 1922, or interest whatever; admits that interest at the rate of six per cent per annum is a reasonable rate of interest in the State of Montana; admits that defendant now refuses to pay any part of said alleged claim, but denies that defendant has ever repudiated said debt or obligation, and denies that the aforesaid bonds are the debt or obligation of said defendant.

14. Admits the allegations of Paragraph XV of said [21] complaint.

15. Denies that said bonds are negotiable.

16. Alleges that on February 17, 1920, the Town Council of the Town of Ryegate adopted and passed, and the Mayor of said town approved, Resolution Number 14 of the town of Ryegate creating said special improvement district number 4, a copy of which resolution, marked Exhibit "A," is hereunto annexed and made a part of this answer.

17. Alleges that on June 9, 1920, the Town Council of the Town of Ryegate passed and adopted, and the Mayor of said town approved, Ordinance Number 28 of the Town of Ryegate, which provides the manner and method of assessment and paying cost of improvements in said special improvement district number 4, copy of which said ordinance is hereunto annexed, marked Exhibit "B" and hereby made a part of this answer.

18. Alleges that on June 9, 1920, the Town Council of the Town of Ryegate passed and adopted,

and the Mayor of said town approved, Ordinance Number 29 of the Town of Ryegate, authorizing the execution, issuance and delivery of the bonds in question in payment of the work and improvements in special improvement district number 4 of the Town of Ryegate, a copy of which ordinance is hereunto annexed, marked Exhibit "C" and hereby made a part of this answer.

19. That under the aforesaid resolutions and ordinances, the bonds in question were payable only out of assessments to be levied upon the real property in said special improvement district number 4, and not otherwise, and were and are not general obligations of the Town of Ryegate nor an indebtedness of the Town of Ryegate, nor payable out of the general funds of the Town of Ryegate.

20. Save and except as hereinbefore specifically admitted, qualified or denied, defendant denies generally each and [22] every allegation, and all of the allegations of said complaint.

II.

For its first affirmative defense, defendant alleges that when the contract for the construction of the water system for the Town of Ryegate and the improvements specified in the resolutions creating special improvement district number 4 of the Town of Ryegate was entered into on April 26, 1920, the outstanding and unpaid indebtedness of the Town of Ryegate was $15,584.87; that the assessed value of all property in the Town of Ryegate was then $577,005.00; that there was then no money in the

general fund of the Town of Ryegate out of which the bonds in question could be paid, nor were the same payable out of the current revenues of said Town of Ryegate; that the assessed value of all property in the Town of Ryegate for the year 1920 was the sum of $420,006.00; that on the dates on which the bonds in question were issued and delivered, the general indebtedness of the Town of Ryegate, and the amounts of money in the general fund of said town were as follows, to wit:

Date	General Indebtedness	Amount of Money in General Fund of Said Town
July 28, 1920	$15,965.36	$ 93.53
August 11, 1920	16,669.29	127.53
August 25, 1920	16,615.14	129.17
September 8, 1920	16,877.98	148.17
October 13, 1920	16,953.89	78.20
November 24, 1920	17,180.35	60.70;

that on December 31, 1926, when this action was instituted, the assessed value of all property in the Town of Ryegate was the sum of $375,949.00; that at that time the general indebtedness of the Town of Ryegate was the sum of $19,462.07; that the moneys then in the general fund of the Town of Ryegate was the sum of $494.08; that said bonds never were payable out of the current revenues of said town, and that if the said bonds of special improvement district number 4 of the Town of Ryegate, amounting to the sum of $45,602.42 were held to be [23] general obligations of the Town of Ryegate the same and each of said bonds would be and are unconstitutional, invalid and void for that the amount of said bonds and each of them, added to

the then general indebtedness of said town would be and are greatly in excess of the constitutional and statutory limit of indebtedness which said town might then or may now incur.

III.

For its second affirmative defense, defendant alleges that it is informed and believes and therefore states the fact to be that plaintiff purchased the bonds in question at eighty per cent of the face value of said bonds and paid therefor the sum of $36,481.94, and no more.

IV.

For its third separate defense defendant alleges:

1. That when the Town Council of the Town of Ryegate decided to create special improvement district number four for the purpose of constructing and installing the improvements mentioned and specified in said Resolutions Numbered Ten and Fourteen, the said Town Council employed special counsel of especial skill and experience in bond matters, and particularly in municipal bonds, to prepare the necessary resolutions and ordinances in connection with the creation of special improvement district numbered four, the issuance of the bonds of said district which are the subject of this action, and in supervising all of the proceedings of the Town Council of the Town of Ryegate in connection therewith, for the sole purpose of having all of its proceedings in connection with said bond issue done strictly in accordance with the laws of Montana, and so as to make certain, if possible, that

such bond issue should be legal and valid, and that the said Town Council did everything that it was advised by such special counsel was necessary and proper to make said bond issue a legal and valid obligation of said special improvement district number 4. [24]

2. That the Security Bridge Company did not rely upon said proceedings being had under the advice and direction of special counsel so employed by the Town Council of the Town of Ryegate, but had all of said proceedings with reference to the creation of special improvement district number four, and the issuance of its bonds, passed upon by counsel for said Security Bridge Company, who were of more than ordinary skill and experience in investigating the legality of bond issues and especially the validity of bond issues of special improvement districts under the laws of Montana, and that in purchasing the general bonds of the Town of Ryegate, as herein alleged, and in agreeing to accept said special improvement district bonds at par value in payment of work under its said contract with the Town of Ryegate, said Security Bridge Company relied wholly upon the advice of its counsel; that in so accepting said special improvement district bonds said Security Bridge Company well knew that the Town of Ryegate was not liable for the payment of any part of said bonds, either principal or interest, and accepted said bonds well knowing that it would have to rely entirely upon payment of assessments on real property in said special improvement district

number four for the payment of said bonds, both principal and interest.

3. Defendant is informed and believes and therefore states the fact to be that when plaintiff purchased said special improvement district bonds from Security Bridge Company, it did so knowing that the Town of Ryegate was not liable for the payment of either principal or interest of any of said bonds, and did so without relying upon any statements of any officer of the Town of Ryegate, and did rely solely upon the advice of its counsel, lawyers skilled in examination of proceedings with reference to the legality of bond issues, and purchased said bonds solely upon the advice of its counsel that the proceedings had with reference to the issuance of said special improvement district bonds were legal and that said [25] bonds were valid and binding obligations of said district.

V.

For its fourth affirmative defense, defendant alleges:

1. That the first attempt made by the Town Council of the Town of Ryegate to levy assessments upon the property in said special improvement district number four to pay interest and principal of said special improvement district bonds, was made in the year 1921, and the first alleged assessment therefor was made payable on or prior to November 30, 1921.

2. That in the month of January, 1922, Mike Belecz, a property owner in said special improve-

ment district number four, together with a large number of other property owners in said district, began various suits in the District Court of the Fifteenth Judicial District of the State of Montana, in and for the County of Golden Valley, against the Town of Ryegate, and the County Treasurer of Golden Valley County, Montana, in which county the said Town of Ryegate is located, for the purpose of enjoining and restraining said Town of Ryegate and said County Treasurer, from the collection of any assessments so attempted to be levied upon property in said special improvement district number four, for the payment of any part of the principal or interest of any of said special improvement district bonds, and alleged in their complaints in such suits; that the only description set out in said resolutions numbered ten and fourteen, as to the character of the work to be done and improvements to be made, was "the construction of pipes, hydrants, and hose connections for irrigating appliances and fire protection," which said general language gave no definite information to the lot owners in said special improvement district number four as to the specific character, extent or nature of the contemplated improvements and did not include the payment of the cost of installation of any general waterworks system for the Town of Ryegate; that when said resolution of intention number ten was passed and approved there were no plans and specifications on file or available for [26] examination by lot owners showing the nature or character of improvements to be made un-

der said resolution of intention; that the whole cost of improvements made under said resolutions in said special improvement district number four greatly exceeded the sum of $1.50 per lineal foot plus the cost of the pipe laid in said district, which total cost was in excess of the limit prescribed by law; that no notice of any kind was given of the letting of the contract for construction of said improvements in said special improvement district number four, and when the same was let the contract price therefor amounted to $52,829.35, whereas the estimated cost thereof amounted to the sum of $28,350.00; that in addition to said contract price other payments were made by the Town Council of said town to the contractor and for engineering work so that the total cost of making such improvements was the sum of $57,619.22; that the contract price and the actual cost of making such improvements was and is wholly out of proportion to the value of said improvements to the Town of Ryegate, or to the property included within said district; that when said contract was let it was impossible to sell the bonds or warrants of said special improvement district at par; that no purchaser therefor could be found; that those facts were then well known to the Mayor and Town Council of said town; that the contractor took the bonds of said special improvement district number four in payment of its contract price and claimed extras in connection with the installation of said improvements; that in so doing it allowed for a considerable discount on said bonds and added such dis-

count to its bid for such work; that because thereof the cost of said work was greatly increased over what it would have been if said bonds had been sold at the par value thereof; that when the bid of said contractor was accepted the Mayor and the Town Council of said town had knowledge of said facts, and that such proceedings were had in said suits that judgments and decrees were duly given, made and entered therein holding that all such assessments were null [27] and void and enjoining restraining the Town of Ryegate and said County Treasurer from collecting or attempting to collect any such assessments.

3. That plaintiff herein was advised of the commencement of each and all of said suits, and employed special counsel to assist counsel for the Town of Ryegate in defending said suits; that no appeal was taken from any of said judgments or decrees; and that said judgments and decrees have long since become final judgments and decrees as to the legality of said bond issue of such special improvement district.

WHEREFORE, defendant having fully answered said complaint demands judgment that plaintiff take nothing by this action and that defendant do have and recover of and from plaintiff its costs and disbursements herein.

JOHNSTON, COLEMAN & JOHNSTON,
By W. M. JOHNSTON,
Attorneys for Defendant.

State of Montana,
County of Yellowstone,—ss.

W. M. Johnston, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant in the above-entitled cause; that he makes this verification for and on behalf of defendant for the reason that no officer of defendant is now in Yellowstone County, Montana, where affiant resides and makes this affidavit; that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

W. M. JOHNSTON.

Subscribed and sworn to before me this 8th day of August, 1927.

[Seal] W. J. JAMESON, Jr.,
Notary Public for the State of Montana, Residing at Billings.

My commission expires Aug. 10, 1928. [28]

EXHIBIT "A."

RESOLUTION No. 14.

A RESOLUTION CREATING SPECIAL IMPROVEMENT DISTRICT NO. 4 OF THE TOWN OF RYEGATE, MONTANA, FOR THE PURPOSE OF CONSTRUCTING PIPES, HYDRANTS, AND THE HOSE CONNECTIONS FOR IRRIGATING AP-

PLIANCES AND FIRE PROTECTION WITHIN THE TOWN OF RYEGATE, MONTANA.

WHEREAS, the Town Council of the Town of Ryegate, duly and regularly passed and adopted Resolution No. 10 on the 30th day of December, 1919, which said Resolution is now on file in the office of the Town Clerk of the Town of Ryegate, Montana, and to which reference is hereby made; and

WHEREAS, said Town Council of said Town caused a Notice of its passage and adoption of said Resolution of Intention to be published in the Ryegate Weekly Reporter, a weekly newspaper published in the Town of Ryegate, Montana, in the manner and form and during the period of time as required by law and has also caused the town clerk of said town on the first day of January, 1920, that being the date of the first publication of Notice, to mail to each and every person, firm or corporation, or a known agent thereof, having property within the proposed District, to the last known address of such person, firm or corporation, or agent, a notice of the passage and adoption of said resolution, giving them notice of the intention of the Town Council to create such Special Improvement District for the purposes therein mentioned and giving them full, due and timely notice as is required by law, which said Notices so published and mailed described the character of the improvement proposed to be made in said district, the estimated cost thereof and setting the time and place for the hearing of

protests against the creation of said proposed District and the making of said improvement and which said Notices also contained a reference to the number of said Resolution of Intention, giving the boundaries of the said proposed District and all other necessary particulars; and

WHEREAS, the Town Council having on the 11th day of February, 1920, met in regular session at the time and place fixed [29] and mentioned in said Resolution of Intention and in said Notices for the hearing of protests against the creation of said proposed District and against the making of said proposed improvement and such regular meeting of the Town Council having been regularly adjourned to this 17th day of February, 1920, and the Council having fully heard and considered all such protests, NOW THEREFORE,

BE IT RESOLVED BY THE COUNCIL OF THE TOWN OF RYEGATE MONTANA:

Section 1. That the said Town Council has and does hereby FIND AND DETERMINE that the protests and each of them made against the creation of such proposed Improvement District and against the making of said improvement be and the same are hereby over-ruled and denied and that the Town Council deems itself to have acquired jurisdiction to Order the proposed improvement.

Section 2. That there be and there hereby is created a Special Improvement District to be known and designated as "special Improvement District No. 4 of the Town of Ryegate, Montana" and that the general character of the improvements to be

made in said District as follows, to-wit: The construction of pipes, hydrants, and hose connections for irrigating appliances and fire protection; all of which improvements are to be made in accordance with the plans and specifications to be prepared by the Engineer of the Town of Ryegate and to be adopted by the Council of said Town, and which plans and specifications will then be on file in the office of the Town Clerk to which reference is hereby made and by such reference are made a part hereof, to all intents and purposes the same as though said plans and specifications were fully set forth and incorporated at length in this resolution.

Section 3. That the boundaries of said special improvement District No. 4 shall be and the same are hereby declared to be the same as are described in the foregoing mentioned Resolution No. 10, to which reference is hereby made for a particular description [30] thereof.

Section 4. That the Town Council hereby makes reference to Resolution No. 10 declaring its intention to create the District hereby created, which said resolution is for all purposes hereby referred to for further particulars.

Passed by the Council of the Town of Ryegate, Montana and approved by the Mayor this 17th day of February, 1920.

R. C. CURRIE,
Mayor.

(Seal) Attest: J. A. BROWN,
Town Clerk. [31]

EXHIBIT "B."

ORDINANCE No. 28.

PROVIDING THE MANNER AND METHOD OF ASSESSMENT AND PAYMENT OF THE COST AND EXPENSE OF MAKING AND INSTALLING THE IMPROVEMENTS IN SPECIAL IMPROVEMENT DISTRICT No. 4 OF THE TOWN OF RYEGATE, MONTANA.

BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF RYEGATE, MONTANA:

Section 1. That the entire cost and expense of making and installing the improvements in Special Improvement District No. 4 of the Town of Ryegate, Montana, shall be paid by said entire district, each lot or parcel of land within said district to be assessed for that part of the whole cost of said improvements which its area bears to the area of the entire district, exclusive of streets, alleys and public places. The work and improvements to which this ordinance relates are more particularly described in Resolution No. 10 passed by the Town Council of said Town of Ryegate, on December 30, 1919; the plans and specifications for which said work and improvements are now on file in the office of the Town Clerk of said Town, and reference to which plans and specifications is hereby expressly made.

Section 2. That the entire cost and expense of making and installing said improvements shall be

paid in ten (10) equal annual installments, and bonds therefor are to be drawn against the fund of said Special Improvement District No. 4, and made payable exclusively from said fund. Such bonds shall be in the denomination of One Hundred ($100.00) Dollars each, or some multiple thereof. Said assessments shall be paid in ten (10) equal annual installments, and the payments thereof is hereby extended over a period of ten years from and after the completion and acceptance of said improvements. All moneys derived from the collection of said improvements shall constitute a fund to be known as "FUND OF SPECIAL IMPROVEMENT DISTRICT No. 4."

Section 3. All ordinances and parts of ordinances, resolutions and parts of resolutions, in conflict or inconsistent with this ordinance, are hereby repealed. [32]

Passed and adopted by the Town Council and approved by the Mayor this 9th day of June, 1920.

Approved: W. H. NORTHEY,
Mayor.

(Seal) Attest: J. A. BROWN,
Town Clerk. [33]

EXHIBIT "C."

ORDINANCE No. 29.

AUTHORIZING THE EXECUTION, ISSUANCE AND DELIVERY OF COUPON BONDS IN PAYMENT FOR THE WORK AND IMPROVEMENTS IN SPECIAL IMPROVEMENT DISTRICT No. 4 OF THE

TOWN OF RYEGATE, MONTANA, AND PRESCRIBING THE FORM, DENOMINATION AND MATURITY DATE OF SUCH BONDS.

WHEREAS, on February 17th, 1920, the Town Council of the Town of Ryegate, Montana, passed and finally adopted Resolution No. 14, creating Special Improvement District No. 4 in said Town of Ryegate, for the purpose of installing pipes, hydrants and hose connections for irrigating appliances and fire protection within said Town of Ryegate; and

WHEREAS, it is provided in the resolutions, ordinances and proceedings heretofore passed and had by said Town Council in connection with the creation of said Special Improvement District, that payment for said work and improvement shall be made by Special Improvement District Bonds to be issued against said District; all of which more fully appears from the resolutions and ordinance heretofore passed and adopted by said Town Council, and from the minutes of the meetings of said Town Council, and from the minutes of the meetings of said Town Council, reference to all of which is hereby expressly made:

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF RYEGATE, MONTANA:

Section 1. That for the purpose of providing the necessary funds with which to pay for the work and improvements in Special Improvement District No. 4 of the Town of Ryegate, Montana, including

engineering expenses and all other incidentals, there shall be executed and issued negotiable coupon bonds of said special improvement district No. 4, in the principal sum of ——— Dollars, such bonds to be ——— in number, and numbered consecutively from 1 to ——, both inclusive. Such bonds shall be redeemable at the option of the Town at any time there are funds to the credit of said Special Improvement District No. 4 for the redemption thereof. [34] Each of said bonds shall bear interest at the rate of six per cent (%) per annum from the date of its registration, interest payable annually on January 1st of each year, and interest coupons in the form hereinafter provided shall be attached to each of said bonds, said bonds shall be issued, dated and delivered from time to time as may be necessary in payment for the work and improvements in said District, as the work progresses, and upon estimates to be furnished by the engineer in charge of the said work.

Section 2. That the denomination of each bond issued in payment for the work and improvements in said Special Improvement District No. 4 be, and the same is hereby, fixed at the sum of Five Hundred ($500.00) Dollars, provided, however, that the last bond to be so issued shall be in the sum as shall represent the balance due for said work and improvements less than Five Hundred Dollars ($500.-00).

Section 3. That the maturity date and time of payment of each and all of said bonds shall be the 1st day of January, 1930, subject, however, to re-

demption as provided in the form of bond in this ordinance hereinafter contained.

Section 4. That each of said bonds shall be substantially in the following form:

DISTRICT No. 4.

UNITED STATES OF AMERICA,
STATE OF MONTANA.

BOND.

Bond No. —— $500.00.

Interest 6 per cent per annum, Payable Annually.

Special Improvement District Coupon Bond Issued by the Town of Ryegate, Montana.

THE TREASURER OF THE TOWN OF RYEGATE, MONTANA WILL PAY TO THE BEARER ON THE 1st DAY OF JANUARY, 1930, the sum of Five Hundred ($500.00) Dollars, as authorized by Resolution No. 14, as passed on the 17th day of February, 1920, creating Special Improvement District No. 4, for the construction of the improvements and the work performed as [35] authorized by said Resolution to be done in said District, and all laws, resolutions and ordinances relating thereto, in payment of the contract in accordance therewith.

The Principal and Interest of this bond are payable at the office of the Town Treasurer of Ryegate, Montana. This bond bears interest at the rate of six per cent (6%) per annum from the date of its maturity as expressed herein until the date called for redemption by the Town Treasurer. The interest on this bond is payable annually, on the 1st day

of January in each year, unless paid previous thereto, and as expressed by the interest coupons hereto attached, which bear the engraved facsimile signature of the Mayor and Town Clerk.

This bond is payable from the collection of a special tax or assessment, which is a lien against the real estate within said improvement district as described in said Resolution No. 14, as well as in Resolution No. 10, passed and adopted December 30th, 1919.

This bond is redeemable at the option of the Town of Ryegate at any time there are funds to the credit of said Special Improvement District Fund for the redemption thereof; and in the manner provided for the redemption of the same; Provided, however, that the date of Payment shall not be later than the maturity date hereinabove contained.

IT IS HEREBY CERTIFIED AND RECITED, That all things required to be done precedent to the issuance of this bond have been properly done, happened and been performed in the manner prescribed by the laws of the State of Montana, relating to the issuance thereof.

Dated at Ryegate, Montana, this —— day of ——, 1920.

TOWN OF RYEGATE, MONTANA,
By W. H. NORTHEY,
Mayor.
Attest: J. A. BROWN,
Town Clerk. [36]

Registered at the office of the Town Treasurer of Ryegate, Montana, this —— day of ————, 1920.

————————————,
Town Treasurer.

Section 5. That the interest coupons to be attached to each of said bonds shall be substantially in the following form:

COUPON.

$30.00 Coupon No. ——.

On the first day of January, 192—, the Treasurer of the Town of Ryegate, Montana, will pay to the bearer the sum of Thirty Dollars, at the office of said Treasurer in Ryegate, Montana, out of the funds of Special Improvement District No. 4, being the interest then due on Bond No. —— of said Special Improvement District; provided, however, that if said bond, together with accrued interest thereon to the date called for its redemption, has heretofore been paid under the option reserved in said bond, then this coupon shall be null and void.

W. H. NORTHEY,
Mayor.
J. A. BROWN,
Town Clerk.

Section 6. That each of said bonds shall be signed by the Mayor and Town Clerk of said Town of Ryegate and be impressed with the corporate seal of said Town, and each of said interest coupons shall bear the engraved facsimile signatures of said Mayor and Town Clerk, and said officers are hereby authorized and directed to cause said bonds

and coupons to be prepared and to execute the same for and on behalf of said Special Improvement District No. 4 in accordance with the proceedings heretofore had in connection with the creation of said District.

Section 7. That a continuing direct annual tax in the form of a special assessment be, and the same is hereby levied upon all the taxable real estate within the boundaries of said Special [37] Improvement District No. 4 in said Town of Ryegate, in addition to all other taxes and assessments thereon, which said special assessment shall be in an amount sufficient to pay the interest on said bonds as the same becomes due and to discharge the principal of said bonds at the maturity thereof.

Section 8. That all money derived and received from the collection of said special assessment shall be deposited by the Town Treasurer to the credit of Special Improvement District No. 4 of said Town of Ryegate, and the same shall be paid out by the Town Treasurer for no purpose other than in payment of the principal and interest of said bonds.

Section 9. This ordinance shall take effect and be in full force from and after the date of its passage and approval. All ordinances and parts of ordinances in conflict or inconsistent with this ordinance are hereby repealed.

Passed by the Town Council and approved by the Mayor this 9th day of June, 1920.

Approved: W. H. NORTHEY,
Mayor.

(Seal) Attest: J. A. BROWN,
Town Clerk. [38]

State of Montana,
County of Yellowstone,—ss.

Orpha Kregness, being first duly sworn, deposes and says: That she is informed and believes and therefore states the fact to be that Messrs. Stewart & Brown, whose address is Helena, Montana, are the attorneys for the plaintiff in the above-entitled cause; that Johnston, Coleman & Johnston, of Billings, Montana, are the attorneys for the defendant in said cause; that there is regular communication by mail between Billings, Montana, and Helena, Montana; that on August 8, 1927, she deposited in the postoffice at Billings, Montana, in an envelope securely sealed, with postage thereon prepaid, and addressed to "Messrs. Stewart & Brown, Attorneys at Law, Helena, Montana," a true and correct copy of the foregoing answer.

ORPHA KREGNESS.

Subscribed and sworn to before me this 8th day of August, 1927.

[Notarial Seal] W. M. JOHNSTON,
Notary Public for the State of Montana, Residing at Billings.

My commission expires April 21, 1929.

Filed Aug. 10, 1927. [39]

THEREAFTER, on September 17, 1927, reply was duly filed herein in the words and figures following, to wit: [40]

[Title of Court and Cause.]

REPLY.

Comes now the above-named plaintiff and replying to the answer of the defendant herein on file admits, denies and alleges:

I.

Admits the allegations of new matter set forth in Paragraphs 2 and 5 and all of the allegations of Paragraphs 16, 17 and 18 of said answer.

II.

Admits that the special improvement district bonds were issued by said town at par value in payment of work done under said contract, and that the Security Bridge Company had solicited said work and agreed to take the proceeds from the general bonds of said city and the proceeds of, or the bonds of said special improvement district as evidence of the obligation owing for such construction work.

III.

Generally denies each, every and all of the affirmative allegations and allegations of new matter set forth in said answer not herein specifically admitted or denied.

Replying to the separate and affirmative defenses [41] contained in said answer plaintiff admits, denies and alleges as follows:

I.

Denies that defendant has any knowledge or information sufficient to form a belief as to the allegations contained in the first paragraph of the first affirmative defense (denominated II in the answer) and therefore denies the same.

II.

Generally denies each and every and all of the allegations of said first and second affirmative defenses not herein specifically admitted or denied.

III.

Denies that this plaintiff has any knowledge or information sufficient to form a belief as to the allegations of Paragraph 1 of the third separate defense, and therefore denies each and all of the same.

IV.

Admits that said Security Bridge Company had its own counsel investigate the legality of the bond issues of the defendant.

V.

Generally denies each and every and all of the other allegations of Paragraph 2 of said third separate defense.

VI.

Generally denies each, every and all of the other allegations of said third separate defense not herein specifically admitted or denied.

VII.

Admits the allegations of Paragraph 1 of the fourth affirmative defense. Admits that in the

month of January, 1922, one Mike Belecz, and other property owners began various suits in the District Court of the Fifteenth Judicial District of the [42] State of Montana in and for the County of Golden Valley against the Town of Ryegate and against the Treasurer of Golden Valley County, Montana, for the purpose of enjoining and restraining the said Town of Ryegate and said County Treasurer from the collection of any assessments to be levied upon property in special improvement district number 4 for the payment of principal and interest of said special improvement district bonds.

Denies that this plaintiff has any knowledge or information sufficient to form a belief as to the contents of said complaints in said actions and the allegations therein contained. Admits that in such proceedings judgments and decrees were duly made and entered, but denies that this plaintiff has any knowledge or information sufficient to form a belief as to the extent and character of such judgments and decrees, save and except that they have prevented the collection of said principal and interest upon such special improvement district bonds.

VIII.

Generally denies each and every and all of the allegations of said fourth affirmative defense not herein specifically admitted or denied.

IX.

Generally denies each, every and all of the affirmative allegations and allegations of new matter and of

separate or affirmative defenses in said answer contained which have not been heretofore specifically admitted or denied.

WHEREFORE, having fully replied to defendant's answer the plaintiff prays as in its complaint set forth and demanded.

STEWART & BROWN,
Attorneys for Plaintiff. [43]

State of Montana,
County of Lewis and Clark,—ss.

John G. Brown, being first duly sworn according to law, deposes and says:

That he is one of the attorneys for the plaintiff in the above-entitled action and that he makes this verification for and on behalf of the plaintiff by reason of the fact that there is no officer or agent of said corporation in the County of Lewis and Clark wherein affiant resides and this reply is verified. I have read the foregoing reply, know the contents thereof and the matters and things therein stated are true to the best of my knowledge, information and belief as such attorney.

JOHN G. BROWN.

Subscribed and sworn to before me this 15th day of September, 1927.

[Seal] R. L. HILLIS,
Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires 1–5–1930.

Filed Sept. 17, 1927. [44]

THEREAFTER, on July 16th, 1928, stipulation as to trial and facts was duly filed herein, being in the words and figures, as follows, to wit: [45]

[Title of Court and Cause.]

STIPULATION AS TO TRIAL AND FACTS.

It is hereby stipulated by and between the parties above named as follows:

I.

That a trial by jury in the above-entitled cause is hereby waived by the parties.

II.

That the following matters may be considered by the Court as facts admitted in evidence for all purposes in this action.

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

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

copy of the [46] resolution so passed and said district was created for the purpose of raising additional funds over and above the $15,000.00 general bonds necessary to pay for said water system and improvements specified in such resolution.

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

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

e. The true object and purposes of the passage and approval of said resolution and the issuance of said general and special improvement district bonds was the establishment and installation in and for the Town of Ryegate, and for a portion of its inhabitants of a complete waterworks and a complete waterworks system consisting of reservoir, pump-

ing plant, mains, and all other connections and appliances necessary to have a complete system for the supplying of water for municipal purposes to said town, and water to a portion of the inhabitants thereof and for the purpose set out in said resolutions.

f. That when the said Town of Ryegate called for bids [47] for the construction of said waterworks system and the improvements specified in said resolutions, the Security Bridge Company was the successful bidder therefor and a written contract was thereupon entered into between said town and said Security Bridge Company for the construction of said waterworks system and the improvements specified in said resolution, a true and correct copy of which contract is hereto annexed and marked Exhibit 2.

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

h. On April 14, 1920, W. P. Roscoe, as an officer of the Security Bridge Company, purchased said general bonds of said town at par and accrued interest and said Security Bridge Company agreed to accept and did accept said general bonds and

said special improvement district bonds in the sum of forty-five thousand six hundred two dollars and forty-two cents in payment of the costs of installation of said waterworks system and the improvements specified in said resolution and that said improvement district bonds were issued and delivered to said Security Bridge Company, or upon its order, from time to time as the work progressed and upon the estimates of the engineer of said town as said work was completed and accepted.

i. That said Security Bridge Company was a construction corporation without funds for investment purposes and it was necessary for said company to at once arrange for the sale of [48] said bonds in order to obtain the money necessary to purchase supplies and materials and to pay the labor necessary for the construction of said waterworks and the improvements specified in said resolution.

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

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

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

m. Said water system and improvements specified in said resolution were so constructed and accepted and the said [49] town has been and yet is receiving the income from said system and improvements, and said town and such of the inhabitants thereof as live within the limits of said district now have and are using said water system and improvements.

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

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

(2) Public buildings consisting of public school, courthouse, four churches, postoffice in one of said

business houses, Milwaukee Railway Station, school gymnasium and a shack used as fire hall, all within said special improvement district, there being no similar buildings in said town outside of said improvement district.

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

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

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

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

1921	$211.33	
1922	978.53	[50]
1923	721.16	
1924	980.95	
1925	811.70	
1926	1092.68	
1927	749.18	

Total gross receipts $5,545.53.

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

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

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

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

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

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

o. All of the allegations of Subdivision II of defendant's [51] answer, being defendant's first affirmative defense, are admitted to be true excepting the clause "nor were the same payable out of the current revenues of said town of Ryegate" and excepting the clause "that said bonds were never payable out of the current revenues of said town," and excepting all of that portion of said Subdivision II which reads as follows: "and that if the said bonds of special improvement district number 4 of the Town of Ryegate, amounting to the sum of $45,602.42 were held to be general obligations of the town of Ryegate the same and each of said bonds would be and are unconstitutional, invalid and void for that the amount of said bonds and each of them, added to the then general indebtedness of said town would be and are greatly in excess of the constitutional and statutory limit of indebtedness which said town might then or may now incur." None of the exceptions above noted are admitted.

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

q. All of the allegations of Paragraph 2 of said Subdivision IV are admitted except the following allegations "and that in purchasing the general bonds of the Town of Ryegate, as herein alleged, and in agreeing to accept said special improvement district bonds at par value in payment of work un-

der its said contract with the Town of Ryegate, said Security Bridge Company relied wholly upon the advice of its counsel."

r. It is further admitted that plaintiff purchased said special improvement district bonds from Security Bridge Company with the knowledge that they were special improvement district bonds and with full knowledge of the laws of Montana governing the issuance of such bonds, the powers of the defendant with reference thereto and the methods provided and authorized for the payment thereof. [52]

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

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

t. In none of the minutes of the town council of the Town of Ryegate does the name of plaintiff, as purchaser of said general bonds of the Town of Ryegate or of said special improvement district bonds appear. Neither does plaintiff's name appear in any of said minutes, records or

files in any connection whatever, except in copies of letters of the town clerk remitting some of said bonds to plaintiff at the request of Security Bridge Company, as hereinbefore set forth.

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

Signed and dated July 13, 1928.

JOHNSTON, COLEMAN & JOHNSTON,
Attorneys for Defendant.
STEWART & BROWN,
Attorneys for Plaintiff. [53]

EXHIBIT No. 2.

CONTRACT.

THIS AGREEMENT, made and entered into the 26th day of April in the year ONE THOUSAND NINE HUNDRED TWENTY, by and between the TOWN OF RYEGATE, MONTANA, of the first part, and THE SECURITY BRIDGE COMPANY, a corporation of Billings, Montana, of the second part.

WITNESSETH, that the said party of the second part has agreed, and by these presents does

agree with the said party of the first part, for the considerations herein mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents and hereto attached, to furnish at his own proper cost and expense, all the necessary material and labor, except as herein specifically provided, and to excavate for and build in a good, firm, substantial and workmanlike manner, before the first day of October, A. D. 1920, the water mains, pumping plant, and reservoir indicated on the plans now on file in the office of the Town Clerk, and the connections and appurtenances of every kind complete, of the dimensions, in the manner and under the conditions herein specified, and has further agreed that the Engineer shall be and is hereby authorized to inspect or cause to be inspected the materials to be furnished and the work to be done under this agreement and to see that the same conform to plans and specifications.

The party of the second part hereby further agrees that he will furnish the Town with satisfactory evidence that all persons who have done work or furnished material under this agreement, and are entitled to a lien therefor under any law of the State of Montana, have been fully paid or are no longer entitled to such lien, and in case such evidence be not furnished as aforesaid, such amount as the party of the first part may consider necessary to meet the lawful claims of the persons as aforesaid shall be retained from the money due the party of the second part under [54] this

agreement until the liabilities aforesaid may be fully discharged and the evidence thereof furnished.

The said party of the second part further agrees that within ten days of notification of award of contract he will execute a bond in the sum of Twenty-five Thousand Dollars ($25000.00) satisfactory to the Town Council, for the faithful performance of this contract, conditioned to indemnify and save harmless the said Town of Ryegate, Montana, its officers and agents, from all suits or actions of every name or description brought against any of them for or on account of any injuries or damages received or sustained by any party or parties, by or from the said party of the second part, its servants or agents, in the construction of said work, or by or in consequence of any negligence in guarding the same, or any improper materials used in the construction, or by or on account of any commission of the said party of the second part or its agents in the performance of this agreement, and for the faithful performance of this contract in all respects by the party of the second part, and the said party of the second part hereby further agrees that so much of the moneys due, under and by virtue of this contract, as shall be considered necessary by the said town of Ryegate, may be retained by the said party of the first part until all such suits or claims for damages as aforesaid shall have been settled, and the evidence to that effect furnished to the satisfaction of the town.

The said party of the first part hereby agrees to pay and the said second party agrees to receive the following prices as full compensation for furnishing all materials, labor, tools and equipment used in building and constructing and completing said water system, in the manner and under the conditions heretofore specified, and full conpensation for all loss or damage arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, and for all [55] expenses incurred by or in consequence of the same, and for all expenses incurred by or in consequence of the suspension or discontinuance of the said work, and for well and faithfully completing the same and the whole thereof, according to plans and specifications and the requirements of the engineer under them, to-wit:

For furnishing all material, tools and labor and in every way completing in a first class workmanlike manner the proposed water system in the Town of Ryegate, Montana, according to plans and specifications therefor on file in the office of the Town Clerk, and any special instructions that may be given from time to time during the construction of the work.

Per linear foot for four inch cast iron water pipe complete including the necessary excavation, backfill and all valves and specials according to plans and specifications.

Price in words.	Price in figures.
Two Dollars and Fifty Five Cents.	$2.55

Per linear foot for six inch cast iron water pipe complete including the necessary excavation, backfill and all valves and specials according to plans and specifications.

Price in words.	Price in figures.
Three Dollars and Sixty Cents	$3.60

Per linear foot for eight inch cast iron water pipe complete including the necessary excavation, backfill and all valves and specials according to plans and specifications.

Price in words.	Price in figures.
Five Dollars and Five Cents	$5.*044*

For hydrants complete in place including auxiliary valve and all necessary excavation and backfill according to plans and specifications.

Price in words.	Price in figures.
One Hundred Seventy Four Dollars Forty Cents.	$174.70

Per cubic yard excavation at reservoir site including disposition of surplus material according to plans and specifications. [56]

Price in words.	Price in figures.
Three Dollars Seventeen Cents.	$3.17

Per cubic yard for concrete in reservoir including forms, and reinforcing according to plans and specification.

Price in words.	Price in figures.
Thirty Seven Dollars Fifty Cents.	$37.50

For equipment for reservoir including roof, ladder, overflow, and floor drain according to plans and specifications.

Price in words.	Price in figures.
Fourteen Hundred Twenty Five Dollars.	$1425.00

Per cubic yard for excavation for well including the disposal of surplus material according to plans and specifications.

Price in words.	Price in figures.
Two Dollars and Seventy Five Cents.	$2.75

Per cubic yard for concrete in place in well and pump house foundation, pump pit and floor according to plans and specifications.

Price in words.	Price in figures.
Forty Dollars.	$40.00

For shallow well pumping equipment complete, including pump, motor valves, switchboard and all electrical equipment, according to plans and specifications.

Price in words.	Price in figures.
Twenty Five Hundred Twenty Five Dollars.	$2525.00

For pump house complete according to plans and specifications.

Price in words.	Price in figures.
Sixteen Hundred Twenty Five Dollars.	$1625.00

Per cubic yard for excavating rock encountered

in trench, pump pit and well in addition to above prices.

Price in words.	Price in figures.
Three Dollars.	$3.00

And the said party of the second part further agrees that it will not assign, transfer or sub-let the aforesaid work or any [57] portion thereof, (with the exception of contracts for materials and tools) without the written consent of the Town Council, and that any assignment, transferring or sub-letting without such written consent shall in every case be absolutely void.

It is further agreed by the party of the second part that the payments by the party of the first part shall be as provided for in the specifications.

The provisions herein contained shall bind the parties hereto and their heirs, administrators, successors and assigns.

IN WITNESS WHEREOF The Town of Ryegate, party of the first part, has caused these presents to be sealed with its corporate seal and to be signed by its Mayor and Town Clerk, and said party of the second part has hereunto set its hand on the 15th day of May, A. D. 1920.

TOWN OF RYEGATE.
By W. H. NORTHEY, Mayor.
Party of the Second Part.
By H. C. HARKNESS,
Secty.

(Seal) Attest: J. A. BROWN,
Town Clerk.

State of Oregon,
County of Multnomah,—ss.

I hereby certify that the above is a full, true and correct copy of the Original Contract.

In testimony whereof I have hereunto set my hand and notarial seal this 18th day of February, 1927.

ANNE McNAB,
Notary Public for Oregon.

My commission expires Feb. 25, 1929. [58]

EXHIBIT No. 3.

In the District Court of the Fifteenth Judicial District of the State of Montana in and for the County of Golden Valley.

MIKE BELECZ, IDA GRAMS, BERT BELDING, L. F. LUBELY, GEORGE A. COPE, H. C. STILGER, ISABEL CURRIE, R. C. CURRIE, JOSEPH H. KOLMAN, MARTHA J. BROYLES, SARAH G. SNYDER, PHYLINDA C. REDISKE, W. J. EDSON, HENRY G. JACOBSON, STATE BANK OF RYEGATE, J. B. GREGG, GOLDEN VALLEY COUNTY ABSTRACT COMPANY, L. P. ALBRECHT, G. M. BABCOCK, EVANGELICAL LUTHERAN CHURCH OF RYEGATE, M. W. WAUGH, L. W. MARQUARDT, WILLIAM E. STOKES, HENRY THIEN, THE ROMAN CATHOLIC BISHOP OF GREAT

FALLS, Sometimes Known as MATHIAS C. LENIHAN, Bishop of Great Falls, a Corporation Sole, FRED WYMAN, THE HILBERT-THIEN COMPANY, FRANCES THIEN, RYEGATE CREAMERY COMPANY, CHARLOTTE GRAMS, A. D. LINDERMAN, ESTATE OF P. A. HILBERT, Deceased,

Plaintiffs,

vs.

THE TOWN OF RYEGATE, Montana, and W. O. WOOD, as County Treasurer of Golden Valley County, Montana,

Defendants.

COMPLAINT.

Plaintiffs complain and allege:

1. That the defendant, the Town of Ryegate, is and at all of the times hereinafter mentioned was, a municipal corporation and body politic, duly organized and existing under and by virtue of the laws of the State of Montana, and situated in Golden Valley County, Montana.

2. That the defendant, W. O. Wood, is now and during the year 1921, was the duly elected, qualified and acting treasurer of said County, and the proper person to whom payment should be made of taxes and assessments levied on behalf of the said Town of Ryegate.

3. That the plaintiffs, State Bank of Ryegate, Golden Valley County Abstract Company, The Roman Catholic Bishop of Great Falls, sometimes

known as Mathias C. Lenihan, Bishop of Great Falls, a corporation sole, the Hilbert-Thien Company, Evangelical Luthern Church of Ryegate and Ryegate Creamery Company are now and at all of the times hereinafter mentioned have been corporations organized, existing and doing business under and by virtue of the laws of Montana. [59]

4. That the plaintiffs are now and at all of the times hereinafter mentioned have been the owners of the various tracts of land hereinafter set forth, as belonging to them, and that all of said tracts of land are embraced in the description of Special Improvement District No. 4 in the said Town of Ryegate, hereinafter described.

5. That on or about December 30, 1919, the Town Council of the Town of Ryegate, passed a resolution of intention to create a special improvement district known as Special Improvement District No. 4, which said resolution is designated as Resolution No. 10 of said town, a copy of which is hereunto attached, marked Exhibit "A" and hereby made a part of this complaint.

6. That on January 1, 1920, the notice set out in and required to be published by said resolution of intention, was published in the said Town of Ryegate.

7. That thereafter, and on or about February 11, 1920, a resolution known as Resolution No. 14 of said Town, was passed by the Town Council thereof, creating said Special Improvement District No. 4, and that in said Resolution No. 14, the general character of the improvement to be made is de-

scribed in exactly the same words as in Exhibit "A" hereto attached.

8. That the object and purpose of each and all of the foregoing proceedings was the establishment and installation in the said Town of Ryegate of complete water works and a complete water works system, consisting of reservoir, pumping plant, mains and all other connections and appliances necessary for a complete system for the furnishing of water to the inhabitants of said town; that thereafter a contract was made for the construction and installation of such system and the same was constructed and installed.

9. That thereafter, for the purpose of paying for said improvements, a resolution was passed by the Town Council of said Town, known as Ordinance No. 28, providing the method and manner of [60] assessment and payment of the cost and expense of making and installing the improvements in said Special Improvement District No. 4, by which resolution it was provided that each lot or parcel of land within said District was to be assessed for that part of the whole cost of said improvements which its area bore to the area of the entire district, exclusive of streets, alleys and public places, and which resolution further provided for the issuance of the bonds of said District to be retired out of the fund derived from said assessment when paid; that by Ordinance No. 29 passed by the Town Council of said Town, the issuance of such bonds was authorized, and the amount thereof and form of bond, together with other details in connection therewith, were fixed and determined.

10. Thereafter, the Town Council of said Town, by its Resolution, No. 20, provisionally passed on August 22, 1921, and finally passed and adopted by the Town Council of said Town in the month of September, 1921, purported to levy and assess a tax and special assessment against all the real property in said Special Improvement District No. 4, including the property of these plaintiffs, to defray the cost of said improvements, in which Resolution it was recited that the total cost thereof was $45,-602.42. Plaintiffs are informed and believe and therefore state the fact to be that the notice of the resolution levying such assessment, to the effect that the same was on file in the office of the Town Clerk and stating the time and place at which objections to the final adoption of said resolution would be heard, was not published as required by law; that the property owned by each of the plaintiffs herein and the total amount so attempted to be assessed against the same, exclusive of interest, is as follows, to wit: [61]

Owner	Description	Amount of Tax.
Mike Belecz,	Lots 5 and 6, block 1,	$340.10
	Lot 1, block 5,	136.10
Ida Grams,	Lot 3, block 9,	170.10
Bert Belding,	Lots 10, 11 & 12, Blk. 17,	510.30
L. F. Lubeley,	Lots 1, 2 & 3, Blk. 15,	510.30
	Lots 7, 8 & 9, Blk 16,	510.30
George A. Cope,	Lots 4 and 5, block 22,	340.20
H. C. Stilger,	Lots 3 and 4, Block 21,	340.20
Isabel Currie,	Lots 9 and 10, Block 8,	340.20
R. C. Currie,	South 100 feet of Lots 5 & 6, block 2,	243.00
Joseph H. Kilman,	Lots 4 and 5, block 12,	340.20
Martha J. Broyles,	Lot 4, block 24,	170.10
	Lots 5 and 6, block 3,	340.20
Sarah G. Snyder,	Lots 7, 8 and 9, Blk. 15,	510.30

Owner	Description	Amount of Tax.
Phylinda C. Rediske,	Lots 9 and 10, Blk. 9,	340.20
W. J. Edson,	Lots 4, block 8,	170.10
Henry G. Jacobson,	Lots 7, 8 & 9, Blk. 18,	510.30
State Bank of Ryegate,	Lots 13 & 14, Blk. 5,	159.20
J. B. Gregg,	Lots 11 & 12, block 9,	340.20
Golden Valley County Abstract Company,	of lots 15 to 18, Blk. 4,	48.60
L. P. Albrecht,	Lot 1 of block 1,	170.10
Evangelical Lutheran Church of Ryegate,	Lot 12, block 19,	170.10
G. M. Babcock,	Lot 12, Block 7,	170.10
M. W. Waugh,	Lot 6, block 24,	170.10
L. W. Marquardt,	West ½ of lot 2 and lot 3, Blk. 22,	255.20
William E. Stokes,	Lots 10, 11 & 12, block 10,	510.30
Roman Catholic Bishop of Great Falls,		

Owner	Description	Amount of Tax.
The Hilbert Thien Company,	Lots 10, 11 and 12, Blk. 10,	510.30
	Lot 2, block 5,	136.10
	Lot 9 in block 10,	170.10
[62]		
Henry Thien,	Lot 6, block 15,	170.10
Fred Wyman,	Lot 1, block 2	170.10
	———— of lots 15 to 18, block 4,	121.50
	Lots 1, 2 & 3, block 6,	510.30
	Lots 1 and 2 in block 7,	340.20
	Lot 1 in block 8,	170.10
	Lot 4 in block 16,	170.10
	Lot 6 in block 22,	170.10
Frances Thien,	Lots 7, 8 and 12, block 5,	238.80
Ryegate Creamery Company	South 50 ft. of lots 7 to 10, block 6,	121.50
Charlotte Grams,	————	———
A. D. Linderman,	Lot 2, block 24,	170.10
Estate of P. A. Hilbert, deceased,	Lot 3 in block 3,	170.10
	Lots 3 and 4, block 5,	159.20
	Lot 9, block 20,	170.10

11. That the resolution of intention hereto attached and marked Exhibit "A" did not contain any sufficient description of the general character of the improvements to be made as required by law in this,—that the only description used was: "the construction of pipes, hydrants and hose connections for irrigating appliances and fire protection," which said general language gave no definite information to plaintiffs and others within the district as to the specific character, extent or nature of said improvement; that there was nothing in said description advising the plaintiff and others in the district that a waterworks system or a system of mains was contemplated or would be installed and that the character of the improvement described in said notice included only pipes, hydrants and hose connections for irrigating appliances and fire protection, and did not include waterworks or a general waterworks system or system of mains, or reservoir, or pumping plant, which was in fact contemplated, and was thereafter constructed and installed; that the improvements described in the notice were entirely different and much less extensive than the improvements that were actually made; [63] that said description recited that said improvements were to be made in accordance with plans and specifications to be prepared, which said plans and specifications were not then prepared and were not on file or available for the examination of these plaintiffs or any other property owners within said district; that the notice as published and the resolution purporting to create said

district, were defective in the same particulars as in this paragraph recited, in failing to describe the character of the improvement, and that for the reasons herein stated the said Town Council of the Town of Ryegate did not at any time acquire any jurisdiction to create said improvement district or to proceed with the installation or construction of said mains, and that all subsequent proceedings were and are void and of no effect.

12. That the whole cost of said improvements so assessed as hereinbefore alleged, far exceeds 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 said district and that said total cost is in excess of the limit prescribed by law.

13. That no notice of any kind was given of the letting of the contract for said improvement, and when the same was let the contract price therefor amounted to $52,829.35, whereas the estimated cost amounted to $28,350; that in addition to said contract price, other payments have been made by the Town Council of said Town to the contractor and for engineering work, so that the total cost of making such improvements is the sum of $57,619.22 and that both the contract price agreed upon and the actual cost of making such improvements is wholly out of proportion to the value of said improvements to the said Town or to the property included within said district.

14. That plaintiff is informed and believes and therefore states, that at the time said contract was let, it was impossible to sell the bonds or warrants of said Special Improvement District at [64]

par; that no purchaser therefor could be found; that these facts were then well known to the Mayor and Town Council of said Town; that the contractor took the bonds of said District in payment of its contract price and claimed extras in connection with the installation of said improvements; that in so doing, it allowed for a considerable discount on said bonds and added such discount to its bid for said work; that because thereof, the cost of said work was greatly increased over what it would have been if said bonds had been sold by said town council at the par value thereof, and that at the time said contract was entered into and the bid of said contractor accepted, the Mayor and Town Council of said Town had knowledge of all of the aforesaid facts.

15. That before the time fixed in said Resolution No. 10 for hearing objections and protests to the creation of said Special Improvement District No. 4, written protests thereto were made and filed by the owners of a majority in area of the lots and parcels of land within said District No. 4. Among the lot owners so protesting was the Chicago, Milwaukee & St. Paul Railway Company, the owner of a large amount of land within the said district; that prior to the hearing upon the creation of said Special Improvement District No. 4, said Chicago, Milwaukee & St. Paul Railway Company withdrew its protest to the creation of said district, thereby leaving protests from the owners of an insufficient number of lots to defeat the creation of said district, and that plaintiff is informed and believes, and therefore states the fact to be that said Chicago,

Milwaukee & St. Paul Railway Company was induced to withdraw its said protest by the payment to it of $2500.00, which sum of money was furnished, provided and paid by certain parties who were greatly interested in having said improvements made, including the contractor who secured the contract for making such improvements.

16. That by reason of the facts stated in paragraphs 11 to 15, inclusive, in this complaint, the levy of any and all assessments [65] against the said property of plaintiffs in said district was and is, illegal and void.

17. That one-tenth of all of the taxes and assessments so attempted to be levied against the aforesaid property of these plaintiffs was by the resolution aforesaid, to be paid on or before November 30, 1921; that if not so paid, the same was to become delinquent on December 1, 1921, and a ten per cent penalty added thereto because of such delinquency; that none of the plaintiffs herein has paid any part of said alleged tax and assessment against his or its said property for the year 1921; that the said Town of Ryegate is now advertising said property for sale for the non-payment of the taxes and assessments which it claims should have been paid thereon in November, 1921; that if not restrained by order and decree of this court, the defendants will sell all of the aforesaid property belonging to plaintiffs for the non-payment of the aforesaid installments thereon for the year 1921, and thus cloud the title to plaintiff's said lands; that if plaintiffs were to pay said alleged taxes each year under protest and then bring suit against the defendants to re-

cover the taxes and assessments so paid, it would result in a great multiplicity of suits; that plaintiffs have no plain, speedy and adequate remedy at law for the wrongs herein complained of and that great and irreparable damage and injury will be done to plaintiffs and each of them, if said defendants are not enjoined and restrained from selling any portion of the aforesaid lands, because of the non-payment of any of said alleged taxes and assessments.

WHEREFORE, plaintiffs demand judgment:

That a decree of this court be entered adjudging and decreeing the aforesaid taxes and assessments null and void;

That the defendants herein be enjoined and restrained from selling any of the aforesaid property of these plaintiffs on account of the non-payment of said alleged taxes and assessments thereon for the year 1921; that their agents, servants, attorneys, employes [66] and successors be enjoined and restrained from selling any portion of said described lands for the non-payment of any installment of said alleged taxes and assessments for any year hereafter;

That in case any of said property should be sold by said defendants or either of them, for the non-payment of said installments of such alleged taxes and assessments for the year 1921, before the final determination of this suit, that the said defendants, their agents, servants, attorneys, employes and successors be enjoined and restrained from issuing any tax deed to the purchaser of said lots or any part thereof at such sale.

That said defendants, their agents, servants, attorneys, employ*rs* and successors be enjoined and restrained from in any way or manner attempting to collect any portion of said alleged taxes and assessments.

That plaintiffs may have such other and further relief as to the court may seem just and equitable, and that they may recover their costs and disbursements herein incurred.

D. AUGUSTUS JONES,
JOHNSTON, COLEMAN & JOHNSTON,
By W. M. JOHNSTON,
Attorneys for Plaintiffs.

(Duly verified.) [67]

EXHIBIT No. 4.

ANSWER.

Come now the defendants in the above-entitled cause and, answering the complaint of plaintiffs herein allege:

I.

They admit the averments of paragraphs 1, 2, 3, 4, 5, 6, 7, 9 and all that portion of paragraph 10 excepting that part thereof beginning with the words "Plaintiffs" in the last line on page 3 and concluding with the words "law" in line five on page 4.

II.

They specifically deny the averments of paragraphs 8, 11, 12, 13, 14, 15 and 16.

III.

Answering the averments of paragraph 17 of said

complaint, the defendants admit all the averments thereof excepting that portion beginning with the words "that plaintiffs" in the last line on page 8 and continuing to the end of the paragraph, as to which they deny the same.

Further answering said complaint and as a special defense, the defendants allege:

I.

That notice of the passage of the resolution of intention to create said Special Improvement District No. 4 was actually published in one issue of the Ryegate Reporter, a weekly newspaper printed and published in the Town of Ryegate, said publication having been made on the 1st day of January, 1920, as required by law.

II.

That the plaintiffs did not at any time within sixty days from the date of the awarding of the contract for the construction of the improvements referred in said complaint, file with the said Clerk of the Town or Ryegate a written notice specifying in what respect [68] the said acts were irregular, erroneous, or invalid, or in what manner their property would be damaged by the making of said improvements, and did not in writing make any objections to any act or proceeding in relation to the making of said improvements; and these defendants now allege that the plaintiffs have thereby waived all the objections which they now urge in their said complaint and upon which their cause of action is based.

WHEREFORE, the defendants having answered the complaint of the plaintiffs herein, now pray that they may take nothing by their cause of action and that the defendants may have judgment against them for their costs and disbursements herein.

STUART McHAFFIE,
NICHOLS & WILSON,
By EDMUND NICHOLS,
Attorneys for Defendants.

(Duly verified.) [69]

EXHIBIT No. 5.

REPLY.

Plaintiffs make this their reply to the answer of defendants herein:

1. Admit the allegations contained in paragraphs one and two of defendants' Special Defense, except that they deny that they waived any objections to the irregular, erroneous and invalid acts of the officials of the Town of Ryegate complained of in the complaint herein.

2. Save and except as hereinbefore specifically admitted or denied, plaintiffs deny generally each and every allegation of new matter in said answer.

WHEREFORE, plaintiffs demand judgment as prayed for in their complaint.

D. AUGUSTUS JONES,
JOHNSTON, COLEMAN & JOHNSTON,
By W. M JOHNSTON,
Attorneys for Plaintiffs.

(Duly verified.) [70]

EXHIBIT No. 6.

DECREE.

This cause came on for trial February 6, 1923, before the Court, sitting without a jury, a jury having been expressly waived by counsel for the respective parties. D. Augustus Jones, Esq., and Johnston, Coleman & Johnston appeared as attorneys for plaintiffs, and Stuart McHaffie, Esq., and Nichols and Wilson appeared as attorneys for the defendants. Evidence was introduced on behalf of both plaintiffs and defendants and the cause was thereupon submitted to the Court.

Thereafter and on June 27, 1924, the Court made and filed its Findings of Fact and Conclusions of Law herein, which, omitting title of Court and cause, are as follows, to-wit:

"FINDINGS OF FACT.

1. That the defendant Town of Ryegate is, and was, at all times referred to in the proceedings, a Municipal corporation, organized and existing under and by virtue of the laws of Montana, and situated in the county of Golden Valley, Montana, and that the defendant W. O. Wood, was, during the times referred to in the proceedings, the duly elected, qualified and acting treasurer of said Golden Valley County, and the officer to whom the assessments hereinafter referred to were paid.

2. That the plaintiffs were at all of the times referred to in the proceedings herein, the owners of the

various lots and tracts of land described in plaintiffs' complaint as belonging to said plaintiffs, all of which property was and is embraced within the limits of Special Improvement District No. 4 in the said Town of Ryegate.

3. That on the 30th day of December, 1919, the town Council of the Town of Ryegate, duly passed resolution of intention number 10, for the creation of special improvement district No. 4 within said Town of Ryegate, a copy of which said resolution as adopted is attached to the plaintiffs's complaint and marked Exhibit "A" and that notice of such [71] resolution was duly published as required by law, and that thereafter on the 11th day of February, 1920, resolution number 14, creating said special improvement District No. 4 was duly passed by the Town Council of said Town of Ryegate.

4. That the character of the improvements as set out in said resolution of intention and also in said resolution No. 14 was "the construction of pipes, hydrants, and hose connections for irrigating appliances and fire protection." That the actual improvement sought to be installed as a result of said proceedings and which was actually installed by said town was a complete water works and water system consisting of reservoirs, pumping plant, mains and fire hydrants constituting a complete system for the furnishing of water to the inhabitants of said town That said improvement was installed and constructed by Security Bridge Company, a corporation, under one contract, which contract was entered into upon the award of said work to said Security

Bridge Company, which said award was made upon bid filed in response to notice to contractors given in pursuance of resolutions numbers 10 and 14, referred to above. That the notice to contractors and the plans and specifications covering said work and contract itself all refer to and call for the construction of a complete water system consisting of the elements above described.

5. That after the contract for said water system was let, the Town Council of the Town of Ryegate by appropriate action provided the mode of assessment for the payment of said improvement and assessed each parcel of land within the district for that part of the entire cost of the improvement which its area bore to the entire area of said district, exclusive of streets and alleys, and that the total amount assessed against each of the plaintiffs herein is correctly set forth in their complaint herein. That the assessment so made against the property in said district was for the purpose of retiring the bonds of said district to the amount of $45,602.42, which said bonds under the provisions of said contract with said [72] Security Bridge Company, were to be accepted and were in fact issued and accepted in payment for said improvement to the extent of forty-five thousand six hundred two and 42/100 dollars.

6. That the plans and specifications for the improvements actually made were delivered to the Town Clerk ten days or two weeks before April 13, 1920, but were not presented to the Town Council or approved by the Town Council of Ryegate until

April 13, 1920, one day before bids were received for the construction of the improvements called for by said plans and specifications.

7. That the total amount of pipe used in said construction was 8271 feet of four inch pipe, 2726 feet of six inch pipe and 841 feet of eight inch pipe, and that the cost of said pipe so used was not in excess of Seventeen Thousand Seven Hundred Twenty-six and 47/100 dollars. ($17,726.47.)

8. That the said contractor, Security Bridge Company, in making its bid took into consideration the fact that the bonds issued in payment would have to be sold at a discount and it was known to the Town Council of the Town of Ryegate at the time the contract for said improvement was let that the bid of said contractor was made upon that basis and with the expectation and understanding that said bonds would be disposed of at a discount and with the knowledge that the bid was higher than it would have been had it been provided that payment was to be made in cash.

9. That no notice of any kind was ever given to the property owners in Improvement District No. 4 or to anyone else of the letting of the contract for the construction of the improvements made under the aforesaid plans and specifications.

10. That the cost of installation of improvement made, which the Town Council of the Town of Ryegate attempted to assess against the property included in Special Improvement District No. 4 was the sum of $45,602.40; whereas, the estimated cost of such improvements was $28,350.00. [73]

11. That there are no sprinkling, or parking, or boulevard districts in the Town of Ryegate, and never have been.

12. That the plaintiffs L. F. Lubeley, Isabel Currie, W. J. Edson, Henry G. Jacobson, State Bank of Ryegate, Henry Thien, Fred Wyman and the Hilbert-Thien Company within sixty days of the letting of the contract to construct the improvements in question, made and filed their written protests and objections thereto, setting up the grounds relied upon by plaintiff in this action, and that none of the other plaintiffs herein filed any protest or objection whatsoever.

13. That the improvement actually installed as a result of the proceedings hereinbefore referred to was a different improvement from that described in resolutions 10 and 14 in that the improvement actually installed was an entire and complete water system, whereas the improvement described in the resolution of intention was the construction of pipes, hydrants, and hose connections for irrigating appliances and fire protection.

14. That within the time fixed by the resolution of intention for the creation of Special Improvement District No. 4, written protests were made and filed by the owners of a majority in area of the lots and parcels of land within said District No. 4; that among the land owners so protesting was the Chicago, Milwaukee & St. Paul Railway Company, the owner of a large amount of land within said District; that prior to the hearing upon said protests, interested citizens of the Town of Rygate agreed to

raise a fund of $2500.00 and to pay the same to the Chicago, Milwaukee & St. Paul Railway Company so as to reduce its assessment to the sum of $6,000.00, for installation of both a water system and sewer system in the town of Ryegate, as it was informed by the parties so agreeing to raise and pay said sum of money, and that on account of said agreement, the said Chicago, Milwaukee and St. Paul Railway Company withdrew its protest to the formation and creation of Special Improvement District No. 4; that by so doing an insufficient number of protests were left on file to defeat the creation of said district. [74]

From the findings of Fact the Court makes the following Conclusions of Law.

CONCLUSIONS OF LAW.

1. That the Town Council of the Town of Ryegate never at any time acquired jurisdiction to create an improvement district for the installation of a water system or of an improvement of the kind actually installed, and that the installation of said system was without authority and all of the proceedings with reference thereto were and are null and void and of no effect.

2. That the cost of said system as installed was in excess of the cost allowed by law, to-wit: $1.50 per lineal foot of pipe laid, plus the cost of pipe and the assessment imposed upon the tax payers within said district was and is for that reason illegal.

3. That the Town Council of the Town of Ryegate in awarding the contract for said improvement

knew that the contract price was increased by reason of the fact that the bonds issued in payment therefor would have to be disposed of at less than par and knew that the bid would have been a lower bid and the contract price lower if the bonds could have been sold at par, and that for this reason the proceedings of the Council in letting said contract were null and void

4. Plaintiffs are entitled to an injunction restraining the defendants, their agents, servants, attorneys, employees, or successors from in any way or manner attempting to collect any portion of the alleged assessments against the property of any of said plaintiffs situate in Special Improvement District No. 4 of the Town of Ryegate.

5. Let Decree be drawn in accordance with these Findings and Conclusions.

Dated this 27 day of June, A. D. 1924.

GEO. A. HORKAN,

Judge." [75]

WHEREFORE, by reason of the law and the premises aforesaid, IT IS ORDERED, ADJUDGED AND DECREED:

That all taxes and assessments levied and assessed upon property situate in Special Improvement District No 4 within the Town of Ryegate, in Golden Valley County, Montana, to pay for special improvements therein under resolution of intention No. 10 for the creation of said district, and under resolution No. 14 of said town creating said Special Improvement District No. 4, which are the subject of this action, are null and void; that the defendants

are, and each of them is hereby enjoined and restrained from selling any of the property of plaintiffs herein, described in the complaint herein, on account of the nonpayment of any of said alleged taxes and assessments imposed because of the creation of said district and the construction of improvements therein; that if any of said property has been sold for the nonpayment of any of such taxes or assessments, the defendants, their agents, servants, attorneys, employees and successors are, and each of them is, hereby enjoined and restrained from issuing any tax deed to the purchaser of any of said lots or property, or any part thereof.

That the said defendants, their agents, servants, attorneys, employees and successors are, and each of them is, hereby enjoined and restrained from in any way or manner attempting to collect any portion of said alleged taxes and assessments;

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

> Lots 5 and 6, block 1; lot 1 of block 5; lot e of block 9; lots 10, 11 & 12 of block 17; lots 1, 2 & 3 of block 15; Lots 7, 8, & 9 of Block 16; Lots 4 and 5 of block 22; Lots 3 and 4 of block 21; lots 9 and 10 of block 8; south 100 feet of lots 5 and 6 in block 2; lots 4 and 5 of block 12; lot 4 of block 24; lots 5 and 6 of block 3; lots

7, 8, [76] and 9 of block 15; Lots 9 and 10 of Block 9, lot 4 of Block 8; Lots 7, 8, and 9 of Block 18; lots 13 and 14 of Block 5; Lots 11, and 12 of Block 9; Lots 15 to 18 of Block 4; lot 1 of block 1; lot 12 of block 19; lots 7 and 8 of block 5; lot 12 of block 7; lot 6 of block 24; West half of lot 2 and lot 3 of block 22; lots 10, 11 and 12 of block 10; lot 2 of block 5; lot 6 of block 15; lot 12 of block 5; lot 1 of block 2; north 50 feet of lots 15 to 18 in block 4; lots 1 and 3 of block 6; lots 1 to 6 of block 7; lots 1, 11, and 12 of block 8; lot 4 of Block 16; lot 6 of block 22; lots 1, 2, and 3 of block 17; Lots 7 and 8 of Block 20; South 50 feet of lots 7 to 10 of Block 6; Lots 3, 4, 5 and 6 of block 18; Lots 7, 8, 9, 10 and 11 of Block 19; lots 5 and 6 of block 23; lot 2 of block 24; lot 3 of block 3; lots 3 and 4 of block 5; Lot 9 of Block 10; and Lot 9 of Block 20.

Done in open court this 8th day of July, 1924.

GEO. A. HORKAN,
Judge.

Filed July 16, 1928. [77]

THEREAFTER, on December 11th, 1929, the cause herein was tried to the Court, the record of trial being in the words and figures as follows, to wit: [78]

[Title of Court and Cause.]

TRIAL.

This cause came on regularly for trial to the Court this day without a jury, a jury trial having been expressly waived by written stipulation of the parties filed herein on July 16, 1928. Messrs. Stewart and Brown appeared for the plaintiff and Messrs. Johnston, Coleman and Jameson appeared for the defendant.

Thereupon the agreed statement of facts filed herein on July 16, 1928, and the depositions of John D. Neale and W. P. Briggs, as witnesses for plaintiff, were read in evidence. Thereupon W. P. Roscoe was sworn and examined as a witness for the plaintiff and certain documentary evidence introduced, whereupon plaintiff rested.

Thereupon Henry Thien, G. H. Corrington, C. H. Parizek, W. H. Northey and B. Mellen were sworn and examined as witnesses for the defendant, and certain documentary evidence introduced, whereupon the defendant rested.

Thereupon Henry Thien and W. P. Roscoe were recalled in rebuttal and Mr. Hastings was sworn and examined as a witness for plaintiff in rebuttal, whereupon the evidence closed and the cause was submitted to the Court and taken under advisement, the plaintiff being granted twenty-five days from this day and the defendant twenty-five days thereafter in which to submit and file briefs and proposed findings.

Entered in open court this 11th day of December, 1929.

C. R. GARLOW,
Clerk. [79]

THEREAFTER, on May 14, 1931, the court rendered its decision herein, said decision being in the words and figures as follows, to wit: [80]

[Title of Court and Cause.]

DECISION.

The purpose of this action is to establish a liability against the Town of Ryegate, Golden Valley County, Montana, on an implied contract for the balance due on the construction of a water supply system, which otherwise would have been paid from bonds issued by a special improvement district of that town, had the entire issue not been declared illegal and void, after the water supply system had been fully constructed. The facts appear herein and in an agreed statement and testimony taken at the trial, which was before the court without a jury, according to written stipulation of counsel for the respective parties.

Proceedings were begun by the town counsel for the creation of the special improvement district in 1919, followed by the usual bond issue and com*mce*ment of work by the contractor, the Security Bridge Company, the predecessor of plaintiff. It appears from the resolutions adopted by the town that the character of the improvements were to be:

"the construction of pipes, hydrants, and hose connections for irrigating appliances and fire protection." That pursuant thereto the improvements actually installed consisted of waterworks and a water system of reservoirs, pumping plant, mains and fire-hydrants, for the furnishing of water to the inhabitants of the town. To provide for the payment of the improvements the town council assessed each parcel of land within the district for that part of the entire cost which its area bore to the entire area of the improvement district, exclusive of streets and alleys. That the assessment so made against the property in said district was for the purpose of retiring the bonds of the district in the amount of $45,602.42. [81]

No notice was ever given to the property owners in the district of the letting of the contract for the construction of the improvements. The cost of improvements which the town attempted to assess against the property in the district was the sum above mentioned, whereas the estimated cost was only $28,350.00. Within the time allowed after letting the contract protests and objections were filed.

Plaintiff claims that under Section 6, of Article 13, of the Constitution of the State of Montana, and subdivision 64 of section 5039 of the Revised Codes of Montana of 1921, that the Town of Ryegate had general authority to procure a water supply and construct a complete waterworks system and therefore contends that since the city had general power and authority to do the work and construct the im-

provements embraced in the special improvement district in question, although it had no authority to resort to the special improvement district plan to make the improvements and although bonds used in payment of the work were illegal and void, nevertheless, the town, having the general power to make such improvements, and having received and retained the benefit of the improvements and the construction thereof, it is liable as upon an implied contract, and the delivery of void warrants did not amount to payment, and also, that a contract may be illegal and void, yet if the corporation has the general power to do the thing agreed upon, but has done it in an irregular manner, or even in violation of some common-law rule, or statutory inhibition, yet if it has received the benefit and the contract was not immoral, unjust or inequitable, it is liable upon the implied contract.

The defendant states the proposition of law as follows: "The general question presented by this action is whether or not a city or town in Montana is liable upon any theory for the debt represented or evidenced by the bonds of a special improvement district which by their terms are made payable from a special fund derived from special assessments upon and against the property embraced within that district." If this question should receive an affirmative answer, then the further question arises whether the Town of Ryegate can be held [82] liable in this instance in view of Section 6 of Article 13 of the Constitution of Montana. In commenting on the foregoing statement of the issue of law involved

plaintiff contends that the town never acquired jurisdiction to create a special improvement district and that the bonds issued were by the court declared to be invalid, after the contract, for which the bonds were delivered, had been fully performed. Not all the bonds representing the entire consideration for the works were declared invalid; only those of the special improvement district. Fifteen Thousand Dollars of the consideration was paid through an issue of the general bonds of the town, and the remainder by the issue of special improvement district bonds.

It seems clear that because of the constitutional inhibition the town was unable lawfully to contract for the installation of a water system without the approval of the taxpayers. It found that it could lawfully issue $15,000.00 in bonds as a direct obligation and no more, consequently the town counsel by appropriate resolution and with apparent authority undertook the establishment of a special improvement district for the purpose of creating a bonded indebtedness against the property lying within the boundaries of such district to raise the money necessary to install the works hereinbefore described which were to be located in the special improvement district. It appears that the improvement district embraced the greater part of the town including the principal business and residential sections. By resorting to these two methods the town secured a waterworks system, such as was provided by contract, and has used the same for several years without paying for it, except the pay-

ment of $15,000 in bonds of the town. The town apparently set about to accomplish in a lawful manner indirectly what it could not lawfully do directly without an election and favorable majority vote. Unquestionably there is a general obligation to do justice resting upon cities as well as upon natural persons, and while plaintiff cannot now recover upon the contract the question remains can it lawfully recover from the town as on an implied contract for money had and received. Can the town be compelled to assume as a general obligation the indebtedness contracted with the special [83] improvement district and secured by an issue of bonds upon property lying wholly within the district. Irrespective of what the general result has been here, does the law permit the plaintiff to recover from the town when it or its predecessor accepted the bonds of the special improvement district, enforceable against the property of the district for the amount now claimed from the town itself. Plaintiff claims to have no recourse against the property of the district because of a decision of the state court, from which no appeal was taken, declaring the bonds of the district illegal and void. According to the record counsel representing the bondholders took part in the trial of the issues there involved.

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

or not, there is certainly enough in the language of that chapter to lead the members of the average town council to believe that they had the authority to create a special improvement district for the purpose of installing the aforesaid waterworks within the district and paying for it by the issuance of bonds of that district. The Security Bridge Company and plaintiff could have subjected these bonds and proceedings to the closest scrutiny of counsel before accepting them, and could have rejected them if they were issued without authority of law, or if they found that their invalidity consisted in a failure to comply with the requirements of a valid statute.

If in this instance the proper officers had been authorized to enter into the contract on the part of the town, after submitting the question to a vote of the taxpayers as required by law and receiving favorable action thereon, there would be no question whatever as to the liability of the town, irrespective of any mere oversight or irregularity in conducting the proceedings.

Paragraph 64 of Section 5039 of the Political Code of Montana (1921) provides that a city or town council shall have power to contract an indebtedness on behalf of the city or town for the construction of a waterworks system supplying the city or town after the proposition has been submitted to the vote of the taxpayers affected thereby and [84] the majority vote cast in favor of the improvement. The other method is by the creation of a special improvement district under chapter 56

of Part IV of the same code. This was the plan adopted by the town for the balance of the necessary funds, and it failed, but its failure was not discovered until after the receipt of the money and the construction of the system. Section 6 of Article XIII of the Constitution of the State of Montana provides a debt limit for cities and towns. Ryegate had exceeded its constitutional limit of indebtedness. From the authorities and statutes cited by plaintiff it seems that a complete water supply system for an entire city or town cannot be constructed under the special improvement district plan embracing only a part of the city or town and charging up the total cost to the property included therein, and benefited thereby, for such an arrangement manifestly would be an injustice to the residents of the district, but where the cost of a certain part of the works has been accurately figured in correct proportion to the cost of the whole system and constructed and paid for under the special improvement plan an entirely different question is presented and one which does not seem to conflict with the general payment plan for a water system by the other method. But here a complete system was not attempted to be constructed at the expense of the taxpayers of this particular improvement district. The town itself became directly liable for part of the indebtedness; it assumed apparently as much of the debt as could be done without exceeding the constitutional limit and without being obliged to go to the expende of submitting the question to a vote of the taxpayers. Surely the "water-

works, water mains and extension of water mains" along the lots, blocks and parcels of land in the special improvement district as provided in said chapter 56 may be a benefit to the property and persons served—a special benefit to the property and a general benefit to the town at large. Plaintiff attempts to make a distinction between "waterworks" and "water systems" but there appears to be no authority for it in the law and decisions of Montana. On the question of a recovery for money had and received many cases have been cited, but one, that of Rogers vs. City of Omaha, 107 N. W. 214, 215, seems to have been relied upon as a sustaining authority by both [85] sides; there the court held: "There is a clear distinction between contracts outside of the powers conferred upon municipal corporations and contracts within the general scope of the powers conferred, but which have been irregularly exercised. Contracts falling entirely outside of the powers delegated to the corporation are absolutely null and void and no right of action against the corporation can be founded upon them." Reference is then made to the rule as stated by Dillon on municipal corporations: "A municipal corporation as against persons who have dealt with it in good faith and parted with value for its benefit can not set up mere irregularities in the exercise of power conferred, as for example, its failure to make publication in all the required newspapers of a resolution involving the expenditure of moneys." But in the instant case we are not dealing with a mere irregularity but with an express

constitutional requirement in the following language: "No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein * * * 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, unless the legislative assembly extend the debt limit mentioned by authorizing municipalities to submit the question to a vote of the taxpayers affected thereby for the purpose of constructing a sewerage system or to procure a supply of water * * *." (Sec. 6, Article XIII of Constitution of Montana.) Counsel for plaintiff is undoubtedly correct in asserting that when acting in its proprietary capacity a city or town will be more readily held liable than in its governmental, but that is far from admitting that it would be liable here for that reason unless it appeared that an irregularity in procedure was involved instead of the violation of a constitutional provision. Had the bonds of the improvement district been held valid, no good reason appears why payment of both issues could not have been made under the present laws of Montana relating to general taxes and assessments in special improvement districts.

The Supreme Court of Washington, in Comfort vs. Tacoma, 142 [86] Wash. 251, said, in speaking of a similar issue of bonds by a special improvement district, "Countless numbers of these bonds

were purchased by persons unskilled in such matters who failed to grasp the fact that the obligations which the bonds represented were not legally those of the city, but were restricted to the particular fund created by the assessment * * * the creation of a special fund to which the bond holders are restricted in itself negatives the idea of a general indebtedness upon the part of the city."

The leading case relied upon in Bell vs. Kirkland, 113 N. W. 271, that of Moore vs. Mayor, 73 N. Y. 238, seems to be easily distinguishable from the facts here; there the action was to recover a balance due upon a contract made by the corporation of the City of New York, by the Croton Aqueduct Board and Robert Jardine, plaintiff's assignor for the paving of 8th Avenue, from 42nd to 58th Sts. "The contract was entered into, under the terms of, and pursuant to a resolution adopted by the boards of councilmen and aldermen of the city and approved by the Mayor of the city. * * * This resolution provided for the improvement at the expense of the city, to be reimbursed by an assessment upon the property benefited."

One dealing with the agents of a municipality is bound to know the limits of its power. When the Town of Ryegate issued $15,000 in general bonds as a direct obligation of the town those dealing therewith well knew, or should have known, that the city could contract no greater indebtedness at that time for the purpose in view, and because of that fact resorted to the special improvement plan to raise the funds required to pay for that part of

the works to be constructed in that particular district.

The funds here were used for a corporate purpose—a special purpose as to the improvement district and a general corporate purpose as to the town at large. Would that of itself create a legal obligation on the part of the town to pay the debt in event of failure of the district plan? With no such constitutional inhibition, it was within the general powers of the town to construct a water supply, but in the instant case no such general power existed on the part of the town until conferred upon it by the taxpayers of the town. To begin with, it had [87] no power at all, and in order to acquire it, an election must be held to determine whether such power should or should not be granted.

The Court held in Stanley vs. City of Great Falls: "Proposing purchasers of bonds and warrants look only to the present condition of the law, and therefrom determine whether or not such bonds and warrants furnish a reasonably safe investment." The responsibility is upon the purchaser of such bonds to know the law and to see that it has been complied with before investing their funds; and well may they purchase with care when they read the language of the Supreme Court of Montana in respect to them: "No other city bonds and warrants stand in the precarious situation of these special improvement district bonds and warrants, as this is the only class of bonds and warrants which does not have the credit of the city back of them." (Stanley vs. Jeffries, County Treasurer, 86 Mont. 128.) And

again from the same cource: "Section 5226, Id., provides that 'Whenever the public interest or convenience may require, the city council is hereby authorized and empowered to create special improvement districts. * * * ' Then follows a long list of purely public improvements which may be erected by the creation of such a district. Under the special improvement district law, the cost of the work may be assessed to bordering property because of supposed special benefit, and 'whenever the contemplated work or improvement, in the opinion of the city council, is of more than local or ordinary public benefit * * * ' and under certain other conditions, the council may spread the assessment over an extended district (Sec. 5228 Id.) * * * When therefore the legislature provided that, as to special improvement districts created in the future, a fund shall be created to insure the prompt payment of bonds and warrants issued in payment of such improvements, it but modified the special improvement district law to impose upon the general public, within the municipality, a conditional obligation to pay a small portion of the cost of erecting the public improvement, whereas it might have lawfully, imposed a much greater [88] burden upon the municipality. It is readily discernible that, under the law as it existed at the time this act was passed, the value of district bonds and warrants was problematical, and their salability greatly impaired, and the public credit and public good necessitated some action to remedy the defect in existing law. * * * we are concerned only

with the legality, and not at all with the policy or reasonableness of a legislative enactment, and, in the absence of a constitutional limitation the legislature has plenary power to levy taxes for public purposes. The question as to whether or not this enactment will trench upon the constitutional limitation of indebtedness of the city is not here presented. Finding no constitutional prohibition against such an act as this in its application to improvement districts created after the passage of the Act, the judgment in Stanley vs. Jeffries is affirmed."

In Stanley vs. Great Falls, *supra,* the Court said: "Herein the Legislature did not attempt to impose a liability upon the people with respect to past transactions, but merely gave them the option to impose such a burden upon themselves if they saw fit, which, in so far as this inhibition of the constitution is concerned, they may do. In re Pomeroy, 51 Mont. 119, 151 P. 333 * * * . However, what is the purpose of the act in so far as it deals with special improvement district bonds and warrants issued prior to the date thereof? Such bonds and warrants were, it is true, issued for the purpose of constructing a public work, and consequently issued for a public purpose, but the transaction has been completed and the bonds and warrants accepted in full settlement thereof; they have passed into the hands of individuals or corporations. With respect to these there is no duty or obligation resting upon the city other than to enforce and obey the provisions of the special improvement district laws; if this is done, and still

a loss is suffered by reason of deficiencies in that law, the loss falls upon the holders of the bonds and warrants, and not upon the city." From this case it appears that there is no obligation resting upon the city other than to enforce the provisions of the special improvement district laws. The Court held in Gagon vs. [89] Butte, 75 Mont. 279, 'There is no liability in the city to the contractor other than to make and collect the assessment and pay it over, unless the city fails in some duty it owes to the contractor connected with the levy and collection of the assessment. Upon receipt of the assessment the city becomes liable to the contractor as for money received to his use' (2 Dillon on Municipal Corporations, 5th ed., Sec. 82) * * * Primarily, the city of Butte incurred no personal liability to the contractor who did the work. It was merely constituted an instrumentality of the law in initiating and carrying out the improvements and in collecting the money due upon assessments made by it against the property benefitted in order to pay the obligations incurred in execution of the work * * * . The plaintiff was chargeable with knowledge of the nature and terms of the city's obligation with respect to the bonds, and to permit him to hold the general taxpayers responsible because of the neglect of duty on the part of the city Treasurer would be manifestly unjust." And much to the same effect will be found the principles laid down in the following cases:

Moore vs. City of Napa, 18 F. (2d) 861, C. C. A. 9;

New First National Bank vs. City of Weiser, 166 Pac. 213;
Capital Heights vs. Steiner, 101 So. 451;
Windfall City vs. First National Bank, 87 N. E. 984;
Castle vs. City of Louisa, 219 S. W. 439;
Morrison vs. Morey, 48 S. W. 629.

The case of Hitchcock vs. Galveston (24 L. Ed. 659, 96 U. S. 341), fairly illustrates the line of argument of plaintiff in its effort to shift the indebtedness of a special improvement district to the taxpayers of the city. In the main the law presented by plaintiff could be accepted if the facts here were substantially identical with the facts cited in those cases. In the first place, the Town of Ryegate did not enter into a contract to pay this debt. The town officers had no right to bind the town in this instance by any act or failure to act on their part. All the town agreed to do was to deliver the bonds and agree to make the necessary assessments against the property, and the contractor accepted the bonds in full payment. Nowhere has the court been able to find authority for holding that the debt of a special improvement district is an obligation of the city or town; seemingly under Montana statutes and decisions there can be found no authority [90] *authority* for doing so. Under the contract in the Hitchcock case the city was primarily liable for the cost of the improvement; "The resort to the land owner is to be after the work has been done, after the expense has been incurred, and it is to be for the reimbursement of the city."

That the special improvement district in Ryegate "for practical purposes included the town," was a general statement made by counsel for plaintiff in their brief. According to the stipulated facts herein, the improvement district embraced within its boundaries thirty business houses, several public buildings and sixty-one residences, and thirty-five residences, four warehouses and a substation of the Montana Power Company in the town but outside of the improvement district. Of that number, not within the district, thirteen residences and two warehouses receive no benefit from the improvement district except fire protection, and twenty-two residences and two warehouses "can not use the water sytem and improvements or equipment for fire protection, or for any other purposes as the same is now installed." It appears that the persons owning property within the district were the ones chiefly benefited by the water system and that perhaps the claim here made should have been advanced in the suits brought in the state court to enjoin the town and its officers from levying the special improvement assessments, wherein the Lumbermens Trust Company was represented by its counsel. From the evidence there were many taxpayers outside of the district who were not benefited by the water system and who were given no opportunity to be heard on the question of creating the indebtedness.

The agreed facts show that plaintiff purchased these bonds from the Security Bridge Company

"with the knowledge that they were special improvement district bonds and with full knowledge of the laws of Montana governing the issuance of such bonds, the power of the defendant with reference thereto and the methods provided and authorized for the payment thereof."

Whatever the decision here loss is bound to be sustained, if for the plaintiff—many taxpayers who derive no benefit from the [91] waterworks system and others who never had a chance to object, if for the defendant—the bondholders lose. It was held by the Supreme Court of Washington in German-American Savings Bank vs. Spokane, 49 Pac. 542, 549, 550, that "after all that can be said and done, however, as a matter of right and law, where one of two parties must suffer, the loss should fall upon the one who has the best opportunity to protect himself and and is the most at fault. * * * While perhaps such general taxpayer might have compelled the city officers to act after the work was done, and the danger of loss to him imminent, the contractor or warrant holder had this same right, and the courts have all the time been open to him. By force of the contract such officers should be held to be more directly his agents or representatives than the agents of the general taxpayers for the purposes of the assessment, if they were such taxpayers' agents at all in the premises. By the contract the contractor has in effect adopted the machinery provided for raising his money through the acts of such officers."

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

After consideration of both sides of the issues the court feels obliged to hold that the Town of Ryegate did not become indebted to plaintiff on account of the special improvement district bonds delivered to it. In accordance with these views judgment will be entered for the defendant with costs.

Bell vs. Kirkland, 113 N. W. 271;

Stanley vs. Jeffries and Stanley vs. City of Great Falls, 86 Mont. 114.

City of Lichfield vs. Ballou, 114 U. S. 190.

City of Santa Cruz vs. Wykes, 202 Fed. 361 C. C. A. 9;

Deer Creek Highway District vs. Doumecq Highway District, (Idaho) 218 Pac. 371; [92]

Mittry vs. Bonneville County, 222 Pac. 292;

Eaton vs. Shia Wassee County, 218 Fed. 588;

Atkinson vs. City of Great Falls, 16 Mont. 372;

44 C. J. 1131;
Sections 5278, 5280, 5039 #64, 5227, 5229, 5230 and 5279 of the Political Code of Mont. (1921);
44 C. J. 1194;
State vs. Jeffries, 83 Mont. 76.

CHARLES N. PRAY,
Judge.

Dated May 14th, 1931.
Filed May 14, 1931. [93]

THEREAFTER, on May 16th, 1931, decree was duly filed and entered herein, said decree being in the words and figures as follows, to wit: [94]

In the District Court of the United States, in and for the District of Montana, Billings Division.

LUMBERMENS TRUST COMPANY, a Corporation,
Plaintiff,

vs.

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

DECREE.

This cause came on to be heard January 20, 1930, and was submitted upon briefs thereafter filed by counsel; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED that the complaint of plaintiff

herein be dismissed, that plaintiff take nothing by this action and that the defendant do have and recover of and from plaintiff its costs and disbursements herein, taxed at the sum of $193.50.

Done in open court, May 16th, 1931.

CHARLES N. PRAY,
Judge.

Filed May 16, 1931. [95]

THEREAFTER, on June 19th, 1931, plaintiff's bill of exceptions was duly signed, settled, allowed and filed herein, as follows, to wit: [96]

[Title of Court and Cause:]

PLAINTIFF'S BILL OF EXCEPTIONS.

BE IT REMEMBERED, That this cause came on regularly for trial at Billings, Montana, on the 20th day of January, 1930, before the above-entitled court, sitting without a jury, a jury having been theretofore duly waived by a stipulation in writing and filed in said cause, the same being hereinafter referred to and set out.

There appeared as counsel for the plaintiff, John G. Brown, Esq., of the firm of Stewart and Brown and as counsel for the defendant, W. M. Johnston, Esq., and H. J. Coleman, Esq., of the firm of Johnston, Coleman & Jameson.

After both parties had announced to the court their readiness for trial the following testimony was given and proceedings had.

Mr. Brown offered in evidence on behalf of both parties an agreed statement of facts, the same being in words and figures as follows:

(Title of Court and Cause.)

STIPULATION AS TO TRIAL AND FACTS.

It is hereby stipulated by and between the parties above named as follows: [97]

I.

That a trial by jury in the above-entitled cause is hereby waived by the parties.

II.

That the following matters may be considered by the Court as facts admitted in evidence for all purposes in this action.

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

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

passed and said district was created for the purpose of raising additional funds over and above the $15,000.00 general bonds necessary to pay for said water system and improvements specified in such resolution.

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

d. The map initialed and marked Exhibit 1 filed with this agreed statement correctly portrays the boundaries of the town and its additions, the boundaries of said improvement district and location of water-mains and street or city hydrants of said water system. The unplatted area shown within the boundaries of the town and its additions on said map is liable for the payment of all taxes levied for town purposes, the same as though it were platted; said map also portrays the location of certain public buildings in said town. The only buildings belonging [98] to the Town of Ryegate as a municipal corporation are the pumping station of said water system and a small frame building used to store fire equipment, said building and equipment having a value not to exceed $1,000.00.

e. The true object and purposes of the passage and approval of said resolution and the issuance of said general and special improvement district bonds was the establishment and installation in and for the Town of Ryegate, and for a portion of its inhabitants of a complete waterworks and a complete waterworks system consisting of reser-

voir, pumping plant, mains, and all other connections and appliances necessary to have a complete system for the supplying of water for municipal purposes to said town, and water to a portion of the inhabitants thereof and for the purpose set out in said resolutions.

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

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

h. On April 14, 1920, W. P. Roscoe, as an officer of the Security Bridge Company, purchased said general bonds of said town at par and accrued

interest and said Security Bridge Company agreed to accept and did accept said general bonds and said special improvement district bonds [99] in the sum of forty-five thousand six hundred two dollars and forty-two cents in payment of the costs of installation of said waterworks system and the improvements specified in said resolution and that said improvement district bonds were issued and delivered to said Security Bridge Company, or upon its order, from time to time as the work progressed and upon the estimates of the engineer of said town as said work was completed and accepted.

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

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

k. That while said contract disclosed that said bonds were taken at par as the consideration in the construction contract, they were in accordance with a *rior* agreement between plaintiff and the Security Bridge Company sold by the Security

Bridge Company to the plaintiff herein at a price of 85% of the par value thereof.

l. From time to time, after said improvement district bonds were issued for completed and accepted work, plaintiff purchased and accepted said bonds at 85% of their par value with accrued interest from said Security Bridge Company and did thus by the purchase of said district and said general bonds furnish to Security Bridge Company all the money used by it to build and complete said waterworks system and the improvements specified in said resolutions, that plaintiff became the purchaser of said bonds for value before maturity and is now the owner and holder thereof and that said general and improvement district bonds were issued and delivered by said town to said Security Bridge Company, [100] or delivered to the plaintiff, at the request of said Security Bridge Company, upon the dates, of the number and in the amounts set out in paragraph twelve of the complaint herein.

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

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

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

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

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

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

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

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

1921	$211.33	
1922	978.53	[101]
1923	721.16	
1924	980.95	
1925	811.70	
1926	1092.68	
1927	749.18	

Total gross receipts $5,545.53.

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

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

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

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

n. On October 16, 1930, the town clerk of the Town of Ryegate at the request of Security Bridge Company forwarded bonds numbered fifty-four to seventy-eight inclusive for five hundred dollars

each a total par value of twelve thousand five hundred dollars of said Special Improvement District No. 4 to plaintiff and on November 26, 1920, at the request of Security Bridge Company said town clerk forwarded to plaintiff bonds of said Special Improvement District No. 4, numbered from seventy-nine to ninety-one inclusive of the par value of six thousand six hundred two dollars and forty-two cents and that plaintiff remitted to Security Bridge Company 85% of the par value of said bonds with accrued interest.

o. All of the allegations of Subdivision II of defendant's answer, being defendant's first affirmative defense, are admitted to be true excepting the clause "nor were the same payable out of the current [102] revenues of said Town of Ryegate" and excepting the clause "that said bonds were never payable out of the current revenues of said town," and excepting all of that portion of said Subdivision II which reads as follows: "and that if the said bonds of special improvement district number 4 of the Town of Ryegate, amounting to the sum of $45,602.42 were held to be general obligations of the town of Ryegate the same and each of said bonds would be and are unconstitutional, invalid and void for that the amount of said bonds and each of them, added to the then general indebtedness of said town would be and are greatly in excess of the constitutional and statutory limit of indebtedness which said town might then or may now incur." None of the exceptions above noted are admitted.

p. All of the allegations of paragraph one of Subdivision IV of defendant's answer being defendant's third separate defense are admitted.

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

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

s. It is admitted that in the month of January, 1922, Mike Belecz and other property owners began various suits (see reference thereto in Subdivision V of defendants answer), and that made a part of this statement of agreed to facts by being attached hereto, marked Exhibits 3, 4, 5 and 6 are, except for formal parts, true copies of the [103] complaint, answer, reply and decree respectively in said suit.

That similar suits were filed by a number of other persons similarly entitled to sue with a similar

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

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

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

Signed and dated July 13, 1928.

(Signed) JOHNSTON, COLEMAN & JOHNSTON,
Attorneys for Defendant.
STEWART & BROWN,
Attorneys for Plaintiff.

EXHIBIT No. 2.

CONTRACT.

THIS AGREEMENT, made and entered into the 26th day of April in the year ONE THOUSAND NINE HUNDRED TWENTY, by and between the TOWN OF RYEGATE, MONTANA, of the first part, and THE SECURITY BRIDGE COMPANY, a corporation of Billings, Montana, of the second part.

WITNESSETH, that the said party of the second part has agreed, [104] and by these presents does agree with the said party of the first part, for the considerations herein mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents and hereto attached, to furnish at his own proper cost and expense, all the necessary material and labor, except as herein specifically provided, and to excavate for and build in a good, firm, substantial and workmanlike manner, before the first day of October, A. D. 1920, the water mains, pumping plant, and reservoir indicated on the plans now on file in the office of the Town Clerk, and the connections and appurtenances of every kind complete, of the dimensions, in the manner and under the conditions herein specified, and has further agreed that the Engineer shall be and is hereby authorized to inspect or cause to be inspected the materials to be furnished and the work to be done under this agreement and to see that the same conform to plans and specifications.

The party of the second part hereby further agrees that he will furnish the Town with satisfactory evidence that all persons who have done work or furnished material under this agreement, and are entitled to a lien therefor under any law of the State of Montana, have been fully paid or are no longer entitled to such lien, and in case such evidence be not furnished as aforesaid such amount as the party of the first part may consider necessary to meet the lawful claims of the persons as aforesaid shall be retained from the money due the party of the second part under this agreement until the liabilities aforesaid may be fully discharged and the evidence thereof furnished.

The said party of the second part further agrees that within ten days of notification of award of contract he will execute a bond in the sum of Twenty-five Thousand Dollars ($25000.00) satisfactory to the Town Council, for the faithful performance of this contract, conditioned to indemnify and save harmless the said Town of Ryegate, Montana, its officers and agents, from all suits or actions of every name or description brought against [105] any of them for or on account of any injuries or damages received or sustained by any party or parties, by or from the said party of the second part, its servants or agents, in the construction of said work, or by or in consequence of any negligence in guarding the same, or any improper materials used in the construction, or by or on account of any commission of the said party of the second part or its agents in the performance of this agreement, and for the faithful

performance of this contract in all respects by the party of the second part, and the said party of the second part hereby further agrees that so much of the moneys due, under and by virtue of this contract, as shall be considered necessary by the said town of Ryegate, may be retained by the said party of the first part until all such suits or claims for damages as aforesaid shall have been settled, and the evidence to that effect furnished to the satisfaction of the town.

The said party of the first part hereby agrees to pay and the said second party agrees to receive the following prices as full compensation for furnishing all materials, labor, tools and equipment used in building and constructing and completing said water system, in the manner and under the conditions heretofore specified, and full compensation for all loss or damage arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforseen obstructions or difficulties which may be encountered in the prosecution of the same, and for all expenses incurred by or in consequence of the same, and for all expenses incurred by or in consequence of the suspension or discontinuance of the said work, and for well and faithfully completing the same and the whole thereof, according to plans and specifications and the requirements of the engineer under them, to-wit:

For furnishing all material, tools and labor and in every way completing in a first class workmanlike manner the proposed water system in the Town of Ryegate, Montana, according to plans [106] and specifications therefor on file in the office of the

Town Clerk, and any special instructions that may be given from time to time during the construction of the work.

Per linear foot four inch cast iron water pipe complete including the necessary excavation, backfill and all valves and specials according to plans and specifications.

Price in words.	Price in figures.
Two Dollars and Fifty-five Cents.	$2.55

Per linear foot for six inch cast iron water pipe complete including the necessary excavation, backfill and all valves and specials according to plans and specifications.

Price in words.	Price in figures.
Three Dollars and Sixty Cents.	$3.60

Per linear foot for eight inch cast iron water pipe complete including the necessary excavation, backfill and all valves and specials according to plans and specifications.

Price in words.	Price in figures.
Five Dollars and Five Cents.	$5.04

For hydrants complete in place including auxiliary valve and all necessary excavation and backfill according to plans and specifications.

Price in words.	Price in figures.
One Hundred Seventy Four Dollars Forty Cents.	$174.70

Per cubic yard excavation at reservoir site including disposition of surplus material according to plans and specifications.

Price in words.	Price in figures.
Three Dollars Seventeen Cents.	$3.17

Per cubic yard for concrete in reservoir including forms, and reinforcing according to plans and specication.

Price in words.	Price in figures.
Thirty Seven Dollars Fifty Cents.	$37.50

For equipment for reservoir including roof, ladder, overflow, and floor drain according to plans and specifications [107]

Price in words.	Price in figures.
Fourteen Hundred Twenty-five Dollars.	$1425.00

Per cubic yard for excavation for well including the disposal of surplus material according to plans and specifications.

Price in words.	Price in figures.
Two Dollars and Seventy-five Cents.	$2.75

Per cubic yard for concrete in place in well and pump house foundation, pump pit and floor according to plans and specifications.

Price in words.	Price in figures.
Forty Dollars.	$40.00

For shallow well pumping equipment complete, including pump, motor valves, switchboard and all electrical equipment, according to plans and specifications.

Price in words.	Price in figures.
Twenty-five Hundred Twenty-five Dollars.	$2525.00

For pump house complete according to plans and specifications.

Price in words.	Price in figures.
Sixteen Hundred Twenty-five Dollars.	$1625.00

Per cubic yard for excavating rock encountered in trench, pump pit and well in addition to above prices.

Price in words.	Price in figures.
Three Dollars	$3.00

And the said party of the second part further agrees that it will not assign, transfer or sub-let the aforesaid work or any portion thereof, (with the exception of contracts for materials and tools) without the written consent of the Town Council, and that any assignment, transferring or sub-letting without such written consent shall in every case be absolutely void.

It is further agreed by the party of the second part that the payments by the party of the first part shall be as provided for in the specifications.

The provisions herein contained shall bind the parties hereto [108] and their heirs, administrators, successors and assigns.

IN WITNESS WHEREOF The Town of Ryegate, party of the first part, has caused these presents to be sealed with its corporate seal and to be signed by its Mayor and Town Clerk, and said party

of the second part has hereunto set its hand on the 15th day of May, A D. 1920.

TOWN OF RYEGATE,
By W. H. NORTHEY, Mayor.
Attest: J. A. BROWN, Town Clerk.
PARTY OF THE SECOND PART.
[Seal] By H. C. HARKNESS,
Secty.

State of Oregon,
County of Multnomah,—ss.

I hereby certify that the above is a full, true and correct copy of the original contract.

IN TESTIMONY WHEREOF I have hereunto set my hand and notarial seal this 18th day of February, 1927.

ANNE McNAB,
Notary Public for Oregon.

My commission expires Feb. 25, 1929.

EXHIBIT No. 3.

In the District Court of the Fifteenth Judicial District of the State of Montana, in and for the County of Golden Valley.

MIKE BELECZ, IDA GRAMS, BERT BELDING, L. F. LUBELY, GEORGE A. COPE, H. C. STILGER, ISABEL CURRIE, R. C. CURRIE, JOSEPH H. KOLMAN, MARTHA J. BROYLES, SARAH G. SNYDER, PHYLINDA C. REDISKE, W. J. EDSON, HENRY G. JACOBSON, STATE BANK OF RYEGATE, J. B. GREGG, GOL-

DEN VALLEY COUNTY ABSTRACT COMPANY, L. P. ALBRECHT, G. M. BABCOCK, EVANGELICAL LUTHERAN CHURCH OF RYEGATE, M. W. WAUGH, L. W. MARQUARDT, WILLIAM E. STOKES, HENRY THIEN, THE ROMAN CATHOLIC BISHOP OF GREAT FALLS, Sometimes Known as MATHIAS C. LENIHAN, Bishop of Great Falls, a Corporation Sole, FRED WYMAN, THE HILBERT-THIEN COMPANY, FRANCES THIEN, RYEGATE CREAMERY COMPANY, CHARLOTTE GRAMS, A. D. LINDERMAN, Estate of P. A. HILBERT, Deceased,

Plaintiffs,

vs.

THE TOWN OF RYEGATE, MONTANA, and W. O. WOOD, as County Treasurer of Golden Valley County, Montana,

Defendants.

COMPLAINT. [109]

Plaintiffs complain and allege:

1. That the defendant, the Town of Ryegate, is and at all of the times hereinafter mentioned was, a municipal corporation and body politic, duly organized and existing under and by virtue of the laws of the State of Montana, and situated in Golden Valley County, Montana.

2. That the defendant, W. O. Wood, is now and during the year 1921, was the duly elected, qualified and acting treasurer of said County, and the proper

person to whom payment should be made of taxes and assessments levied on behalf of the said Town of Ryegate.

3. That the plaintiffs, State Bank of Ryegate, Golden Valley County Abstract Company, The Roman Catholic Bishop of Great Falls, sometimes known as Mathias C. Lenihan, Bishop of Great Falls, a corporation sole, the Hilbert-Thien Company, Evangelical Lutheran Church of Ryegate and Ryegate Creamery Company are now and at all of the times hereinafter mentioned have been corporations organized, existing and doing business under and by virtue of the laws of Montana.

4. That the plaintiffs are not and at all of the times hereinafter mentioned have been the owners of the various tracts of land hereinafter set forth, as belonging to them, and that all of said tracts of land are embraced in the description of Special Improvement District No. 4 in the said Town of Ryegate, hereinafter described.

5. That on or about December 30, 1919, the Town Council of the Town of Ryegate, passed a resolution of intention to create a special improvement district known as Special Improvement District No. 4, which said resolution is designated as Resolution No. 10 of said town, a copy of which is hereunto attached, marked "Exhibit A" and hereby made a part of this complaint.

6. That on January 1, 1920, the notice set out in and required to be published by said resolution of intention, was published in the said Town of Ryegate.

7. That thereafter, and on or about February 11, 1920, a resolution known as Resolution No. 14 of said Town, was passed by the Town Council thereof, creating said Special Improvement District No. 4, and [110] that in said Resolution No. 14, the general character of the improvement to be made is described in exactly the same words as in "Exhibit A" hereto attached.

8. That the object and purpose of each and all of the foregoing proceedings was the establishment and installation in the said Town of Ryegate of complete water works and a complete water works system, consisting of reservoir, pumping plant, mains and all other connections and appliances necessary for a complete system for the furnishing of water to the inhabitants of said town; that thereafter a contract was made for the construction and installation of such system and the same was constructed and installed.

9. That thereafter, for the purpose of paying for said improvements, a resolution was passed by the Town Council of said Town, known as Ordinance No. 28, providing the method and manner of assessment and payment of the cost and expense of making and installing the improvements in said Special Improvement District No. 4, by which resolution it was provided that each lot or parcel of land within said District was to be assessed for that part of the whole cost of said improvements which its area bore to the area of the entire district, exclusive of streets, alleys and public places, and which resolution further provided for the issuance of the bonds of said

District to be retired out of the fund derived from said assessments when paid; that by Ordinance No. 29 passed by the Town Council of said Town, the issuance of such bonds was authorized, and the amount thereof and form of Bond, together with other details in connection therewith, were fixed and determined.

10. Thereafter, the Town Council of said Town, by its Resolution No. 20, provisionally passed on August 22, 1921, and finally passed and adopted by the Town Council of said Town in the month of September, 1921, purported to levy and assess a tax and special assessment against all the real property in said Special Improvement District No. 4, including the property of these plaintiffs, to defray the cost [111] of said improvements, in which Resolution it was recited that the total cost thereof was $45,602.42. Plaintiffs are informed and believe and therefore state the fact to be that the notice of resolution levying such assessment, to the effect that the same was on file in the office of the Town Clerk and stating the time and place at which objections to the final adoption of said resolution would be heard, was not published as required by law; that the property owned by each of the plaintiffs herein and the total amount so attempted to be assessed against the same, exclusive of interest, is as follows, to-wit:

Owner.	Description.	Amount of tax.
Mike Belecz,	Lots 5 and 6, Block 1,	$340.10
	Lot 1, Block 5,	136.10
Ida Grams,	Lot 3, Block 9,	170.10
Bert Belding,	Lots 10, 11 & 12, Blk. 17,	510.30
L. F. Lubeley,	Lots 1, 2 & 3, Blk. 15,	510.30
	Lots 7, 8 & 9, Blk. 16,	510.30
George A. Cope,	Lots 4 and 5, Block 22,	340.20
H. C. Stilger,	Lots 3 and 4, Block 21,	340.20
Isabel Currie,	Lots 9 and 10, Block 8,	340.20
R. C. Currie,	South 100 feet of Lots 5 & 6, Block 2,	243.00
Joseph H. Kilman,	Lots 4 and 5, Block 12,	340.20
Martha J. Broyles,	Lot 4, Block 24,	170.10
	Lots 5 and 6, Block 3,	340.20

Owner.	Description.	Amount of tax.
Sarah G. Snyder,	Lots 7, 8 and 9, Blk. 15,	510.30
Phylinda C. Rediske,	Lots 9 and 10, Blk. 9,	340.20
W. J. Edson,	Lot 4, Block 8,	170.10
Henry C. Jacobson,	Lots 7, 8 & 9, Blk. 18,	510.30
State Bank of Ryegate,	Lots 13 & 14, Blk. 5,	159.20
J. B. Gregg,	Lots 11 & 12, Block 9,	340.20
Golden Valley County Abstract Company,	of lots 15 to 18, Blk. 4,	48.60
L. P. Albrecht,	Lot 1 of Block 1,	170.10
Evangelical Lutheran Church of Ryegate,	Lot 12, Block 19,	170.10
[112]		
G. M. Babcock,		
M. W. Waugh,	Lot 12, Block 7,	170.10

Owner.	Description.	Amount of tax.
L. W. Marquardt,	Lot 6, Block 24,	170.10
William E. Stokes,	West ½ of lot 2 and lot 3, Blk. 22,	255.20
Roman Catholic Bishop of Great Falls,	Lots 10, 11 & 12, Block 10,	510.30
The Hilbert Thien Company,	Lots 10, 11 and 12, Blk. 10,	510.30
	Lot 2, Block 5,	136.10
	Lot 9 in Block 10,	170.10
Henry Thien,	Lot 6, Block 15,	170.10
Fred Wyman,	Lot 1, Block 2 of lots 15 to 18, Block 4,	170.10
		121.50
	Lots 1, 2 & 3, Block 6,	510.30
	Lots 1 and 2 in Block 7,	340.20
	Lot 1 in Block 8,	170.10
	Lot 4 in Block 16,	170.10
	Lot 6 in Block 22,	170.10

Owner.	Description.	Amount of tax.
Frances Thien,	Lots 7, 8 and 12, Block 5,	238.80
Ryegate Creamery Company,	South 50 ft. of lots 7 to 10, Block 6,	121.50
Charlotte Grams,		
A. D. Linderman,	Lot 2, Block 24,	170.10
Estate of P. A. Hilbert, deceased,	Lot 3 in Block 3,	170.10
	Lots 3 and 4, Block 5,	159.20
	Lot 9, Block 20,	170.10

11. That the resolution of intention hereto attached and marked "Exhibit A" did not contain any sufficient description of the general character of the improvements to be made as required by law in this,—that the only description used was: "the construction of pipes, hydrants and hose connections for irrigating appliances and fire protection," which said general language gave no definite information to plaintiffs and others within the district as to the specific character, extent or nature of said improvement; that there was nothing in said description advising the plaintiff and others in the district that a waterworks system or a system of mains was contemplated [113] or would be installed and that the character of the improvement described in said notice included only pipes, hydrants and hose connections for irrigating appliances and fire protection, and did not include waterworks or a general waterworks system or system of mains, or reservoir, or pumping plant, which was in fact contemplated, and was thereafter constructed and installed; that the improvements described in the notice were entirely different and much less extensive than the improvements that were actually made; that said description recited that said improvements were to be made in accordance with plans and specifications to be prepared, which said plans and specifications were not then prepared and were not on file or available for the examination of these plaintiffs or any other property owners within said district; that the notice as published and the resolution purporting to create said district, were defective in the same particulars as in this paragraph recited, in failing

to describe the character of the improvement, and that for the reasons herein stated the said Town Council of the Town of Ryegate did not at any time acquire any jurisdiction to create said improvement district or to proceed with the installation or construction of said mains, and that all subsequent proceedings were and are void and of no effect.

12. That the whole cost of said improvements so assessed as hereinbefore alleged, far exceeds 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 said district and that said total cost is in excess of the limit prescribed by law.

13. That no notice of any kind was given of the letting of the contract for said improvement, and when the same was let the contract price therefor amounted to $52,829.35, whereas the estimated cost amounted to $28,350; that in addition to said contract price, other payments have been made by the Town Council of said Town to the contractor and for engineering work, so that the total cost of making such improvements is the sum of $57,619.22 and that both the [114] contract price agreed upon and the actual cost of making such improvements is wholly out of proportion to the value of said improvements to the said Town or to the property included within said district.

14. That plaintiff is informed and believes and therefore states, that at the time said contract was let, it was impossible to sell the bonds or warrants of said Special Improvement District at par; that no purchaser therefor could be found; that these

facts were then well known to the Mayor and Town Council of said Town; that the contractor took the bonds of said District in payment of its contract price and claimed extras in connection with the installation of said improvements; that in so doing, it allowed for a considerable discount on said bonds and added such discount to its bid for said work; that because thereof, the cost of said work was greatly increased over what it would have been if said bonds had been sold by said town council at the par value thereof, and that at the time said contract was entered into and the bid of said contractor accepted, the Mayor and Town Council of said Town had knowledge of all of the aforesaid facts.

15. That before the time fixed in said Resolution No. 10 for hearing objections and protests to the creation of said Special Improvement District No. 4, written protests thereto were made and filed by the owners of a majority in area of the lots and parcels of land within said District No. 4. Among the lot owners so protesting was the Chicago, Milwaukee & St. Paul Railway Company, the owner of a large amount of land within the said district; that prior to the hearing upon the creation of said Special Improvement District No. 4, said Chicago, Milwaukee & St Paul Railway Company withdrew its protest to the creation of said district, thereby leaving protests from the owners of an insufficient number of lots to defeat the creation of said district, and that plaintiff is informed and believes, and therefore states the fact to be that said Chicago, Milwaukee & St. Paul Railway Company was induced to with-

draw its said [115] protest by the payment to it of $2500.00, which sum of money was furnished, provided and paid by certain parties who were greatly interested in having said improvements made, including the contractor who secured the contract for making such improvements.

16. That by reason of the facts stated in paragraphs 11 to 15, inclusive, in this complaint, the levy of any and all assessments against the said property of plaintiffs in said district was and is, illegal and void.

17. That one-tenth of all of the taxes and assessments so attempted to be levied against the aforesaid property of these plaintiffs was by the resolution aforesaid, to be paid on or before November 30, 1921; that if not so paid, the same was to become delinquent on December 1, 1921, and a ten per cent penalty added thereto because of such delinquency; that none of the plaintiffs herein has paid any part of said alleged tax and assessment against his or its said property for the year 1921; that the said Town of Ryegate is now advertising said property for sale for the nonpayment of the taxes and assessments which it claims should have been paid thereon in November, 1921; that if not restrained by order and decree of this court, the defendants will sell all of the aforesaid property belonging to plaintiffs for the nonpayment of the aforesaid installments thereon for the year 1921, and thus cloud the title to plaintiff's said lands; that if plaintiffs were to pay said alleged taxes each year under protest and then bring suit against the defendants to recover the taxes and assessments so paid, it would result in

a great multiplicity of suits; that plaintiffs have no plain, speedy and adequate remedy at law for the wrongs herein complained of and that great and irreparable damage and injury will be done to plaintiffs and each of them, if said defendants are not enjoined and restrained from selling any portion of the aforesaid lands, because of the nonpayment of any of said alleged taxes and assessments.

[116]

WHEREFORE, plaintiffs demand judgment;

That a decree of this court be entered adjudging and decreeing the aforesaid taxes and assessments null and void;

That the defendants herein be enjoined and restrained from selling any of the aforesaid property of these plaintiffs on account of the nonpayment of said alleged taxes and assessments thereon for the year 1921; that their agents, servants, attorneys, employes and successors be enjoined and restrained from selling any portion of said described lands for the non-payment of any installment of said alleged taxes and assessments for any year hereafter;

That in case any of said property should be sold by said defendants or either of them, for the nonpayment of said installments of such alleged taxes and assessments for the year 1921, before the final determination of this suit, that the said defendants, their agents, servants, attorneys, employes and successors be enjoined and restrained from issuing any tax deed to the purchaser of said lots or any part thereof at such sale.

That said defendants, their agents, servants, attorneys, employes and successors be enjoined and

restrained from in any way or manner attempting to collect any portion of said alleged taxes and assessments.

That plaintiffs may have such other and further relief as to the court may seem just and equitable, and that they may recover their costs and disbursements herein incurred.

D. AUGUSTUS JONES,
JOHNSTON, COLEMAN & JOHNSTON,
By W. M. JOHNSTON,
Attorneys for Plaintiffs.

(Duly verified.)

EXHIBIT No. 4.

ANSWER.

Comes now the defendants in the above entitled cause and, answering the complaint of the plaintiffs herein allege:

I.

They admit the averments of paragraphs 1, 2, 3, 4, 5, 6, 7, 9 and all that portion of paragraph 10 excepting that part thereof [117] beginning with the words "Plaintiffs" in the last line on page 3 and concluding with the words "law" in line five on page 4.

II.

They specifically deny the averments of paragraphs 8, 11, 12, 13, 14, 15 and 16.

III.

Answering the averments of paragraph 17 of said complaint, the defendants admit all the averments thereof excepting that portion beginning

with the words "that plaintiffs" in the last line on page 8 and continuing to the end of the paragraph, as to which they deny the same.

Further answering said complaint and as a special defense, the defendants allege:

I.

That notice of the passage of the resolution of intention to create said Special Improvement District No. 4 was actually published in one issue of the Ryegate Reporter, a weekly newspaper printed and published in the Town of Ryegate, said publication having been made on the 1st day of January, 1920, as required by law.

II.

That the plaintiffs did not at any time within sixty days from the date of the awarding of the contract for the construction of the improvements referred to in said complaint, file with the said Clerk of the Town *or* Ryegate a written notice specifying in what respect the said acts were irregular, erroneous, or invalid, or in what manner their property would be damaged by the making of said improvements, and did not in writing make any objections to any act or proceeding in relation to the making of said improvements; and these defendants now allege that the plaintiffs have thereby waived all the objections which they now urge in their said complaint and upon which their cause of action is based. [118]

WHEREFORE, the defendants having answered the complaint of the plaintiffs herein, now pray that they may take nothing by their cause of action

and that the defendants may have judgment against them for their costs and disbursements herein.

STUART McHAFFIE,
NICHOLS & WILSON,
By EDMUND NICHOLS,
Attorneys for Defendants.

(Duly verified.)

EXHIBIT No. 5.

REPLY.

Plaintiffs make this their reply to the answer of defendants herein:

1. Admit the allegations contained in paragraphs one and two of defendants' Special Defense, except that they deny that they waived any objections to the irregular, erroneous and invalid acts of the officials of the Town of Ryegate complained of in the complaint herein.

2. Save and except as hereinbefore specifically admitted or denied, plaintiffs deny generally each and every allegation of new matter in said answer.

WHEREFORE, plaintiffs demand judgment as prayed for in their complaint.

D. AUGUSTUS JONES,
JOHNSTON, COLEMAN & JOHNSTON,
By W. M. JOHNSTON,
Attorneys for Plaintiffs.

(Duly verified.) [119]

EXHIBIT No. 6.

DECREE.

This cause came on for trial February 6, 1923, before the Court sitting without a jury, a jury having been expressly waived by counsel for the respective parties. D. Augustus Jones, Esq., and Johnston, Coleman & Johnston appeared as attorneys for plaintiffs, and Stuart McHaffie, Esq., and Nichols and Wilson appeared as attorneys for the defendants. Evidence was introduced on behalf of both plaintiffs and defendants and the cause was thereupon submitted to the Court.

Thereafter and on June 27, 1924, the Court made and filed its Findings of Fact and Conclusions of Law herein, which, omitting title of Court and cause, are as follows, to-wit:

"FINDINGS OF FACT.

1. That the defendant Town of Ryegate is, and was, at all times referred to in the proceedings, a Municipal corporation, organized and existing under and by virtue of the laws of Montana, and situated in the county of Golden Valley, Montana, and that the defendant W. O. Wood, was, during the times referred to in the proceedings, the duly elected, qualified and acting treasurer of said Golden Valley County, and the officer to whom the assessments hereinafter referred to were paid.

2. That the plaintiffs were at all of the times referred to in the proceedings herein, the owners of the various lots and tracts of land described in plain-

tiff's complaint as belonging to said plaintiffs, all of which property was and is embraced within the limits of Special Improvement District No. 4 in the said Town of Ryegate.

3. That on the 30th day of December 1919, the town Council of the Town of Ryegate, duly passed resolution of intention number 10, for the creation of special improvement district No. 4 within said Town of Ryegate, a copy of which said resolution as adopted is attached to the plaintiffs' complaint and marked Exhibit "A" and that notice of such resolution was duly published as required by law, and that thereafter on the 11th day of February, 1920, resolution number 14, creating said [120] special improvement District No. 4 was duly passed by the Town Council of said Town of Ryegate.

4. That the character of the improvements as set out in said resolution of intention and also in said resolution No. 14 was "the construction of pipes, hydrants, and hose connections for irrigating appliances and fire protection." That the actual improvement sought to be installed as a result of said proceedings and which was actually installed by said town was a complete water works and water system consisting of reservoirs, pumping plant, mains and fire hydrants constituting a complete system for the furnishing of water to the inhabitants of said town. That said improvement was installed and constructed by Security Bridge Company, a corporation, under one contract, which contract was entered into upon the award of said work to said Security Bridge Company, which said award was made upon bid filed in response to notice to con-

tractors given in pursuance of resolutions numbers 10 and 14, referred to above. That the notice to contractors and the plans and specifications covering said work and contract itself all refer to and call for the construction of a complete water system consisting of the elements above described.

5. That after the contract for said water system was let, the Town Council of the town of Ryegate by appropriate action provided the mode of assessment for the payment of said improvement and assessed each parcel of land within the district for that part of the entire cost of the improvement which its area bore to the entire area of said district, exclusive of streets and alleys, and that the total amount assessed against each of the plaintiffs herein is correctly set forth in their complaint herein. That the assessment so made against the property in said district was for the purpose of retiring the bonds of said district to the amount of $45,602.42, which said bonds under the provisions of said contract with said Security Bridge Company, were to be accepted and were in fact issued and accepted in payment for said improvement to the extent of forty-five thousand six hundred two and 42/100 dollars. [121]

6. That the plans and specifications for the improvements actually made were delivered to the Town Clerk ten days or two weeks before April 13, 1920, but were not presented to the Town Council or approved by the Town Council of Ryegate until April 13, 1920, one day before bids were received for the construction of the improvements called for by said plans and specifications.

7. That the total amount of pipe used in said construction was 8271 feet of four inch pipe, 2726 feet of six inch pipe and 841 feet of eight inch pipe, and that the cost of said pipe so used was not in excess of Seventeen Thousand Seven Hundred Twenty-six and 47/100 dollars. ($17,726.47.)

8. That the said contractor, Security Bridge Company, in making its bid took into consideration the fact that the bonds issued in payment would have to be sold at a discount and it was known to the Town Council of the Town of Ryegate at the time the contract for said improvement was let that the bid of said contractor was made upon that basis and with the expectation and understanding that said bonds would be disposed of at a discount and with the knowledge that the bid was higher than it would have been had it been provided that payment was to be made in cash.

9. That no notice of any kind was ever given to the property owners in Improvement District No. 4 or to anyone else of the letting of the contract for the construction of the improvements made under the aforesaid plans and specifications.

10. That the cost of installation of improvements made, which the Town Council of the Town of Ryegate attempted to assess against the property included in Special Improvement District No. 4 was the sum of $45,602.40; whereas, the estimated cost of such improvements was $28,350.00.

11. That there are no sprinkling, or parking, or boulevard districts in the Town of Ryegate, and never have been.

12. That the plaintiffs L. F. Lubeley, Isabel Currie, W. J. Edeson, Henry G. Jacobson, State Bank of Ryegate, Henry Thien, Fred [122] Wyman and the Hilbert-Thien Company within sixty days of the letting of the contract to construct the improvements in question, made and filed their written protests and objections thereto, setting up the grounds relied upon by plaintiffs in this action, and that none of the other plaintiffs herein filed any protest or objection whatsoever.

13. That the improvement actually installed as a result of the proceedings hereinbefore referred to was a different improvement from that described in resolutions 10 and 14 in that the improvement actually installed was an entire and complete water system, whereas the improvement described in the resolution of intention was the construction of pipes, hydrants, and hose connections for irrigating appliances and fire protection.

14. That within the time fixed by the resolution of intention for the creation of Special Improvement District No. 4, written protests were made and filed by the owners of a majority in area of the lots and parcels of land within said District No. 4; that among the land owners so protesting was the Chicago, Milwaukee & St. Paul Railway Company, the owner of a large amount of land within said District; that prior to the hearing upon said protests, interested citizens of the Town of Ryegate agreed to raise a fund of $2500.00 and to pay the same to the Chicago, Milwaukee & St. Paul Railway Company so as to reduce its assessment to the sum of $6,000.00,

for installation of both a water system and sewer system in the town of Ryegate, as it was informed by the parties so agreeing to raise and pay said sum of money, and that on account of said agreement, the said Chicago, Milwaukee and St. Paul Railway Company withdrew its protest to the formation and creation of Special Improvement District No. 4; that by so doing an insufficient number of protests were left on file to defeat the creation of said district.

From the Findings of Fact the Court makes the following Conclusions of Law. [123]

CONCLUSIONS OF LAW.

1. That the Town Council of the Town of Ryegate never at any time acquired jurisdiction to create an improvement district for the installation of a water system or of an improvement of the kind actually installed, and that the installation of said system was without authority and all of the proceedings with reference thereto were and are null and void and of no effect.

2. That the cost of said system as installed was in excess of the cost allowed by law, to-wit: $1.50 per lineal foot of pipe laid, plus the cost of pipe and the assessment imposed upon the tax payers within said district was and is for that reason illegal.

3. That the Town Council of the Town of Ryegate in awarding the contract for said improvement knew that the contract price was increased my reason of the fact that the bonds issued in payment therefor would have to be disposed of at less than

par and knew that the bid would have been a lower bid and the contract price lower if the bonds could have been sold at par, and that for this reason the proceedings of the Council in letting said contract were null and void.

4. Plaintiffs are entitled to an injunction restraining the defendants, their agents, servants, attorneys, employees, or successors from in any way or manner attempting to collect any portion of the alleged assessments against the property of any of said plaintiffs situate in Special Improvement District No. 4 of the Town of Ryegate.

5. Let Decree be drawn in accordance with these Findings and Conclusions.

Dated this 27 day of June, A. D. 1924.

GEO. A. HORKAN,

Judge."

WHEREFORE, by reason of the law and the premises aforesaid, IT IS ORDERED, ADJUDGED AND DECREED:

That all taxes and assessments levied and assessed upon property [124] situate in Special Improvement District No. 4 within the Town of Ryegate, in Golden Valley County, Montana, to pay for special improvements therein under resolution of intention No. 10 for the creation of said district, and under resolution No. 14 of said town creating said Special Improvement District No. 4, which are the subject of this action, are null and void; that the defendants are, and each of them is hereby enjoined and restrained from selling any of the property of plaintiffs herein, described in the complaint herein, on account of the nonpayment of any of said alleged

taxes and assessments imposed because of the creation of said district and the construction of improvements therein; that if any of said property has been sold for the nonpayment of any of such taxes or assessments, the defendants, their agents, servants, attorneys, employees and successors are, and each of them is, hereby enjoined and restrained from issuing any tax deed to the purchaser of any of said lots or property, or any part thereof.

That the said defendants, their agents, servants, attorneys, employees and successors are, and each of them is, hereby enjoined and restrained from in any way or manner attempting to collect any portion of said alleged taxes and assessments:

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

> Lots 5 and 6, block 1; lot 1 of block 5; lot *e* of block 9; lots 10, 11 & 12 of block 17; lots 1, 2 & 3 of block 15; Lots 7, 8, & 9 of Block 16; Lots 4 and 5 or block 22; Lots 3 and 4 of block 21; lots 9 and 10 of block 8; south 100 feet of lots 5 and 6 in block 2; lots 4 and 5 of block 12; lot 4 of block 24; lots 5 and 6 of block 3; lots 7, 8, and 9 of block 15; Lots 9 and 10 of Block 9, lot 4 of Block 8; Lots 7, 8, and 9 of Block 18; lots 13 and 14 of Block 5; Lots 11, and 12 of Block 9; Lots 15 to 18 of Block 4; lot 1 of block 1; lot 12 of

block 19; lots 7 and 8 of block 5; lot 12 of block 7; lot 6 of block 24; West half of lot 2 and lot 3 of block 22; lots 10, 11 and 12 of block 10; lot 2 of block 5; lot 6 of block 15; [125] lot 12 of block 5; lot 1 of block 2; north 50 feet of lots 15 to 18 in block 4; lots 1 and 3 of block 6; lots 1 to 6 of block 7; lots 1, 11, and 12 of block 8; lot 4 of Block 16; lot 6 of block 22; lots 1, 2, and 3 of block 17; Lots 7 and 8 of Block 20; South 50 feet of lots 7 to 10 of Block 6; Lots 3, 4, 5 and 6 of block 18; Lots 7, 8, 9, 10, and 11 of Block 19; lots 5 and 6 of block 23; lot 2 of block 24; lot 3 of block 3; lots 3 and 4 of block 5; Lot 9 of Block 10; and Lot 9 of Block 20.

Done in open court this 8th day of July, 1924.

GEO. A. HORKAN,
Judge.

Filed July 16, 1928. [126]

The deposition of John D. Neale, taken under stipulation between the parties was read in evidence by Mr. Brown, during which reading the following objections were made to the questions noted:

(First question on page 5.)

"Q. And what was the character and extent of your investigation of bond issue prior to the time that it was passed and issued?"

Mr. JOHNSTON.—We object to that as irrelevant and immaterial.

By the COURT.—I will let it stand, subject to the objection. (Exception.)

(Last question on page 5.)

"Q. In connection with your desire to find

out not only the financial resources, but the attitude of the town, did you discuss with the town officers there the feasibility of the project and learn their attitude either for or against it?"

Mr. JOHNSTON.—We object to that as irrelevant.

By the COURT.—It is rather difficult to say whether it is or not. I do not think I will pass on the objection. Let is stand, subject to the objection. (Exception.)

(Second and third questions on page 8.)

"Q. Now subsequently when the bond issue came up for sale, or when the contract came up for bidding, did you have any correspondence or wires from Roscoe relative to it?

Q. And at that time were you reminded of the assurances that you had given relative to [127] the handling some of these bonds—I mean the water bonds?"

Mr. JOHNSTON.—We object to that as irrelevant and immaterial.

By the COURT.—Overruled. (Exception.)

Cross-examination of Witness JOHN D. NEALE, in the Deposition of Said Witness.

Mr. BROWN.—To that question, which is the second question on page 11 of the deposition, we object as not proper cross-examination; as assuming a state of facts not shown to exist, and for the further reason that the Milwaukee Railroad or any other protestant would have a perfect right to, for or without consideration, to withdraw its protest if it so desired.

By the COURT.—I will overrule the objection.

The said deposition being in the words and figures as follows:

"Pursuant to the stipulation of the parties for taking the depositions of witnesses on behalf of plaintiff, and the conditions under which depositions should be taken, on the 30th day of July, A. D. 1928, at the hour of 1:30 P. M., the plaintiff appeared by John G. Brown of Helena, Montana, and the defendant appeared by W. M. Johnston of Billings, Montana, before Fred M. Rose, a Notary Public in and for the State of Oregon in the city of Portland, Oregon, whereupon proceedings were had as follows:

DEPOSITION OF JOHN N. NEALE, FOR PLAINTIFF.

"JOHN N. NEALE was produced as a witness on behalf of plaintiff in the above-entitled cause, and, testified on direct examination by Mr. BROWN as follows:

Direct Examination.

"My name is John D. Neale. I reside at 318 Elm Street, San Mateo, California. In 1919 I was employed by the Lumbermens Trust Company of Portland, Oregon, as a bond buyer. My duties required examination of securities; examination of towns and districts, and cities, where we were [128] negotiating for the purchase of bonds and other

towns, cities and municipal subdivisions that had no bonds for sale. During that year, representing the Lumbermens Trust Company, I went to Billings, Montana, some time about the middle of May, 1919, I was in that vicinity until about the month of September of the same year. I know and then knew W. P. Roscoe, Executive Vice-President of the Security Bridge Company. The principal place of business of the Security Bridge Company was Billings, Montana, and its business was general contracting, building of bridges, installation of water systems, sewer systems, etc. It had a very extensive and substantial business at that time. It had no financial department, it was entirely a construction concern. In connection with my trip to Billings for the Lumbermens Trust Company I made investigation of contemplated municipal projects in Roundup, Hardin, Laural, Harlowton, Ryegate, Ingomar and Musselshell, towns in Montana which were contemplating municipal or public bond issues based upon construction contemplated to be done by the Security Bridge Company. I visited the Town of Ryegate at least twice, possibly three times. The improvement there contemplated was a water extension for municipal and domestic purposes. Oh, no, it wasn't any irrigation system. It was a municipal proposition for fire protection and domestic purposes. Mr. Roscoe accompanied me on the trip to Ryegate. The Lumbermens Trust Company which I represented subsequently got these bonds that were issued to install this water system at Rye-

(Deposition of John N. Neale.)

gate. I was the man they sent there. As to my investigation of the bond issue prior to the time that it was passed and issued, I examined carefully the territory to be included in the enterprise, going over the plat with the City Clerk. I also checked up carefully the resources of the community there and the shipments of products from the Town of Ryegate. I talked the matter over with an officer of the town in the bank there, Mr. Thien, or Thiel, or some such name. I discussed the bond issue with another officer of the town, a member of the Council, in the creamery. Whether he was manager of the creamery or just in the creamery that day, I don't know; I have forgotten, but he was a member of the Council. Naturally we were interested in knowing whether the town was anxious to make this [129] improvement or whether it was simply a contractor's promotion. The figures pertaining to valuations were obtained from the City Clerk, which I believe was a man by the name of Brown at that time. There was other work contemplated besides the water extension, but I never gave Mr. Roscoe nor anyone else connected with the enterprise any encouragement that we would be interested in the sidewalk bonds. Yes, I discussed the feasibility of project and attempted to learn the attitude of the town, from these two men that I talked to, two members of the Council. I don't remember for sure whether I talked to any more than that. I don't remember about a pool-hall. I met a city official one evening there, but whether it was on the street or on the platform of the hotel,

(Deposition of John N. Neale.)

on the porch of the hotel, where we ate, or some other place—I don't know at this time. As to the information given these officials by Mr. Roscoe, as to why I was interested, Roscoe introduced me as the representative of the Lumbermens Trust Company, to whom he would sell the bonds if he secured them from the city for the work contemplated. He stated to them in my presence his inability to handle them. As to the extent of his explanation, he stated that he could not do the work and accept bonds in payment therefor, except he was assured beforehand that he had a market for the bonds, stating that he was not in the bond business and must be assured that he could convert them into cash before he accepted them and took the contract, unless they expected to pay him in cash. It seems that the city could not pay him in cash. I made at least two trips to Ryegate. The first trip was when I saw the Councilman in the bank and the man in the creamery, who was a member of the City Council. Another trip was late in the evening. Roscoe and I came in from Harlowton, ate dinner at the hotel in Ryegate, and talked to one member of the City Council late that evening on the street. Yes, I made up my mind that my company would be interested in these bonds and I so stated to Roscoe. I recommended the purchase of about fifty thousand dollars of water bonds, approximately fifty thousand dollars worth. Yes, I know that my company subsequently purchased the general [130] and the improvement bonds that were to cover the

(Deposition of John N. Neale.)

installation of this water system, about sixty thousand dollars worth of them. The purchase didn't take place until eight or nine months later, sometime the next year following my investigation, but it was on the basis of my investigation of the issue. Subsequently I had some correspondence with Roscoe about these bonds. In the meantime I had been transferred by the Trust Company to San Francisco, late in September, 1919, and some time early in the spring of 1920, possibly March, I received communications from Mr. Roscoe concerning this particular financing, and was reminded of the assurances that I had given relative to handling some of these water bonds. I recommended the purchase to the Lumbermens Trust Company."

Cross-examination by Mr. JOHNSTON.

"As to my going to Montana in 1919, I was there primarily to meet Mr. Roscoe or to meet representatives of the Security Bridge Company for the purpose of buying bonds. Yes, I knew that the Security Bridge Company was doing considerable contracting work and I knew it was quite a common practice for contractors to do work for small cities and take their pay in bonds and dispose of them to bond buyers. I went with Mr. Roscoe to look over towns where he was already figuring with them on work. Yes, he had been figuring with the Town of Ryegate on that work. I am quite sure of that. As to whether or not the Town of Ryegate had planned on any improvement, it was my understanding that it had;

(Deposition of John N. Neale.)

that before we visited the town, considerable talk had been taking place between Roscoe and the city officials. I got that understanding from things Mr. Roscoe said. As to whether or not when I was there in May, 1919, anything had been done, I am not able to say whether or not any previous construction had been done in the Town of Ryegate. It had evidently been discussing the matter with the Security Bridge Company. As to it being the fact that Mr. Roscoe and I went there to promote the installation of the city water system, he was not promoting anything. [131] It seemed to be an established fact on the part of the Security Bridge Company and the City of Ryegate that a water system was going to be constructed and that the chances were good that the Security Bridge Company would be the agency through which the construction should take place. As to what I base that statement on, it is on account of my talks with Roscoe and statements which he made in my presence when we were in Ryegate and statements made to members of the Council that I met there. As to my recollections of the names of these councilmen, I do not recall their names, except Mr. Thien.

"Q. Is it not a fact that when you and Roscoe were there you examined the Town of Ryegate without disclosing to any city official who you were or what company you represented?

"A. That is not a fact."

WITNESS.—(Continuing.) "I do not recall the name of the city official I met on my second visit.

(Deposition of John N. Neale.)

I think he was the mayor, but I am not sure. As to my business when I go to towns like that it is not simply to examine the town or city with reference to reporting as to the assessable wealth of the town and its future prospects and the security that would really be back of any bond issue, but to ascertain whether the proposed improvement was popular, whether the bonds which we were considering would be authorized. There would be no use in us examining the towns unless we knew that the city officials and the taxpayers were in favor of the improvement. I did not learn in the spring of 1920 that the bonds were opposed, by nearly one-half of the property holders in the district. I did not know of the Chicago, Milwaukee & St. Paul Railroad protest and their being paid to withdraw their name from the protest. I do not pass upon the legality of the bonds. Messrs. Teal, Minor & Winfree of Portland, Oregon, passed upon them for the Lumbermens Trust Company I think. I do not know whether they are the regular attorneys or not, but they approved many bond issues. I am not certain which one of the attorneys did it. It is my understanding that they don't buy bonds until they have their counsel pass upon the legality of the proceedings. I do not know the firm of Nichols & Wilson, a firm of lawyers of Billings, Montana. [132]

Redirect Examination by Mr. BROWN.

"As a result of this trip we bought bonds at Hardin, Harlowton and Laurel. I do not remember the name of the mayor of Hardin. I do not re-

(Deposition of John N. Neale.)

member the names of the aldermen at Hardin. I do not remember the name of the mayor of Harlowton. I do not remember the *name* of the aldermen of Harlowton. It would be very difficult to remember the names of all the city officials that we meet when I am making investigations over a period of years. As to the investigation as to the financial responsibility and attitude of the town generally, that is very distinct because it is fundamental.

"Q. Now, counsel has asked you about protests, and suggested an improper use of money to get protestants to withdraw; I will ask you when was the first time you ever heard of that?

"A. When Mr. Johnston mentioned it just now.

"Q. Did you ever hear of any such thing as that in connection with your investigation?

"A. No, sir.

"Q. Was there ever any suggestion that there would be protests at the time you made the investigation? A. Certainly not."

WITNESS.—(Continuing.) "If I had known at my first visit or at my second investigation of protests of a substantial character I would not have made a recommendation to purchase any bonds. I would not have made a recommendation to purchase any bonds where there was any actual or threatened litigation existing or pending, as at the time I made this investigation I was an experienced bond buyer, and that is one of the things that an experienced bond buyer always looks out for, as to whether there is threatened litigation.

(Deposition of John N. Neale.)

"Q. As to any improper or other use of money to get a railroad or any other taxpayer to withdraw protests, did you ever hear of any such thing in connection with this?

"A. Not before Mr. Johnston's question to-day, no, sir; absolutely not. [133]

"Q. Did you or your company have anything to do with any such thing? A. No, sir."

Recross-examination by Mr. JOHNSTON.

"I did not make any effort to ascertain whether there were any protests after my second investigation. I was out of the transaction. I know nothing about what transpired after my last visit. I know nothing of any dissatisfaction on the part of any property owners concerning this improvement. As to whether or not one of the council opposed the creation of the district and the issuance of the district improvement bonds, I knew nothing about it. My investigation had shown there was absolute harmony in connection with the proposed improvement.

"Q. And you did not know, in the spring of 1920, that the then Mayor of the Town of Ryegate refused to sign ordinances and resolutions for the creation of the district and the issuance of these bonds? A. I did not; no."

Further Redirect Examination by Mr. BROWN.

"As to whether or not there was any secretive or covered-up character about my visits to Ryegate, absolutely not. All these jobs I went to look over

(Deposition of John N. Neale.)

had been talked over by Roscoe and the officials before I had ever looked at them. Mr. Roscoe had a story that he illustrated it with. The cities were always anxious to carry out these proposed improvements, and they stated their desires and enthusiasm to Roscoe and myself, and Roscoe would always say that if the Lumbermens Trust Company will buy the bonds, we will be glad to do the work, but we cannot take the bonds unless we have them sold. His story was that bonds to a contractor are no good, are worth nothing to the contractor unless he can sell them; that 'in fact, there was a dozen contractors found starved to death last winter with their pockets full of bonds.' That was his story, the one he always told in illustrating the point that he couldn't accept bonds unless they were [134] sold first. They used to say to him, 'We will give you the bonds,' He always told them the bonds would not do him any good unless he was sure he could convert them into cash."

Further Recross-examination by Mr. JOHNSTON.

"My information as to these bonds being talked over before I went to Ryegate came from Mr. Roscoe. I knew it was talked over before I was there because the first man we met, who was one of the councilmen, if not the mayor himself, in the creamery, was thoroughly conversant with the situation when I first saw him. He had evidently been told by Mr. Roscoe he would bring a man through that country soon to look over a number of towns and districts in which he had been and on which he had been figuring contracts, and when I was introduced

(Deposition of John N. Neale.)

to this member of the Council in the Creamery, Roscoe told him that I was the man that he had been speaking about. I do not recollect the man's name. When I refer to the City officials I met, I met three. I know the name of Mr. Brown and Mr. Thien, or Mr. Thiel. I don't recall the name of the man I met one night, late at night there. That was the second trip there."

Further Redirect Examination by Mr. BROWN.

"It is my recollection that the man I met late at night on the street, or the porch of the hotel, was the mayor."

Witness signed the deposition and was excused.

The deposition of W. P. BRIGGS taken under stipulation between the parties was read in evidence by Mr. Brown, during which reading the following objections were made to the questions noted:

"Mr. BROWN.—We offer the Financial Statement that is attached to the deposition, in evidence.

"Mr. JOHNSTON.—No objection.

"By the COURT.—It will be received. [135]

"Mr. JOHNSTON.—I object to the following questions and answers on page 19 of the deposition of W. P. Briggs, on the ground the matters mentioned in these questions and answers are thoroughly covered by the Agreed Statement of Facts in this case, therefore, under the Agreed Statement, they are not admissible in evidence.

"Q. Did your Company buy both the general and special improvement district bonds, necessary for

(Deposition of John N. Neale.)

the promotion and completing of the water improvements of the Town of Ryegate? A. Yes, sir.

"Q. In connection with the general bonds, or the first group of bonds that was sent in, did you buy them through the Security Bridge Company or deal direct with the City upon those?

"A. You mean in taking them up?

"Q. Yes.

"A. We dealt with the City direct and paid to them."

"Mr. JOHNSTON.—We make the further objection, on the ground those questions and answers are irrelevant and immaterial, and also, incompetent, for the reason that the matter of the general bonds are not involved in this case. It would make no difference whether the plaintiff purchased those bonds direct from the City or from the Security Bridge Company.

"By the COURT.—I will let it stand. (Exception.)

"Mr. BROWN.—We offer this paper in evidence.)"

(Paper marked Plaintiff's Exhibit 2 attached to Deposition of W. P. Briggs.) [136]

"Mr. JOHNSTON.—We object to the testimony, and I would like to have an objection to all that part of the deposition with reference to this proof, on the ground and for the reason it is irrelevant and immaterial, and also, incompetent, as being in relation to the general bond issue, and not having anything to do, whatever, with the special improvement bonds which are involved in this case.

(Deposition of John N. Neale.)

"For the further reason that is covers matters that are completely covered by the agreed statement of facts in this case, which shows that these general bonds were sent to the plaintiff by the Town of Ryegate at the request of the Security Bridge Company, and the mere fact that a sight draft would accompany them would have no bearing on the issues in this case, whatever.

By the COURT.—It may go in, subject to your objection, and I will either rule on it and cut it out or let it stay in, after I carefully scrutinize this."

(Question in latter part of the Deposition of W. P. Briggs.)

"Q. What was the first that you knew, your company or you knew, that there was a contest about these bonds, the payment of the principal or interest—that there was objection to these bonds in the payment of principal or interest?

"Mr. JOHNSTON.—Objected to as irrelevant and immaterial.

"By the COURT.—Overruled. (Exception.)"

(Question found in latter part of Deposition of W. P. Briggs.) [137]

"Q. Now some suggestion has been made here in connection with this, with relation to protests being made to the creation of the District or the issues of the bonds; did you or your company, so far as you know, ever have any knowledge of any contest or objection to those bonds prior to their issuance?

"Mr. JOHNSTON.—Objected to as irrelevant and immaterial.

(Deposition of W. P. Briggs.)

By the COURT.—Overruled. (Exception.)"

The said deposition being in the words and figures as follows:

Under the same stipulation and at the same time and place, the deposition of W. P. BRIGGS was taken, who being duly sworn, on direct examination by Mr. BROWN, testified as follows:

DEPOSITION OF W. P. BRIGGS, FOR PLAINTIFF.

"My name is W. P. Briggs and I have been either assistant secretary or secretary of the Lumbermens Trust Company during the time involved in controversy here. As to the investigation of the records and so forth pertaining to municipal or public bond issues prior to my company's purchase of them, I handled considerable of the office end of the matter, taking care of the correspondence and getting figures here to submit to attorneys and submit to our officials. I made a request of the town clerk of the Town of Ryegate to furnish me or my company, under seal, an official statement of local improvement district bonds and financial statement of the City of Ryegate, with reference to the particular bond issues here in controversy. This paper which you call to my attention, marked for identification as Plaintiff's Exhibit No. 1, to be attached to my deposition, is the statement furnished to the Lumbermens Trust Company by J. A. Brown, town clerk of the Town of Ryegate, relative to the bond issues here under controversy and was

(Deposition of W. P. Briggs.)

furnished to the Company and received in due course of mail in response to requests therefor." [138]

The said statement was thereupon marked for identification, Plaintiff's Exhibit 1 and offered and received in evidence and the same is in words and figures as follows:

PLAINTIFF'S EXHIBIT No. 1.

Lumbermens Trust Co.
Portland, Oregon.

OFFICIAL STATEMENT OF LOCAL IMPROVEMENT BONDS.

Town of Ryegate in the County of Golden Valley, State of Montana.

District No. 4. Boundaries and names of streets to be improved ———.
See Transcript of Proceedings.

If possible, furnish map of city showing location of district ———.

Nature of improvement ——— Water improvement.

Material used in improvement ——— Cast Iron Pipe and concrete structures.

Opposition to improvement ———. Not material ———. How evidenced ———. By protest against creation of district.

Engineer's estimate of *coss*—$42000. ———— Amount of Contract, $56000 Less $15000 Cash.

Number of blocks improved—264 Lots Basis 50x140. Average size ———.

Number of front feet ———. See map ———. Cost per front ft. Figured area $158.00 per 50x146.

Assessed value of District:

Real Estate, $ 73 543.

Improvements, $130 289.

Estimated actual value:

Real Estate $———

Improvements $———

Amount of Bonds authorized for this improvement —Entire cost of plant over and above authorized.

Estimated amount to be used for this improvement —$43,000.

Interest rate ——— six ——— payable annually or semi-annually—Annually.

Date of Bonds. ——— Dated as issued ———. Maturity of bonds 1931, Jany. 1st.

Denomination $500.00. ——— When ready for delivery from time to time.

Principal and interest payable at office Town Treasurer of Ryegate, Mt.

Are Bonds Special Assessment, District or General Obligations—Special. Assessment on District.

Does the city or abutting property pay for street intersections—Yes, *pro rata* over district.

Character of abutting property, business or residence—Partly residential and partly business property.

What percentage of District improved with buildings—70%.

Give names of six responsible people who own property abutting improvements—Henry Henton, Binone Mellen, C. H. Corrington, T. A. Strong, Anton Barta.

If any city, county or school property is abutting the improvement, what portion of above indebtedness is assessed against same—School District equal to 6 lots.

Nature and amount of other assessment liens in this district—$ ———. Sidewalk Districts cover portion of this district outstanding—Sidewalk Bonds $18,200.00.

Amount of maintenance bond required and for how long a period does it remain in force—None.

Any litigation pending or threatened affecting this issue—No.

Under what law or authority are bonds issued—State of Montana, Chapter 89, 1913.

Can you arrange to have principal and interest payable in New York, or remitted by treasurer in New York Exchange ———. [139]

FINANCIAL STATEMENT OF CITY.

Estimated actual value of all taxable property in city $601,366.00

Assessed valuation of all property (year 1919) Assessed at full value $601,366.00

INDEBTEDNESS—

Bonded debt (Water Bonds) .....$ 15,000.00

Floating debt .....$ 1,315.90

Water debt included in above (Included in $15000 item) .....Yes

Local Improvement debt NOT included above ..... $ 18,200
sidewalk bonds

Amount of Sinking Fund—Bonds just issued ———. $ None

Population of city (census 1910) 300. Present estimate—750.

Date city incorporated—April, 1917.

On what railroads—C. M. & St. P. Ry. Co.

General Resources—Agricultural, County Seat Golden Valley County.

Nature of surrounding country—Well improved, good farming country.

Who owns waterworks—Town. Who owns electric light plant?—Montana Power Co.

Have your bonds (including local improvement bonds) and the interest thereon always been paid promptly when due—Yes.

The foregoing statement I certify to be, to the best of my knowledge and belief, true and correct.

IN TESTIMONY WHEREOF, I have hereunto set my hand this 12th day of August, A. D. 1920.

(Seal) (Signature) J. A. BROWN,

(Official Title) Town Clerk, Town of Ryegate.

ATTACH PRINTED NOTICE AND COPY OF ORDINANCE. [140]

"My company bought both the general and the special improvement district bonds necessary for the promotion and completing of the water improvements of the Town of Ryegate. As to the first issue of bonds sent out we dealt direct with the city and paid to them. The paper which you have

marked as Plaintiff's Exhibit No. 2, to be offered in connection with my deposition, is a draft written on the typewriter; it is a sight draft on the Lumbermens Trust Company, drawn under date of May 29th, 1920, payable to the order of The Farmers and Merchants State Bank of Ryegate, for $11,158.76, plus certain accrued interest, and drawn on the Town of Ryegate by Harry Henton, Treasurer. That is the draft that accompanied this issue of bonds when they were forwarded to me by the Town of Ryegate. My company took up the draft when it came."

The said draft, known as Plaintiff's Exhibit 2, was offered and received in evidence to be attached to the deposition of witness Briggs, the same being in words and figures as follows:

PLAINTIFF'S EXHIBIT No. 2.

"The Farmers & Merchants State Bank of Ryegate,
Ryegate, Montana, May 29th, 1920.
(Int. 375.00)

On sight pay to the order of The Farmers & Merchants State Bank of Ryegate $11,158.76 plus accrued interest at 6% on $15,000 from Jany. 1st, 1920, to date of settlement. Eleven thousand one hundred fifty eight and 76/100 dollars with exchange.

Value received and charge the same to account of
TOWN OF RYEGATE, RYEGATE, MONT.
By HARRY HENTON, Treas.

(Deposition of W. P. Briggs.)

Lumbermen's Trust Company, Portland, Oregon.

Care Ladd & Tilton, Bankers, Portland, Oregon.

Ladd & Tilton Bank.
Paid
June 1, 1920.
Collection Teller,
Portland, Oregon. [141]

"The first that I knew there was any trouble about these bonds, that there was a contest about these bonds, the payment of the principal or interest was early in 1922 when we were advised that somebody had started injunction proceedings.

"Q. Now, some suggestion has been made here in connection with this, with relation to protests being made to the creation of the district or the issues of the bonds; did you or your company, so far as you know, ever have any knowledge of any contest or objection to these bonds prior to their issuance?

"A. Not so far as I know.

"Q. If there had been any such, you, doubtless, would have known it, wouldn't you, in your position?

"A. I think so, because that detail, normally, came through my hands.

"Q. The suggestion also has been made of a possible proper or improper use of money in connection with the withdrawal of objections to the creation of the improvement district and the issues of bonds; when was the first time you ever heard of any such comment as that?

(Deposition of W. P. Briggs.)

"A. After this litigation was started, some time in the early part of 1922, and pleadings had been filed by the plaintiffs; I think they set up something of that character in the litigation. It was in connection with that, was the first time I ever heard of it.

"Q. Did your company or you or anyone, to your knowledge, ever have anything to do with anything of that kind or nature? A. We did not.

"Q. Did you ever instigate any such action or conduct? A. We did not.

"Q. Or approve or ratify or confirm it?

"A. We did not.

WITNESS.—(Continuing.) "Mr. J. A. Brown was town clerk of the Town of Ryegate at the time I received Plaintiff's Exhibit 1. I am morally certain they furnished [142] us with a transcript of the proceedings. This Exhibit 1 is the form of certificate which we always require and was furnished in response to our request."

Cross-examination by Mr. JOHNSON.

"I can't say positively without checking up the correspondence of whom I made the request for this statement."

(Witness was excused after signing his deposition.)

DEPOSITION OF W. P. ROSCOE, FOR PLAINTIFF.

W. P. ROSCOE, a witness called on behalf of the plaintiff, being first duly sworn, on direct examination by Mr. BROWN, testified as follows:

"My name is W. P. Roscoe and I am the Mr. Roscoe referred to as executive vice-president of the Security Bridge Company. I was such officer of that company at the time of the building of the waterworks involved in the controversy and was then acquainted with the Mayor and Councilmen of the Town of Ryegate. I made infrequent trips to Ryegate possibly over a period of 18 months, upon which trips I talked to Mr. Thien, and Mr. Gregory. Mr. Curry was Mayor at that time. No, I never met the Mayor and Councilmen in executive session. I did meet them in groups, met at one time the three of them, that is the Mayor and two aldermen."

"Q. You may state whether or not in these various conferences you had with them prior to your taking the contract, if they understood and were told by you of the necessity of your selling bonds?"

Mr. JOHNSTON.—We object to that as irrelevant and immaterial, also, incompetent. It does not appear this was a session of the City Council, and statements on the curbstone between the witness and the officials would not be of any material weight in this matter.

By the COURT.—Perhaps you would have to show some authority on the part of one to speak

(Deposition of W. P. Roscoe.)

rather than the actual conversation, to make it material. Was there any official sanction of this? [143]

Mr. BROWN.—We have to come to that later.

By the COURT.—It is merely preliminary?

Overruled, if it is simply preliminary.

Mr. JOHNSTON.—Exception. Subject to be stricken out if you do not connect it up. An examination of the minutes will never disclose any authority of that kind, I am quite sure.

(Question read.)

"A. Oh, yes.

Q. Did you advise the Town, or its officers, of the Company to whom you expected to sell these bonds?

Mr. JOHNSTON.—Objected to as irrelevant and immaterial.

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

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

By the COURT.—That is some law we have to encounter and pass upon later on. I will let him show that under his allegation, subject to your objection.

Mr. JOHNSTON.—We may have an exception.

By the COURT.—Yes.

Mr. JOHNSTON.—In order to save time and

(Deposition of W. P. Roscoe.)

the record, may it be understood, we have that objection and exception to all questions of this character?

By the COURT.—Everything is deemed excepted to.

Mr. JOHNSTON.—With reference to conversations between this witness and any official of the City or Town of Ryegate? [144]

By the COURT.—Yes.

(Question read.)

A. Yes, sir.

Q. Now, as to the first bond issue, the fifteen thousand general bond issue, I will ask you to state whether or not you directed the Town and its Clerk, to mail these bonds, with draft attached, to the Lumbermens Trust Company, in Portland, Oregon?

Mr. JOHNSTON.—I object to that as irrelevant and immaterial.

By the COURT.—I will let it stand in the same way.

Mr. JOHNSTON.—I object to this question, additionally, for the reason it is covered by the Agreed Statement of Facts.

By the COURT.—I will let him answer, subject to your objection. (Exception.)

(Question read.)

"A. I will answer that question this way: Yes, sir. The draft was not in the full amount of the bonds.

Q. We were not asking you the amount, we were asking you if you did that? A. Yes, sir."

(Deposition of W. P. Roscoe.)

WITNESS.—(Continuing.) Prior to the time that the bonds were sent and the draft issued, I made request of the Town Council and City Clerk of Ryegate for a legal opinion as to the $15,000 bond issue. Plaintiff's Exhibit "A" is the letter that was furnished me by the Town of Ryegate in response to this request. I made this request for a legal opinion of the Council. No, sir, I do not recall that the request was in writing. I might explain the matter so that you will understand it, Mr. Johnston, if the Court permits. Yes, sir, the City Council furnished me with that opinion of Mr. Thompson on this general bond issued. Plaintiff's Exhibit "A" is the opinion in question.

(Plaintiff's Exhibit "A" offered and admitted in evidence.)

At the time I got the opinion I advised the city officers of the Town of Ryegate that it was to be forwarded to the Lumbermens Trust Company and I [145] did forward it to the Lumbermens Trust Company. This is the first time I have seen it since then. Subsequently I made a request of the City (Ryegate) to furnish me with an official transcript of the proceedings of the Special Improvement District of the Town of Ryegate. When I requested these proceedings I likewise advised the City Officers who it was for and they furnished me that transcript of the proceedings, which was for and delivered by me to the Lumbermens Trust Company. Plaintiff's Exhibit "B" contains the official transcript of the Special Improve-

(Deposition of W. P. Roscoe.)

ment District proceedings that are involved in this lawsuit and that is the transcript so furnished by the officers of the Town of Ryegate for transmittal to the Lumbermens Trust Company.

(Plaintiff's Exhibit "B" admitted in evidence.)

WITNESS.—(Continuing.) "Claude Renshaw of Roundup, Montana, was the engineer on the Ryegate job. He is the same engineer who was on a number of waterworks systems along the line of the Milwaukee. He had charge of the work at Harlowton, Roundup and Ryegate. From time to time this City Engineer made up an estimate of the amount of work completed in any prescribed period and furnished it to the City Council so that they could authorize bonds to be issued for work done. The City Council would allow these estimates. In two or three instances they paid us cash out of the proceeds—out of the general obligations and the balance out of the Improvement District Bonds. When they furnished me with Improvement District Bonds I would request a certificate from the city showing that the Council had authorized the issuance, advising the Council and officers that it was for the Lumbermens Trust Company. Plaintiff's papers grouped together as Exhibit "C" are the certificates covering these estimates, covering the Improvement District Bonds and covering the certificates of the officers, but I did not personally obtain all of them. Some other officer of our company got the rest of them. These were forwarded to the Lumbermens Trust Company."

(Deposition of W. P. Roscoe.)

(Plaintiff's Exhibit "C" offered and received in evidence.)

WITNESS.—(Continuing.) [146] "During the times in question, as vice-president of the company, I was in charge of what we call the Waterworks and Sewer Department, particularly in charge of the work and various matters we had in connection with the council of the Town of Ryegate and the consctruction work of the Security Bridge Company. I was the one exclusively in charge and made frequent trips to Ryegate in connection with the work. When I could not go I outlined what was to be done to some other office of the company. I have been in the contracting business 26 years, including 10 years of waterworks construction in the State of Montana, and have a knowledge and experience of waterworks construction in Montana generally. I have made a study of the capacity of plants for future growth of towns and things of that sort. I am also personally familiar with the character and kind of equipment and installation made in the Ryegate waterworks system. The population of Ryegate when this construction was put in was approximately four or five hundred. The construction that we put in there I would say would serve a population of 1500 people with the equipment installed. It would serve more people than there is now in Ryegate, or up to fifteen hundred people. To furnish water it would not require any changes or alterations in the fundamental system installed by us. The system was installed in such a way that exten-

(Deposition of W. P. Roscoe.)

sions could be made to it that would serve the entire community of Ryegate within the corporate limits."

Cross-examination by Mr. JOHNSTON.

"Yes, sir, I would say that no changes would be necessary to serve more people with this water system. Well, that is true in one sense that it is on the theory that these additional people were living adjacent to the mains that are there now; however, they could be served outside the lines of the district. If they lived outside of the lines of the district there would have to be some extensions to the mains; yes, sir, the same as in Billings. As to whether or not there would have to be additions if there were any additional population in Ryegate, some could be served with ordinary service, Mr. Johnston, similar to that that runs from the main to the house—and some on the other side of the line. If they were outside the [147] district they could be served by these mains if they would build additional houses along side of these mains. If they built a block or half a block away from these mains, you would have to have a service pipe. The ordinary distance, the length of the service pipe is from the street to the house. There are lots of service, however, run further than that. Well, some here in Billings. About over in Ryegate, I don't know. If a man lived outside the district and wanted to get, and got permission of the Council to build his own main, it would not cost the

(Deposition of W. P. Roscoe.)

city anything, I don't think. If the town wanted to extend the system so as to cover additional territory to any extent, yes, sir, it would have to lay additional mains."

Redirect Examination by Mr. BROWN.

"As to these additional mains, they would not have to put new mains going back to the pumping system. They would be simply extensions. There were "T's" placed at street intersections for that purpose so that these extensions could be made at some future date. Oh, yes, that was done at the request of the city; that was part of the plan."

(Witness excused.)

Mr. BROWN.—There was furnished to us at our request, the Ordinances of the City of Ryegate and we would offer them in evidence. Ordinance No. 33, found on pages 152 to 158 of the Ordinance Records of the Town of Ryegate, and Ordinance No. 34, found on page 159 of the Ordinance Records. We offer these in evidence.

(Objected to; objection overruled and ordinances admitted.)

The Ordinances in question, read as follows: [148]

ORDINANCE No. 33.

Entitled: "AN ORDINANCE PROVIDING REGULATIONS FOR THE USE OF WATER IN THE TOWN OF RYEGATE, PROVIDING RATES FOR THE USE OF SAME, PROVIDING PENALTIES FOR THE VIOLATION OF THIS ORDINANCE AND REPEALING ALL RULES AND ORDINANCES IN CONFLICT HEREWITH.

BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF RYGATE, MONTANA:

Section. 1. The following rules and regulations, approved by the Public Service Commission of Montana are hereby adopted to govern the use of city water in the Town of Ryegate, Montana, and are hereby made a part of the contract with every individual, firm or corporation, who takes water, and every such individual, firm or corporation agrees, in making application for water to be bound hereby.

GENERAL RULES AND REGULATIONS:

Rule G–1. THE CITY WATER DEPARTMENT contracts with agents or with tenants. The City Water Department may require a deposit equal to one and one-half the estimated amount of the monthly or billing period, as guarantee of payment of same. Application for the use of water must be made at the City Water Department office on a printed form furnished for that purpose. Service will be furnished to any consumer who fully and truly sets forth all the purposes for which

water may be required and who agrees to and conforms to all rules and regulations governing the service; provided the purposes set forth comply with all the City Water Department Rules, and that the system of mains and pipes extend to the point where service is desired, and is adequate to supply the service applied for. Interest will be paid on consumers' deposits at the rate of six per cent per annum, provided such deposits are left with the City Water Department for one month or longer. Such interest will cease when the use of City water is discontinued.

Rule G–2. An application for the installation must be signed by the owner of the premises and must be made on the regular form furnished by the City Water Department for that purpose. When such application has been granted, the City Water Department at its own expense, will tap the main and furnish corporation cock or any other material used or labor furnished in connection with the tapping of the main. All expense of laying and maintaining the service pipes from the mains to the consumers' premises must be borne by the consumer. The service pipe must be laid below the street grade and on the consumers premises, at a standard depth designated by the City Water Department, to prevent freezing. A Curb cock of approved pattern with cast iron curb box must be installed by the consumer at a point designated by the City Water Department. Whenever a tap is made through which service is not immediately desired, the appli-

cant will bear the entire expense of tapping, subject to refund whenever regular service is begun.

Rule G–3. At some convenient point inside the building and so located that it cannot freeze, a stop and waste cock must be placed, so that water can be readily shut off from the building and the water pipes drained to prevent freezing. [149]

Rule G–4. Waste of water is prohibited, and consumers must keep their fixtures and service pipes in good order at their own expense, and all waterways closed when not in use. Leaky fixtures must be repaired at once without waiting for notice from the City Water Department, and if not repaired for notice from the City Water Department, and if not repaired after reasonable notice is given, the water will be shut off by the City Water Department.

Rule G–5. No plumber or other person will be allowed to make connection with any conduit, pipe or other fixture therewith, or to connect pipes when they have been disconnected or to turn water off or on, on any premises without permission from the City Water Department.

Rule G–6. Service pipes will be so arranged that the supply of each separate building, house or premises, may be controlled by a separate curb cock, placed within or near the line of the street curb, under rules established by the City Water Department or civil authorities. This curb cock and box must be kept in repair and easily accessible by the owner of the premises.

Rule G–7. Should the concumer desire to dis-

continue the use of water temporarily, or should the premises become vacant, the City Water Department, when notified to do so in writing, will shut off the water at the curb cock and allowance will be made on the bill for such time as the water is not in use. No deductions will be made in bills for the time any service pipes may be frozen.

Rule G–8. Notice will be given whenever practicable, prior to shutting off water, but consumers are warned that, owing to unavoidable accidents or emergencies, their water supply may be shut off at any time.

All persons having boilers on their premises, depending on connected pressure with the water mains, are cautioned against collapse of their boilers. As soon as water is turned off, the hot water faucet should be opened and left open until the water is again turned on. A check valve must always be placed between the boiler and the City Water Department mains to prevent draining the boiler. Never leave the premises with any faucets open and the water turned off.

Rule G–9. Contractors, builders and owners are required to take out a permit for the use of water for building and other purposes in construction work. Consumers are warned not to allow contractors to use fixtures unless they produce a permit specifying the premises on which the water is to be used. Water will not be turned on at any building until all water used during construction has been paid for.

Rule G–10. Permits for lawn sprinkling during each current year must be secured at the office of the City Water Department as the supply to any premises, using a hose without a permit, will be shut off without warning. Lawn sprinklers will only be permitted where water is carried into the house also.

Rule G–11. The City Water Department agents or other authorized persons, shall have access at reasonable hours [150] to any premises where water is used, for the purpose of making inspections or investigations.

Rule G–12. For violation of any of these rules, or for non-payment of water rent, for either domestic, sprinkling or other purposes, the City Water Department has the right to turn off water without further notice, and after it has been turned off from any service pipe on account of non-payment or violation of rules, the same shall not be turned on again until back rents are paid, together with the actual costs incurred thereby, not to exceed $1.00.

Rule G–13. The foregoing rules shall be effective for all water utilitiès operating in Montana. The flat rate rules and meter rules shall be effective for all water utilities having schedules of that nature.

This rule, however, shall not be construed to mean that any utility must have both flat rates and meter rates. A utility may adopt, subject to the approval of the Public Service Commission, either a flat rate or a meter schedule, or both.

In addition to the general flat rate and meter rate rules a utility may adopt, subject to the ap-

proval of the Public Service Commission, other rules to be designated as special rules, to fit local conditions. In case of an apparent conflict in rules, the general rules shall govern.

MONTHLY RATES—FLAT.

1.	Apartments	Not over five rooms	$1.50
		Each additional room	.15
2.	Bakery	Using not more than one barrel of flour per day	2.50
		Each additional barrel	.75
3.	Banks	Not more than two persons	1.50
		Each additional person	.15
4.	Barber Shops	1 chair and lavatory	2.00
		Each additional chair	.50
5.	Bath tubs	Private each	.35
		Public each	1.50
6.	Blacksmith shop	One fire	1.50
		Each additional	.50
7.	Boarding House	Board only not more than ten persons	3.00
		Each additional 5 persons	1.00
8.	Board and Lodging	Not over ten rooms or persons	5.00
		Each additional room or persons	.35
9.	Building & Construction	(Brick per 1000	.20
		(Cement walk per 100 Sq. Ft.	.30
		(Concrete work per Cu. Yd.	.12½
		(Plastering per 100 Sq. yds.	1.00

		(Settling earth per Cu. yd.	.05
		(Stone work per perch	.10
10.	Butcher Shop	Not more than two persons	2.50
		Each additional person	.15
11.	Dwelling	Not more than five rooms	1.50
		Each additional room	.15
12.	Fire Hydrants	Municipal First 15 per year	225.00
		Each Additional	10.00
13.	Garage.	Private one car	.25
		Each additional car	.15

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14.	Halls, Lodge Rooms	One cold water faucet	1.00
		Each additional	.25
15.	Heating Plant Steam Boiler or Hot Water	(First 10,000 cu. ft. heating (space or less	.50
		(Each additional 1000 ft.	.05
16.	Hotel	Base rate: kitchen, dining room and office.....	5.00
		Each additional room	.10
17.	Hydrant—Yard	Not more than one family	1.50
		Each additional family	1.50
18.	Ice Cream Parlor	12 chairs or stools	3.00
		Each additional six chairs	.50
19.	Laundry	Hand.....Meter	
		Steam.....Meter	
20.	Lodging House	Not over ten rooms	3.00
		Each additional room	.15
21.	Office Building.	Each room	.25
22.	Photograph Gallery	Not over two persons	3.00

23.	Printing Office	Not over two persons..	2.00
24.	Public Building	.....Meter	
25.	Restaurant	12 chairs or stools or less	3.50
		Each additional 6 chairs	.50
26.	Schools	.....Meter	
27.	Soda Fountain	Single fountain per season	12.00
28.	Sprinkling	Lawn, Garden, etc. each Sq. Ft. or major portion thereof per season	6.00
29.	Store	Drug	3.00
		Candy, grocery, fruit etc.	2.00
30.	Theater	One cold water faucet	1.50
31.	Urinal	Public	1.50
32.	Water Closets	(Private	.65
		(Each additional	.50
		(Public self closing	1.00
		(Each additional one	1.00
		(Public continuous flow	2.00

METER RATE.

The meter rates are divided into commercial and industrial.

Commercial Rates.

Minimum rate per month $2.00

1st 5000 gallons..... .40 per 1000 gallons

next 5000 gallons..... .35 per 1000 gallons

above 10,000 gallons..... .30 per 1000 gallons

Industrial Rate.

Minimum rate $5.00 per month.

From 1 to 25,000 gallons per month per 1000 gallons .20

From 25M to 50,000 gallons per month per 1000 gallons .15
From 50M to 100,000 gallons per month per 1000 gallons .13
From 100M to 200,000 gallons per month per 1000 gallons .12
From 200M to 300,000 gallons per month per 1000 gallons .10
From 300M to 500,000 gallons per month per 1000 gallons .09
From 500M to 10,000,000 gallons per month per 1M gallons .08
Above 10,000,000 gallons per month per 1000 gallons .07

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FLAT RATE SERVICE.

Rule F–1. The flat rate will cover the use of water for domestic uses, lawn sprinkling, and any other purposes enumerated on the rate sheet covering flat rate service. The City Water Department agrees to furnish water for certain specified uses for a certain specified sum. *Id,* therefore, a consumer furnishes other people with water without permission from the City Water Department, or uses it for other purposes than he is paying for, it is a violation of his contract, and the consumer offending, after reasonable notice, may have his water shut off and service discontinued until such time as the additional service furnished has been paid for, together with the additional expense incurred in shutting off the water, not to exceed $1.00.

Rule F–2. Flat rate water rents are payable monthly in advance, and payments should be made at the City's office before the 10th of each month. If not paid before the 15th of each month, the right is reserved to discontinue the service after reasonable notice.

Rule F–3. Should any consumer on a flat rate schedule wish to install additional fixtures, or should he desire to apply for water for purposes not stated in the original application, written notice must be given to the City Water Department prior to making such installation or change of use. Special extension permits are issued for any extension of pipe within a building. In case a consumer places new fixtures on his premises without securing an extension permit from the City Water Department when such fixtures are discovered, a charge will be made for such extra fixture at schedule rates for the full length of time such fixtures have been installed.

Rule F–4. Should it be desired to discontinue the use of water for any purpose, whether for bath tubs, closets, lawn sprinkling, hose connections, or other fixtures, the faucet must be removed, the branch line plugged and notice given the City Water Department at its office before any reduction of rates will be made.

METERED SERVICE.

Rule M–1. Meter rates will apply to all services not covered by the accompanying flat rate schedule. Any consumer desiring to receive water by meter

measurement may have meter placed by the City Water Department under the following rules and regulations. Meters may be installed on any service when the same becomes necessary to prevent the waste of water. Meters are owned by the City Water Department and are furnished to consumers and set in place, provided proper receptacles are provided for them.

Rule M–2. Each metered consumer is subject to the minimum charge for such class of service as he receives. Minimum and rates for additional water are shown on accompanying schedules of meter rates.

Rule M–3. In all cases where a meter is installed the consumer must furnish proper protection from frost or other damage, and meter must be located where it is easily accessible for reading purposes and repairs; where necessary for [153] protection a standard form of meter box will be placed by the City Water Department. The actual cost of the same shall be paid for by the consumer. After such receptacle is placed the City Water Department will furnish and connect the meter, and maintain the same in good condition.

Rule M–4. When a meter is installed at the request of the consumer its installation is to be permanent unless the consumer elects to have the same removed and pays all expenses incident to the installation and removal of same, or discontinues service entirely. Service on a meter for a shorter period than six months will be considered temporary, and in such case the consumer will be required

to reimburse the City Water Department for the actual cost of the labor in connection with the installation and removal of the meter.

Rule M–5. One meter only will be supplied for a single service and in case a consumer desire one or more secondary meters for various tenants in a single building, the consumer will be required to pay $1.00 per month for the installation and maintenance including the reading of said secondary meters. The City Water Department will not make collections for any secondary meters and all water rents for a single building must be paid by one consumer when supplied by meter measurement from one service. The City Water Department, however, will inclose the reading of the secondary meters with the bill for the whole building.

Rule M–6. The City Water Department may replace any meter at such time as it may see fit and shall be the judge of the size and make any meter installed. In case of a dispute as to the accuracy of the meter, the consumer may upon depositing the estimated cost of making a test, demand the meter be removed and tested as to accuracy, in his presence. In case the meter is found to be registering correctly or in favor of the consumer the cost of such testing and replacing of the meter shall be *born* by the consumer.

In case the meter is found to be recording incorrectly and against the consumer, the amount deposited by the consumer will be funded and a reasonable adjustment made for overcharges, for

period not exceeding sixty days previous to the demand of the consumer for a test to be made.

Rule M–7. In case a meter is found stopped for any reason so that it is not correctly registering the quantity of water consumed the City Water Department may average the amount due for the current month, using the past two months as a basis of such average.

Rule M–8. Water consumers are not permitted to interfere in any way with the meter after it is set in place. In case the meter seal is broken, or the working parts of the meter have been tampered with or the meter damaged, the City Water Department may render a bill for the current month based on an average of the last two months, together with the cost of such damage as has been done the meter and may refuse to furnish water until the account is paid in full.

Rule M–9. In no case will the City Water Department furnish water from one meter to two or more houses, whether the same are owned by one person or not. [154]

SPECIAL RULES AND REGULATIONS.

Rule S–1. The Office of the Water Department will be open daily for the transaction of business and acco*mo*dation of the public, from 9:00 A. M. to 4 P. M. with the exception of Sundays and Holidays.

Rule S–2. All water supplied to consumers must be paid in advance, and such charges become delinquent on the 5th day of each month and if not paid by the 15th of the current month, it is hereby made the duty of the Superintendent to shut *of* the water

from such consumer and he shall not *trun* the water on again except for the payment of all past indebtedness, and in addition $1.00 for turning the water on again.

Rule S–3. Blank application forms for the tapping of the main, extension of service lines and for the installing of additional fixtures must be procured at the office of the Town Clerk.

Rule S–4. Service pipes must be laid at least fice feet below the established street grade and at least five feet below the surface of the ground in all other places. Where service enters upon property from the street the curb cock and curb box shall be placed one foot from the outer edge of the *s*ude walk line. Where the surface enters the property from the alley the curb box and curb cock shall be placed one foot from the outside of the property line. This rule must be strictly complied with.

Rule S–6. Owners, agents and tenants should familiarize themselves with the location of the stop and waste, which should be installed in such a manner as to drain the entire building, and close it as soon as the property becomes vacant, thereby preventing the pipes freezing and bursting. This stop and waste should always be placed in an accessible part of the premises. The shutting off of the water at the curb cock will not drain the pipes.

Rule S–7. For flat rate services, where the rate remains the same from month to month, failure to receive a bill will not constitute a waiver of the provisions of this ordinance requiring that rentals be paid before a certain date of each month.

Rule S–9. The hours during which sprinkling

is allowed will always appear on the permit in accordance with Rule G–10. These hours must be strictly observed except where water is metered, and for the violation of this rule the water will be shut off without notice.

Rule S–10. In no case will consumers be permitted to use a hose larger than 3/4 inches in inside diameter for lawn sprinkling, washing vehicles or any other purpose. No hose of any size shall be used for any purpose except that it be provided with a nozzle with a discharge not greater than ¼ inches in diameter except when service is metered.

Rule S–11. Meters may be placed at the option of the water Superintendent where in his judgment water is being wasted or the amount of water used is in excess of the amount the consumer is entitled to under the flat rate. Meters will be installed for any consumer complying with [155] the regulations of the City Water Department on request.

Rule S–12. The size and character of the services shall be subject to the approval of the water Superintendent and shall be governed by such rules as may be prescribed from time to time by the water Department.

Section 2: This Ordinance shall be in full force and effect from and after its passage, and approval and publication as provided by law.

Passed and approved this 8th day of December, A. D. 1920.

Approved:

W. H. NORTHEY,
Mayor.

(Corporate Seal) Attest: J. W. BROWN,
Town Clerk.

ORDINANCE No. 34.

Entitled an "ORDINANCE OF THE CITY COUNCIL OF THE CITY OF RYEGATE, MONTANA, CREATING THE OFFICE OF CITY WATER COMMISSIONER, PROVIDING FOR THE APPOINTMENT, PRESCRIBING THE DUTIES AND FIXING THE SALARY OF THE APPOINTEE:"

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF RYEGATE, MONTANA:

Section 1. There is hereby created the Office of City Water Commissioner for the City of Ryegate, Montana, which office shall be filled by appointment by the Mayor, subject to confirmation of the City Council, and shall hold during the term of the Mayor appointing.

Section 2. The person so appointed to the office of City Water Commissioner may be the same person holding the appointment of City Clerk, and while exercising the duties of the City Water Commissioner shall be designated as "City Water Commissioner."

Section 3. The person appointed to the office of City Water Commissioner before assuming the duties thereof, shall take and subscribe the Constitutional Oath and file the same duly certified, and furnish the City a good and sufficient bond in the

penal sum of One Thousand ($1000.00) Dollars conditioned upon the faithful performance of the duties of his office, and the prompt, and faithful payment over to the person entitled thereto of all moneys coming into his hands by virtue of his office; which said bond, when approved by the City Council, shall be filed with the City Treasurer of the City of Ryegate, Montana.

Section 4. It shall be the duty of the City Water Commissioner to ask, demand, and collect all water rentals as heretofore, or as may hereinafter be fixed and prescribed by ordinance or the City Council, and subscribe and deliver receipts therefor, and to collect fees for permits and fines and forfeitures pursuant to ordinances and rules and regulations of said City Council, in the conduct, [156] management and control of the City Water Department, and to monthly pay all such moneys collected over to the City Treasurer, taking his receipts therefor.

Section 5. It shall be the duty of the City Water Commissioner, and he is hereby empowered and directed to enforce all rules and regulations prescribed for the furnishing of water to the consumers, including the issuing of permits, shutting off or discontinuing the supply to consumers for the violation thereof as heretofore, or as may hereinafter be, prescribed by said City Council; and said City Water Commissioner shall make, subscribed a monthly report and statement to the City Council of the amount of collections made, permits issued, and causes and reasons for any discontinuances of service, if any, to consumers.

Section 6. The City Water Commissioner shall receive for his services a salary to be fixed by the City Council, and until the City Council shall otherwise determine, his salary shall be One Hundred Twenty Dollars per year ($120.00) payable in equal installments at the end of each month after his services are rendered upon his filing of the proper voucher and approval thereof by the City Council.

7. This office is hereby declared to be an emergency measure and ordinance and shall take effect and be in full force and effect after its passage and approval.

Passed and Approved this 22nd day of December A. D. 1920.

Approved:

W. H. NORTHEY,
Mayor.

Attest: ——————————,
Town Clerk.

Plaintiff rests.

DEPOSITION OF HENRY THIEN, FOR DEFENDANT.

HENRY THIEN, a witness called on behalf of the defendant, being first duly sworn, on direct examination by Mr. JOHNSTON, testified as follows:

"My name is Henry Thien; I live at Ryegate and was living there in 1919 and 1920. In 1919, up to May, 1920, I was a member of the Town Council. R. C. Curry was the Mayor at the time. He is not living now. The other members of the Council at that time were T. A. Strong, C. H. Parizek, D. H.

(Deposition of Henry Thien.)

Corrington, he wasn't the full time, but part of the time, and myself. Mr. Gregory succeeded Mr. Corrington, in the fall of 1919 I should judge, September or October, I would not know the exact date. My term of office [157] expired in May, 1920. Yes, sir, I know Mr. Roscoe who was just on the stand, and knew him prior to 1919, and the company that he was then connected with. The question of establishing a water and sewer system for Ryegate was first discussed in a general way among the people in the summer of 1919. I remember Mr. Roscoe coming to town, I think it was in May or June, possibly in July. I think I saw him there three or four times up to September. I recall one instance that he was accompanied by another party. As to whether or not the other party was Mr. Neale, I cannot recall. I cannot say I knew him personally or even recall the name. I know there was another man accompanined Mr. Roscoe that called at my place of business on that trip. I was running a bank there at the time. I think it was in May, June or July. I could not make it any more definite as to time. No, I don't think I remember what business Mr. Neale, or whoever this man was with Mr. Roscoe, represented. I think Mr. Roscoe introduced him as representing some bond company, a purchaser of bonds, but I do not recall he mentioned the name of the company that he was representing. I believe he mentioned 'Portland' but I do not recall that he mentioned any firm. I would rather think that he mentioned Portland as the residence of Mr. Neale, if he mentioned it at all, but I would

(Deposition of Henry Thien.)

not be certain as to that. I heard Mr. Roscoe's testimeny this morning relative to the conversations that took place between us and him and this third man. I do not recall Mr. Roscoe in that conversation telling me that if the Security Bridge Company took the contract and built the water system they would have to sell the bonds. I do not recall in that conversation that anything was said about Mr. Neale, or whoever this third man was, buying any bonds of the Town of Ryegate. As to what action was taken by the Council, as a body, with reference to the installation of the water system, I thing not any, when these two men were there. I think the matter did not come before the Council before probably August cr September, when perhaps it started. Yes, there was some opposition to this proposed plan later in the year 1919. The cause of the opposition was, when we obtained the estimate of what the probable cost would be, that was when the opposition developed, on account of the excessive cost; that it was more than the Town could [158] stand—could bear. That was the grounds for the opposition. Yes, sir, we had that estimate before the Ordinance or Resolution was passed creating the district. I was present at the Council Meeting when Mr. Roscoe, for the Security Bridge Company, became the purchaser of the Gener*la* Bonds for the sum of $15,000, and I think it was the same day, the same meeting, that he submitted the bid of the Security Bridge Company for the contract of this water system. Mr. Roscoe may have appeared before the Town Council on other occasions. He may

(Deposition of Henry Thien.)

have appeared once or twice besides that, after I think, perhaps before. As to this meeting when the bid for the General Bonds was submitted being my last meeting which I attended as Councilman, no, I think we had another meeting prior to when our term expired. It was the windup of the old Council before the new one took charge. I don't think Mr. Roscoe was there at that time. As to whether or not Mr. Roscoe said when he made his bid for the General Bonds and submitted his contract, or at any other time when he appeared before the Council in session, I do not recall that he ever said anything as to the Security Bridge Company selling the General and Special improvement Bonds if they got the contract. I do not recall that the purchaser, Lumbermens Trust Company's name was ever mentioned. He didn't ever mention in conversation with me when the Council was in session that the Lumbermens Trust Company had purchased or was going to purchase these bonds, either the general or special, in case his company got the contract to construct the sewer system. I do not recall ever knowing until after the suit was started by the property owners in 1922 that the Lumbermens Trust Company had purchased the general or special bonds from the Security Bridge Company. That suit was the one started to have these improvement bonds declared illegal, the cases that are mentioned in this lawsuit. Mr. Strong who in 1919 was a member of the Council is no longer living. Mr. Parizek is here as a witness. The other Councilman, Mr. Gregory, is in California, although I haven't his address.

(Deposition of Henry Thien.)

During 1919, the Mayor of Ryegate or a councilman was connected with the creamery in Ryegate as a stockholder, but not to my knowledge, as manager or employee. You call my [159] attention to the legal opinion of these general bonds by John C. Thompson, dated April 1, 1920, Exhibit 'A,' well I might have seen it, but I do not recall it. I was not aware that the City Council employed Mr. Thompson or his firm to pass on the legality of the issue. I was aware that they employed an attorney named Mitchell, who was acting for the Wells-Dickie Company, the Council made arrangements with him. Since you refresh my memory, I think it was the Gold-Stabeck Company. I don't recall Mr. Roscoe making a request of the Council for an opinion of Mr. Thompson, though I attended every meeting of the Council. I don't recall Mr. Roscoe ever advising the Council that he was going to forward this opinion of Mr. Thompson to the Lumbermens Trust Company of Portland."

Cross-examination by Mr. BROWN.

"Yes, the opposition developed later; it was due to the high cost it would probably involve. This installation was made during 1920. That was in the period at which expenses were rather high, following the war. Materials were high. Mr. Renshaw was the engineer who prepared the estimates, plans and specifications for the Town Council in the fall of 1919 and I was still a member of the Council. That was the fall preceding the passage of the ordinance that created the district that went ahead.

(Deposition of Henry Thien.)

Well, I examined those plans and specifications in a general way. They were before the Council and I was a member of it. Yes, the opposition was confined to the question of costs. I would say I was one of the leaders of that opposition. Well, perhaps, it might be stated without embarrassment to me that I was the leader of it. When these matters were taken up and worked out, I was the only Councilman who voted 'No.' I got out of the situation. My term expired and I wasn't anxious to continue as councilman. I was engaged in the banking business at Ryegate at that time and the leader in the movement in favor of the ordinance was the opposing banker, yes, sir. I would not call it a war between the two bankers. I think it was a controversy between the elements who considered the cost entirely excessive for a town of that size and on the other hand such that thought it would be all right. [160]

The two leaders of the two movements, myself as opposed to the construction and the other bank of those in favor of it. There were a good many on the other side. I, also, had some associates on the thing. I didn't say that I didn't remember seeing Roscoe before the Council. I remember seeing him at the time the bid was submitted and he probably appeared before that. The general bond issue had been authorized and issued when I went out of office. The bid had been accepted, later, I think the Council passed the ordinances having these bonds issued and the amount that might be necessary. I don't remember Mr. Roscoe ever mentioning the Lumber-

(Deposition of Henry Thien.)

mens Trust Company. I heard his testimony here this morning, upon that subject. In preparing for this bond issue the Town Council employed the Gold-Stabeck Company to get up the proceedings and I believe Mr. Mitchell represented them."

Redirect Examination by Mr. JOHNSTON.

"Referring to the opposition that was arising and the extent of it there were formal protests against the creation of the district."

"Q. There has something been said today about some opposition arising, and the extent of it; were there any formal protests filed against the creation of the district? A. Yes.

Q. Did you examine that so as to know whether or not as it was originally filed it represented over half of the area of the Improvement District?

Mr. BROWN.—Objected to as not the best evidence.

By the COURT.—Sustained.

Q. Do you know whether that protest was numerously signed, or not?

Mr. BROWN.—Objected to as not the best evidence.

By the COURT.—I think you should produce the protest if it was a written protest. He says it was.

Mr. JOHNSTON.—I will look it up and put it in later on.

By the COURT.—Very well." [161]

WITNESS.—(Continuing.) "Prior to engaging Renshaw we had another engineer there to prepare a rough estimate as to the probable cost."

(Deposition of Henry Thien.)

"Q. Do you know, Mr. Thein, how much, if at all, the actual cost exceeded the estimate of Mr. Renshaw?

Mr. BROWN.—To which we object as not competent from this witness.

By the COURT.—I hardly think, unless you have the estimates here, showing it is competent. That would be a matter of writing. There must be some written document in existence showing what that is. I do not think he could testify about it. I will sustain the objection. (Exception.)

Mr. JOHNSTON.—(Offer of proof.) We now offer to show by this witness that the estimate of the engineer, Renshaw, for that portion of the work which was to be paid for by special improvement bonds, was something over $28,000.00 and that the actual cost of the work, which was in excess of the $15,000.00 general bond issue and was paid by Special Improvement warrants, was over $45,000.00.

Mr. BROWN.—That is objected to as not the best evidence and for that very reason, incompetent to any issue in this proceeding. It is for the actual money involved irrespective of whether it was over or under the estimates. If there were a charge of fraud an issue might be raised upon that.

By the COURT.—I will let it stand as it is."

WITNESS.—(Continuing.) "I knew J. W. Brown, Town Clerk of Ryegate at that time and am familiar with his signature. Yes, that is his signature on Defendant's Exhibit 'D.' "

Mr. BROWN.—I am willing to agree that the record may show, there is now produced on the

(Deposition of Henry Thien.)

witness-stand from the files of the Town of Ryegate, a paper called Specifications of Water and Sewer System, and the captions Contractors [162] Proposal: Instructions to Bidders, etc., and that that received the approval of the Mayor and Council on the meeting of April 13, 1920, and that proposal includes all the things which that description describes, to wit: The Specifications, the copy of Instructions, etc., and that it includes as a part thereof such parts as counsel wants to read.

Mr. JOHNSTON.—Counsel for the defendant now offers in evidence the second page of the document marked Defendant's Exhibit "D," referred to by Mr. Brown in his statement to the Court, being entitled "NOTICE TO CONTRACTORS," and particularly the first 5 lines of that proposal. The proposal consisting of two pages, the first part being signed by the United States F. & G. Co., Baltimore, Md., and then as a part of that proposal, signed by The Security Bridge Company, by P. W. Hastings, Treasurer, on April 14, 1920, to which is appended in pen and ink, the following:

"This proposal is made upon the express condition that the bid of W. P. Roscoe upon the general obligation bonds be accepted.

THE SECURITY BRIDGE CO.
By P. W. HASTINGS,
Treas."

And that part of the Specifications, being a part of the same exhibit, which appears upon page 28, as it is numbered in the exhibit under the word "PAYMENTS," being the latter part of page 28

and a portion of page 29.

Now, it may simplify the record by reading it into the record.

(Pages 28 and 29.)

"PAYMENTS.

The contractor will receive monthly partial payments of the amount of ninety per cent of an estimate of the work done or the material furnished during the preceding month made by the engineer in charge on the 1st day of each month. Said estimate to be less the amount of any deduction which may be made in accordance with these specifications. The remaining ten per cent shall be paid upon final completion and acceptance of the work by the engineer and members of the Town Council. Final payment shall be made within ten days [163] of date of final acceptance of the work. The Town now has available from the proceeds of general obligation bonds, $15,000.00 in cash to apply on the construction of the sewer system and $15,000.00 in cash to apply on the construction of the water system. After deducting the preliminary expenses this money will be paid to the contractor in cash for the construction of the reservoir, pump house, pumping plant, the sewage disposal plant, and such of the main water line and the main sewer line as it will cover. The balance of the water system is to be paid in Special Improvement District bonds drawn against Special Improvement District No. 4 in the Town of Ryegate, Montana, and the balance of the cost of the Sewer System will be paid for in Special

Improvement District Bonds drawn against Special Improvement District No. 3, in the Town of Ryegate, Montana. These bonds will be accepted by the contractor in full payment for such work at their par value.

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

Mr. BROWN.—To which offer the plaintiff objects for the reason, First: That the item is covered, or the evidence sought to be introduced, by the stipulation of facts therein.

There is no dispute, according to the agreed statement of facts, as to the procedure, the terms and conditions under which the petition or contract—including the fact he obtained the contract under the agreement he would accept the Special Improvement District Warrants.

Second: Because the proposed offer includes the contract or details relative to another construction job of public improvement, to wit: Sewer System and Improvement District Number 3 about which there is no controversy in this lawsuit and has no part in this lawsuit.

Object further, for the reason it is a segregation of a part of the exhibit without offering the whole,

and without counsel has an opportunity to examine to see if the whole would modify or affect any of the parts offered in evidence. [164]

By the COURT.—I would sustain the objection as to the Sewer proposal—it is not involved here. Really, it ought to be sustained as to the parts offered on the ground it all should be offered. If there are any parts that might modify what you have introduced it certainly would be immaterial—would be material to have them considered as well.

You can put it all in if you want to submit it as an exhibit.

Mr. JOHNSTON.—I am perfectly willing. It makes the record more cumbersome.

By the COURT.—I know it is.

Mr. JOHNSTON.—As long as he objects to it—I now offer the entire Exhibit, Defendant's Exhibit "D."

By the COURT.—It will go in subject to your objection, Mr. Brown. (Exception.)

(Portion of Exhibit "D" offered by Mr. Johnston, referred to as "the first five lines of page 2.)

EXHIBIT "D."

"NOTICE TO CONTRACTORS.

Sealed Bids will be received by the Town Clerk at his office until eight o'clock P. M. of the Fourteenth day of April, A. D. 1920, for the furnishing of all materials and the construction of the proposed water system in the Town of Ryegate, Montana, and in Special Improvement District No. Four in said Town of Ryegate. . . . .

(Portion of Exhibit 'D' offered by Mr. Johnston, referred to in his offer as 'Proposal,' consisting of two pages, the first part being signed by the United States F. & G. Co., Baltimore, Md., and then as a part of that proposal, signed by the Security Bridge Company, by P. W. Hastings, Treasurer).

PROPOSAL.

To the Honorable Mayor and Town Council of the Town of Ryegate, Montana.

Gentlemen:

The undersigned propose to furnish all material and do all work of constructing the proposed water and sewer systems in the town of Ryegate, Montana, in a first class workmanlike manner, according to the attached form of contract and specifications, plans and profiles on file in the office of the Town Clerk, at the prices hereinafter mentioned and named.

The following is the name and place of business of the surety company which will sign the form of bond as surety if the work is awarded to the undersigned. [165]

UNITED STATES F. & G. CO.,
Baltimore, Md.

And we hereby agree, to enter into a contract within 10 days of the notification of the acceptance of this proposal to finish and complete all of said work by the 1st day of October, A. D. 1920, according to the form of contract, plans and specifications hereto attached or filed in the office of the Town Clerk under which this proposal is made. In default of any of the conditions to be performed by the

party of the second part, the certified checks which accompany this proposal, shall at the discretion of the Town Council, be absolutely forfeited to the Town of Ryegate as liquidated damages for the failure of the undersigned to comply with all the terms of this proposal. If this proposal is rejected, then the accompanying checks made payable to the Town of Ryegate shall be returned to the undersigned within 10 days of the date thereof. If this proposal is accepted then the enclosed checks will be returned within 10 days of the filing of a bond for the faithful performance of the work.

Dated this 14 day of April, A. D., 1920.

Name THE SECURITY BRIDGE CO.,
Residence ————————————,
By P. W. HASTINGS,
Treas."

(The following letter was received by the Court Reporter, accounting for only the portions originally offered by Mr. Johnston being copied in the record.

"Helena, Montana. Jan. 28th, 1930.

Re: Lumbermens Trust Co. v. Town of Ryegate, Mont.

Mr. C. S. Prater,
Court Reporter,
Billings, Mont.

Dear Mr. Prater:

Upon further consideration of Mr. Johnston's Exhibit D I can see no reason for burdening the record with this entire exhibit. I believe his suggestion that we only use the parts that he desires is perfectly proper. I return the Exhibit to you here-

with. I am copying this letter to Mr. Johnston that he may be advised.

Very truly yours,

JOHN G. BROWN.")

Mr. JOHNSTON.—We now offer in evidence the Minutes of the Town Council of the Town of Ryegate of February 11, 1919, appearing on Pages 135, 136, 137 and 138 of the Minute Book of the Town of Ryegate, and—

Page 139 of the same Minute Book, being a copy of the protests referred to in the minutes of that meeting.

Mr. BROWN.—We object to the offer upon the sole ground that the minutes offered refer to a meeting of a later date, which later date appears to have been [166] on February 17, 1920, and found on Page 140 of the same Minutes, and if this is offered in connection with the other, we have no objection.

Mr. JOHNSTON.—We will include that in the offer.

Mr. BROWN.—No objection.

By the COURT.—It may be admitted.

Mr. BROWN.—That will include Page 140, as well as the other pages?

By the COURT.—Yes.

Mr. BROWN.—We can agree that the Stenographer may omit parts of that minute that has nothing to do with this case.

By the COURT.—You may agree on that, there.

Page 135.

MINUTES OF REGULAR MEETING OF THE TOWN COUNCIL OF THE TOWN OF RYEGATE, MONTANA, HELD AT THE REGULAR PLACE OF MEETING, THE FARMERS AND MERCHANTS STATE BANK, ON WEDNESDAY THE 11TH DAY OF FEBRUARY *L*(''), (1920) AT 7:30 P. M.

Upon roll call the following members were found to be present: Mayor R. C. Currie. Aldermen, Gregory, Parizek, Strong and Thirn. Absent None. Town Clerk J. A. Brown was present.

The Committee to whom was referred Ordinance No. 25 at the regular meeting of the Council on January 14, 1920, submitted the following report: ''To the Mayor and Council of the Town of

Ryegate, Montana.

Gentlemen:—

We, your Committee, to whom was referred by the Mayor at the regular meeting of the Town Council on January 14, 1920, Ordinance No. 25 entitled: ''AN ORDINANCE TO PROVIDE FOR THE ISSUANCE AND SALE OF $15,000 WATER BONDS OF THE TOWN OF RYEGATE, MONTANA, FOR THE PURPOSE OF PROCURING A WATER SUPPLY AND CONSTRUCTING A WATER SYSTEM FOR SAID TOWN: AND DESIGNATING THE FORM OF SUCH BONDS AND PROVIDING FOR THE LEVY OF A TAX FOR THE PURPOSE OF PAYING THE INTEREST ON AND TO CRE-

ATE A SINKING FUND FOR THE REDEMPTION OF SAID BONDS," beg leave to report and recommend the following amendments to said Ordinance as introduced and passed upon its first reading:

The Town Treasurer having filed a Certificate with the Town Clerk, designating the LIBERTY NATIONAL BANK in the City of New York, State of New York, as the Bank in the City of New York at which the principal and interest of said bonds may be payable at the option of the holder, that the words "Liberty National" be inserted in the first paragraph of the [167] form of the bond and also in the form of the coupon in Section 2 of said Ordinance, so that the same will read, "or at the option of the holder at the LIBERTY NATIONAL BANK in the City of New York, State of New York."

That the date of the sale of such bonds be the 14th day of April, 1920, at 8 o'clock P. M. and that the Notice of Sale, provided for in Section 4 of said Ordinance be amended in the second line thereof by interlineation so as to provide for the sale of such bonds at said date and hour.

That the last line in the second paragraph of said Notice of Sale be amended by inserting the words "Liberty National" so as to read as follows: "or at the option of the holder at the LIBERTY NATIONAL BANK in the City of New York, State of New York."

We recommend that the foregoing amendments be made in said Ordinance and that as amended the said Ordinance be finally passed and adopted.

Respectfully submitted,
L. W. GREGORY,
C. H. PARIZEK,
Committee."

Alderman Gregory moved the adoption of the report of the Committee which motion was duly seconded and carried and the foregoing report was adopted and ordered spread upon the minutes of the meeting. Alderman Gregory thereupon moved that the Clerk be instructed to amend said Ordinance by interlineation in accordance with the above report, which motion was duly seconded and carried and the Clerk thereupon inserted the words "LIBERTY NATIONAL" in the form of the bond and form of the coupon in Section 2 of said Ordinance and also in the Notice of Sale in Section 4, and also inserted the words "14th day of April, 1920 at 8 o'clock P. M." in the second line of said Notice of Sale.

Thereupon said Ordinance No. 25 was read at length as of its second reading and Alderman Strong regularly moved the final passage and adoption of said Ordinance. Such motion was duly seconded by Alderman Parizek and upon roll call the following vote was recorded upon the final passage and adoption of said Ordinance.

AYES: Alderman Gregory, Parizek, Strong and Thien.

NOES: None.

Thereupon said Ordinance No. 25 was declared

duly passed and adopted and was signed by the Mayor and Clerk in open session of the Council and the Clerk was directed to make proper record and publication of the same. The Town Clerk was instructed to cause the Notice of Sale provided in said Ordinance No. 25 to be published in the "Ryegate Weekly Reporter," a weekly newspaper published and printed in the Town of Ryegate and in the Bond Buyer, a newspaper published in New York City, for a period of not less than four weeks.

(Minutes of meeting held February 11, 1920, continued.)

The Town Council of the Town of Ryegate having at a [168] Special meeting thereof duly called and held on December 30, 1919, regularly passed and adopted Resolution No. 10, the same being a Resolution declaring it to be the intention of the Town Council of the Town of Ryegate, Montana, to create Special Improvement District No. 4 and Notices having been regularly published and mailed on the first day of January, 1920, as provided in said Resolution No. 10, and this being the next regular meeting of the Town Council, after the expiration of the time within which protests may be made to the Town Council against the creation of said Special Improvement District, the Council proceeded to hear and pass upon all protests which had been filed with the Town Clerk within the time allowed by law after the first publication of such Notice of the passage of said Resolution of Intention.

Attorney D. Augustus Jones representing certain protestants was present at such hearing and

orally argued the reasons why protestants opposed creation of such districts and the proposed works; said reasons being same as set out in the written protests.

After considering such protests filed, Alderman Strong made the following motion: That an adjourned regular meeting of the Town Council be held Tuesday, February 17th, 1920, at 8 o'clock P. M. for the purpose of giving such protests filed final consideration and for the additional purpose of finally determining the matter of the creation of such special improvement districts, hereinbefore mentioned, in accordance with Resolutions of Intention heretofore introduced and passed by the Town Council. Said motion was regularly seconded by Alderman Parizek. The Mayor stated the motion and put the question and upon roll call the following vote was recorded:

AYES Alderman Gregory, Parizek, Strong and Thien.

NOES None.

PROTESTS FILED WITH TOWN CLERK AGAINST CREATION OF SPECIAL IMPROVEMENT DISTRICT NUMBERED 3 AND NUMBERED 4.

Name of Protestant.	Property Protested		Area Protested.
(Protestants represented at hearing Feby. 11th by D. A. Jones in accordance with written Power of Attorney filed with Clerk.)			
May Edson	Lots 7 and 8	Block 8	14,000 Sq. Ft.
W. J. Edson	Lot 4	Block 8	7,000 " "
John H. Fraher	Lot 2	Block 6	7,000 " "
Mrs. Charlotte Grams	Lot 4	Block 20	7,000 " "
Floyd M. Edson	Lot 3	Block 8	7,000 " "
Henry G. Jacobson	Lots 7, 8, 9	Block 18	21,000 " "
Ethel Stinton	Lot 1, E½2	Block 22	10,500 " "
Mrs. Chloe J. Gugler	Lot 1	Block 3	7,000 " "
C. H. Broyles	Lot 4	Block 24	7,000 " "
C. H. Broyles	Lot 5 & 6	Block 3	14,000 " "
A. D. Linderman	Lot 2	Block 24	7,000 " "
L. F. Lubeley	Lots 1, 2, 3	Block 15,	21,000 " "

Name of Protestant.	Property Protested.		Area Protested.
L. F. Lubeley	Lots 7, 8, 9	Block 16,	21,000 Sq. Ft.
Isabel Currie	Lots 9, 10	Block 8,	14,000 " "
Sarah G. Snyder	Lots 7, 8, 9	Block 15,	21,000 " "
Fran Reavely	Lots 5, 6	Block 17	14,000 " "
[169]			
Lubeley & Reavley	Pt. Lots 15, 16, 17, 17	Block 4	1,800 " "
	(Lots 1 & 3	Block 6	14,000 " "
	(Lots 1, 2, 3, 4, 5, 6, 12	Block 7	49,000 " "
Fred Wyman	(Lots 1, 11, 12	Block 7	21,000 " "
	(Lots 4 & 5	Block 15	14,000 " "
and	(Lot 4	Block 16	7,000 " "
	(Lots 1, 2, 3	Block 17	21,000 " "
R. C. Currie	(Lots 3, 4, 5, 6	Block 18	28,000 " "
	(Lots 7, 8, 9, 10, 11	Block 19	35,000 " "
	(Lots 7, 8, 9	Block 20	21,000 " "
	(Lot 6	Block 22	7,000 " "

Name of Protestant.	Property Protested.		Area Protested.
	Lots 5 & 6	Block 23	14,000 Sq. Ft.
Fred Wyman	Lot 1	Block 1	7,000 " "
Fred Wyman	Lot 1	Block 2	7,000 " "
Fred Wyman	Pt. Lots 15, 16, 17, 18	Blk 4	5,200 " "
Wilste & Currie	Pt. Lots 5 & 6	Block 2	10,000 " "
Sasch Leah Sterling	Pt. Lots 4, 5, 6	Block 9	10,500 " "

(Protestants represented at said hearing by D. A. Jones under verbal request by Henry Thien made in said meeting; said Henry Thien holding written Power of Attorney from protestants and filed with Clerk.)

Name of Protestant.	Property Protested.		Area Protested.
Edwin M. Wright by Henry Thien, Agent	Lot 4	Block 3	7,000 Sq. Ft.
A. B. Hoehler by Henry Thien Agent,	Lots 2, 5, 6	Block 8	21,000 " "
State Bank of Ryegate	Lots 13 & 14	Block 5	7,000 " "
Henry Thien	Lot 12	Block 5	3,500 " "
Mathias T. Lenihan, Bishop by B. A. Kuhn	Lots 10, 11, 12	Block 10	21,000 " "
Henry Thien	Pt. Lots 15, 16, 17, 18	Block 4	2,000 " "
Hilbert Thien Co.	Lots 3	Block 3	7,000 " "
Hilbert Thien Co.	Lots 3 & 4	Block 5	7,000 " "
Hilbert Thien Co.	Lot 9	Block 10	7,000 " "
Ryegate Creamery Co.	Pt. Lot 7, 8, 9, 10	Block 6	5,000 " "

(The following protests filed but prior to said hearing WITHDRAWN by written instrument filed with the Clerk together with revocation of Power of Attorney.)

Name of Protestant	Property Protested.		Area Protested.
Fred Amner	Lots 3 & 7	Block 4	10,500 Sq. Ft.
Joe Schultz	Lots 5 & 6	Block 21	14,000 " "
Milwaukee Land Co.	Lots 11, 12, 13, 14, 15, 16, 17, 18	Block 6	28,000 " "
C. M. & *St. Ry.* Co. Dist. #4 Pt. of Right of Way			389,200 " "
C. M. & St. P. Ry. Co. Dist. #3 Pt. of Right of Way			268,800 " "

Protest of I. G. Madden for Lot 1 Block 2 not considered as signature was not authorized.

I, J. A. Brown, Town Clerk of the Town of Ryegate, Montana, hereby certify that the foregoing is true and correct list of all the protests and withdrawal of protests filed with me as such Town Clerk against the formation of Special Improvement Districts as outlined in Resolution Nine and Ten declaring it to be the intenstion of the council to create such districts.

(Corporate Seal) J. A. BROWN,
Town Clerk. [170]

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MINUTES OF ADJOURNED REGULAR MEETING HELD FEBRUARY 17, 1920.

MINUTES OF AN ADJOURNED REGULAR MEETING OF THE TOWN COUNCIL OF THE TOWN OF RYEGATE, MONTANA, HELD AT THE REGULAR PLACE OF MEETING, THE FARMERS AND MERCHANTS STATE BANK, ON TUESDAY THE 17th DAY OF FEBRUARY, A. D. 1920, AT EIGHT O'CLOCK P. M.

Upon roll call, the following members were found to be present.

Mayor R. C. Currie.

Aldermen Gregory, Parizek, Strong and Thien.

Absent none.

Town Clerk J. A. Brown was also present.

The Clerk read all the protests filed with him against the creation of Special Improvement Districts Number 3 and Number 4 as outlined in Reso-

(Deposition of G. H. Corrington.)
lutions Number 9 and Number 10 passed by the Council at the meeting held December 10, 1919.

The Council then fully considered the protests filed against the creation of Special Improvement District No. 4 and upon finding that the total area of the property protested was less than 50% of the total area of the entire district, Alderman Strong made the following motion: "That the protests filed with the Clerk in accordance Resolution No. 9 protesting the creation of Special Improvement District No. 4 have been considered in full and found insufficient under the law to prevent the creation of such District." Alderman Gregory seconded the motion. The Mayor stated the motion and put the question and the following vote was recorded.

Ayes: Aldermen Gregory, Parizek and Strong.

Noes: Alderman Thien.

The Mayor declared the motion carried. . . . .

DEPOSITION OF G. H. CORRINGTON, FOR DEFENDANT.

G. H. CORRINGTON, a witness called on behalf of the defendant, being first duly sworn, on direct examination by Mr. JOHNSTON, testified as follows:

"G. H. Corrington is my name and I live at Ryegate, Montana. I am Town Treasurer and have been since the spring of 1922. Prior to that time I was alderman. I was alderman when we were

(Deposition of G. H. Corrington.)

first incorporated, until the fall of 1919—September or October. I resigned in the fall of 1919. I know W. P. Roscoe who testified in this case. No, sir, Mr. Roscoe never appeared before the Council with reference to the proposed water system for the Town of Ryegate while I was a member of the Town Council. I recall meeting Mr. Roscoe but not in regard to this particular matter in the summer *of* fall of 1919. He did not discuss with me the matter of the water system for the Town of Ryegate. My resignation was accepted in October. I do not recall meeting Mr. Roscoe in that spring or summer [171] or fall when he was accompanied by another gentleman and I do not recall having met Mr. Neale. I didn't know that the Lumbermens Trust Company contemplated buying the General or Special Improvement Bonds of the Town of Ryegate, for the construction of this water system."

"Q. Did you, as an officer of the Town of Ryegate, ever importune or request the Lumbermens Trust Company to buy *an* of the General or Special Improvement District bonds of the Town of Ryegate?

Mr. BROWN.—To which we object for the reason that the witness has said he never knew of their being in the market up to the time he went out of office; no bonds were ready to be sold until after he had passed out as an officer.

(Deposition of C. H. Parizek.)

By the COURT.—Ask him the question; let it go.

(Exception.)

(Question read.)

A. I did not."

DEPOSITION OF HENRY THIEN, FOR DEFENDANT (RECALLED).

HENRY THIEN a witness recalled on behalf of the defendant, on direct examination by Mr. JOHNSTON, testified as follows:

"Q. Mr. Thien, at any time while you were an officer of the Town of Ryegate, did you importune or request the Lumbermens Trust Company to buy any of the General or Special Improvement Bonds of the Town of Ryegate? A. I did not.

Mr. BROWN.—The same objection.

By the COURT.—The same ruling."

DEPOSITION OF C. H. PARIZEK, FOR DEFENDANT.

C. H. PARIZEK, a witness called on behalf of the defendant, being first duly sworn, on direct examination by Mr. JOHNSTON, testified as follows:

"My name is C. H. Parizek and I live at Ryegate. I was a member of the Town Council in 1919 and 1920. My term of office expired in the spring of 1920, at the same time Mr. Thien's expired. I had never met Mr. W. P. [172] Roscoe who testified here. I have seen him. I do not recall any

(Deposition of C. H. Parizek.)

conversation with Mr. Roscoe during the time I was alderman with reference to the Security Bridge Company getting the contract for the construction of the water system for Ryegate."

"Q. Did you ever meet anybody there in Ryegate with Mr. Roscoe in connection with that water system, about the issuance of these bonds?

Mr. BROWN.—We object to that as incompetent because the witness says he never knew Mr. Roscoe and never saw him.

By the COURT.—I will let it go in. (Exception.)

(Question read.)

A. I never met them to talk to them. I have seen the man with him. I knew Mr. Roscoe by sight."

WITNESS.—(Continuing.) "I do not recollect ever meeting Mr. Neale, whose deposition was read. I do not recollect anybody else ever talking to me about the Lumbermens Trust Company buying either Special or General Improvement bonds of the Town of Ryegate. No, I don't recall Mr. Roscoe ever appearing before any meeting of the Town Council. I don't recall ever having heard that the Lumbermens Trust Company might buy any of these Special Improvement Bonds while I was Councilman. As to whether or not I, or any other official ever requested the Lumbermens Trust Company to buy these Special Improvement Bonds, I would say not that I know of. I do not recall that I ever saw the opinion of Mr. Thomp-

(Deposition of C. H. Parizek.)

son, marked Plaintiff's Exhibit 'A' with reference to the legality of the General Bonds of the Town. I might have seen it but I do not recall. I have no recollection of Mr. Roscoe ever appearing before the Council when it was in session and asking for this copy and advising the Council that he was going to send it to the Lumbermens Trust Company." [173]

Cross-examination by Mr. BROWN.

"I knew Mr. Strong the banker. He was in the Farmers & Merchants State Bank. I also knew Mr. Thien; he was in the State Bank of Ryegate. I was a merchant in Ryegate at that time. I did business with both banks. I do not recollect ever having met Mr. Roscoe and Mr. Neale and two other of the Councilmen with Mr. Strong in Mr. Strong's bank to discuss this matter. I do not recollect any such meeting at any time or at any date. As to my saying I never did, I would answer I do not recall it. I do not recall at that time and place, if there was such a time and occurrence at such a place, it was discussed as to how the matter would be delayed until Thompson's opinion came on these General Bonds, before Mr. Roscoe would forward the bonds, with the opinion, on to the Lumbermens Trust Company. As to whether or not it ever happened, I do not recall."

DEPOSITION OF W. H. NORTHEY, FOR DEFENDANT.

W. H. NORTHEY, a witness called on behalf of the defendant, being first duly sworn, on direct examination by Mr. JOHNSTON, testified as follows:

"My name is W. H. Northey. I live at Ryegate and was a member of the Ryegate Town Council in 1920 and 1921. I was Mayor of the town from May, 1920, to May, 1922. I know Mr. W. P. Roscoe but I am not acquainted with Mr. Neale, whose deposition was read. I never met him that I know of. I was not an official of the town in 1919. I had no conversation with any official of the Lumbermens Trust Company. I never had any knowledge that the Lumbermens Trust Company had agreed to buy these Special Improvement Bonds from the Security Bridge Company. The first time I knew this company had the bonds was the other day when I was served with the summons—I mean the subpoena served on me. That was the first time I ever knew the Lumbermens Trust Company claimed to be the purchaser of these bonds. As to Plaintiff's Exhibit 'A,' the opinion of Mr. Thompson with reference to the legality of the General Bonds of the Town, I don't know anything about it—I don't remember ever seeing it. I don't recall that Mr. Roscoe ever appeared before me and the Council [174] when I was Mayor, asking for this opinion, Plaintiff's Exhibit 'A.' I don't recall Mr. Roscoe ever stating to me and the Coun-

(Deposition of W. H. Northey.)

cil, while in session or otherwise, that he wanted this opinion to send to the Lumbermens Trust Company of Portland, Oregon; in fact I never heard of that man Thompson in connection with the water system at all. [175] Calling my attention to the certificates marked for Identification as Plaintiff's Exhibit 'C,' being certificates relative to the construction, I would say it is my signature on them. I understand they were estimates of work done. Also, this third place, where it appears to be my signature, it is mine. Yes, sir, that is my signature on the fourth and fifth ones."

Mr. BROWN.—Are these signatures disputed?

Mr. JOHNSTON.—No, sir.

WITNESS.—(Continuing.) "I think my signature was put on at the request of the engineer. I think that is the Clerk's handwriting on them, Mr. Brown. Mr. Roscoe never appeared and requested me to sign any of these certificates. Mr. Roscoe, nor anyone else ever told me they were being sent to the Lumbermens Trust Company. I never heard the Lumbermens Trust Company mentioned, in connection with these certificates. I never importuned or requested the Lumbermens Trust Company to buy any of these General or Special Bonds."

DEPOSITION OF B. MELLEN, FOR DEFENDANT.

B. MELLEN, a witness called on behalf of the defendant, being first duly sworn, on direct examination by Mr. JOHNSTON, testified as follows:

(Deposition of B. Mellen.)

"My name is Binone Mellen and I live at Ryegate and was a member of the Town Council of Ryegate in 1920 and 1921. I went into office the first Monday in May, 1920. I served two full years. I know Mr. Roscoe by sight; I never met him until I came on the Council. I do not know Mr. Neale whose deposition was read in evidence. I was not an officer of the Town of Ryegate in 1919 and to my knowledge I never met Mr. Roscoe or Mr. Neale in connection with this water system or these bonds. I never at any time importuned the Lumbermens Trust Company to buy any of these Special Improvement Bonds, nor did I never know of any officer of the Town of Ryegate asking the Lumbermens Trust Company to buy any of the bonds. I don't remember when I learned that the Lumbermens Trust Company was the owner of these Special Improvement Bonds. It wasn't until after the suit was started, to annul the bonds. Yes, sir, that was the suit started in 1922. I do not remember Mr. Roscoe appearing before the Town Council as representative of the Security Bridge Company, but [176] he may have been present. I do not remember any particular meeting. He never appeared before the Town Council and mentioned that the Lumbermens Trust Company had bought any of the General or Special Improvement Bonds."

"Q. I call your attention to Plaintiff's Exhibit 'A,' being an opinion of Mr. Thompson with reference to the validity of the General Bond Issue of Ryegate, and ask you whether you recall ever having seen that before.

(Deposition of B. Mellen.)

Mr. BROWN.—Objected to as immaterial. The letter shows by its face it is an advance date, before the time he was a member of the Council.

By the COURT.—Overruled. (Exception.)

A. No, sir."

WITNESS.—(Continuing.) "I do not recall Mr. Roscoe ever appearing before the Council while I was a member and asking for this opinion of Mr. Thompson. I never heard of this opinion of Mr. Thompson's until to-day."

"Q. Now, I call your attention to Plaintiff's Exhibit 'C,' being a bunch of certificates with reference to the work on this system—supposed to be copies of the minutes of the meetings relative to that, the allowance of estimates; certified copy of the minutes being signed by Mr. Brown, and the ones with reference to the work, of the issuance of bonds, signed by Northey, Mayor, Brown, Town Clerk and Hinton, Town Treasurer. Did the matter of the issuance of any of these certificates ever come before the Mayor or Council, in session, while you were a member of the Council?

Mr. BROWN.—We object to that as incompetent. If it came before them, officially, the best evidence of it is the minutes of their meeting.

By the COURT.—Overruled. (Exception.)

(Question read.)

A. These were brought up—these estimates were brought up and allowed at the Board meeting." [177]

WITNESS.—(Continuing.) "I never knew that certified copies of the minutes were being made out

(Deposition of B. Mellen.)

by the Town Clerk and delivered to anyone. No, sir, I didn't know that the Mayor, Town Clerk and Treasurer were making them out at that time. I never heard of them before to-day. I never knew of any officers of the Town of Ryegate having any such knowledge during the time I was Councilman."

Cross-examination by Mr. BROWN.

"Q. Mr. Mellen, you were present at meetings of the Town Council, at seven o'clock P. M. on the 11th of August; 7:30 o'clock the 25th day of August and 7:30 o'clock the 8th of September and other times along in that interval, that the Town Council of Ryegate was in session, were you not?

A. The minutes would show whether I was present.

Q. Do you recall whether or not you were present? A. I think I was present most of the time.

Q. Now *the,* calling your attention to these minutes in question, to the minutes of the dates mentioned, I mean—to the dates mentioned in these certificates, isn't it a fact that each of the estimates submitted by the engineer was submitted to the Council, and each time they were submitted, 'it was regularly moved that the estimate of the Security Bridge Company be allowed as read and that the Mayor and Town Clerk be instructed to issue bonds numbered from 20 to 27, both inclusive, etc., against Special Improvement District Number 4.' Don't you recall of a number of instances where a similar motion to that went through each time these were prepared? A. The estimates, yes, sir.

(Deposition of B. Mellen.)

Q. And that was all done in accordance with the contract for the construction was it not?

Mr. JOHNSTON.—That is a conclusion he is asking for; objected to for that reason. [178]

By the COURT.—Let him answer the question, if you were there and participated in the meeting?

A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. You were present and voted for the authority, for the estimate upon that date—

Mr. JOHNSTON.—Object to that as not the best evidence.

By the COURT.—Let him testify whether he was or not.

A. I was present on that date."

WITNESS.—(Continuing.) "On that date I voted for the estimate being allowed. I was present at the meeting of July 28, 1920, and voted in favor of the allowance of the estimate of the Security Bridge Company on the construction of the waterworks. I was present at the meeting of August 25th and voted for the allowance of the estimate of the Security Bridge Company for the construction work that had been certified to that meeting. I was present at the meeting of September 8, 1920, and voted in favor of the allowance of the estimate of the Security Bridge Company on that date. I was present at the meeting of October 13. There was submitted to the Council and I voted in favor of the allowance of the estimate of the Security Bridge Company for the construction of this water-

works system at that time. As to the meeting of November 24, 1920, I was present on that date and voted in favor of the allowance of the estimate of the Security Bridge Company of the waterworks of the City of Ryegate submitted to that meeting. I still live in Ryegate."

"Mr. JOHNSTON.—We now offer in evidence the minutes of the meetings of the Town Council of Ryegate on each of the dates mentioned by counsel on his inquires of the witness who just left the stand. We want to show there was nothing—

Mr. BROWN.—We have no objection to the offer if confined to this; if confined to the bills of Tom, Dick and Harry— [179]

By the COURT.—Let it be confined to the estimates, and they may go in.

Mr. JOHNSTON.—Offered for the purpose of showing, at these meetings nothing was said about the certificates.

By the COURT.—They will be admitted for what they show."

(PORTION OF MINUTES OF REGULAR MEETING OF TOWN COUNCIL OF TOWN OF RYEGATE, MONTANA, ON WEDNESDAY THE 11th OF AUGUST, 1920, AT 7:30 O'CLOCK P. M.)

The July estimate of the Security Bridge Company for labor and material on waterworks was read as follows:

117 cu. yds. concrete in reservoir @ $37.50 ..... $ 4,387.50

Reservoir roof structure complete	1,425.00
11 cu. yds. concrete at well @ $40.00	440.00
100 cu. yds. excavation at well @ $2.75..	275.00
300 cu. yds. excavation at reservoir @ $3.17	951.00
1400 lin. ft. 6″ pipe on ground @ $2.50..	3,500.00
Material on ground as per first estimate	4,268.04
Total to August 1st	$15,246.54
Less	
Previous estimated $6,341.24	
Re-inforcing at reservoir 873.00	
10% 1,532.30	
Total deductions $8,746.54	
Balance due contractor this estimate....	$ 6,500.00

Alderman Gregory moved that the estimate be allowed as read *at the the* Mayor and Town Clerk be instructed to issue bonds numbered 7 to 19 inclusive of Special Improvement District No. 4 in the denomination of $500.00 each to the Security Bridge Company according to the terms of the contract with that company. This motion was duly seconded and unanimously carried.

(PORTION OF MINUTES OF REGULAR MEETING OF THE TOWN COUNCIL OF THE TOWN OF RYEGATE, MONTANA, ON WEDNESDAY THE 28th OF JULY, 1920, AT 7:30 P. M.)

Estimate Ryegate Water System for the month of June, 1920, to the Security Bridge Company,

Contractors, approved by Claude A. Renshaw was read as follows:

Material on ground as per previous estimate	$4,268.04
64 yds. Concrete in place in reservoir @ $37.50	2,400.00
300 Cu. Yds. excavation at reservoir @ $3.17	951.00
Total material furnished and work completed to date	$7,619.04

[180]

Less previous estimate	$3,841.24	
Less re-inforcing in reservr..	360.00	
Less 10%	917.80	
Total deductions	$5,119.04	
Balance due contractor this estimate		$2,500.00

(PORTION OF MINUTES OF SPECIAL MEETING OF THE TOWN COUNCIL OF THE TOWN OF RYEGATE, MONTANA, HELD ON THE 25th DAY OF AUGUST, 1920, AT 7:30 P. M.)

Fourth Estimate Ryegate Water Works System, Security Bridge Company, Contractors.

August 25th, 1920.

Previous estimates	$15,246.54
Materials furnished and labor performed since August 11th Estimate as follows:	
1200′ 6″ pipe @ $2.50	3,000.00
2 tons specials @ $365.00	730.00

11 Cu. Yds. Concrete at well @ $40.00...		440.00
100 Cu. yds. Excavation at well @ $2.75		275.00
Total material furnished & labor performed		$19,691.54
Less previous estimate	$12,841.24	
Less reinforcing in reservoir	873.00	
Less 10%	1,977.30	
Total deductions	$15,691.54	
Bal. due this Estimate	4,000.00	
	$19,691.54	

These items are correct.

(Signed) CLAUDE A. RENSHAW,
Engineer.

Alderman Gregory moved that the Fourth Estimate of the Security Bridge Company be allowed as read and that the Mayor and Town Clerk be instructed to issue Bonds numbered from 20 to 27, both inclusive in the denomination of five hundred dollars each against Special Improvement District Number 4 be issued in payment of same.

Upon roll call all the members voted "Aye." The motion was declared to have unanimously carried.

(PORTIONS OF MINUTES OF REGULAR MEETING OF THE TOWN COUNCIL OF THE TOWN OF RYEGATE, MONTANA, HELD ON SEPTEMBER 8, 1920, AT 7:30 P. M.)

The following estimate of the Security Bridge Company was read:

"Fifth Estimate for the Security Bridge Company for Ryegate Water System."

Previous estimated		$19,691.54
Work done and materials furnished since last estimate,		
840 lin. feet 8" C. I. Pipe @ $3.50		2,940.00
4320 Lin. feet 4" C. L. Pipe @ 165		7,128.00
9000# lead @ 15¢		1,350.00
Brick and Tile		250.00
Millwork		100.00
[181]		
Pump, Motor, Switchboard & other pumping equip.		1,750.00
100 Cu. Yds. Excavation at well @ $40.00		960.00
Total work completed & material furnished to date		$34,444.54
Less previous estimates	$16,481.24	
Less reinforcing used	873.00	
Less 10%	3,730.30	
Total Deductions	$21,444.54	
Due Cont'r this Est.	13,000.00	
	$34,444.54	

This estimate was approved by Claud A. Renshaw, Engineer in charge.

Alderman (In lead pencil ("Mellen") moved that this estimate be allowed as read. This motion was duly seconded and on roll call all members present voted, "Aye." The motion was declared to have been carried by the Mayor and the Mayor and Town

Clerk were instructed to issue Special Improvement District #4 Bonds numbered from 28 to 40 both inclusive.

(PORTION OF MINUTES OF REGULAR MEETING OF THE TOWN COUNCIL OF THE TOWN OF RYEGATE, MONTANA, HELD ON OCTOBER 13, 1920, AT 7:30 P. M.)

The September Estimate (estimate #6) Ryegate Water System, Security Bridge Company, Contractors, was read as follows:

5437 Lin. feet 4″ pipe laid complete @ $2.55	$16,414.35
1602 Lin. feet 6″ pipe laid complete @ $3.60	5,767.20
10 Fire Hydrants complete @ $174.40	1,744.00
438 Cu. Yds. Excavation at well @ $2.75	1,204.50
79 Cu. Yds. concrete at well @ $40.00	3,160.00
300 Cu. Yds. excavation at reservoir @ $3.17	951.00
117 Cu. yds. concrete at reservoir @ $37.50	4,387.50
Roof and reservoir equipment complete	1,425.00
Materials on ground,	
1835 Lin. feet 4″ pipe @ $1.65	3,027.75
1011 Lin. feet 6″ pipe @ $2.50	2,527.50
840 Lin. feet 8″ pipe @ $3.50	2,940.00
3 fire hydrants @ $142.50	427.50
1800# specials @ $365.00 per	328.50
5 valves with boxes	280.50
Motor and pumping equipment	1,750.00

Millwork, brick tile etc.		350.00
4000# lead @ 15¢		600.00
Total work complete to date and material on gd.		$47,285.30
Less previous estimates	$29,841.24	
Leback fill incomplete	300.00	
Less 10%	4,644.06	
Total deductions	$34,785.30	
Balance due contractor	12,000.00	
	47,285.30	

Alderman Gregory moved and Alderman seconded the motion that the estimate No. 6 be allowed and that the Mayor and Town Clerk be instructed to issue Special Improvement District No. 4 Bonds numbered from 54 to 78 both inclusive in the sum [182] of Five Hundred dollars each to the Security Bridge Company in payment for said estimate. On roll call all the members voted "AYE."

(PORTION OF MINUTES OF AN ADJOURNED REGULAR MEETING OF THE TOWN COUNCIL OF THE TOWN OF RYEGATE, MONTANA, HELD NOVEMBER 24, 1920, AT 7:30 O'CLOCK P. M.)

The Final Estimate on the Ryegate Water System submitted by the Security Bridge Company, Contractors, and approved by Claude A. Renshaw, Engineer, was read as follows:

8271 Lin. Feet 4" C I Pipe @ $2.55	$21,091.05
2726 Lin. Feet 6" C I Pipe @ $3.60	9,813.60

841 Lin. Feet 8″ C I Pipe @ $5.04	4,238.64
13 Fire Hydrants @ $174.40	2,267.20
320 Cu. Yds. Excavation at reservoir @ $3.17	1,014.40
117 Cu. Yds. concrete at reservoir @ $37.50	4,387.50
Reservoir equipment complete	1,425.00
452 Cu. Yds. Excavation at well @ 2.75..	1,243.00
89.1 Cu. Yds. Excavation at well @ 40.00	3,564.00
Pumping Equipment complete	2,525.00
Pump House complete	1,625.00
Frost casing complete (force account)..	316.43
15 profit on above item	47.40
Printing bonds (Billings Gazette Prtg. Co.)	104.00
239 Cu. yds. extra rock excavation @ 3.00	717.00
Engineering @ 6% as per contract	3,240.00
Total Cost of Improvements	$57,619.22

Paid to contractor by previous estimates	$42,341.24
Paid engineer by previous estimates	2,078.30
Balance due contractor.....	12,037.98
Balance due Engineer	1,161.70
	$57,619.22

Alderman Gregory moved that the final Estimate just read be allowed and in payment for the same the Clerk be instructed to pay out of the Treasury the sum of $5,435.56 and that the balance be paid

(Deposition of Henry Thien.)

by Special Improvement District No. 4 Bonds numbered 79 to 91 both inclusive in the sum of $500.00 excepting Bond numbered 91 shall be in the sum of $602.40. Alderman Mellen seconded the motion and on roll call all the members voted "Aye." Whereupon the motion was declared to have carried."

The defendant rests.

DEPOSITION OF HENRY THIEN, FOR DEFENDANT (RECALLED IN REBUTTAL).

HENRY THIEN, a witness heretofore called on behalf of the defendant, being recalled in rebuttal, on direct examination by Mr. BROWN, testified as follows: [183]

"When on the stand a while ago, I testified that I knew the signature of Mr. Brown, the Town Clerk. As to the two letters you call my attention to, I believe that is his signature. I believe they contain his signature. One of these letters is dated October 16, 1916, but it refers to these Ryegate water bonds; there wasn't any Ryegate water bonds in existence at that time, so that date must have been in error. I am a banker at Ryegate. I met Mr. Roscoe at different times. Generally, I am interested in public bonds, and so forth, used as collateral for county and public deposits, and am interested in Town finances and improvements. No, I never knew and was never informed who was going to buy these bonds."

(Deposition of Henry Thien.)

Cross-examination by Mr. JOHNSTON.

"As to whether or not, I ever made any inquiry as to who was buying these bonds, well, it was naturally presumed—I presumed that they had some outlet for these bonds otherwise they would not take them. It didn't particularly concern me who was taking them. I knew that Mr. Roscoe of the Security Bridge Company submitted the bid. Yes, I knew he submitted a certified check for $15,000.00. That was the par value of the General Bonds."

"Q. Then did you know what his proposal was with reference to taking the Special Improvement Bonds in part payment of his work?

Mr. BROWN.—Objected to as not proper cross-examination.

By the COURT.—I think such cross-examination would be warranted. Proceed.

(Question read.)

A. Yes."

DEPOSITION OF PARKER W. HASTINGS, FOR PLAINTIFF (IN REBUTTAL).

PARKER W. HASTINGS, a witness on behalf of the plaintiff, being first duly sworn, on direct examination, in rebuttal, by Mr. BROWN, testified as follows: [184]

"I was one of the officers of the Security Bridge Company during the times there was up with the Security Bridge Company, the Town of Ryegate and the Lumbermens Trust Company, the matter of

(Deposition of Parker W. Hastings.)

waterworks construction and the sale of the waterworks bonds of Ryegate. During the time I was such officer, I requested the Town or Town officers of the Town of Ryegate to forward these certificates as to estimates to the Lumbermens Trust Company. These are certificates included in Plaintiff's Exhibit 'C.'"

Cross-examination by Mr. JOHNSTON.

"I requested that the certificate to the bonds be sent. I refer to the certificate that was issued with each bond issue. I made the request in person once or twice to the City Clerk, Brown. The Council was not in session when I made the request. I simply went to the Clerk's office and requested it. The estimate had been allowed."

"Q. You really went to him, personally, or write him, personally, a letter asking that this be done?

A. Yes.

Q. Were any other officers—were the Mayor or any Councilmen of the Town, present at the time, as far as you know?

A. I think at one time I took the certificate to the Mayor, Mayor Northey to have him sign it.

Q. You didn't go into any explanation, you simply asked him to sign that certificate *did not?*

A. Yes, sir."

Redirect Examination by Mr. BROWN.

"I got the Mayor's signature to one of the certificates, yes. I don't recollect explaining to him the details of what he was signing. I think it was evi-

(Deposition of Parker W. Hastings.)

dent what he was signing. I have a bare recollection of taking it to him."

"Q. In answer to counsel's question a minute ago; I may be wrong, but you gave me the impression you got the bonds [185] and these certificates at the same time, is that correct?

A. An issue of bonds and the certificates at the same time, yes, sir.

Q. For the purpose of refreshing your memory, I call your attention to a letter and ask you if there wasn't an interval of time between the getting of the bonds and the forwarding of the certificates. (Witness examining letter.)

A. Evidently there was."

WITNESS.—(Continuing.) "Evidently I sent the bonds and the clerk sent the certificates."

The plaintiff rests.

"Mr. JOHNSTON.—I would like the record to show that the stenographer is authorized to make copies of the minutes and ordinances of the Town Council of the Town of Ryegate, which were introduced in evidence and when that is done, he then return the Minute Book and the Ordinance Book to the Town Clerk of the Town of Ryegate.

Mr. BROWN.—There is no objection to that order. I ask that the stenographer submit what he proposes to copy to counsel for the defense so we do not copy immaterial matter.

Mr. JOHNSTON.—Just the part of the minutes we made reference to in these matters. Mr. Prater may take that up with me and I will cut out any-

(Deposition of Parker W. Hastings.)

thing that does not pertain to the issues in this case.

By the COURT.—Only such matters that pertain to the issues here.

By Mr. BROWN.—And that he may return these exhibits without further order.

By the COURT.—Very well, it is so ordered."

[186]

Said cause being finally submitted to the Court, thereafter upon the 15th day of May, 1931, the Court did file his findings and conclusions in words and figures as follows:

(Clerk please here insert copy of same.)

The plaintiff herein being allowed an exception thereto.

Thereafter and on the —— day of May, 1931, at the request of the attorneys for the defendant there was signed, filed, entered and docketed a judgment in said cause, in favor of the defendant and against the plaintiff, the same being in words and figures as follows:

(Clerk please herein insert copy of same.)

The plaintiff herein being allowed an exception thereto.

Now within the time allowed by law and orders of the Court herein, the plaintiff having presented the foregoing as and for a bill of exceptions herein, and a full, true and correct record of the proceedings had upon said trial and of all of the agreed facts, evidence and pleadings submitted to the Court and upon which it based its decision, the said parties hereto, acting through their respective attorneys,

do hereby stipulate and agree that the foregoing proposed bill of exceptions, or statement on appeal, may be signed, settled and allowed herein as and for a full, true, and correct record of the proceedings had in this cause, the agreed facts and evidence submitted to the Court and the records, evidence and agreed statement of facts before the Court in making its decision herein.

And the defendant hereby waives the right granted by the rules of the Court herein to propose amendments to the foregoing draft of the bill of exceptions herein.

Dated, June 18th, 1931.

STEWART & BROWN,
Attorneys for Plaintiff.
JOHNSTON, COLEMAN & JAMESON,
Attorneys for Defendant. [187]

United States of America,
District of Montana,—ss.

I, Chas. N. Pray, Judge of the District Court of the United States, in and for the District of Montana, and the Judge before whom the foregoing entitled action was tried, do hereby certify that the foregoing bill of exceptions is a full, true and correct bill of exceptions and statement on appeal in the above-entitled cause and the same is hereby signed, settled and allowed by me as a full, true and correct bill of exceptions and statement on appeal herein.

Dated this 19th day of June, 1931.

CHARLES N. PRAY,

Judge of the United States District Court, in and for the District of Montana.

Filed June 19, 1931. [188]

THEREAFTER, on July 7th, 1931, order amending decision was duly filed and entered herein, as follows, to wit: [189]

ORDER AMENDING DECISION.

On application of plaintiff IT IS ORDERED that the decision heretofore rendered in the above-entitled cause may 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 said cause is an action at law or a suit in equity, and accordingly such decision is hereby amended to conform to said rule.

CHARLES N. PRAY,

Judge.

Filed July 7th, 1931. [190]

THEREAFTER, on July 31st, 1931, assignment of errors was duly filed herein as follows, to wit: [191]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now Lumbermens Trust Company, a cor-

poration, plaintiff in the above-entitled cause, and by their solicitors, Stewart & Brown, of Helena, Montana, makes and files its assignment of errors, as follows:

I.

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

II.

The Court erred in making any findings whatsoever relative to whether or not there was notice given to property owners within the district of the letting of the contract for the construction of the improvement in the Town of Ryegate, which is the subject of this action.

III.

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

IV.

The Court erred in making any finding as to whether or not protests were filed after the contract was let for the installation of the improvement in the Town of Ryegate, which is the subject of this action. [192]

V.

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

VI.

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

VII.

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

VIII.

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

WHEREFORE, plaintiff, now appellant herein, prays that the judgment of the District Court of the United States for the District of Montana, Billings Division, may be reversed and the cause be remanded to said District Court with orders to enter a judgment for the plaintiff, this appellant herein, Lumbermens Trust Company, a corporation, for the sum of $38,762.56.

STEWART and BROWN,
Attorneys for Appellant, Helena, Montana.

Filed July 31, 1931. [193]

THEREAFTER, on July 31st, 1931, petition to appeal was duly filed herein as follows, to wit: [194]

[Title of Court and Cause.]

PETITION TO APPEAL.

Now comes Lumbermens Trust Company, a corporation, plaintiff in the above-entitled cause, and respectfully asking to become appellant herein, and conceived itself aggrieved by the decree of the above-entitled court, made and entered in the above-entitled suit on the 16th day of May, 1931, does hereby appeal from said decree and judgment entered herein and from the whole and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, State of California, and prays that its appeal be allowed; and that a transcript of the records and proceedings and papers upon which said decree was made, rendered and duly authenticated, and all the papers upon which said decree was entered and rendered may be sent to the United States Circuit Court of Appeals at its place of sitting at San Francisco, in the State of California.

Dated, July 31st, 1931.

STEWART & BROWN,

Solicitors for the Above-named Plaintiff and Appellant, Helena, Montana.

Filed July 31, 1931. [195]

THEREAFTER, on July 31st, 1931, order allowing appeal was duly filed and entered herein, as follows, to wit: [196]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

And now, to wit, upon this 31st day of July, 1931, IT IS ORDERED that the appeal of the plaintiff in the above-entitled cause be allowed as prayed for, and IT IS FURTHER ORDERED that a bond in the sum of Five Hundred Dollars, in form and with sureties approved by the Court, be given for the payment of all costs which may be hereafter assessed against said plaintiff and appellant in the United States Circuit Court of Appeals for the Ninth Circuit; and IT IS FURTHER ORDERED that all proceedings under said decree entered on the 16th day of May, 1931, as aforesaid, be stayed from the date of this order, and that upon the giving and filing in the office of the Clerk of this court of the bond now ordered in the sum of five hundred dollars in the form and with sureties approved by the Court and conditioned that the said plaintiff and appellant will prosecute such appeal with effect, and answer all damages and costs if it fails to procure a reversal of said decree by the said United States Circuit Court of Appeals for the Ninth Circuit, within ten days from the date of this order, all proceedings under the aforesaid decree entered on the 16th day of May, 1931, be stayed,

pending said appeal and until the further order of this court.

Dated, July 31, 1931.

CHARLES N. PRAY,
Judge District Court of the United States, District of Montana.

Filed July 31, 1931. [197]

THEREAFTER, on July 31st, 1931, bond on appeal was duly filed herein as follows, to wit: [198]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, the Lumbermens Trust Company, a corporation, as principal, and the National Surety Company, a corporation, duly authorized under the laws of the State of Montana and its compliance therewith, to act as surety and indemnitor upon bonds upon appeal, do acknowledge ourselves to be indebted to the Town of Ryegate, a municipal corporation, defendant in the above-entitled cause, in the sum of five hundred dollars ($500) conditioned that whereas on the 16th day of May, 1931, in the District Court of the United States for the District of Montana, Billings Division, in a suit pending in that court wherein the said Lumbermens Trust Company, a corporation was plaintiff and the Town of Ryegate, a municipal corporation, was defendant, numbered 224 of the Records of that

Court, a decree was rendered and judgment entered against the plaintiff, Lumbermens Trust Company, a corporation and in favor of the defendant, the Town of Ryegate, a municipal corporation, and said plaintiff, Lumbermens Trust Company, a corporation, having obtained an appeal to the United States Circuit Court of Appeals of the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the said District Court of Montana to reverse said decree, and a citation directing and admonishing the said Town of Ryegate, a municipal corporation, defendant to appear within thirty days at a session of the United States Circuit Court of Appeals for the Nith Circuit, to be holden in the city of [199] San Francisco, State of California, on the —— day of ————, 1931, next.

Now, if said plaintiff, Lumbermens Trust Company, a corporation, shall prosecute their appeal to effect, and answer all costs, if it fails to procure a reversal of said decree by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation shall be void, otherwise to remain in full force and virtue.

LUMBERMENS TRUST COMPANY, a Corporation,

[Corporate Seal] By JOHN G. BROWN,
Its Attorney Hereunto Duly Authorized.

NATIONAL SURETY COMPANY.
By H. L. HART,
State Manager and Resident Vice-president,
Attorney-in-fact.

Filed July 31, 1931. [200]

THEREAFTER, on July 31st, 1931, a citation was duly issued herein, which original citation is hereto annexed and is in the words and figures as follows, to wit: [201]

[Title of Court and Cause.]

CITATION ON APPEAL.

To the Town of Ryegate, a Municipal Corporation, GREETING:

You are cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal taken, allowed and filed in the office of the Clerk of the United States Court for the District of Montana on the 31st day of July, 1931, in that certain suit being No. 224, wherein Lumbermens Trust Company, a corporation, is the plaintiff and The Town of Ryegate, a municipal corporation, is the defendant, to show cause, if any there be, why the judgment made and entered in the above-entitled action in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in this behalf.

Dated this 31st day of July, 1931.

CHARLES N. PRAY,

United States District Judge for the District of Montana, Eastern Division. [202]

Filed July 31, 1931. [203]

THEREAFTER, on July 31st, 1931, an agreement of statement of evidence was duly filed herein, as follows, to wit: [204]

[Title of Court and Cause.]

AGREEMENT OF STATEMENT OF EVIDENCE.

We have examined and read the "Stipulation as To Trial and Facts" and the bill of exceptions settled in the above-entitled action, and, do state that said stipulation as to trial and facts and bill of exceptions herein does comprise all of the evidence taken in the above-entitled action which is relevant and material to the hearing of the appeal on said action; the said evidence being set out in simple and concise form, all of the evidence not essential to the decision and the questions presented by the appeal being omitted and the testimony of the witnesses being stated in narrative form.

AND WE AGREE that all parties hereto have received due and legal notice of the statement of evidence as required by equity rule number 75, and we accept service of such notice, and hereby waive further notice of filing of said statement, and we agree that said statement as made may be approved by a Judge of the United States District Court, District of Montana, without further notice to the parties hereto, and when so approved, may be filed in the Clerk's office and become a part of the record

for the purposes of appeal in said action taken by the above-named plaintiff.

STEWART & BROWN,
Helena, Montana,
Attorneys for the Plaintiff.

JOHNSTON, COLEMAN & JAMESON,
Billings, Montana,
Attorneys for the Defendant.

Filed July 31, 1931. [205]

THEREAFTER, on July 31st, 1931, order approving statement of evidence was duly filed and entered herein, as follows, to wit: [206]

[Title of Court and Cause.]

ORDER APPROVING STATEMENT OF EVIDENCE.

It appearing that the herewith and foregoing statement of evidence was lodged in due time with the Clerk of this court, and that the attorneys for all parties to the said action have agreed that said statement may be approved without further notice to any of said parties, and it appearing that said statement is true, complete, and properly prepared, and that it contains all of the evidence relevant and material to a hearing of the question to be presented on the appeal in said action,—

IT IS THEREFORE ORDERED that the same be allowed, settled and approved as a true, complete and correct statement of the evidence of said action.

Dated this 31st day of July, 1931.

CHARLES N. PRAY,
Judge.

Filed July 31, 1931. [207]

THEREAFTER, on July 31st, 1931, affidavit of mailing of appeal papers was duly filed herein, as follows, to wit: [208]

[Title of Court and Cause.]

AFFIDAVIT OF MAILING OF APPEAL PAPERS.

State of Montana,
County of Cascade,—ss.

John G. Brown, being first duly sworn upon oath, deposes and says:

He is a member of the firm of Stewart & Brown, who are solicitors for the plaintiff, now the appellant in the above-entitled cause; that on the 31st day of July, 1931, I deposited in the United States mail at Great Falls, Montana, in an envelope with postage prepaid thereon addressed to the firm of Johnston, Coleman and Jameson, Montana Power Block, Billings, Montana, known to me to be the address of the attorneys who are now attorneys and solicitors for the defendant, now respondent, in the above-entitled cause, true and correct copies of the following papers, which were on the same day filed with the Clerk of the above-entitled court in said cause, to wit:

Petition to appeal.

Assignment of errors.
Order allowing appeal.
Bond on appeal.
Citation on appeal.
Praecipe for transcript of the record on appeal.

JOHN G. BROWN.

Subscribed and sworn to before me this 31 day of July, 1931.

[Seal] C. G. KEGEL,
Deputy Clerk U. S. District Court, District of Montana.

Filed July 31, 1931. [209]

THEREAFTER, on July 31, 1931, order extending time to file transcript on appeal was duly filed and entered herein, as follows, to wit: [210]

[Title of Court and Cause.]

ORDER EXTENDING TIME FIFTY DAYS TO FILE TRANSCRIPT ON APPEAL.

For good cause appearing, IT IS HEREBY ORDERED that the time for filing the record on appeal in this case be, and the same is hereby extended for a period of fifty days from and after the time allowed by law and the rules of this court.

Dated, this 31st day of July, 1931.

CHARLES N. PRAY,
Judge of the District Court of the United States for the District of Montana.

Filed July 31, 1931. [211]

THEREAFTER, on July 31st, 1931, praecipe for transcript of record was duly filed herein, as follows, to wit: [212]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court for the District of Montana, Having Reference to the Billings Division:

Please prepare a record for the purpose of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and include the following:

1. Plaintiff's bill of complaint, including its exhibits.
2. Answer of defendant, including its exhibits.
3. Reply of plaintiff, including its exhibits.
4. All minutes of the court having to do materially with said cause.
5. Stipulation as to trial and facts.
6. All bills of exception and statements of evidence which have been signed, settled and allowed.
7. Court's opinion and findings.
8. All orders of Court made in said cause as distinguished from the minute entries hereinbefore requested, including order amending opinion.
9. The judgment and decree.
10. Assignment of errors.
11. Petition to appeal and allowance thereof.
12. Bond on appeal.

13. Citation on appeal.
14. Agreed statement of evidence.
15. Order extending time for filing transcript. [213]
16. Affidavit of service of appeal papers.
17. This praecipe.

All captions and endorsements may be omitted. Provisions of act approved February 13, 1911, are waived and you are requested to forward typewritten transcript to the United States Circuit Court of Appeals for the Ninth Circuit for printing under the rules of Court.

Dated this 31st day of July, 1931.

STEWART & BROWN,

Solicitors for Appealing Plaintiff, Helena, Montana.

Filed July 31, 1931. [214]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 215 pages, numbered from 1 to 215, inclusive, is a full, true and correct transcript of the records and proceedings in the within entitled cause, and all that is required by praecipe filed, to be incorporated in

said transcript, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of $31.60 and have been paid by the appellant.

WITNESS my hand and the seal of said court at Great Falls, Montana, this 4th day of August, 1931.

[Seal] C. R. GARLOW,
Clerk U. S. District Court for the District of Montana.

By C. G. Kegel,
Deputy. [215]

[Endorsed]: No. 6564. United States Circuit Court of Appeals for the Ninth Circuit. Lumbermens Trust Company, a Corporation, Appellant, vs. The Town of Ryegate, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed August 7, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6564

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LUMBERMENS TRUST COMPANY,
a Corporation,
Appellant,

vs.

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

Brief for Appellant

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

SAMUEL V. STEWART,
JOHN G. BROWN,
STEWART & BROWN,
Helena, Montana,

GEO. B. GUTHRIE and
WILSON & REILLY,
Platt Building,
Portland, Oregon,

Attorneys and Solicitors for Appellant.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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No. 6564

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LUMBERMENS TRUST COMPANY,
a Corporation,
Appellant,

vs.

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

Brief for Appellant

GENERAL STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

The bond further declared itself to be

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

and it further recited that

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

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

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

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

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

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

ASSIGNMENT OF ERRORS

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

I

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

II

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

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

III

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

IV

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

V

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

VI

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

VII

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

VIII

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

THE PLEADINGS

(pp. 2-51 of Printed Transcript)

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

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

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

I

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

II

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

III

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

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

IV

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

V

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

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

VI

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

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

VII

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

VIII

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

IX

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

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

X

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

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

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

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

XI

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

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

XII

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

XIII

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

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

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

XIV

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

XV

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

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

XVI

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

XVII

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

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

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

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

XVIII

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

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

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

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

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

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

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

STIPULATED FACTS

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

It is agreed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This Stipulation of Agreed Facts refers to

EXHIBIT NO. 1

Blue-Printed Map of Ryegate

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

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

The Agreed Facts refer also to

EXHIBIT NO. 2

(Printed Transcript, pp. 61-67.)

Construction Contract

(Important provisions only are set up.)

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

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

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

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

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

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

(Signatures follow).

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

PAYMENTS

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

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

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

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

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

EXHIBITS NOS. 3, 4, 5.

(Printed Transcript, pp. 68-83.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT NO. 6

(Printed Transcript, pp. 84-92.)

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

DECREE, ETC.

(p. 84)

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

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

FINDINGS OF FACT

(p. 84)

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

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

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

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

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

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

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

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

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

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

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

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

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

From the foregoing Findings of Fact the Court made

CONCLUSIONS OF LAW

(p. 89)

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

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

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

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

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

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

DECREE

(p. 90)

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

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

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

TESTIMONY

(Printed Transcript, pp. 151-251.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SCOPE OF REVIEW

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

Points and Authorities

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

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

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

Anderson v. Messinger, 146 Fed. 929.

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

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

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

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

The same practice obtains in the State of Montana.

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

Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PRELIMINARY

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

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

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

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

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

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

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

Points and Authorities

I

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

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

II

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

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

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

Eyer v. Mercer County, 292 Fed. 292.

III

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

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

IV

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

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

V

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

Northwestern Bank v. Centreville, 143 Fed. 81.

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

Fairfield v. School District, 116 Fed. 838.

VI.

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

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

Argument

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

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

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

EFFECT OF BELECZ DECREE AS RES JUDICATA

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

Points and Authorities

I

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

15 *Ruling Case Law,* p. 483.

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

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

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

II

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

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

III

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

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

Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This precise question was determined by J. Sanborn in

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

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

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

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

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

RULE OF STARE DECISIS INAPPLICABLE TO CASE AT BAR

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

Points and Authorities

I

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

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

II

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

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

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

III

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

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

IV

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

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

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

V

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

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

Argument

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

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

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

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

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

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

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

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

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

It further recited (p. 44):

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

It further certified:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Points and Authorities

I

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

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

II

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

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

III

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

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

IV

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

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

V

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

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

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

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

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

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

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

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

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

Warner v. New Orleans, 87 Fed. 826,

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

See also:

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

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

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

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

VI

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

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

Argument

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

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

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

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

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

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

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

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

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

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

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

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

And further, Section 8 (p. 46):

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The decree further declares:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Points and Authorities

I.

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

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

II.

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

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

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

III.

A prima facie case is made upon a showing of:

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

2—Performance of the contract;

3—Acceptance by the town;

4—Issuance of warrants or bonds; and

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

This is true whether ex delicto or ex contractu.

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

IV.

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

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

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

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

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

V.

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

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

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

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

VI

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

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

VII.

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

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

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

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

VIII.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Edmunds v. Glasgow, 300 Pac. 203.

IX.

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

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

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

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

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

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

X.

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

which has been approved by the United States Supreme Court in

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

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

and has been followed by this Court in

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To the same effect is

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

See also approved statement of Judge Dillon in

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

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

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

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

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

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

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

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

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

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

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

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

Points and Authorities

I

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

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

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

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

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

II

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

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

III

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

Burlington Bank v. Clinton, 106 Fed. 269.

IV

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

Revised Code Montana 1921, Sec. 5252.

Argument

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

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

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

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

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

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

Points and Authorities

I

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

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

II

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

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

III

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

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

IV

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

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

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

V

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

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

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

VI

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

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

VII

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

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

VIII

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

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

Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1—Resolution of intention.

2—Publication of notice.

3—Hearing and determination of protests.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And further at page 108:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

under the great weight of authority separately discussed herein.

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

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

RIGHT TO DETERMINE ENTIRE CAUSE IN EQUITY

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

I

Points and Authority

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

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

II

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

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

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

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

III

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

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

IV

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

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

Argument

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

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

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

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

> 2 *Dillon, Municipal Corporations* (5th Ed.), Sec. 893, p. 1394:
>
> "The usual remedy to enforce the duty of the municipality to provide the special fund for the payment of the bonds is doubtless to be found in mandamus. But in the Federal courts, mandamus will not issue as an original independent proceeding, but only in the exercise of a jurisdiction already acquired; and notwithstanding the existence of a direct remedy in the State courts by mandamus to enforce the duty of the municipality or its officers, and notwithstanding the fact that the municipality is not generally liable under the obligation, an action will lie against the municipality in the Federal courts to establish the validity and amount of the plaintiff's debt in which a judgment may be rendered establishing the right of the plaintiff to recover and his right to a mandamus or to enforce the special remedies provided. If a municipality collects the special assessment or fund out of which the bonds are payable, it holds such fund for the benefit of the creditors entitled to enforce the obligations of the bonds, and *when it has the money* in its treasury, *it cannot refuse to pay* the obligations *on the ground that the assessments are invalid or because the*

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

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

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

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

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

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

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

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

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

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

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

Suggestions of Adjustments

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

Plan A

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

Plan B

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

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

Plan C

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

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

Plan D

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

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

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

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

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

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

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

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

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

We further find the following: (Tr. 56)

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

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

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

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

Points and Authorities

I.

Under the Montana Constitution all power is vested in the people. The Constitution is not a grant but is a limitation thereof. Many Montana decisions so hold.

Constitution of Montana, Art. III, Sec. 1, Art. IV, Sec. 1, Art. V, Sec. 1.
Great Northern Ry. Co. v. Public Ser. Com., 88 Mont. 180; 293 Pac. 294.
Hilger v. Moore, 56 Mont. 146, 182 Pac. 477.
McClintock v. City of Great Falls, 53 Mont. 221, 163 Pac. 297.
Edwards v. County of Lewis and Clark, 53 Mont., 359; 165 Pac. 297.
State v. State Board of Equalization, 56 Mont. 413; 185 Pac. 708; 186 Pac. 697.
State ex rel. Smith v. District Court, 50 Mont. 134; 145 Pac. 721.
Northern Pacific Ry. Co. v. Mjelde, 48 Mont. 287; 137 Pac. 386.
Heckman v. Custer County, 70 Mont. 84; 223 Pac. 916.

No citations of authority are necessary upon the general propositions of the *power* and the *duty* of a town *to supply itself and its citizens with water.* There is no limitation upon this in the constitution. The Montana constitution, however, does limit the power of its people to create an indebtedness. First, it limits the state; next,

the counties, and lastly, (Art. XIII, Sec. 6) the cities and towns, but as to the limitation of indebtedness in cities and towns, it makes an exception where greater indebtedness is required for the purpose of constructing a sewer or procuring a supply of water. The section in question reads as follows: (Art. XIII, Sec. 6)

> "No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate, exceeding three (3) per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void; provided, however, that *the legislative assembly may extend the limit* mentioned in this section, *by authorizing municipal corporations to submit the question to a vote of the taxpayers affected* thereby, *when* such *increase is necessary* to construct a sewerage system or *to procure a supply of water* for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

II.

Under appropriate general laws the legislative assembly has acted under the constitution exception to the 3% limitation of indebtedness, thereby permitting increased indebtedness for the purpose of procuring a water supply.

Montana Revised Code, 1921, Sec. 5039 (subd. 64).
McClintock v. Great Falls, 53 Mont. 221; 163 Pac. 297.
Edmunds v. Glasgow, .. Mont. . . .; 300 Pac. 203.

III.

The Town of Ryegate had general power to procure a water supply for itself and its inhabitants under Subd. 64 of *Section 5039,* and the holding of an election upon the question was the mode of exercising its admitted power.

Edmunds v. Glasgow, .. Mont. . . . ; 300 Pac. 203.
Carlson v. Helena, 39 Mont. 82, 104, 114; 102 Pac. 39.

IV.

Having the power to procure a water supply the Town of Ryegate is liable to plaintiff for the reasonable value of the water supply and distributing system acquired, accepted and used by it, plaintiff having furnished all of the money which paid for the labor and materials entering in the installation, construction and cost.

Hitchcock v. Galveston, 96 U. S. 341; 24 L. Ed. 659.
Marsh v. Fulton County, 10 Wall. 676, 684.
Louisiana v. Wood, 102 U. S. 294.
Read v. Plattsmouth, 107 U. S. 568.
Chapman v. Douglas County, 107 U. S. 348.
Gause v. Clarksville, 5 Dill. 168, Fed. Cas. No. 5276.
Gause v. Clarksville, 1 Fed. 353.
Warner v. New Orleans, 87 Fed. 829.
Bill v. Denver, 29 Fed. 344.
Bangor Sav. Bank v. Stillwater, 49 Fed. 721.
Dodge v. Memphis, 51 Fed. 165.
Geer v. School District, 111 Fed. 682.
Gilman v. Fernald, 141 Fed. 941.
Scott County v. Advance-Rumely, 288 Fed. 739.
Eyer v. Mercer County, 292 Fed. 292, 1 Fed. (2d) 609.

South Sioux City v. Hanchett Bond Co., 19 Fed. (2d) 476.

State authorities in accord are numerous. We cite:

State v. Greer, 88 Fla. 249.
Bank v. Goodhue, 120 Minn. 362; 139 N. W. 599.
Durant v. Story, 112 Okla. 110; 240 Pac. 84.
Dakota Trust Co. v. Hankinson, 53 N. D. 356, 205 N. W. 990.
Oubre v. Donaldsonville, 33 La. Ann. 390.
Cole v. Shreveport, 41 La. Ann. 839; 6 So. 688.
Waitz v. Ormsby County, 1 Nev. 370.
Long Beach School District v. Lutge, 129 Cal. 490; 62 Pac. 36.
Thomson v. Elton, 109 Wis. 589; 85 N. W. 425.

The Montana decisions have followed in the same trend:

State v. Dickerman, 16 Mont. 278, 288; 40 Pac. 698.
Morse v. Granite County, 19 Mont. 450; 48 Pac. 745.

And this Court on appeal from the Montana District Court has similarly expressed itself:

Hill County v. Shaw & Borden Co., 225 Fed. 475, 477.

V.

And a town having in fact procured for itself public improvements, although originally intended to be paid exclusively by benefited property-owners, is liable itself when the special improvement proceedings fail because of invalidity.

Barber Asphalt Co. v. Harrisburg, 64 Fed. 688.
Cole v. Shreveport, 41 La. Ann. 839; 6 So. 688.

Freese v. Pierre, 37 S. Dak. 433; 158 N. W. 1013.
Dakota Trust Co. v. Hankinson, 53 N. Dak. 356; 205 N. W. 990.

And a town is liable in quantum meruit for the use of properties, though it had no authority to purchase the same.

Hogansville v. Planters Bank, 108 S. E. 480 (Ga. App.).
Shoemaker v. Buffalo Steam Roller Co., 144 N. Y. S. 721.

Argument

It is quite apparent that the Montana constitution is not concerned with the kind of a water system, or whether it shall be one proposition or another, or whether it shall be sewerage systems or water systems, its concern is with the *question:* "Shall the limit of indebtedness which it provides be extended beyond the three per cent limit?" In discussing this provision of the Montana constitution and the reasonable interpretation to be given it, the Supreme Court of Montana has said:

> "The proviso under which the legislature may authorize an extension of the limit is also clear in purpose, to-wit, to allow an extension of this limit when such extension (increase) is necessary to construct a sewerage system or procure a water supply." *Butler v. Andrus,* 35 Mont. 575, at 581; 90 Pac. 785.
>
> "The orderly course of procedure would be to submit the question generally whether the indebtedness, not in excess of a definite amount within the limit, should be incurred; then the council would be left free, in case the indebtedness should be authorized, to

use its discretion in securing one supply or another, according as its judgment would dictate." *Carlson v. City of Helena,* 39 Mont. 82-114, at 106; 102 Pac. 39.

This provision is also a direct authority to the legislature and permits the legislative assembly to extend the limit by authorizing the submission of the question of extending the limit to a vote of the taxpayers. This the legislature has done in Montana by the enacting of Sub-division 64 of Section 5039, *Revised Codes Montana 1921,* which reads as follows:

"5039. Powers of city councils. The city or town council has power:

64. To contract an *indebtedness* on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds *for* the following purposes, to-wit: Erection of public *buildings,* construction of *sewers, bridges, water-works, lighting plants,* supplying the city or town with *water by contract,* the purchase of *fire apparatus,* the construction or *purchase of canals or ditches and water rights* for supplying the city or town with water, and the funding of outstanding warrants and maturing bonds; provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not, at any time, exceed three per centum of the total assessed valuation of the taxable property of the city or town, as ascertained by the last assessment for state and county taxes; provided, that *no money must be borrowed on bonds issued for* the construction, purchase, or *securing of a water plant, water system, water supply,* or sewerage system, *until the proposition has been submitted to* the *vote of the taxpayers* affected thereby of the city or town, and the majority vote cast in favor thereof; and further provided, that *an additional indebtedness shall be incurred, when necessary, to* construct a sewerage system or *procure a water supply* for the said

city or town, which shall own or control said water supply and devote the revenue derived therefrom to the payment of the debt. *The additional indebtedness* authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, *for* the construction of a *sewerage* system, shall not exceed *ten* per centum over and above the three per centum heretofore referred to, of the total assessed valuation of the taxable property of the city or town as ascertained by the last assessment for state and county taxes; and provided, further, that *the above limit of three per centum shall not be extended, unless the question* shall have been submitted to a vote of the taxpayers affected thereby, and carried in the affirmative by a vote of the majority of said taxpayers who vote at such election * * *" (The remaining portion of Subdivision 64 is of no concern to the question here under discussion.)

It will be noted that the legislative act above quoted concerns itself with carrying out the mandate of the constitution "to *submit the question*", and provides further that the 3% limit "shall not be extended *unless the question* shall have been submitted". The legislative act includes a further restriction to the effect that

> "*no money must be borrowed on bonds* issued for the construction * * * of a water plant * * * until the *proposition* has been submitted to the vote of the taxpayers * * *"

This restriction on the issuance of *bonds* is added by the legislative assembly to the restriction already made in the constitution, which refers only to *indebtedness.* The language of the act is

> "*additional indebtedness* shall be incurred *when necessary* to * * * procure a water supply * * *"

The Constitution therefore is gratified by an election which submits the question of exceeding the 3% limit. The matter of an election touching *bonds* refers only to the legislative act. If the election held shall cover both a proposed bond issue and the question of exceeding the 3% constitutional limit for a water supply, both the law and the constitution are gratified, although the bond issue may in amount not cover the entire authorized indebtedness. In other words, under an appropriate election a town may be limited to the issuance of a certain amount of bonds by reason of the legislative proposition, but the further question of exceeding the 3% limit under the constitution *permits additional indebtedness,* having no necessary or fixed relation to the amount of bonds. The town, therefore, under such an election has complete legislative and constitutional authority for the acquiring of a water supply upon favorable vote on the submitted questions, although it may be restricted under the legislative act to a specific amount of bonds to be issued in part.

In the case at bar, the Town of Ryegate issued $15,000 par value of general water bonds. The printed record does not include a transcript of the election proceedings under which these bonds were authorized and issued. Such an election, however, was duly held and at the election there was submitted the constitutional question of exceeding the 3% limit, and there was also submitted the further legislative question of issuance of $15,000 of general bonds. There is no dispute over this matter which was freely admitted in the trial, and evidence sustaining this position in the record is found

in the fact of the $15,000 par value of general bonds issued, which in themselves, together with the general sewer bonds of $15,000 par value referred to in the specifications of the construction contract (p. 212), necessarily disclose an exceeding of the 3% limit in the issuance of bonds alone. Further, the testimony of the witness *Roscoe* (p. 181) introduced, as Exhibit "A" attached to his deposition, a letter of John C. Thomson, an attorney of New York City, dated May 7, 1920, addressed to the Town Council of the Town of Ryegate, which letter expressed the legal opinion of this attorney on request from defendant herein. It will be noted that in this letter the following is found:

> "* * * I have examined the Constitution and statutes of the State of Montana, and *certified copies of the proceedings* of the Town Council of the Town of Ryegate, Montana, authorizing the issuance of said bonds, also an executed bond of said issue, No. 1.
>
> In my opinion said bonds have been authorized and issued in accordance with the Constitution and statutes of the State of Montana, and constitute valid and legally binding obligations of said Town of Ryegate, Montana."

Under the constitutional laws of Montana it was necessary that such elections be held, as we have hereinbefore demonstrated, and this record is in accord. The further question of the additional 10% within which additional indebtedness might be incurred under *Section 5039*, subd. 64, is in our opinion applicable only to the matter of a sewerage system. The language of the act seems to be clear in that respect. The question may not be important in this case since the amount of in-

debtedness would fall within the limitation of 13% in any event, but with respect to this construction see *Edmunds v. Glasgow,* 300 Pac. 203, where this language is recognized by the Supreme Court of Montana as being open to such construction.

The Supreme Court of Montana has had occasion to pass upon this question of extending the 3% limit, and the further question of issuing bonds, and it has said in its opinion found in *Carlson v. Helena,* 102 Pac. 39; 39 Mont. 82, at p. 104:

> "After the *authority to incur* an *indebtedness* beyond the constitutional rate has been granted, the requirements of the fundamental law should be deemed satisfied, provided the council proceeds with reasonable diligence and the amount of indebtedness incurred does not exceed the rate of the extension when calculated upon the basis of either assessment-roll.
>
> "It is said that the authority of the city to incur an indebtedness does not include an authority to issue bonds, and therefore that two elections were necessary to authorize the proposed issue, (1) To extend the limit and incure the indebtedness, and (2) to issue bonds. It is not necessary to inquire whether the power conferred upon a municipality to incur indebtedness does not imply the additional power to issue evidences thereof, in the form of negotiable securities. Here the authority is expressly given. The Constitution does not prescribe the mode by which the legislature may authorize submission to the taxpayers of the question whether an indebtedness shall be incurred. The legislature, therefore, was free to prescribe such method as it chose. The method of procedure and the form of the question to be submitted by the council are prescribed in sections 3454 et seq., Revised Codes. The form of the submission requires the electors to vote 'Yes' or 'No' upon the question

whether bonds shall be issued; so that, in voting upon this question, they authorize the debt to be incurred by the issuance of bonds. The contention must be overruled."

The special concurring opinion of Mr. Justice Smith in the foregoing case very aptly says: (32 Mont. at p. 114)

"I think the only legal method of procedure is to first obtain from the taxpayers a general consent to the *project of raising the limit of indebtedness,* and that the council should thereafter select the particular water supply. Any other consideration of the law will lead to the result that, if the council's first selection cannot be acquired, a new election will be necessary."

The legislature has acted under the power given it by the constitution to provide for an election upon the question of increasing indebtedness and it has also provided two methods for cities to supply themselves and their inhabitants with a water supply or system. By way of digression, we here make the suggestion that we repeatedly refer to this water supply as being of a two-fold character, namely, for the town, which includes all municipal purposes, fire protection, capacity to reduce insurance, etc., and water for domestic uses by a portion of the inhabitants. We do this advisedly because the stipulated facts in this case clearly recognize the two-fold nature of this system and agree that the town on the one hand and a portion of the inhabitants on the other, are using the water system and the testimony is undisputed that it is available for everybody within the corporate limits and its availability is made possible not

only physically but legally by general ordinances of the town as well.

But to return to the two methods of supplying a water system. The first method authorized by the legislature is by direct vote upon the "proposition which has been submitted". (Subd. 64, Sec. 5039, *Revised Code 1921.*) The second method is by the creation of a special improvement district under the authority of Subd. 80, Sec. 5039, and Chapter 56 of Part IV of the 1921 Revised Code, being Secs. 5225 et seq. The section specifies the purposes for which they may be created and among others, we find the following:

> "* * * Water works, water mains, and extensions of water mains; pipes, hydrants, hose connections for irrigation purposes; appliances for fire protection, tunnels, viaducts, conduits * * * and to maintain, preserve and care for any and all the improvements herein mentioned; and the construction or reconstruction * * * (of) pipes, hose connections for irrigation, hydrants and appliances for fire protection; * * *"

Other sections disclose the clear intention of authorizing under the special improvement theory the construction of such a water-system as is here under discussion.

The legality of the creation of this improvement district is clear, notwithstanding the decision of the state court in the *Belecz* case, nor is this Court thereby denied the right to go into the question of legality. A discussion of these subjects has heretofore been made in this brief and for that reason is not repeated here, but in this connection we again particularly refer to the *Mankato* case at page 138 of this brief. In other words, we

have here a city's duty toward itself; toward its inhabitants; its inherent power without limitation to discharge these duties; a constitutional exception to the limit of indebtedness otherwise placed upon the people of the state and a constitutional delimitation of power on the question of indebtedness for these purposes to enable it to discharge these natural duties; legislative action granting the right to vote upon it; an election held upon the question of extending the debt limit, and also the issuance of $15,000.00 general bonds under such electoral mandate; a city council's action after such an election and under legislative special improvement legislation, all looking to and authorizing the construction of the water system here under discussion. Then the Town of Ryegate acted under such authority, constructed for its own use and that of its inhabitants and now operates for its own use, and for its inhabitants' use—accessible to all—a water-system, for which it now refuses to pay.

Can this defendant town, knowing, as the stipulated facts disclose that it did, that plaintiff was to furnish, and did furnish all the money for this improvement, which the town now has and uses, refuse to repay this money so borrowed? This question is answered by the cases listed under *Points and Authorities V*, supra.

It matters not if the method of payment now sought to be enforced is beyond the authority of the special improvement legislation. This not only for the fact reasons, to-wit, the city's use and enjoyment of the water system as a municipal property, distinguished from the property of a special improvement district, but also because of substantive law. The leading cases

upon this subject come from the Supreme Court of the United States, an earlier one of which holds: *(Marsh v. Fulton,* 77 U. S. 676, 19 L. Ed. 1040, 1043)

> "We do not mean to intimate that liabilities may not be iccurred by counties independent of the statute. Undoubtedly they may be. *The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."*

The leading case is, of course, *Hitchcock v. Galveston,* 96 U. S. 341, 24 L. Ed. 659, 661, wherein the Supreme Court of the United States held:

> "In the view which we shall take of the present case, it is, perhaps, not necessary to inquire whether those cases justify the court's conclusion; for, *if it were conceded that the City had no lawful authority to issue the bonds, described in the ordinance and mentioned in the contract, it does not follow that the contract was wholly illegal and void, or that the plaintiffs have no rights under it.* They are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. *It is enough for them that the City Council have power to enter into a contract for the improvement of the sidewalks;* that such a *contract was made* with them; *that under it they have proceeded to furnish materials and do work,* as well as to assume liabilities; *that the City has received and now enjoys the benefit of what they have done and furnished;* that for these things the City promised to pay, and that after having received the benefit of the contract the City has broken it. *It matters not that the promise was to pay in a manner not authorized by law.* If payments cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that

payment need not be made at all. *Such is not the law.* The contract between the parties is in force, so far as it is lawful.

"There may be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case of where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions. But the present is not a case in which the issue of the bonds was prohibited by any statute. At most, the issue was unauthorized. At most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest, only ultra vires; and, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. *Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform.*"

A later case holds: (*Louisiana v. Wood,* 102 U. S. 294, 26 L. Ed. 153, 155)

"While, therefore, the bonds cannot be enforced, because defectively executed the money paid for them may be recovered back. As we took occasion to say in Marsh v. Fulton Co., 10 Wall. 676 (77 U. S. XIX., 1040), 'The obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.'

"It is argued, however, that, as the City was only authorized by law to borrow money at a rate of interest not exceeding ten per cent per annum, the money cannot be recovered back, because a sale of the bonds involved an obligation to pay interest beyond the limited rate, and the borrowing was, therefore, ultra

vires. There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to-wit: that the City would, on demand, return the money paid to it by mistake and, as the money was gotten under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other."

Again the Supreme Court of the United States says upon this subject: *(Read v. Plattsmouth,* 107 U. S. 568, 27 L. Ed. 414, 417)

"In the present case, the statute in question does not impose upon the City of Plattsmouth, by an arbitrary Act, a burden without consent and consideration. On the contrary, upon the supposition that the bonds issued, as to the excess over $15,000, were void, because unauthorized, the City of Plattsmouth received the money of the plaintiff in error, and applied it to the purpose intended, of building a school house on property, the title to which is confirmed to it by the very statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept and used, immediately arose. This obligation, according to general principles of law accepted in Nebraska, was capable of judicial enforcement. (Citing cases).

"As was said by Mr. Justice Field, in N. O. v. Clark (supra): 'A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law, no more so than an appropriation Act providing for the payment of a preexisting claim. The constitutional inhi-

bition does not apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agencies, with respect to past transactions.' "

These principles of law (and common honesty) have affirmance both in Supreme Court and Federal Court cases from Montana. In *State v. Dickerman,* 16 Mont. 278, 288; 40 Pac. 698, we read:

"The appellant contends that the school district did not become indebted to or liable to repay the relator the money advanced by it to pay warrants issued for the construction of a school building in said district under the contract entered into with relator. This contention proceeds, and is sought to be maintained, upon the theory that trustees had no authority in law to enter into such contract with relator; that said contract is for that reason void, and, being void, the relator is not entitled to recover the amount advanced thereunder.

"The doctrine here contended for by appellant is fully discussed, and a great many authorities collected, in Brown v. City of Atchison, 39 Kan. 37, 17 Pac. 465. In this case the court says: 'From the authorities we think the following principle may be educed: Where a contract has been entered into in good faith between a corporation, public or private, and an individual person, and the contract is void in whole or in part, because of a want of power on the part of the corporation to make it or enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be re-

quired to do equity towards the other party, by either rescinding the contract and placing the other party in statu quo, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit.

"In Pimental v. San Francisco, 21 Cal. 352, the city had received money from the unauthorized sale of land, and refused to refund the same. In speaking of the rights of the purchaser to recover money paid for said lands at said void sales, Mr. Chief Justice Field says: 'This alleged want of privity, as we understand it, amounts to this: That, inasmuch as the mayor and land committee had no authority to make the sale, they had no authority to pay the money which they received from the bidders into the treasury of the city, and therefore no obligation can be fastened from such unauthorized act upon the city. The position thus restricted in its statement is undoubtedly correct, but the facts of the case go beyond this statement. They show an appropriation of the proceeds, and the liability of the city arises from the use of the moneys or her refusal to refund them after their receipt. The city is not exempted from the common obligation to do justice, which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property, which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor, from the like obligation. (Argenti v. San Francisco, 16 Cal. 282). The legal liability springs from the moral duty to make restitution; and we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics. Its command always is to do justice.' From these authorities it seems clear that if, in making the contract un-

der discussion, the trustees exceeded their authority, still there was created thereby a liability to refund the money advanced by relator under and in pursuance of said contract. The most, we think, that can be said in this case, is that there was an imperfect or defective attempt to comply with the law on the part of the trustees in the issuing of the bonds of the district. They had the authority under the law to issue them for the purpose for which they were issued, but failed to give a sufficient notice of the purpose and conditions thereof in providing for the election to authorize their issuance. Nor is any bad faith or fraud alleged in the issuance of said bonds. If the bonds had been declared void, we think it could hardly be contended that the contract with relator to advance money on them as security, for the building of the school house, would have been considered void for want of authority in the trustees to make the same. And, besides, the contract, so far as relator is concerned, has been fully executed, and we think the doctrine of ultra vires can be invoked with less force here than in cases of executory contracts. *The school district secured the benefit of relator's money, advanced in good faith; and we think it would be a most inequitable and unjust holding to say the district assumed no liability on account thereof, and that relator is left without a remedy, under the circumstances of this case."* .

This Court affirming a decision by U. S. District Judge Bourquin upon a Montana case has said: *(Hill County v. Shaw & Borden,* 225 Fed. 475)

"It is a doctrine of the courts, however, now well established that sanction will be given a cause of action proceeding as for *quantum meruit,* or for recovery of property or in trover, where the property has been converted, aside from the contract and independent thereof, where the contract is merely malum prohibitum, not malum in se nor involving moral turpitude, and does not contravene public policy, and

where the statute imposes no penalty for its infraction. This upon the principle that the courts will always try to do justice between the parties where they can do so consistently, with adherence to law. Thus it was held, in City of Concordia v. Hagaman et al., 1 Kan. App. 35, 41 Pac. 133, that:

'In the absence of a penal prohibitive statute, on grounds of public policy alone, an express contract entered into between the mayor and council of a city of the second class and one who is at the time a councilman of such city, for the performance of a service for the city, will not be enforced. Such contract, while not absolutely void, may be avoided by the city, at will, so long as it remains executory; but *when it was entered into in good faith,* was, *for* the *doing of lawful* and necessary *work* for the city, and has been, without objection, *fully executed,* the city receiving and retaining the benefit thereof, a *recovery may be had on the quantum meruit* for what the services were reasonably worth.'

"Parkersburg v. Brown, 106 U. S. 487, 503, 1 Sup. Ct. 442, 455 (27 L. Ed. 238), was a case for recovery against the city of certain realty which had been conveyed to a trustee as security for a loan by the issuance of bonds, which bonds it proved the city had no authority to issue, because the act under which the city authorities proceeded was declared unconstitutional. Of this state of the case the court said:

'There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely malum prohibitum, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received.'

"So it was said in Chapman v. County of Douglas, 107 U. S. 348, 355, 2 Sup. Ct. 62, 68 (27 L. Ed. 378):

'As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in Marsh v. Fulton County, 10 Wall. 676, 684, (19 L. Ed. 1040), and repeated in Louisiana v. Wood, 102 U. S. 294 (26 L. Ed. 153), 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute will compel restitution or compensation.' * * * The purchase itself, as we have seen, was expressly authorized. The agreement for definite times of payment and for security alone was not authorized. It was not illegal in the sense of being prohibited as an offense; the power in that form was simply withheld. The policy of the law extends no further than merely to defeat what it does not permit, and imposes upon the parties no penalty. It thus falls within the rule, as stated by Mr. Pollock, in his Principles of Contract (264): 'When no penalty is imposed, and the intention of the Legislature appears to be simply that the agreement is not to be enforced, then neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose.' "

"And again, in Pullman's Car Co. v. Transportation Co., supra, the court, quoting from 139 U. S. 60, 11 Sup. Ct. 489, 35 L. Wd. 69 (Central Transp. Co. v. Pullman's Car Co.) says:

'The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract, to be recovered back, or compen-

sation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or failing to do that, to make compensation for, property or money which it had no right to retain. To maintain such an action is not to affirm, but disaffirm, the unlawful contract.' "

A case which is cited as a leading authority on this question of *quantum meruit* following contracts entered into in good faith for property within the power of the corporation to purchase comes from Minnesota, *Bank v. Goodhue*, 120 Minn. 362, 139 N. W. 599:

"The trial court found that plaintiff loaned the money to the village in good faith, and that the same was expended as just stated. Both transactions were illegal and void for the reason that the village *council was not authorized* to make such a loan of money *without first submitting the question to the legal voters* for their approval. The *question was not so submitted* as to either loan. The *first loan was illegal and void for the further reason* that the *president* of the village council, who as such participated in the transaction, was also a managing officer of plaintiff bank, and *was prohibited by law from entering into any contract* with the village in which his bank was interested. Section 731, Rev. Laws, 1905.

"Plaintiff brought this action to recover the amount so loaned, having first demanded repayment, on the ground of money had and received. Plaintiff conceded in its complaint the invalidity of the warrants, and they were brought into the court for the use of defendant; and the action is predicated, not upon the contract, but upon the alleged implied obligations of the village to repay the money. The trial court ordered judgment for the plaintiff, and defendant appealed from an order denying a new trial.

"The only question presented is whether, on the facts stated, which are not in dispute, an action will lie for money had and received; or, as otherwise expressed, whether a municipal corporation is liable in assumpsit upon an implied contract to pay for what it has received, where the express contract pursuant to which it received the same is invalid because of the failure of its officers to comply with statutory requirements.

"1. The courts are in full harmony in holding that one who deals with a municipal corporation in respect to a matter beyond its corporate powers can have no relief, either in law or in equity. Contracts so entered into are wholly void, because prohibited, of which all are required to take notice. But there is a sharp conflict in the adjudicated cases upon the question of liability where the corporation is vested with power to enter into a particular contract, and its *invalidity arises solely from the failure to comply with essential requirements of law.* In such cases many courts of high standing hold that the municipality may be compelled to do justice, and recovery is allowed as upon an implied contract to pay for what it has received. (Citing cases). In short, the 'doctrines of assumpsit are applicable to municipalities as well as to natural persons, and the action may be maintained on any of the common counts,' 'not from any contract entered into on the subject, but from the general obligation to do justice, which binds all persons whether natural or artificial.' Ingersoll, Pub. Corp. 299. The rule stated has often been applied in cases of borrowed money, where the money has been paid into the municipal treasury, and subsequently expended for legitimate municipal purposes. Fernald v. Gilman (C. C.) 123 Fed. 797, and authorities cited in Ingersoll, Pub. Corp. supra. The opposite view of the question proceeds upon the theory that to permit a recovery in such cases results for all practical purposes to upholding the invalid contract, *thus enabling the municipality to do indirectly that which it could not do directly.* The courts so holding apply

the doctrine of ultra vires strictly, and refuse relief where the contract was entered into irregularly or in violation of law, as well as where the subject-matter was beyond the power of the corporation. The question on facts precisely like those here disclosed has never been presented to this court, *though in analogous cases the tendency of our later decisions has been in harmony with the rule of liability applied by the authorities cited.* In this case the money was loaned to the municipality by plaintiff in good faith, it was paid into the village treasury, and subsequently expended for a purpose authorized by law. The forms of law were not complied with in effecting the loan, and the contract was invalid for that reason. Yet the village received the money, and ought in equity and good conscience return it. And, though we have held that the doctrine of ultra vires is applied to municipal corporations with greater strictness than to private corporations, the doctrine really has no application to the case. If the question was whether the contract was valid, the decision necessarily would be that it was not. This action proceeds upon that theory. In that view the express contract disappears, because unauthorized, and the rule of implied liability takes its place. We are unable to assign a good reason for differentiating between the private and the municipal corporations as respects the rule of justice and common honesty. The private corporation in a case of this kind would not be heard to dispute its liability, nor would a public corporation be permitted to do so where, as in the case at bar, there is no question of fraud or collusion, and no concerted purpose between the village officers and plaintiff intentionally to evade or violate the law. A situation of that kind would present a question of fraud, and, both parties being participants, the courts would probably decline to aid either. The finding of good faith in this case negatives any such situation. Though defendant at one stage of the trial offered some evidence tending to show that the question whether the loan could properly be made without a favorable vote of the people

was brought before the council, yet the evidence offered fell short of disclosing a fraudulent purpose intentionally to evade the law, and the ruling of the court excluding it is not assigned as error. So that whether such a purpose participated in by both parties, the city authorities and the other contracting party, would present a case of nonliability, we need not determine. As heretofore stated, our later decisions on principle sustain the rule of liability on facts like those here presented. (Citing cases). We follow and apply the rule adopted in these cases, and hold, on the facts found by the trial court, defendant liable as upon an implied promise to repay the money."

A Federal decision often cited holds: (*Geer v. School District*, 111 Fed. 682, 684)

"From the foregoing provisions of the laws of Colorado, it is obvious, in our opinion, that it was left to the voters of school districts to determine whether there should be one or more buildings, how much they should cost, and whether they would raise a tax to pay for the same themselves, or whether they would create a bonded indebtedness, and saddle the payment of the same upon posterity. The record of this case shows that they attempted to adopt the latter course. They secured a valuable school building, and attempted to pay for the same by the issue of bonds which were, ab initio, void. The question for our determination is whether, under the constitution and laws of Colorado, the proceedings taken and acts done by the district created an indebtedness which may be lawfully asserted against it, notwithstanding the fact that the person from whom it borrowed the money unwittingly accepted void bonds as evidence of his right against the district.

"It is urged upon us that the only indebtedness which the district might create for the building of school houses was a bonded indebtedness, and that inasmuch as there was a statutory barrier against the creation of any such indebtedness in excess of 3½ per

cent. of the assessed value of the property of the district, such barrier interposed a fatal objection to a recovery on the original consideration paid for bonds issued in excess of that limit. In the light of the foregoing analysis of the constitution and laws of Colorado, we cannot agree with this view. On the contrary, we are of opinion that the constitution and all the statutes relating to the subject in question, including section 4057, upon which reliance is mainly placed, clearly contemplate and provide for the creation of a general indebtedness to be liquidated by concurrent taxation if the qualified electors of the district so determine, as well as for the creation of a bonded indebtedness to be paid at a distant time in the future. It follows that the limitation as to the amount of permissible bonded indebtedness has no application to the other kind of indebtedness which might be created for the building of school houses, and which by the provisions of the law is limited only by the necessities of the district according to the judgment of the duly-qualified electors."

One of the important cases because of the frequency of its citation and further because it reversed the District Court and held the City liable on contract although it had stipulated that the work should be paid for by assessments and that the City would not otherwise be liable, comes from the Circuit Court of Appeals of the Third Circuit. It bases its decision largely upon the case of *Hitchcock v. Galveston* above cited and holds directly to the point that the City was the one that entered into the contract and it having broken its contract by giving invalid bonds and having as a city benefited from the improvement, it was held liable. The decision cites a number of cases where contractors were permitted to recover against the City although they had

agreed to look to the assessments alone for their payments.

The case referred to above is *Barber Asphalt Co. v. Harrisburg,* 64 Fed. 283; certiorari denied 163 U. S. 671. Other cases holding a town liable generally, because of invalidity in the proceedings had for special improvements to be paid exclusively by the benefited property owners are:

Dakota Trust Co. v. Hankinson, 53 N. Dak. 356; 205 N. W. 990.
Durant v. Story, 112 Okla. 110; 240 Pac. 84.
Freese v. Pierre, 37 S. Dak. 433; 158 N. W. 113.
Cole v. Shreveport, 41 La. Ann. 839; 6 So. 688.
Oubre v. Donaldsonville, 33 La. Ann. 390.

And the courts have held that where a municipality has used properties under contracts of purchase, which were in themselves void by reason of lack of power as construed by the courts, yet the municipality would be held liable for the reasonable value of the *use* thereof.

Hogansville v. Planters Bank, 108 S. E. 480 (Ga. App.)
Shoemaker v. Buffalo Steam Roller Co., 144 N. Y. S. 741.

It must be borne in mind that the Town of Ryegate has used the water-system and the distributing plant for a period of eleven years without paying anything therefor; and common justice requires that payment should be made by the town for the use and benefit of this property under every doctrine which we have been able to find in the adjudicated cases.

A number of the cases cited deal with instances where *no election* was held. This is particularly true of *Eyer v. Mercer County,* 292 Fed. 292, and *Bank v. Goodhue,* 120 Minn. 362; 139 N. W. 599, from which case we have quoted a liberal excerpt. In the case at bar there was an election and the vote taken was favorably expressed for the procuring of a water supply for the Town of Ryegate, which should be owned and controlled by the town, and the revenues derived therefrom should be devoted to the payment of the debt. Judge Pray's decision coming nearly 17 months after the trial, completely overlooked the election as held and considered only that no election had specifically voted the credit of the town for the Special Bonds of District No. 4.

The recent opinion in *Edmunds v. Glasgow,* 300 Pac. 203, clears up the whole question of "power" to acquire a water-supply, etc. That power *was granted* towns by the legislature pursuant to the Constitution, a grant *in praesenti*—"town has power" (Sec. 5039, Subd. 64). The legal requirement of a favorable vote on an election on the "question" of exceeding the 3% limit, is the mode of its exercise. The vote *does not grant the power,* as Judge Pray assumes. The town already had it. Having the power it may, though irregularly, acquire the water-supply, etc. Such acquisition is not *ultra vires.*

DEFENSES OFFERED BY THE TOWN OF RYEGATE

(Page references, unless otherwise mentioned, indicate *Printed Transcript.*)

First Defense—Constitutional Debt Inhibition

The affirmative defenses are disclosed in the Answer

(p. 27). The "first affirmative defense" pleads facts and figures intended to show the Town of Ryegate as already indebted to the constitutional limit, and that if the town were imposed with the obligation of paying the special improvement bonds the indebtedness of the town would greatly exceed the indebtedness limit. This contention is covered at pages 135-142 of the brief insofar as such obligation may grow out of the obligation involuntarily imposed upon the town by reason of its failure to perform its duties in the premises. That argument need not be here repeated. The law is clear that such involuntary obligation is not a "debt" falling within the constitutional inhibition.

The effect of the constitutional provision when considered in connection with the obligation of the town in taking the improvements as for its own. That discussion will be found in another portion of this brief beginning at pp. 190-213, and we shall not discuss that line of authority here.

Second Defense—Price Paid

The "second affirmative defense" (p. 29) alleges that plaintiff purchased the bonds in question at 80% of their face value.

Before passing this second defense however we call the Court's attention to the fact that this second defense is not a good pleading under Montana Statutes. At most it is an assertion that there is no liability for 100%, but that the liability if any is only for the amount actually paid for the bonds, to-wit, 85%. This is clearly a partial defense.

Sec. 9146, *Revised Code, 1921* provides:

> "A defendant may set forth, in his answer, as many defenses or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defense or counterclaim must be separately stated and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer."

The question of partial defense, however, is covered in the next section (Sec. 9147), which provides:

> "A partial defense may be set forth, as prescribed in the last section; *but it must be expressly stated to be a partial defense* to the entire complaint, or to one or more separate causes of action therein set forth. Upon a demurrer thereto, the question is whether it is sufficient for that purpose. Matter tending only to mitigate or reduce damages, in an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, is a partial defense, within the meaning of this section."

This section has been interpreted by the Montana Supreme Court to require a special pleading of partial defense:

McKim v. Beiseker, 56 Mont. 330, 336; 185 Pac. 153.
Cornell v. G. N. Railway, 57 Mont. 177, 195; 187 Pac. 902.

and the Federal Court for the Montana District has expressly held that a partial defense must be set forth in the words of the statute.

U. S. v. Mullan Fuel Co., 118 Fed. 663, 668.

The Agreed Facts stipulate that these bonds were purchased at 85% face value. This defense can be nothing more than a partial defense, and we have shown at pages 60-62 of this brief that plaintiff's position is that of a bona fide holder, and authorities grouped under different heads throughout this brief clearly show that a bondholder in good faith is protected at least to the extent of his investment, no fraud being shown. Plaintiff's position in this case is that of one asking only the amount paid for the bonds plus interest thereon.

Third Defense—Advice of Counsel Relied Upon, Etc.

The "third separate defense" (p. 29) is to the effect that, in doing what it did in creating Special Improvement District No. 4, the town council had employed skilled counsel, whose advice was followed in every respect. As shown in other portions of this brief it is no excuse that the town was mistaken, although acting in the best of faith in making its arrangements. This is particularly developed in the opinion of *Barber Asphalt Co. v. Harrisburg,* 64 Fed. 283. It is also pleaded that Security Bridge Company relied upon its own counsel, who was skilled in such matters, and accepted the bonds in question knowing them to be special improvement bonds and not obligations of the town itself. In other portions of this brief we have shown that knowledge of the proceedings on the part of the purchaser or contractor does not relieve the obligation to make valid assessments. *Barber Asphalt Co. v. Harrisburg, supra;* and see *Eyer v. Mercer County,* 292 Fed. 292. It is further pleaded that plaintiff herein relied solely upon

the advice of its own counsel, who were skilled in such matters, and purchased the same knowing the town not to be liable itself and under the belief that the proceedings had were valid and binding obligations of the district. These allegations were denied in the Reply, but the cases developed in other portions of this brief, of which *Barber Asphalt Co. v. Harrisburg, supra,* is an example, clearly show that if the allegations are to be taken as wholly true the town is nevertheless liable for its failure to have made those proceedings legal and valid ones.

Fourth Defense—Proceedings in Belecz Suit

We come now to the most important of the defenses, the "fourth affirmative defense," which deals with the *Belecz* suit in the state court. Under appropriate headings we have already discussed the effect of this state suit as being insufficient as a bar under the doctrine of *res judicata;* and its inapplicability under the doctrine of *stare decisis* has been fully covered and discussed.

We believe the record as made and stipulated under the Agreed Facts to foreclose any question as to the actual improvement made within the district being different from the improvement resolved upon in the ordinances relating to the creation of the district and the notice relating to protests in that connection. As set forth at pages 90-96 of this brief we feel that the record is emphatic in its admissions and stipulations covering the nature of the improvements.

However, in view of the narrations made in the "fourth affirmative defense" we will briefly touch upon

the law relating to the contentions made in the state case without conceding the sufficiency of the record herein for such determination as a court has a right to require. These allegations are found (pp. 31-34) and appear to be a fair statement of the allegations contained in the *Belecz* pleadings, which are made an Exhibit to the Agreed Facts herein (pp. 68, 76-80). The attack made in the state court can be fairly grouped as follows:

1—Lack of jurisdiction to create Improvement District No. 4 or proceed with the installation "of said mains," it being alleged that the description in the resolution of intention was "construction of pipes, hydrants and hose connections for irrigating appliances and fire protection," which gave no definite information as to the specific character, extent or nature of said improvement; nothing in said description advised that a waterworks system or a system of mains was contemplated or would be installed, and that description included only pipes, hydrants, etc., did not include waterworks, system of mains, reservoir, pumping plant; that the improvements were entirely different and less extensive than the improvements actually made; that the description recited that improvements would be made in accordance with plans and specifications to be prepared, which were not then prepared, and were not on file or available; that the notice published relating to protest was defective in the same way.

2—That the cost of improvements exceeded the sum of $1.50 per lineal foot plus the cost of pipes laid, which was contended to be in excess of the legal limit.

3—That no notice of any kind was given of the letting of the contract for the improvement; that the contract price when let greatly exceeded the estimated cost and both contract price as agreed and actual cost

of construction was out of proportion to the value of the improvements.

4—That the special improvement bonds were not salable at par and the town council and mayor with such notice negotiated the agreement with the contractor, who took the bonds in payment of the contract price, the contract having been increased in price in order to take care of the discount and that certain extras were included therein.

Character of Improvements, Etc.

Under the first group we have in repeated form the same allegations and contentions that the improvements actually made were entirely different from those resolved upon. This has been sufficiently discussed at pages 90-96 of this brief and we wish at this time to say nothing further other than that all the *references* available *in this record agree and show that the improvements* actually made within the district *were pipes and hydrants in fact.* The pleadings *admit such were constructed* and the *Agreed Facts stipulate that such were installed,* and the *Minutes of the Council indicate approval* of estimates for the *installation of pipes and hydrants.* The blue-printed *map shows* nothing but *pipes and hydrants installed* within the district. There is no record to the contrary other than the mere statement in the findings made by the state court, with respect to which no supporting evidence was offered whatever in the case at bar.

That portion of the first group which suggests insufficiency of the notice published for the hearing of protests requires the same answer as heretofore suggested respecting the contention of difference in the

improvements. We call attention, however, to the case of *Mansur v. Polson,* 45 Mont. 585; 125 Pac. 1002, decided in 1912, in which case it was held, in a suit brought to enjoin the proceedings *before* the work was commenced, that a notice relating to street improvements, which included graveling, was not defective because the contract awarded had omitted graveling. Contentions as to lack of availability of the plans and specifications must be considered *after* the happening of the work as the merest irregularity. The cases touching on this matter will be mentioned hereafter.

Legal Cost Limit

Under the second grouping indicated by us, complaint was made of the cost of the improvement as exceeding $1.50 per lineal foot plus cost of the pipes laid. We shall show by the cases hereafter that a cost which develops out of the construction of the work which may be in excess of that first contemplated either by law or by estimates, cannot invalidate the contract itself. A contract entered into cannot be defeated because the ultimate cost is greater than that first contemplated. *At most it may be invalid for the excess.*

Notice—Estimates, Etc.

Under the third group as stated by us, complaint was made that no notice was given of the letting of the contract for the improvement, and that the contract price when let was in excess of the estimated cost, and that both contract price and the actual cost of the construction was out of proportion to the value of the im-

provements to the property. The record herein discloses that publication was made of the notice to bidders (p. 214). Under this notice 8 P. M. April 14, 1920, was fixed for the time of receiving sealed bids for the construction. It appears that Security Bridge Company made a bid (p. 215) and this bid disclosed an offer on the part of that company to enter into a contract within ten days from that date. Any interested property owner was in a position to know from the publication when the bids would be received. His attendance at that time or inquiry thereafter would have given him desired information as to the bid made by the Security Bridge Company and the time within which the contract should be awarded. This should be a sufficient practical notice. However, we know of *no law,* and none has been suggested by defendant in its pleadings or otherwise, which *requires such notice* of the letting of a contract as complained of.

The further complaint was that the contract price was in excess of the estimate made and that the work as completed was in excess of and out of proportion to the value of the improvements made. The answer to this may be found in the Statute (Sec. 5227, Revised Code 1921) which provides only that "an approximate estimate of the cost thereof" need be made in the resolution of intention, and that the published notice shall state "the estimated cost thereof." Cases dealing with the matter of estimates will be shown hereafter, which support the position that the estimate is not conclusive unless made so by statute, and that mistaken estimates do not invalidate the contract in whole, but that the

contracts are valid up to the amount of the estimates, even where the law prohibits costs in excess thereof.

The contention that the cost of the construction is wholly out of proportion to the value of the improvements is met by the law which proceeds on the theory that properties improved in such fashion have their values enhanced by the cost of the improvement. In any event the record supplies no information with respect to the value of the property itself. In the absence of such showing this presumption must obtain.

Bonds Sold Below Par

The fourth grouping deals with the contention that the bonds were sold at less than par by the arrangement concluded whereby the contractor took the bonds at par but increased the prices on the work in order to absorb that discount, all of which was alleged to have been done with the knowledge of the mayor and town council. For the present we content ourselves with saying that, conceding the truth of all the matters as alleged, with respect to which we must note in passing that no evidence or supporting testimony was introduced in the case at bar, such a sale would not invalidate the obligation to pay what the work was worth on a par basis, particularly when the work is completed and no action taken to prevent its installation, but the attack is made after the improvements are fully constructed, installed and accepted.

We will briefly refer to the following groups of authority touching upon the matters hereinbefore discussed, the length of this brief being such that we do

not care to set forth the full discussion which the cases justify, in view of the record herein, which should not open these questions for such determination as would be proper had defendant brought in evidence and testimony to support the *Belecz* allegations as a basis for redetermination in the federal court which is required under the doctrines of *Burgess v. Seligman,* 107 U. S. 20.

Acquiescence, Delay and Waiver

Plaintiffs in the *Belecz* case admittedly were in the position of having brought a suit some fourteen months after the completion of the work and nearly two years after the publication of the notices with respect to protests against the creation of the district. In the case at bar plaintiff herein must insist that its rights were fixed long prior to the bringing of the *Belecz* suit, and that being true the cases and the Montana statutes dealing with the matter represent real and tangible rights which accrued to plaintiff when it purchased the bonds. The cases dealing with property owners who bring suit before the work is commenced, and who are diligent in preventing the construction of work with respect to which they complain of defects, have no bearing whatever on plaintiff's rights herein or as affected by the *Belecz* proceeding.

We look first to the general law on waiver of rights by a property owner who stands by and permits the improvements to be made acquiescing therein, or with no more than a mere protest, but who resists collection of the assessment after his property has been benefited.

Such a property owner has no *right* to complain in equity. Plaintiff herein has rights based in part on such acquiescence as well as upon the 60-day statutes. We refer to the following:

Authorities

Where the law itself has provided a method for hearing objections before the council the property owner who does not exercise his right so to be heard will be held to have waived his right to object later.

Moore v. Yonkers, 235 Fed. 485; 9 A. L. R. 590.

~~Montana follows the rule so generally expressed in~~

Montana follows the rule as to estoppel and waiver so generally expressed in nearly every equity court in the country.

Sec. 5237, Montana Revised Code 1921.
Harvey v. Townsend, 57 Mont. 407; 188 Pac. 897.
Power v. Helena, 43 Mont. 336; 116 Pac. 415.
Swords v. Simineo, 68 Mont. 164; 216 Pac. 806, 809.
Billings Assn. v. Yellowstone County, 70 Mont. 401; 225 Pac. 996.

See also *Partee v. Cleveland Trinidad Co.,* 172 Pac. 945 (Okla.); 9 A. L. R. 606, holding that a property owner, who did make a protest before the commissioners and was overruled, but who did not proceed further either by appeal or by a suit in equity to restrain the proceedings, cannot stand by, see the work done, speculate upon the result thereof, and thereafter oppose the enforcement of the assessments.

Damron v. Huntington, 82 W. Va. 401; 96 S. E. 53; 9 A. L. R. 623, holds that one who protests but

whose protests are overruled, is not protected unless he further acts promptly in seeking an injunction to preserve the rights complained of, otherwise he will be compelled to have waived his rights by permitting valuable improvements to be made. Other important cases are *Bartlesville v. Holm,* 40 Okla. 467; 139 Pac. 273; 9 A. L. R. 627, and a great mass of authority compiled in the note in 9 A. L. R. following these cases, the note exhaustively covering the authorities as of the time of its preparation. (This note in itself is so voluminous as to cover 200 pages of printed matter, and is respectfully referred to in this matter.)

We specially refer to a few cases gleaned from different courts. In *Johnston v. Hartford,* 96 Conn. 142; 113 Atl. 273, the city charter required a vote where an expenditure exceed $25,000. The court holds an order made without such approval is not invalid for any purpose. A property owner who stands by, permits improvement work to be done, is estopped from later attacking validity of assessment on that account. In this case a period of one year had elapsed and a *protest had been made,* but no litigation prosecuted, although *a suit had been filed.* Laches was not relieved by mere filing; it must be followed up by a diligent prosecution.

O'Brien v. Wheelock, 184 U. S. 450, 491; 22 Sup. Ct. 354; 46 L. Ed. 636, supports the rule referred to, even where denial is made of the power to incur the obligation complained of. See also *Atkinson v. Newton,* 169 Mass. 240; 47 N. E. 1029, involving some slight variation in cost.

Jones v. Gable, 150 Mich. 30; 113 N. W. 577; *Farr v. Detroit,* 136 Mich. 200; 99 N. W. 19; *Vickery v. Hendricks County,* 134 Ind. 554; 32 N. E. 880, enforce the doctrine, even where lack of statutory power is asserted. To prevent such, an owner who is benefited, must act before the improvement is made. He cannot wait until the benefits have accrued and then claim statutory defects. *Avis v. Allen,* 83 W. Va. 789; 99 S. E. 188, requires suit to be brought before the work is done.

Butters v. Oakland, 58 Cal. App. 294; 200 Pac. 354, and *Raines v. Clay,* 161 Ga. 574; 131 S. E. 499, hold the making of a protest does not save property owner's position. His opposition must go further than mere protest; he must bring suit for injunction, or be estopped thereafter from complaining of the improvements made. *Mayor v. Brown Bros.,* 168 Ga. 1; 147 S. E. 80, expounds the rule as being broader than an estoppel. Immediate action is required to prevent the construction if one is not willing to pay for the improvement thereafter. *Marietta v. Kile,* 40 Ga. App. 73; 149 S. E. 54; *Farris v. Manchester,* 168 Ga. 653; 149 S. E. 27; *Cochran v. Thomasville,* 167 Ga. 579; 146 S. E. 462, hold that a litigating property owner must do equity; that is, offer to pay the fair value of the improvements before relief can be expected. *St. Louis v. Prendergast Co.,* 288 Mo. 197; 231 S. W. 989; affirmed 260 U. S. 469, holds that the same rule applies where jurisdictional defects are complained of. *Haislup v. Union Const. Co.,* 70 Ind. App. 308; 123 N. E. 426, holds a property owner who stands by is estopped, even where the proceedings are held to be void. *Breakenridge v. Newark,* 94

N. J. Law 361; 110 Atl. 570, holds where no jurisdiction obtained, the ordinances not having been passed under the appropriate laws, the property owner is estopped by acquiescence. *Platt v. Columbia,* 131 S. C. 89; 126 S. E. 523, is a case where the improvement was made without consent of the requisite number of voters, two-thirds being required, but not secured. A property owner standing by, is estopped to complain of improvements after completion.

The best recent case so far as analysis and discussion of the principles involved will be found in *Bass v. Casper,* 205 Pac. 1008; 28 Wyo. 387; 208 Pac. 439, wherein the court enters into a full and general discussion of the rights of property owners to attack proceedings after completion of improvements, where laws provide a means for hearing and adjustment of claims before the council, etc., With great care it analyzes the provisions of the Wyoming statutes and compares them with statutory provisions in other states.

A recent case which explains the underlying principles which may be applied in testing what defects are waived by failure to object is *Southlands Co. v. San Diego,* 297 Pac. 521. The tests suggested by the court in this opinion are the following:

1—Could the town council body under its powers correct the defect complained of?

2—Could the state legislature in setting up the statutory practice and proceedings have omitted the step complained of as being defective or lacking?

That case holds that if the town council could correct the defects under its power, or the state legislature

might have provided a practice which omitted the step altogether, the matter must be considered as an *irregularity,* and not a fundamental right which cannot be waived.

Argument

Applying these tests to the matters in the case at bar and in the *Belecz* case, what do we find with respect to all matters of cost, estimates of cost, statutory limitation of cost per front foot or lineal foot; matters with respect to the sale of bonds and price; notice of the specific character, nature and extent of improvements? We are obliged to say that the legislature could have waived any or all of these. There are but a few fundamentals, and these are due process, the right to a hearing in a reasonable way upon notice, and such a description of the boundaries of the district as will advise a property owner that his property is involved; and perhaps a description of proposed improvements sufficient at least to know their general nature. Other details can be left to the town council in working out price; the time involved, the method of payment. By the California test there was nothing whatever in the *Belecz* case to give the court pause.

Estimated Cost, Etc.

The fact that *no plans or estimates* were *on file* is not a ground of complaint by a property owner after the completion of the work, he having permitted the work to be completed without interference. *Wingate v. Astoria,* 39 Or. 603; 65 Pac. 982; *New Albany v. Crumbo,* 37 N. E. 1062; 10 Ind. App. 360.

The same rule obtains where *no estimates whatever* have been furnished, the work being completed. *Elkhart v. Wickwire,* 121 Ind. 331; 22 N. E. 342; *Walsh v. First Nat. Bank,* 139 Mo. App. 641; 123 S. W. 1001.

In *Branting v. Salt Lake City,* 47 Utah 296; 153 Pac. 995, an exhaustive discussion is made as to the power of a municipality to contract for improvements in excess of the estimates made, that case being one where the resolution of intention and corresponding notice made an estimate of $1.30 per front foot for a sewer improvement. The contract was let on the basis of $2.15 per front foot, notwithstanding a tender by the plaintiff property owner of $1.30 in payment of his assessment. The court held that equity would give no relief, the property owner having stood by and permitted the improvement to be completed. The procedure in Utah is given a thorough discussion and compared with other states, including Montana. The court holds the "estimate" not to be jurisdictional where the procedure permits a second hearing for the correction of assessments, which is the procedure in Montana. (Secs. 5237-5241-5243, *Revised Code 1921.*)

In *Pope v. Rich,* 293 S. W. 373 (Mo.), the estimate was $3,978.15. The contractor bid on a unit basis, which aggregated $3,799.50. The completed work cost $5,553.33. The Missouri statute read as follows:

> "No contract shall be entered into for any * * * improvements * * * exceeding such estimates."

The court held under that statute that the contractor's bid should prevail, since the extra cost had developed

from overhaul not covered by the contract, otherwise the engineer's estimate would have been the limitation. A contract would be invalid *only for such excess.* To the same effect is *Collins v. Ellensburg,* 68 Wash. 212; 122 Pac. 1010, which involved sewer improvements estimated at $6,000.00; actual cost $11,147.04; levy held good up to $6,000.00, following *Chehalis v. Cory,* 64 Wash. 367; 116 Pac. 875, where the estimate was $6,000.00, actual cost $14,812.50.

In *Pointer v. Chelsea,* 125 Okla. 278, 257 Pac. 785, contract was on a unit basis. The estimate was $142,-537.35; the completed work exceeded $150,000.00; no fraud was involved; held, the estimate was not jurisdictional but a mere irregularity and assessments for the *full amount* would not be set aside after the completion of the work.

In *Ennever v. Harrington Park,* 150 Atl. 571; 8 N. J. (Misc.) 448, the engineer's estimate covered 6,500 square yards of pavement, pavement actually laid covered 8,009.3 yards, and extra cost was in excess of $4,800.00. The excess was held not important.

The foregoing authorities pretty well cover costs, whether in excess of the "estimate" made in the notice, or in excess of a statutory figure such as $1.50 per lineal foot as to laying pipes, it being clear that *unless the statutes prohibit the cost from exceeding the estimate,* the *actual* costs, in the absence of fraud will be sustained, and that in all such cases the "estimate" or statutory amount is valid. If Judge Horkan was correct in a finding made in the state court (p. 87) then we have a value of $17,726.47 placed upon the pipe itself actually

used in the construction. This finding shows that 11,838 lineal feet of pipe were laid. This was also shown in the Council's Minutes (pp. 246-247). Laying this pipe at $1.50 per lineal foot we find $17,754.00 a legal limit for the cost of laying. This does not include hydrants, with respect to which thirteen were installed, as shown by the minutes above referred to, at a gross cost of $2,267.20. The total cost of pipe and hydrants plus the cost of laying the pipe is therefore $37,747.82. If to this shall be added the engineering expense at 6%, which was actually paid by the contractor as disclosed (p. 247), a total gross of $38,947.29 is reached. This is actually greater than plaintiff's demand herein, which is $38,762.06 (p. 55).

Changes in Improvements

The cases dealing with changes in the improvements actually made are practically to the same effect as those dealing with excess costs. No fraud being shown, reasonable differences are not of jurisdictional importance. This has been held by Montana in *Mansur v. Polson, supra,* where the change was that of omitting "gravelling" from the contract. We call attention to cases dealing with changes found in *Ennever v. Harrington Park,* 150 Atl. 571, where street corners were widened thereby making additional improvements, whereby the area paved was increased more than 20%, and this added cost was sustained. *In Richardson v. Denison,* 189 Ia. 426; 178 N. W. 332, a six-inch pavement was laid instead of seven-inch as called for by the original resolution. The difference exceeded 14%, but in the absence

of a showing that the pavement as laid was not practically sufficient for the purpose intended, the court refused to disturb the proceeding. In *Janutola, etc. Co. v. Taulbee,* 211 Ken. 356; 277 S. W. 477, street grading only was resolved upon in the initial resolution, while the contract covered grading and *drainage.* This was held good, first, as a matter of common sense and prudence, in order to protect the grading done; and second, because the notice stated that the work would be done in accordance with plans and specifications, to which reference had been made. (The notice in the case at bar also referred to the specifications which were to be filed thereafter.) Other cases dealing with the subject are: *Nelson v. Kearny,* 132 Atl. 299 (N. J.), *McArthur v. Picayune,* 156 Miss. 456; 125 So. 813. See also: 16 S. W. (2d) 1026, reaffirming the doctrine of the *Janutola* case on a second appeal.

Value to Property

The contention advanced that the cost of the improvement was out of proportion to the value of the improvements is not open to a property owner after the completion of the work. This was determined in *Power v. Helena,* 43 Mont. 336; 116 Pac. 415, the case being one of a sewer improvement and the property involved was so located as not to be drained into the sewer under any possible arrangement. That case was published before the proceedings involved in the case at bar were initiated and fixed the Montana law for the purposes of determining plaintiff's rights herein. In that case *no benefit* could result to the property from the sewer

improvement involved. Had the property owner proceeded in timely fashion he could have had relief, but having waited until the work was completed his rights were gone under the 60-day statute. The *record* discloses no lack of value in any event.

Bond Disposal Below Par

The matter of bond sales at less than par has been brought before the courts in other states under somewhat similar statutes and these decisions are worthy of our investigation. The State of Georgia has a statute providing that special improvement bonds:

> "Shall be sold at not less than par * * * or * * * shall be turned over * * * to the contractor at par value in payment * * * for the contract."

This is strong and clear language, much better phrased than the language of the Montana Statute, which the court in the *Evans* case refers to as awkward.

In *Bainbridge v. Jester,* 157 Ga. 505; 121 S. E. 798; 33 A. L. R. 1406, the Georgia court had before it a suit brought by a property owner and as representative of all who cared to join, praying an injunction against the city of Bainbridge and its officials to stay execution on account of property sales under levies made for special paving assessments. It appeared that the contractors in making their bids offered in each case alternative bids, *one for cash* and *one in bonds;* the successful bid was cash $1.29, bonds $1.65, and was awarded on the bond basis of $1.65 and assessments made accordingly. It was contended in the trial court that this condition invalidated the contract itself and was a proper basis for *set-*

ting aside all of the assessments against the property owners. On appeal the supreme court held that property holders were estopped from attacking this assessment when they stood by and permitted the property to be improved, making no move until the work was completed; that they then came too late, this on the general principle of laches. The same contract developed further litigation. See *Floyd v. Bainbridge,* 164 Ga. 316; 138 S. E. 851, and still later the case of *Bower v. Bainbridge,* 168 Ga. 616; 148 S. E. 517. In all of these cases the identical contract and underlying facts existed. In every case the court held the parties to be estopped by reason of their having permitted the work to progress without prosecuting any restraining suit. In the last case of *Bower v. Bainbridge* it was shown that the plaintiff *had* protested. This was *held not* in itself to be *enough.* A mere protest was insufficient to protect the plaintiff against claim of estoppel or laches. Further, however, the court held that had the plaintiff in the *Bower* case tendered into court the *cash* value of improvement, that is $1.29 per square yard rather than the $1.65 per square yard as assessed, the case would be different and a reassessment ordered. In the absence of such tender equity could not grant relief to one who did not offer to do equity on his part.

The State of Oklahoma has a series of decisions dealing with similar situations. *Kerker v. Bocher,* 20 Okla. 729; 95 Pac. 981, involved a contract which carried a provision within itself that the contractor would grant a *40% discount* to those property owners who paid cash for the improvements before the securities were issued.

This was held insufficient to invalidate the assessments. *Tulsa v. Weston,* 102 Okla. 222; 229 Pac. 108, 122, was a suit to enjoin assessments on account of improvements contemplated. It appeared that preliminary resolutions had regularly been enacted and adopted. The plan for payment in tax bills was disputed. The engineer's estimate, as made up, included a 15% market discount on the tax bills. The complaint also asserted fraud and collusion in this respect, by which the contract was claimed to be wholly void. Held that the proceedings, having been regularly adopted and in compliance with the law, a contract let thereunder must be considered final and conclusive as to price, in the absence of fraud or mistake, which the court did not find. Further, since the plaintiffs had not offered either to pay their assessments at the cash price, or to take up the tax bills at par, they could not be given consideration in a court of equity, it being apparent that the relief sought *was to evade any payment whatever* and secure the improvements at no cost to themselves. An effort was made to review this case in the United States Supreme Court, which, of course, dismissed the same for lack of jurisdiction (269 U. S. 540).

In *Beggs v. Kelly,* 110 Okla. 274; 238 Pac. 466, an injunction was sought against enforcement of assessments and to set aside assessments on account of paving within the city. The trial court directed a new assessment at 85%. The bonds to be used in payment for the construction work had been figured at 85% par value, the engineer having added 15% in his estimates to take care of such market discount. The work had been com-

pleted, the contractor had settled with one of the property owners for its share of the assessments at a 20% cash discount. The position in the lower court was, on the part of the plaintiff, that the assessments should be *invalidated in their entirety.* The city's position in the trial court was to hold the assessments liable for the *full 100%.* The supreme court followed the Supreme Court of Georgia's reasoning expressed (since departed from in that respect) in ***Bainbridge v. Jester;*** held the contract *not* invalid; and that the parties were estopped *after completion* of the work from enjoining assessments, and liable for the 100%.

By way of further authority, we quote from

Dillon, Municipal Corporations (5th Ed.) pp. 1400-1401:

"In disposing of the bonds, municipalities are frequently prohibited from selling them 'at less than the par value thereof.' The words 'par value' when so used mean a value equal to the face of the bonds and accrued interest to date of sale. * * * A *sale* of the bonds *at less than par,* contrary to the statutory direction, *does not affect the fundamental power* of the municipality *to make and issue the bonds; it is a mere irregularity in the exercise of its powers,* and the validity of the bonds is not affected thereby in the hands of innocent purchasers for value." Citing: St. Paul Gas Light Co. v. Sandstone, 73 Minn. 225; Citizens' Sav. Bank v. Greenburgh, 173 N. Y. 215; Mercer Co. v. Hackett, 1 Wall. 83; Woods v. Lawrence, 1 Black (U. S.), 386; Montpelier National Life Ins. Co. v. Huron Board of Education, 63 Fed. Rep. 778; Gladstone v. Throop, 71 Fed. Rep. 341; Greenburg v. International Trust Co., 94 Fed. Rep. 755; same bonds, 173 N. Y. 215; Knapp v. Newtown, 1 Hun (N. Y.), 268; Sherlock v. Winnetka, 68 Ill. 530; Atchison v. Butcher, 3 Kans. 104.

Belecz Facts

Let us now look at the *Belecz* case and its surrounding facts:

The contention advanced as jurisdictional was specious in its contention that pipes, hydrants, etc., are wholly different from the improvements actually installed. The merest inspection of the map, Exhibit No. 1, attached to the Agreed Facts shows that nothing has been installed *within* District No. 4 other than pipes and hydrants, and the minutes of the meeting of November 24, 1920 (set up pp. 246-247) disclose that there was laid altogether:

8271 Lin. Feet 4" C I *Pipe* at $2.55....	$21,091.05
2726 Lin. Feet 6" C I *Pipe* at $3.60....	9,813.60
841 Lin. Feet 8" C I *Pipe* at $5.04....	4,238.64
13 Fire *Hydrants* at $174.40.....	2,267.20

The other matters referred to in the minutes touching excavation and construction at the reservoir and the pumping plant will, upon inspection of Exhibit No. 1, be found to be *entirely outside* the boundaries of the district. When the plaintiffs in the *Belecz* case stated in their complaint that there was nothing in the description advising plaintiffs that a water works system or a system of mains was contemplated, it must be read in connection with the whole record, which shows, and the Agreed Facts *affirmatively stipulate,* that the plan was that *$15,000 of general bonds* would be for the *reservoir, pump-house, pumping plant* and so much of the mains as it would cover, and the balance, which was in fact pipes and hydrants, would be taken care of through the

payment of special improvement district bonds. There is no magic in the words "water-works" or "water works system" as alleged in the *Belecz* complaint. The water-works involved in this case, as common sense indicates, are the well, included in the pumping plant, the pump house and the reservoir; all of the rest was made up of pipes and hydrants, and although the record does not show great detail, we have no doubt the hydrants had hose connections which could be used for irrigating appliances and fire protection. These are shown to be fire hydrants, and we believe that in its judicial knowledge the court recognizes that fire hydrants have hose connections. Improvement District No. 4, therefore, was created for the purpose of installing pipes, hydrants, etc.; they were installed under a single contract, which is in itself not illegal, which also provided for the construction of the water-works, (the reservoir, pump house, pumping plant) in addition to the pipes and hydrants. The Specifications provided that the $15,000 should go to the payment of the reservoir, pumping plant, pump house and so much of the mains as it would cover. There is not a word in the specifications to show that any of Special Improvement Bonds was predetermined to pay any portion of the cost of anything except that of pipes and hydrants. Now if it be true that in final estimates and settlement some portion of the bonds went to pay for some fraction of the cost of the pump house, reservoir or pumping plant, because of the insufficiency of the $15,000 general bonds proceeds to cover the same, then a court of equity may properly impose that portion of the expense upon the town itself, because there

is no doubt of the law that some unexpected increase of expense incurred in good faith in connection with improvements payable out of a general bond issue may legally be added to the expense of the town generally. See *Dillon, Municipal Corporations* (5th Ed.), Sec. 813, pp. 1225-1229.

If some portion of the cost assessed against the special improvement district was actually expended for some portion of the system outside the boundaries of the district, that amount may be determined by a court in equity, and, if suit be seasonably brought, this might result in some further charge as to a portion of the water mains which should be borne by the town generally and for which the special improvement district should be excused.

Property Owners Estopped

It seems to us, however, that after the work had been completed, Mike Belecz and the State Bank of Rye-gate and other important citizens, should not be heard to complain after they had stood by and seen the expenditure of considerable sums of money on account of labor and material, so much so that there appears to have been invested by the contractor and the plaintiff herein money sufficient to purchase and install over two miles of water pipe sufficient to distribute water among the inhabitants of the district, and thirteen fire hydrants to provide a method of protecting against fire which might ravage and destroy their property. There is no doubt that all of these plaintiffs who had improved properties secured from their insurance companies re-

duced insurance rates upon the completion and operation of this system. They have saved in the intervening years substantial and considerable sums of money made possible by the construction of this system and the funds furnished to install the same by the plaintiff herein. Insurance premiums on stocks of goods, grain in warehouse, etc., are important expense items to a business; and if without fire-protection are often prohibitory in rates. The domestic user of water if forced to supply his own water from his own well in a semi-arid country would have a tremendous individual expense, plus personal inconvenience; no practical value to the plumbing attached to the sewerage system installed and to be paid for; no practical method of garden or lawn irrigation; and even the more serious aspects of impure water and faulty if not unhealthy sewage conditions. These conveniences and sanitary values are now freely enjoyed at the expense of the plaintiff, other than mere operative expense. It is difficult to express one's self touching the principles of morality and common honesty herein, where the Belecz plaintiffs asked the court to *excuse them from paying anything whatever* on account of the improvements installed and the benefits they enjoy therefrom.

No doubt it may be answered by defendant that these property owners and citizens are general taxpayers and as such they contribute something in the way of general taxes to take care of the interest on the $15,000 of general bonds, and that the benefits derived from the entire water system is paid for in that respect. If this were true, which cannot be conceded, it would be no

more than saying that because these citizens have other obligations which happen to attach themselves to the water system, they prefer and choose to be understood as willing to pay for the well and reservoir, and perhaps the pumping plant, but that plaintiff herein should expect nothing further, a sort of scaling down of their obligations by which in truth they pay some obligations and refuse altogether to pay others, a type of fractional or percentage honesty. Pertinently applied it merely means that they are willing to pay the *holders of the general bonds,* among whom plaintiff is *not* included, but do not care to pay the holders of the *special bonds* at all. Of course a reply to this would be that the taxes generally of the taxpayers only go to pay for the well, reservoir, pump house, etc., and that the distributing pipes and hydrants give them as great a service as does the pumping and storage portion of the system. In this respect the suggestions as to the insurance premiums would be equally pertinent. The distance from the reservoir, if water were stored there independently, or the distance from the well, which is completely across the town from the reservoir, is so remote from the locations of the property owners who seek to escape payment of their assessments, that if the distributing system were entirely cut off, insurance rates would immediately rise, since proximity to the hydrants, etc., is necessary in securing low insurance rates.

The cases are replete with expressions from courts touching upon similar matters. In *Fetzer v. Johnson*, 15 Fed. (2d) 145, 152, the court commenting on the benefits derived from drainage district improvements,

in which some of the land owners had paid their assessments while Johnson declined so to do and brought suit, said:

> "Some of the other landowners paid their assessments of benefits in full before the bonds were issued, and the balance needed to pay for the improvements was raised by the issuance and sale of the district's bonds. Their proceeds went to pay for improvements of Johnson's lands, not only the lands he owned when the district was created but other lands in the district which he bought after the improvements were made; and from the assessments on all of which he sought relief in the state court. A more inequitable attitude than that taken by Johnson can hardly be conceived. He asks that a court of conscience stay its hand and refuse relief while he will enrich himself at the expense of Fetzer." (the bondholder)

In the case at bar we have exactly that same general condition; the property owners in Ryegate would enrich themselves at the expense of plaintiff herein, who in good faith and for value bought the bonds issued by the town and furnished the money which provided for the town and its inhabitants a water distribution system, which it has used for more than eleven years at the present time and has paid on principal absolutely nothing. Under these circumstances we submit to the court that the proceedings in the state court cannot be followed as a *stare decisis,* and under all of the circumstances the state proceedings mean nothing other than a history of the conduct of certain citizens and town officials, whose moral sense deflated with the interruption of the town's prosperity.

Montana Law

Montana cases are not lacking in support of the general rule of equity that laches and estoppel will prevail against a property owner who sits by and permits his lands to be improved, and thereafter seeks to resist payment therefor. In *Swords v. Simineo,* 68 Mont. 164; 216 Pac. 806, 808, the court said:

> "It has been held by this court that the owner of property within a special improvement district *cannot sit by and see improvements made benefiting his property and increasing its value, and then, after such improvements are made, refuse to pay for the same.* Power v. City of Helena, 43 Mont. 336, 116 Pac. 415, 36 L. R. A. (N. S.) 39. The complaint, as we stated before, does not disclose when the improvements were made. If he acquired his property prior to the making of the improvements, he is liable for the cost for the reasons stated in the Power Case. If he acquired his property after the improvements were made, he could not free it from liability to bear its proper part of the cost, even though he be a mandatory of the government." (Plaintiff was receiver of a national bank).

60-day Protest Statute

In addition to the general rule of equity above referred to, there is a Montana statute, (Sec. 5237, *Revised Code, 1921)* which provides for the filing of a written protest, within sixty days after the date of the award of the improvement contract, specifying the defect, irregularity, etc., complained of, and a property owner failing so to protest will be deemed to have waived his right to complain. This statute is supported. *Shapard v. Missoula,* 49 Mont. 269; 141 Pac. 544; *Power v. Helena,* 43 Mont. 336; 116 Pac. 415.

Statute of Limitations

We also call attention to the provisions of Sec. 9040, *Revised Code, 1921,* (enacted in 1919) which is a statute of limitation. It will be found in the following language:

> ***"9040. Actions to restrain bond issues, time for bringing.*** *No action cen be brought for the purpose of restraining the issuance and sale of bonds by any* school district, county, city, or *town* in the state of Montana, or for the *purpose of restraining the levy and collection of taxes for the payment of such bonds,* after the expiration of sixty days from the date of the order authorizing the issuance and sale of such bonds, on account of *any defect,* irregularity, or informality *in* giving *notice,* or in holding the election upon the question of such bond issue."

This act was in effect when the events herein transpired. We call attention to the language of this act, which is to be contrasted with the language of other statutes of limitation (Secs. 9027-9035). The preamble to the general statute of limitations reads:

> "The *periods prescribed for* the *commencement* of actions * * **are* as follows * * * within ten years * * * within eight years, etc. * * *"

The words used in Section 9040 are quite different; it is the language of prohibition; it declares: "No action *can be brought* for the purpose of restraining, etc. * * *" This language means something different from the language which merely *prescribes* a period. After the expiration of sixty days from the date of the order for the issuance and sale of the bonds the statute declares "No action can be brought," and this is the language of an absolute bar. Under this statute a court

has no jurisdiction over such an action. It differs from the usual statute of limitation which may be waived by an appearance. Under Section 9040, irrespective of waiver, the action cannot be brought, *the cause of action is destroyed.*

Under Ordinance No. 29 (pp. 40-46) by Section 1 it was declared "there shall be executed and *issued* negotiable coupon bonds" of District No. 4, and in the same section:

> "Said bonds *shall be issued,* dated and delivered *from time to time as may be necessary* in payment for the work * * **as the work progresses* * * *"

Under Section 6 (p. 45) it provided:

> "Each of said bonds shall be signed by the mayor and town clerk * * * and *said officers are hereby authorized* and directed * * * to execute the same * * * *in accordance with the proceedings heretofore had* * * *"

This ordinance was approved June 9, 1920. The language certainly authorizes the *issuance* of the bonds in question to be delivered when necessary as the work progresses. The contract had been awarded April 26, 1920. This statute thereby barred a suit touching the matters after August 9, 1920. The various meetings held in connection with the approval of estimates and awards (pp. 240-247) covered a period extending from July 28, 1920, to November 24, 1920. These minutes show that the *issuance of certain bonds* were directed by the council. The language of the several minutes varies in terminology but has a common meaning. Sixty

days after November 24, 1920, was an absolute limitation of the period if the earlier ordinance of June 9, 1920, were not already sufficient. For reasons respecting which we are not advised, in its defense to the *Belecz* suit the Town of Ryegate appears not to have raised the bar of this statute , thus disclosing further neglect and culpability on its part. Considering its inflexible language, it is submitted that this statute establishes a right of the bondholders. The U. S. Supreme Court is authority on this doctrine dealing with the Interstate Commerce Act and its two-year period for bringing of actions. The language of that Act is:

"Shall be filed * * * *within* two years, and *not* after * * *"

The Montana law declares:

"No action *can be brought* * * * *after* * * * sixty days * **"

If anything the Montana law is the more emphatic. The limitation destroys the cause of action. It cannot be waived. *Kansas City So. Ry. v. Wolf,* 261 U. S. 133, 43 Sup. Ct. 259; *Danzer Co. v. Gulf & S. I. Ry.,* 268 U. S. 633, 45 Sup. Ct. 612.

As to *any defect in the notice* the *Belecz* plaintiffs therefore had *no* right to bring an action, the Town could not waive the statute, and the proceedings based thereon cannot affect the bondholders' rights which are entitled to full protection against such.

DISCUSSION OF EVANS v. HELENA

The opinion of the Montana Supreme Court in *Evans v. Helena,* 60 Mont. 577, 199 Pac. 445, was published in July, 1921. That opinion, without doubt, was the inspiration for the filing of the *Belecz* suit several months thereafter. The *Evans* case was brought by a diligent property owner against the City of Helena to restrain the performance of work under a contract relating to street improvements. The case is important because the issues raised were somewhat similar to those in the *Belecz* suit against the Town of Ryegate. In the *Evans* case it was complained that the work to be performed varied widely from that stated in the resolution of intention and referred to in the notice relating to protests when the special improvement district was about to be created. We have referred to this feature of the matter in an earlier portion of this brief and it is enough now to say that the improvements contracted for in the *Evans* case were markedly different, in that storm-sewers were included in the contract which were not mentioned in the resolution and notice, and the change of parking widths, destruction of old street-curbing, etc., were equally lacking. The suit being brought before the work had commenced, the court decided, and we think properly, that an injunction should issue to restrain the performance of the work. We have shown repeatedly in this brief that the *work done* in the Town of Ryegate *was the installation of pipes and hydrants in fact,* and the *Evans* case is not applicable thereto.

A second contention in the *Evans* case related to the difference in contract price from that estimated and

published in the notice. The difference was not very large and the court passed the contention.

The third contention in the *Evans* case related to the disposal of the bonds whereby the contractor took the bonds at par prices, it being contended that with the knowledge of the town the contract price was increased to take care of a market situation which made impossible a cash sale at par. This was the first decision of the supreme court passing on the statute (Sec. 5250). The *Evans* trial showed testimony on the part of two different councilmen who were called as witnesses, each of whom testified that the market condition was known to him and was taken into consideration, and that he would not have awarded the contract had the market been otherwise. A third witness, an unsuccessful bidder, testified that in figuring his bid he took into consideration that the bonds could not be sold at a better price than ninety. With this record before it the supreme court held the statute to contemplate that bonds should *not* be sold when a market condition did not permit their sale at par and that the payment of the inflated contract price in bonds rather than cash was the same as a sale below par. The court seems to say that when a market condition is such that the bonds cannot be sold at par, the statute should operate to prevent their issuance and sale. The suit being brought before the work was commenced or any of the bonds issued, the court properly enjoined the issuance of the bonds, and such was the further holding of that case.

The *Belecz* complaint was drawn to take advantage of the *Evans* decision, as a casual reading will demon-

strate. We point out the following important differences, referring now to the matter of bond disposal:

First—The *Evans* case was brought *before* any of the work was done or any of the bonds issued. Under such circumstances the court properly should restrain irregularity in order that the matters may be corrected. Contrast this situation with the *Belecz* complaint, filed twenty months after the contract was awarded, and more than a year *after* the *issuance of all* of the *bonds and* the *completion of all* of the *work*. Equity looks with a different eye on the property-owner who is diligent, than one who sits by and speculates upon the result and the attendant cost and, after the work is completed and the contractor has expended for labor and materials all that has been required, and investors, upon the faith of the pledge, have given their funds as a loan to the property owners and the town resists payment of his assessments on grounds relating to initial irregularities and defects which were as well known to the property owner at the time the contract was awarded as it was twenty months thereafter.

Second—The *record* made in the *Evans* case was fairly complete in showing the market condition touching disposal of the bonds at less than par. In the record herein there is nothing to support the *Belecz* plaintiffs touching the bond market in the Town of Ryegate. The court cannot assume that the bonds were in fact disposed of under a scheme whereby the town and the district did not receive their money's worth. We must consider the time of the construction work and the proposed improvements. The entire country, as the court

judicially knows, was at the apex of a great inflation in the years 1919 and 1920. Prices were extremely high, both as to labor and material. A contractor, in order to be safe in making a bid, because of rapidly advancing prices of material as well as wages, was obliged to figure a margin of profit which under more stable conditions might seem high. The record discloses that the same contractor installed the sewerage system (p. 212) and that the specifications herein covered both sewerage and water systems. It may well be that the contractor was willing to forego all of the profit to be derived from the distributing pipes and hydrants installation, by disposing of the special improvement bonds at eighty-five, the contractor looking only to the profit which he should earn from the other work being done, including that portion of the water system paid for by the general bond issue and the sewerage construction. In a small town somewhat remote from supply of materials a 15% profit in 1920 would not be out of line, and that a contractor saw fit to waive his profit on one portion of the work in order that he might carry the entire job, suggests a very reasonable proposition.

The fact that plaintiff bought the bonds at eighty-five reflects no more than that in order to dispose of a relatively small issue and profitably carry the necessary expense involved in operating its business, particularly that of its investigators who first visited Ryegate, its salesmen, who thereafter should be obliged to meet customers, and incidental advertising and circulars, a price of eighty-five would not be out of line to retail at par a 6% bond. Most certainly nothing in the record indicates

or intimates overreaching in these transactions. Everyone then acted in the best of faith. There is nothing herein to indicate that the town officials acted under the impression that the bond market was such that the bonds would not be sold at par.

If it is to be argued under the *Evans* case that the statute deprives the town of power to issue bonds during the pendency of a subpar market, then we suggest the practical impossibility of determining such a market condition, particularly when dealing with securities of smaller municipalities. A small town has no open listed market where quotations can be accurately determined at a given time; the funded indebtedness is small in amount, particular buyers must be contacted. Whether a sale is subnormal depends entirely upon the success of a particular buyer and seller. It cannot be as a matter of law that special improvements determined upon in regular proceedings, and contracts entered into for the improvements as authorized by law, can thereafter be invalidated because of the result obtained in the sale of the bonds, the success or nonsuccess of which is to be *subsequently* determined on the principles of barter. There must be a more reasonable construction to be given the statute when applied to smaller municipalities, unless the language of the statute permits no other meaning whatever.

Third—The *Evans* case was the first determination of the Montana Supreme Court touching this statute in question. That determination was not made until more than a year after the contract in question was awarded and the bond authorized. A federal court is not bound

to accept a construction of a state statute made by the highest court of a state made subsequent to the entering into of the contract litigated in a federal court, which must exercise its independent judgment; and the cases almost uniformly observe that rule and depart from a state court's construction when its application would be a denial of justice. *Burgess v. Seligman,* 107 U. S. 20; *Thompson v. Perrine,* 103 U. S. 806, 817; *Tulare District v. Shepard,* 185 U. S. 1, 12, 18, 26; *Mankato v. Barber Co.,* 142 Fed. 329.

The trial court in the case at bar did not pass upon this contention. Judge Pray appears to have assumed that the decision in the state court made in the *Belecz* case governed the matter as a *res judicata.* Earlier portions of this brief have demonstrated the fallacy of this assumption and of course the *Belecz* decision has no value as *stare decisis* coming after the contract was entered into.

CASES RELIED UPON BY JUDGE PRAY

Judge Pray's opinion in the case at bar (pp. 94-112), reported in 50 Fed. (2d) 219, relies upon the following authorities, which we shall briefly discuss.

The cases of *Rogers v. Omaha,* 76 Neb. 187; 107 N. W. 214, and *Bell v. Kirkland,* 102 Minn. 213; 113 N. W. 271, in no way oppose the contentions of plaintiff, but on the contrary are supporting authorities for plaintiff, and the case of *Moore v. Mayor,* 73 N. Y. 238, is entirely favorable to plaintiff's position so far as it goes, the facts being distinguishable.

Gagnon v. Butte, 75 Mont. 279; 243 Pac. 1085; *Capitol Heights v. Steiner,* 211 Ala. 640; 101 So. 451, and *Bank v. Weiser,* 30 Idaho 15; 166 Pac. 213, may be grouped together. Those cases deny the bondholder the right to hold the city for failure to make collections, etc., but the *statutes* involved *specifically denied any right against the city,* and further provided a right in the bondholder to foreclose his lien directly and without the city's assistance. The more recent decision of *Steiner v. Capitol Heights,* 213 Ala. 539; 109 So. 682, makes this clear. We have already discussed the *Gagnon* case and have shown *the statutes involved* in that case to *have been repealed* prior to the Ryegate happenings, and that the present Montana laws do not carry comparable provisions. Further, there was no laches on the part of the bondholders of the Ryegate issues because there had been no default, and therefore no right to ask a court's assistance, when the property owners in the *Belecz* suit undertook to destroy the underlying security.

Stanley v. Great Falls, 86 Mont. 114; 284 Pac. 134, deals with the constitutionality of the revolving fund act of 1929 and the language quoted by Judge Pray is used by way of argument to show the private interests in the unpaid bonds sought to be redeemed out of the revolving fund, thereby disclosing the unconstitutional feature of applying public funds to a private purpose. The case is not in point.

State v. Jeffries, 83 Mont. 76; 270 Pac. 638, holds county property to be subject to an improvement assessment. It also holds that special improvement liens are

extinguished by general tax foreclosures. It has no bearing on the case at bar.

In re Pomeroy, 51 Mont. 119; 151 Pac. 333, deals with retrospective laws touching escheat.

Windfall City v. Bank, 172 Ind. 679; 87 N. E. 894, correctly states the rule as to the initial liability for the payment of special improvement securities. The case holds the city not liable for an assessment which had been made on school property which was exempt. The opinion cites with approval *Spydell v. Johnson,* 128 Ind. 235; 25 N. E. 889, discussed at greater length in an earlier portion of this brief under the equity jurisdiction applicable. The more recent case of *Dublin v. State,* 198 Ind. 164; 152 N. E. 812, shows the Indiana rule to be in accord with the great weight of authority in holding a municipality liable for its breach of duty in such cases.

The cases of *Morrison v. Morey,* 146 Mo. 543; 48 S. W. 629; *Castle v. Louisa,* 187 Ky. 397; 219 S. W. 439, and *Atkinson v. Great Falls,* 16 Mont. 372; 40 Pac. 877, all hold in accord with the great weight of authority that the "indebtedness" inhibited by the constitution does not include special improvement obligations where the city has not directly pledged its own credit as of the first instance. We fully agree, as heretofore discussed, this has nothing to do with its liability for breach of duty to make valid assessments, etc.

Deer Creek District v. Doumecq District, 37 Idaho 601; 218 Pac. 371; is opposed to the federal rule and the great weight of authority with respect to estoppel. It is based on the peculiar provision of Idaho's Constitution. Montana has no comparable provision.

Mittry v. Bonneville, 38 Idaho 306; 222 Pac. 292, deals with bonds partially in excess of the legal limit and holds them good up to that limit, and bad only as to the excess. This has no direct bearing on the case at bar.

Hitchcock v. Galveston, 96 U. S. 341, is a case holding the city for a *quantum meruit.* The facts do not show the city to have had no direct liability, but the theory of the case and the sustaining argument is in favor of plaintiff's position here. With respect to such contentions it has been cited innumerably in the later decisions of the federal court. It does not oppose plaintiff's position.

Litchfield v. Ballou, 114 U. S. 190, does not pass upon the liability of a town under similar constitutional provisions, where the town has been guilty of a breach of duty. In this case the assessments and levies made do not partake of special improvement character. They were bad because of a failure to hold an election authorizing the excess indebtedness. Justice Miller, while emphasizing the value of the constitutional limitation does not hold that the town would not be liable for the return of property which can be identified, or for the payment of its value if it has used the same. The case involved an asserted equitable lien upon the water system, with respect to which the complainants hold only a fraction of the bonds, and the water system had been constructed with moneys secured from many other sources, including general taxation. The court was powerless to identify the property, which in equity belonged to the complainant, but it is clear that had it been able so to do the complainant would have had relief. *Litchfield v. Ballou* has

been cited in numerous cases. We respectfully refer to Judge Kenyon's discussion and distinction found in *Scott County v. Advance-Rumley,* 288 Fed. 739; 36 A. L. R. 937, which last case holds that a general estoppel will be raised against a municipality where it has used the property, notwithstanding contract void as made without prior appropriation. He shows that under inequitable circumstances a municipality will be estopped to deny its liability. Careful research is shown in this opinion, which is commended to the court for a careful reading.

Eaton v. Shiawassie County, 218 Fed. 588, held a contract void as to the excess in connection with a courthouse construction in Michigan. The Circuit Court of Appeals for the 6th Ciruit for itself construed the Michigan Constitution to prevent such excess. This had nothing to do with a special improvement or a breach of duty connected therewith. We contrast this decision with the more recent case in the same circuit of *Eyer v. Mercer County,* 292 Fed. 292, affirmed at 1 Fed. (2d) 609. The *Mercer County* case held the county liable, notwithstanding its failure to hold an election, and notwithstanding apparent knowledge of defects on the part of the noteholder who advanced the funds in the first instance. The principle is one of common honesty and morality. Where the money has been received it must be repaid when applied to an authorized municipal purpose.

Santa Cruz v. Wykes, 202 Fed. 357, is a decision by this court which holds the City of Santa Cruz liable for bonds which may have been invalid when issued, but subsequent legislation permitting a larger percentage of

indebtedness to be created was effective to validate them. The case discusses the broader liability of a municipality when dealing with a water-system and other activities which are proprietary in their nature as distinguished from governmental. The case is an authority in plaintiff's favor if it has any bearing at all.

Moore v. Nampa, 18 Fed. (2d) 860, was decided by this court recently. It was thereafter reviewed on certiorari by the Supreme Court. (See 276 U. S. 536, 48 S. Ct. 340). The case originated in the District Court of Idaho. The City of Nampa made a sewer improvement under the Idaho laws.

The Idaho statute provides that no contract shall be made for work at a price in excess of the estimate. The language is prohibitory. The Montana statutes do not prohibit such excess, the resolution of intention need only be an "approximate estimate."

The Nampa *bonds in question were entirely an excess issue.* The original estimate upon which bonds were issued had been found insufficient upon the completion of the work and supplemental ordinances were adopted which attempted to legalize a defective estimate with respect to which there was no statutory authority whatever. It must be recognized that a municipal corporation has no powers except as granted by the legislature. It was therefore *wholly without power at any time under any circumstances to issue valid bonds for the excess costs.* Montana has no similar legislation unless it be found in the statute relating to a price of $1.50 per lineal foot for the cost of laying pipes, which under the authorities would be valid to that amount under any cir-

cumstances. The Ryegate issue involved herein is not an excess issue, even under that construction.

The Idaho statutes include a thirty day limitation for the bringing of suits by property owners to test the legality of improvement proceedings. The excess bonds were authorized January 10, 1921. A property owner, Lucas, brought a suit February 5. The bonds were delivered March 8 to a bond house notwithstanding, who sold them to the plaintiff July 13. The bonds carried a general recital as to the validity and the performance of all things necessary to be done, happened and performed. Certain officers of the city signed a separate but false certificate to the effect that no litigation was pending or threatened, which accompanied the bonds at the time of their delivery, March 8. Upon this false certificate *and the transcript of the proceedings, which disclosed the issue to be wholly an excess issue,* attorneys for the bond house gave an opinion that the bonds were legal.

The property owners' suit proved to be successful and the bond issue was invalidated and the assessments enjoined against by the Supreme Court of Idaho. Thereafter the owner of the bonds brought his action *in tort* for *neglect* and *false representations* made. The neglect contended for was failure to make valid ordinances respecting the excess upon which valid assessments could be predicated, and the false representations were declared upon as growing out of the recitals and the separate, unofficial but false certificates as to no pending litigation.

The Federal Supreme Court holds there to be no such neglect, since the proceedings were wholly that of attempted authorization of excess bonds which were necessarily invalid. They were void from the beginning, there being no power to issue excess bonds under any conditions. That being true, there was no obligation to make valid assessments to support them.

The Federal Supreme Court further holds that the representations complained of *were not made to the bondholder* who purchased his bonds months after this representation was made to the bond house. No representations had been made by the officers of the town to the bondholder at all. There was no legal authority for these officers to make such a certificate to anyone. And further, the opinion of attorneys to the effect that the issue was valid could not bind the city, they being mere expressions of opinions of other parties.

The case further discloses that *the transcript* of the proceedings furnished *fully disclosed all of the defects, and* since knowledge of the law is imputed to all parties dealing therewith, it must be held that *knowledge of illegality was brought home to the bond house.* Being special improvement bonds and not negotiable, the ultimate purchaser had no better right than did the bond house.

This has no bearing whatever as determinative of the matters in the case at bar. Reygate was not dealing with an excess bond issue. The transcript of the proceedings, if furnished, could not disclose under any circumstances that the entire issue was void for excess, whether it be in excess of estimated costs or of the cost

of pipe plus a legal laying cost. The Montana statutes do not prohibit excessive costs *ex vi termini.*

It must be noted with care that the *Nampa* case was reviewed on a certiorari based upon a number of cases cited in the note as being in conflict with the decision of 18 Fed. (2d) 860. The cases noted include *Barber Asphalt Co. v. Denver,* 72 Fed. 336; *Barber Asphalt Co. v. Harrisburg,* 64 Fed. 283 (certiorari denied 163 U. S. 671); *Mankato v. Barber Asphalt Co.,* 142 Fed. 329; *Bates County v. Wills,* 239 Fed. 785, 789; and others. In concluding his opinion Justice Butler takes pains to say that the *Nampa* case does not conflict with these authorities, which our earlier discussion has shown to be in accord with plaintiff's position in the case at bar. Further he limits the opinion to the precise form of action and allegations of negligence made.

ERRONEOUS ASSUMPTIONS BY JUDGE PRAY

In reading the opinion of Judge Pray we are impressed with the court's errors in *assuming facts and* underlying *conditions to exist, which assumptions are inaccurate* and *not in harmony with the existent facts and history.* Judge Pray in passing refers to the bond issue as having "been declared illegal and void." (p. 94) The State Court did not so decree as we have heretofore demonstrated. Its decree touched only the levies and assessments made on the specific real estate described (p. 91). Again (p. 95) the court is inaccurate in referring to the improvements actually installed as a "waterworks," "water system of reservoirs, pumping plant," etc., whereas the scheme was planned (p. 212)

to pay for those items out of the $15,000.00 general bond issue. And the court *in the absence of a record herein* states (p. 95) that timely protests *were filed as provided by law,* whereas no such *issue* was before the court and the town in the *Belecz* case had sworn (p. 82) that *no* such protests were made, and the *Belecz* plaintiffs admitted (p. 83) such assertion!

Plaintiff's position is inaccurately stated by the court (p. 96)) to mean that the town had no authority to create special improvement districts. That is not plaintiff's position as the pleadings demonstrate, but some argument was made to the court that if the town had no authority to create District No. 4—an improvement for the entire town's benefit, though at the expense of property within the district only—one theory— the town would be liable under its general powers in quantum meruit. That is an alternative theory of liability on the town's part; but plaintiff, as this brief discloses, contends that the town created the district and further breached its duties relating to valid assessments, etc., touching the same.

Again (p. 97) the court refers to the bonds being declared invalid, excepting the $15,000. There was no declaration or decree of any bond invalidity. The court errs again (p. 97) in saying the town found $15,000 to be the maximum amount of issue possible without taxpayers approval. Under the Montana laws (Sec. 5039, subd. 80) *no bond can be issued without a taxpayers vote* of approval. There is no record herein of such a question being raised or discussed much less "found." This statement is wholly *ex gratia,* and the

error is repeated (p. 98) when the court states that the method adopted was to do indirectly what it could not directly do "without an election and favorable majority vote." The law required an election, and an election was held on the general bond issue and the question of exceeding the 3% limitation. The *law makes no limit* on such bonded debt for acquisition of a water system (Sec. 5039, subd. 80) since the ten percentum limit applies *ex vi termini* only to sewerage systems. *Edmunds v. Glasgow,* 300 Pac. 203.

Again (p. 98) Judge Pray states that plaintiff claims to have no recourse against the district because of the State Court decree. The reason stated is an error. Plaintiff has no right directly against the district because the district is not an entity; it is not a municipality; it cannot be sued; it has no officers; it has no legal status other than a mere physical subdivision of a town. It is about the equivalent of a precinct. Plaintiff's rights are of necessity against the town, even as a foundation for enforcement against the properties. It is also charged with certain duties in the premises. The former statutes gave the bondholders a direct right of enforcement against the benefited properties, but that was repealed as heretofore explained in discussing *Gagnon v. Butte,* 75 Mont. 279, 243 Pac. 1080.

Further (p. 99) the court asserts that if the question had been submitted to the taxpayers the town's obligation would be clear. The $15,000 bond issue and the question of exceeding the constitutional 3% limitation were submitted to the taxpayers and favorably voted upon. But the court assumes no election to have been

held (p. 100) in order to save expense. *This is entirely a mistake.* An election was held and the expenses incurred, and the $15,000 issue is based thereon. The court (p. 103) once more assumes that $15,000 was the maximum direct obligation which the town could legally incur. That is wholly wrong. The Constitution, Art. XIII, Sec. 6, makes no limit as to water supply, etc., if a vote is had; and the Legislative Assembly (Sec. 5039, subd. 80) made no limit against water, but fixed a 10% limitation on sewer, while requiring an election and vote in order to validate *any amount of bonds,* irrespective of limitations. This error in the assumption of no election is repeated (p. 111). Apparently Judge Pray has believed the election should have specifically authorized as a direct obligation of the town, the $45,-602.40 issue of special bonds involved herein. That is not necessary under the doctrine of *Carlson v. Helena,* supra. In these erroneous assumptions of fact may be found support for plaintiff's *Assignments of Error* Nos. I, V, VI, VII and VIII.

The court (p. 109) assumes that questions might be advanced before the State Court, but not in the Federal Court now. This error grows out of the legal assumption of *res judicata* which is of course not involved. See pages 63-72 of this Brief.

LIABILITY BASED UPON UNJUST ENRICHMENT

At the opening of this brief we have suggested the application of the broad principle of unjust enrichment as an underlying basis of liability asserted herein. Here and there throughout the cases one will occasionally find the expressions of judges to the effect that municipalities on the principles of common honesty and morality have no more right to enrich themselves at the expense of contractors or bondholders than a private corporation or an individual. This is particularly true where the municipality has received the benefits in the form of a municipal plant. And in the case at bar it must be remembered that a water-system and distributing mains and hydrants are involved, which, although they may as to the latter be a proper basis for a special improvement within a special improvement district, they may on the other hand properly be classified as a general improvement for a municipality itself and for its inhabitants irrespective of the confines of an improvement district. This is the more emphatic when, as in the case at bar, the Town of Ryegate had no other municipal water system whatsoever. It is indeed assumed by Judge Pray that the town might have installed the entire water-system and the distributing mains at the expense of the town had the procedure been so developed.

The principle of unjust enrichment referred to was a favorite one with the late Dean Ames of Harvard Law School. To show the history of this underlying liability we refer to *"Lectures on Legal History"* (1913, University Press, Cambridge). This volume was published

after the death of Mr. Ames and contains his lectures on legal history touching various actions, their origin and underlying bases of liability. His Lecture XII (pp. 120-128) deals with the history of "Simple Contracts Prior to Assumpsit", and at pages 127-128, the author points out that as early as the 15th Century, obligations were enforced, although a promise was not present, money having been paid and received under expectation that performance would be made. A defendant might not rely upon the common law being insufficient to supply a remedy and equity would enforce the right and prevent defendant enriching himself at the expense of plaintiff.

In Lecture XX (pp. 233-242) the "Origin of Uses" is historically traced and the author points out (p. 234) the difference between legal and equitable relief in the early days, especially noting that where equity offered an exclusive remedy, as in recovering specific property by reason of fraud, return of consideration for a promise upon defendant's refusal to perform, etc., the author points out that in most of these cases it would be found that plaintiff was seeking restitution from a defendant who was trying to unconscionably enrich himself at plaintiff's expense, and that this early English equity of the 14th Century was giving effect to an enlightened sense of justice in order to supplement the rigor of the common law.

In his Lecture XIV on the subject of "Implied Assumpsit", which is also found in 2 *Harvard Law Review* 53, the author deals with the development of implied assumpsit and distinguishes quasi-contracts, pointing

out that quasi-contract rests upon the fundamental principle of justice, that no one ought to unjustly enrich himself at the expense of another. This discussion (pp. 160 to 166) shows the development of the action for money had and received as applicable thereto, traces its development through the earlier years until fully established in the days of Lord Mansfield.

We have referred to the foregoing to support the early statement of this brief and to show the broad principle as underlying not only general equity, particularly the law of constructive trusts, and to show the early tendency of equity to grant relief where the rigid principles of the common law were unresponsive. Then the development of the common law actions in the later years, and particularly the action of indebitatus assumpsit in Lord Mansfield's day, brought substantially the same relief, but based upon the identical principles, into the law courts. Applied to the case at bar, therefore, it is immaterial whether, so far as underlying principles are concerned, relief should be granted as in equity or at law, although the necessity of securing an accounting and to enforce necessary orders looking toward relief, make the remedies of equity as administered today more appropriate than the judgments had at law, unless the case is to be wholly determined upon the liability of the town itself in its breach of duties, with respect to which a judgment at law against the town for the full amount will fully compensate plaintiff herein.

See also text by Prof. Williston touching "unjust enrichment" found *I Williston "Contracts"*, pp. 4, 5,

and statement of Cochran J. at 292 Fed. 297, 298, in *Eyer v. Mercer County.*

In his opinion (Tr. 109, 110) Judge Pray states that many taxpayers are not benefited by the improvement made and had had no right to object thereto; and relied on the expressions of the Washington Supreme Court in the *German-American Bank* case in his position. Let us note first that that case and also the *Gagnon* case dealt with *street grading* improvements, which almost exclusively benefits the abutting property. The case at bar deals with the town's only supply and distribution of *water,* a first necessity to a community in a semi-arid locality, and such a necessity as to secure special Constitutional recognition for increased indebtedness. Many authorities refer to a water supply as the first of municipal needs both for domestic use necessary to health and comfort and protection against fire. Next let us note the construction shown by the map to be one where the pipes and hydrants are so located as to give the very greatest protection and use for the entire town, and so installed as to be the foundation of future extensions at a minimum cost. Again let us note that the taxpayers were liable on the general obligations of the town, the proceeds of which procured the water supply, reservoir, pumping-plant, etc., but did not provide distributing mains, much less fire hydrants. The general taxpayers' investment in well, reservoir, pumping-plant, etc., was practically valueless without the distributing pipes and hydrants, so that in fact the entire benefit secured by such taxpayers is in fact directly attributable to the pipes and hydrants paid for by plaintiff. Suppose these

outside taxpayers had successfully protested and defeated a proposal to acquire the distributing system, then their property would have had *no practical benefit whatever*. Further, we repeat that plaintiff was guilty of no lack of diligence, since no default had occurred prior to the *Belecz* suit and the attempt of the benefited property owners to escape liability for paying for the improvements which they were enjoying. To say the general taxpayers received no benefits in the case of water supply plus fire protection cannot be in accord with the actual facts. The property owners have been enriched at plaintiff's expense and the town is directly enriched as the owner of the improvement system which it operates as a proprietary business, respecting which its position is identical to that of an individual or private corporation; and unless the standards of municipal honesty are to be lowered to and supported at the level of one who acquires property of another under promise of payment, but who thereafter refuses to pay therefor, though using the same to his profit or comfort, the Town of Ryegate must be held liable to plaintiff herein. We are not dealing with such a *special* improvement as paving, sidewalks, curbing, lighting or even sewerage. This case deals with necessary water for the town.

CONCLUSION

Briefly let us summarize the features of this case and the applicable law.

It is clear that defendant town should account fully to plaintiff with respect to moneys collected but not paid over to plaintiff as holder of all the bonds in question. Assignment of Error I is well taken in this respect.

There is no legal requirement that notice of the letting of the construction contract be given property owners. The published notice to bidders, however, gave equivalent information to those who might be interested. No issue in the pleadings is made touching such notice. The trial court erred in making such a finding and in basing responsibility of plaintiff thereon. If such a notice were required, it was defendant's duty, not plaintiff's, to give it. Absence of such notice could not legally assist the position of property owners who did not move to contest proceedings for more than 18 months. Assignment of Error II is well taken.

The testimony of *Thien* (p. 210) did not permit the introduction of evidence as to the estimate at the time of the contract's award. The court's finding thereon was not supported by the record, and Assignment of Error III is well taken.

The pleadings in the *Belecz* case, as frequently mentioned, alleged on the part of the town, and the Belecz plaintiffs by reply admitted, that no protests had been filed within the 60-day period. Judge Pray's finding that protests were duly filed is a plain mistake. Assignment of Error IV is well taken.

A scrutiny of the map of Ryegate and the location of the pipes and hydrants in relation to the town, plus the testimony of Roscoe (pp. 183-185), which is uncontradicted, conclusively shows the improvements as made to contemplate future additions at small expense to serve the entire town. The map shows mains and fire hydrants to be located at the very outside boundaries of District No. 4, so that the area for a considerable distance outside had the full benefit of fire protection and could attach service pipes for domestic use at very slight additional expense. The entire plan was plainly for the general benefit of the town and practically all of its inhabitants. Not a single dwelling outside the district was or is too remote to make a practicable service connection. Assignments of Error V and VI are well taken.

Assignment of Error VIII touches the Constitutional limitation of indebtedness. If the town is held liable for damages in failing to perform its duties in making valid assessments, then that liability is not "voluntarily" created and under all the authorities cited, the Constitution does not affect such. With respect to *quantum meruit,* the town voted to exceed the limit, it had the general power to acquire a water system, it has accepted and now uses such a system. In paying therefor it is not violating the Constitution but acting thereunder. And if there had been no such election, a respectable line of authority holds the town liable under general principles of honesty and justice, it having power under some circumstances, or use of certain methods, to acquire a water system, etc. Assignment of Error VIII is clearly well taken.

Assignment of Error VII goes to the entire subject of liability. We have shown several theories of such. There is no escape from liability whether at law or in equity for the moneys already collected; for damages in failing to set up valid machinery for collection, assessments, etc., or for the reasonable value of the system it has acquired and refuses to pay for. We have so fully discussed this liability that we only repeat that the defendant town cannot in equity or law be permitted to have and use this improvement without payment of the resultant obligation. Municipal morals are no different than those of individuals or private corporations.

Respectfully submitted,

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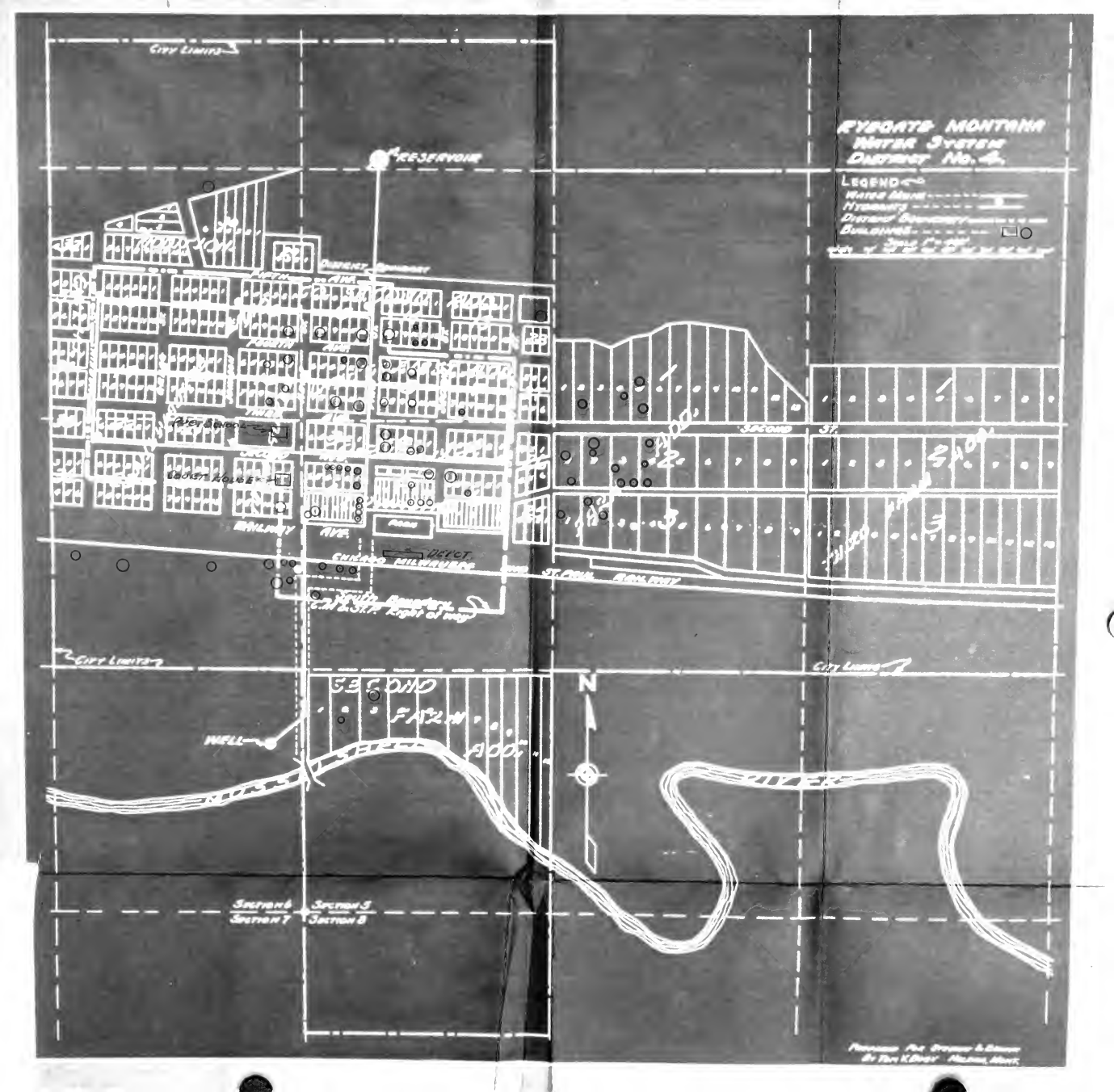
FYSDALE MONTANA
WATER SYSTEM
DISTRICT No. 4.
LEGEND
CITY LIMITS
RESERVOIR
DISTRICT BOUNDARY
SECOND ST.
DEPOT
CHICAGO MILWAUKEE
CITY LIMITS
WELL
SECOND FALLOW
N
SECTION 6
SECTION 7
SECTION 5
SECTION 8

No. 6564

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

LUMBERMEN'S TRUST COMPANY,
a corporation,

Appellant,

—vs.—

THE TOWN OF RYEGATE, MONTANA,
a municipal corporation,

Appellee.

Brief of Appellee
Upon Appeal from the United States District Court for the District of Montana

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Filed....., 1931

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BILLINGS GAZETTE, BILLINGS, MONTANA

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Brief of Appellee

GENERAL STATEMENT

This action was begun by appellant for the purpose of imposing a general liability upon appellee in the sum of $45,602.42, with interest thereon at six per cent per annum from January 1, 1922, in violation of the constitutional provisions of the State of Montana.

In the year 1919 it was desired to secure the benefit of a water supply and distribution system for a portion of the Town of Ryegate, Montana. The total cost of the work done was $60,602.42. Of this amount the Town of Ryegate raised the sum of $15,000.00 by the issuance and sale of its general obligation bonds of the par value of $15,000.00. To raise the addi-

tional sum of $45,602.42 the town attempted to create a special improvement district within the corporate limits of the town, embracing approximately one-sixth of the area of the town, and bonds of such special improvement district in the sum of $45,602.42 were issued and delivered to the contractor as the work progressed, in payment therefor. (Tr. 53 and map of town, copy of which is attached to appellant's brief.) The general obligation bonds in the sum of $15,000.00 are conceded to be valid and are in no way involved in this litigation. The indebtedness represented by the special improvement district bonds is the subject of this litigation.

The first assessment on property in the district for payment of interest and a portion of the principal of said special improvement district bonds became due November 30, 1921. In January, 1922 various persons owning property in the district instituted actions against the Town of Ryegate and the county treasurer of Golden Valley County, Montana, in which that town is situated, to restrain the collection of such assessments, the duty being imposed by the laws of Montana upon the county treasurer to make such collections. The grounds upon which it was sought to restrain such collection are set forth in subdivision V of appellee's answer. (Tr. 31) That litigation resulted in decrees holding that such assessments were null and void and restraining any attempt to collect same. (Tr. 89) No appeal has ever been taken from any of said decrees.

The only issue before the trial court was whether a money judgment for the sum of $45,602.42, with interest thereon, could be rendered against the town as for money had and received or on an implied contract for the balance due on the construction on such water system, evidenced by the invalid bonds of the

special improvement district of the town. (Tr. 8, 9, 94, 95, 96, 98, 111 and 179).

In appellant's brief there are numerous statements that an election was held in the Town of Ryegate to authorize the issuance of the general bond issue of $15,000.00 and to increase the general indebtedness of the town above the constitutional limit of three per cent. The record fails to show any justification for such statement. In "stipulation as to facts" (Tr. 82) it is agreed that the town could not legally and constitutionally issue sufficient general bonds to cover the entire cost of installation of the water system. In appellant's complaint (Tr. 2 to 9) there is no statement that any part of the cost of the system was paid by a general bond issue of the town.

Appellant, who purchased the bonds from the contractor, was not known to have any interest in the transaction until long after the contract for the construction of the system and payment therefor by the issuance and delivery of the bonds in question was entered into. (Tr. 204, 205, 206, 207, 208, 230, 232, 233, 234, 235, 236, 248 and 249). Appellant's name never appeared in the minutes of the town council. (Tr. 123). The improvement district bonds were accepted by the contractor in full payment of cost of constructing system over and above that paid by the issuance and sale of the general bonds of the town. (Tr. 117, 129, 213). Contrary to the allegations of appellant's complaint, the officers of the town did not importune appellant to buy the bonds in question. (Tr. 230, 231, 232 and 236). There is no testimony in the record that the officers of the town ever did so.

On page 270 of appellant's brief it is asserted that "not a single dwelling outside the district was or is too remote to make

a practicable service connection" with the water system in question. In "stipulation as to facts" (Tr. 57) it appears that "there are twenty-two residences and two county warehouses in the Town of Ryegate situated outside of the limits of said special improvement district which cannot use said water system and improvements or equipment for fire protection or for any other purpose, as the same was installed."

As the issues were framed and presented to the trial court, only two questions arose:

1. Is a city or town in Montana liable for a debt represented or evidenced by the bonds of a special improvement district therein, which, by their terms, are made payable from a special fund derived from special assessments upon and against the real property within the district?

2. If so, can the Town of Ryegate be held liable in the case at bar in view of the provisions of Section 6 of Article XIII of the Constitution of Montana?

We shall discuss those questions, and they were the only ones presented to the trial court for its determination, in the order named.

WOULD THE TOWN OF RYEGATE BE LIABLE FOR THE PAYMENT OF THE INDEBTEDNESS IN QUESTION IF IT WERE NOT FOR THE INHIBITION OF THE CONSTITUTION OF MONTANA?

POINT AND AUTHORITIES

The statutes of Montana provide that all warrants and bonds of a special improvement district are payable from a special fund derived from special assessments upon the real property within the district and that such bonds and warrants shall so

state. Because of such statutory provisions, there is no liability from appellee to appellant.

Chap. 56 of Part IV, Secs. 5225 to 5265, R. C. M. 1921; Chap. 24, 1929 Session Laws of Montana; Stanley v. Jeffries, 86 Mont. 114, 284 Pac. 134; Stanley v. Gt. Falls, 86 Mont. 114, 284 Pac. 134; Gagnon v. City of Butte, 75 Mont. 279, 243 Pac. 1085; Moore v. City of Nampa, 18 Fed. (2d) 861; Moore v. City of Nampa, 276 U. S. 536, 48 S. Ct. 340; New First Nat. Bank v. City of Weiser, 166 Pac. 213; Town of Capitol Heights v. Steiner, 101 So. 451; Town of Windfall City v. First Nat. Bank, 87 N. E. 984; Castle v. City of Louisa, 219 S. W. 439; Morrison v. Morey, 48 S. W. 629; White River Savings Bank v. Superior, 148 Fed. 1; Steiner v. Capitol Heights, 105 So. 682; Brooks v. City of Oakland, 117 Pac. 433; City of Beggs v. Kelly, 238 Pac. 460; Sec. 11, Art. XII, Constitution of Montana; Hasbrouck v. City of Milwaukee, 80 Am. Dec. 718; Mote v. Incorporated Town of Carlisle, 233 N. W. 695.

ARGUMENT

In discussing this question, frequent references are made to statutory provisvions, and while the proceedings which are involved in the determination of this case were carried on in the years 1919 and 1920, the codes of 1921 contain the statutes which were then applicable, and for convenience we will refer to those codes instead of to the session laws then existing.

Two complete systems are provided by our law, under either of which the benefits of public improvements such as water works and sewer systems may be secured by the inhabitants or a portion of the inhabitants of a city or town. One of these systems is provided for by paragraph 64 of Section 5039 of the 1921 Political Code. Thereunder it is provided that a city or town council has power to contract an indebtedness on behalf of a city or town for the construction of a water works system supplying the city or town after the proposition has been sub-

mitted to the vote of the taxpayers affected thereby and the majority vote cast in favor of the improvement. Thereunder, of course, the debt becomes and is a general obligation of the city or town. The other of these systems is provided for in Sections 5225 to 5265 of the 1921 Political Code and contemplates the creation of a special improvement district embracing the property to be benefited by the improvement, and providing for the payment of the cost of the improvement to be borne by the property benefited.

It sufficiently appears from the pleadings and the evidence that the latter method was adopted for the construction of that part of the water system of the Town of Ryegate whose cost is represented by the bonds held by the appellant herein.

We shall later discuss the effect of the constitutional provision of Montana with reference to limitations on indebtedness of cities and towns, but we now contend that regardless of the constitution of Montana the claim of the appellant herein cannot be imposed as a general obligation upon the Town of Ryegate.

As we have indicated, the debt to appellant was incurred under the law which is now embodied in Sections 5225 to 5265 of the Political Code of Montana for 1921. That law provides for the creation of special improvement districts and for the construction and installation therein of the particular public improvement specified, including water system. Section 5238 provides that the city council shall assess the entire cost of the improvement against the property included in the district in accordance with one of the two methods therein indicated. Section 5240 provides that the city council shall levy a tax upon all property included within the district to defray the cost of the improvement. Section 5247 provides that the assessment so

levied shall constitute a lien against the property upon which it is made and levied. Setcion 5249 provides that all costs and expenses incurred in the construction of the improvements specified shall be paid for by special improvement bonds or warrants which shall be drawn against the special improvement district fund created for the district. Section 5250 provides that, whether provided for in the call for proposals or not, all contracts let shall be payable in the bonds or warrants of the district.

Appellant's Exhibit A (Tr. 10) is a copy of the resolution of intention to create Special Improvement District No. 4. Section 8 thereof is as follows:

> "That all the cost and expense incurred in the construction and making of such improvements shall be paid by Special Improvement District Bonds, with interest coupons attached; such bonds shall be drawn in substantially the form provided by law in such cases and shall be drawn against 'Special Improvement District Fund No. 4', hereafter to be ordered and created, and that the entire cost and expense of said improvement shall be paid by said Special Improvement District. The entire cost of said improvements shall be assessed against the entire district, each lot or parcel of land within said improvement district to be assessed for that part of the whole cost of said improvements which its area bears to the entire area of said district, exclusive of streets, avenues, alleys and public places." (Tr. 14).

Section 2 of Ordinance No. 28, authorizing the execution and delivery of coupon bonds in payment for the work and improvements in this special improvement district, provides:

> "That the entire cost and expense of making and installing said improvements shall be paid in ten (10) equal annual installments, and bonds therefor are to be drawn against the fund of said Special Improvement District No. 4, *and made payable exclusively from said fund.*" (Tr. 39).

As alleged in the complaint herein, contract for construction of water system was let to the Security Bridge Company, and the specifications attached to the contract provide the method of payment to the contractor in the following words:

> "The Town now has avaivlable from the proceeds of general obligation bonds, $15,000.00 in cash * * * to apply on the construction of the water system. After deducting the preliminary expenses this money will be paid to the contractor in cash for the construction of the reservoir, pump house, pumping plant * * * and such of the main water line * * * as it will cover. The balance of the water system is to be paid in Special Improvement District Bonds drawn against Special Improvement District No. 4 in the Town of Ryegate, Montana * * * . *These bonds will be accepted by the contractor in full payment for such work at their par value.*" (Tr. 212-213).

The bonds themselves provide:

> "The Treasurer of the Town of Ryegate, Montana, will pay to the bearer on the 1st day of January, 1930, the sum of Five Hundred ($500.00) Dollars, as authorized by Resolution No. 14, as passed on the 17th day of February, 1920, creating Special Improvement District No. 4, for the construction of the improvements and the work performed as authorized by said Resolution to be done in said District, and all laws, resolutions and ordinances relating thereto, in payment of the contract in accordance therewith. * * *
>
> "This bond is payable from the collection of a special tax or assessment, which is a lien against the real estate within said Improvement District as described in said Resolution No. 14 as well as in Resolution No. 10 passed and adopted December 30th, 1919." (Tr. 16).

There is not a word in the law which authorizes an inference that the credit of the town is pledged as security for the indebtedness incurred in connection with the construction of the improvements in a special improvement district, nor is there a word in any resolution or ordinance of the town council of

Ryegate, or in the contract or in the bonds themselves which justifies the assumption that the Town of Ryegate is in anywise responsible for the debt created.

Our supreme court has very recently passed upon the action of the legislature of Montana whereby it attempted to do by the enactment of a law what this court is asked to do by judicial decree.

It is a matter of common knowledge that for some years past there has been a continual and increasing default in the payment of special improvement district bonds of cities and towns throughout Montana, with the result that that particular class of securities has, to some extent at least, lost its appeal to investors as a safe and conservativev investment. Our legislative assembly attempted to remedy the situation by the enactment of Chapter 24 of the 1929 Session Laws, which authorizes cities and towns to create a revolving fund by general taxation, to be used for making up delinquencies in special improvement district funds. In a nut shell, towns and cities were to be authorized to assume as general obligations the debts of their special improvement districts.

Recently two cases were submitted to the Montana Supreme Court from Great Falls, wherein the validity of this law was considered. The two cases were disposed of as one by that court. Those cases are Stanley v. Jeffries and Stanley v. Great Falls, 86 Mont. 114; 284 Pac. 134. In the first case the question considered was the validity of the law insofar as it applied to special improvement districts to be created after the law went into effect. Therein the court said:

> "When, therefore, the Legislature provided that, as to special improvement districts created in the future, a fund

shall be created to insure the prompt payment of bonds and warrants issued in payment of such improvements, it but modified the special improvement district law to impose upon the general public, within the municipality, a conditional obligation to pay a small portion of the cost of erecting the public improvement, whereas it might have, lawfully, imposed a much greater burden upon the municipality."

In the second case the question was as to the validity of the law insofar as it applied to special improvement districts created before its enactment, and in considering that question our supreme court said:

"Herein the legislature did not attempt to impose a liability upon the people with respect to past transactions, but merely gave them the option to impose such a burden upon themselves if they saw fit, which, in so far as this inhibition of the Constitution is concerned, they may do. In re Pomeroy, 51 Mont. 119, 151 P. 333.

"The act does not offend against the prohibition contained in section 13 of article 15 of the Constitution.

"However, what is the purpose of the act in so far as it deals with special improvement district bonds and warrants issued prior to the date thereof? Such bonds and warrants were, it is true, issued for the purpose of constructing a public work, and consequently issued for a public purpose, but the transaction has been completed and the bonds and warrants accepted in full settlement thereof; they have passed into the hands of individuals or corporations. *With respect to these, there is no duty or obligation resting upon the city other than to enforce and obey the provisions of the special improvement district laws;* if this is done, and still a loss is suffered by reason of deficiencies in that law, *the loss falls upon the holders of the bonds and warrants, and not upon the city.* * * *

"Here the situation discussed in Stanley v. Jeffries is reversed. The purpose of the act, in so far as it authorizes the assumption of liability for losses suffered by the holders of bonds and warrants issued prior to the passage of the act, must be held to be reimbursement of those holders for such losses, and, although it is urged that such action would

> tend to rehabilitate the city's credit, such a purpose, if it existed, must be held to the secondary or incidental purpose. * * *
>
> As it clearly appears that the portion of the act now under consideration authoriezs the levy and collection of taxes for a private purpose, it is violative of section II, art. 12, of the Constitution, and cannot stand."

Certainly the latter decision is directly opposed to the contention of appellant. If a city or town may be held liable on implied contract or otherwise for the indebtedness represented by special improvement district bonds, the city or town is primarily the debtor and the credit of every city and town in the state is pledged to the payment of every special improvement district bond issued in the state, provided they cannot for any reason be paid out of the funds of the special improvement district itself, and there could be no objection, constitutional or otherwise, to a law authorizing cities and towns to recognize that indebtedness and to make provision for its payment as a general obligation out of their general funds. However, as our court says with respect to these bonds and indebtedness, there is no obligation resting upon the city other than to enforce the provisions of the special improvement district laws, and if there be a loss that loss must fall upon the holders of the bonds.

> "The legislative assembly shall pass no law for the benefit of a railroad or other corporation or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state a new liability in respect to transactions or considerations already passed." Sec. 13, Art. XV, Constituiton of Montana.

Under that section of our constitution, if the legislature of Montana should attempt to pass a law compelling the various towns and cities of the state to assume, as a direct obligation

of the municipality, the special improvement district bonds of such municipality which, for any reason, had not been paid out of the collection of district assessments, such act would be unconstitutional. It would be equally unconstitutional for this court to grant the relief prayed for by appellant, which, in effect, would be judicial legislation.

In the case of Gagnon v. City of Butte, 75 Mont. 279, 243 Pac. 1085, our court said:

> " 'When the charter or statute authorizing the improvement, or an express stipulation in the contract, provides that the contractor shall be remunerated from the proceeds of an assessment on the property benefited and shall look only to the assessment as the source of payment, or when the city charter provides no other means to pay the contractor than the proceeds of the assessment as it is collected, there is no liability in the city to the contractor other than to make and collect the assessment and pay it over, unless the city fails in some duty it owes to the contractor connected with the levy and collection of the assessment. Upon the receipt of the assessment the city becomes liable to the contractor as for money received to his use.' (2 Dillon on Municipal corporations, 5th ed., sec. 827.) * * *
>
> "Primarily, the city of Butte incurred no personal ilability to the contractor who did the work. It was merely constituted *an instrumentality of the law* in initiating and carrying out the improvements and in collecting the money due upon assessments made by it against the property benefited in order to pay the obligations incurred in execution of the work. * * *
>
> "The plaintiff was chargeable with knowledge of the nature and terms of the city's obligation with respect to the bonds, and to now permit him to hold the general taxpayers responsible because of the neglect of duty on the part of the city treasurer would be manifestly unjust.
>
> "Reason in support of our conclusion is well stated by Mr. Chief Justice Scott, speaking for the supreme court of Washington in German-American Savings Bank v. Spokane, supra, which we take the liberty of adopting: 'The

question goes much beyond the interests at stake here, and hardships are bound to result however the principles are settled. On the one hand, we have the rights of the general city taxpayer to consider; he may have paid like assessments with reference to his own property, and it is certainly a hardship to call upon him to make good a failure on the part of some other property holder to pay such an assessment, especially where the threatened burden is so excessive, in view of the high rule of property valuations prevailing in assessing for tax levies, and the liberal public debt limits allowed. In some instances it would come near the confiscation of his property. It is not a satisfactory answer to such a man to say that he must be bound by the negligence of men elected to act in a governmental capacity over a town wherein he may be residing, for it leaves him small chance of escape. * * * On the other hand the warrant holders have parted with value for these obligations, either in performing the work, where the warrants are held by the original parties, or in the amount paid for purchasing them, in the case of subsequent holders. As a matter of justice they are entitled to payment, and we have their interests to consider. * * * After all that can be said and done, however, as a matter of fact and law, where one of two parties must suffer, the loss should fall upon the one who has had the best opportunity to protect himself and is the most at fault. * * * While perhaps such general taxpayer might have compelled the city officers to act after the work was done, and the danger of loss to him imminent, the contractor or warrant holder had this same right, and the courts have all the time been open to him. By force of the contract such officers should be held to be more directly his agents or representatives than the agents of the general taxpayers for the purposes of the assessment, if they were such taxpayers' agents at all in the premises. By the contract the contractor has in effect adopted the machinery provided for raising his money through the acts of such officers'."

On page 284 of the Montana Report the court called attention to the fact that the bondholder had never "resorted to mandamus or other appropriate legal proceedings to compel the city authori-

ties to make collection of the delinquent assessments." So in the instant case, no such action was ever taken by the appellant.

This court has cited the Gagnon case with approval in the case of Moore v. City of Nampa, 18 Fed. (2d) 861. There it is said:

> "It is to be borne in mind that the officers of the defendant, in making the improvement, were not performing corporate functions of the defendant. They were exercising a special power vested in them with reference to local improvements, in which the city as a whole was not concerned. In doing so they were successors to powers which prior to 1917 had been exercised through a 'sewer construction committee,' distinct from the city council, appointed for the purpose of authorizing and carrying out sewerage improvements. In all the transactions here involved they were but *instrumentalities for originating, carrying out, and* paying for the expense of local improvements, the cost of which was assessable against the property benefited thereby. In this fact is an insuperable obstacle to the right of the plaintiff to recover herein, for the officers of the city were not acting on its behalf, and they had no authority to bind it by any act or failure to act in the premises. It is well settled that municipal corporations possess no inherent power to levy assessments for local improvements, and that their only authority to do so is to be found in legislative acts."

It is true that the question presented in that case differs from that which is involved in this litigation, but the language there used is certainly applicable to the facts here considered.

That decision was affirmed by the Supreme Court of the United States, 276 U. S. 536, 48 S. Ct. 340. Mr. Justice Butler delivered the opinion of the court. He called attention to the fact that the bondholder insisted that the city was negligent in failing to make a proper estimate and valid assessment and in causing the issuance of a false certificate. The suit was for tort and damages were claimed because of negligence and mis-

representation; that each bond contained recitals to the effect that all things required by law had been done to make the bonds valid obligations of the city; that the Supreme Court of the United States, in U. S. Mortgage Co. v. Sperry, 138 U. S. 313, had held that respondent's faith or credit is not pledged and that the value of the bonds depends upon the validity and worth of the assessments. Mr. Justice Butler went on to say that actionable negligence cannot be predicated on the failure of defendant's officers properly to assert their powers and perform their duties in respect of the estimate, assessment and contract for construction. Such failure was not a breach of duty owed by the city to the bondholder, who had no relation in the matter until long after the bonds had been issued and sold to another; that no recovery could be had by reason of the certificate issued by the city, falsely stating that there was no suit in respect of the creation of the district, the construction of the sewer or the issuance of the bonds, there being no law requiring or authorizing the making of such certificate, and that, as no actionable negligence or misrepresentation was shown, the complaint did not state a cause of action.

To the same effect are the following cases:

> Hasbrouck v. City of Milwaukee, 80 Am. Dec. 718; Mote v. Incorporated Town of Carlisle, 233 N. W. 695; New First National Bank v. City of Weiser, 166 Pac. 213; Town of Capitol Heights v. Steiner (Ala.) 101 So. 451; Town of Windfall City v. First Nat. Bank (Ind.) 87 N. E. 984; Castle v. City of Louisa (Ky.) 219 S. W. 439; Morrison v. Morey (Mo.) 48 S. W. 629; White River Sav. Bank v. Superior, 148 Fed. 1; Steiner v. Capitol Heights (Ala.) 105 So. 682; Brooks v. City of Oakland (Cal.) 117 Pac. 433; City of Beggs v. Kelly (Okl.) 238 Pac. 460.

Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659, and

other cases cited and relied upon by counsel for appellant, are not in point under the issues in the case at bar. The rule laid down in those cases is that where a municipality or other public corporation creates a debt which is not forbidden by law and receives the benefit thereof and the bonds or other evidences of that indebtedness are unenforceable, the holder may recover from the city or other municipality on contract implied by law. This is apparent from the Hitchcock case, where the court says:

> "It is enough for them that the city council have power to enter into such a contract for the improvement of the sidewalks and that such a contract was made with them, that under it they have proceeded to furnish matedials and do work, as well as to assume liabilities, and that the city has received and now enjoys the benefit of what they have furnished and done; that for these things *the city promised to pay.*"

The essential element present in the Hitchcock case, that the city or town *entered into a contract and promised to pay,* is here missing. As is said by this court, the supreme court of Montana, and all the other courts referred to above, the municipality in such a case as this does not, as a municipality, enter into any contract, *nor does it promise to pay.* The town officers of Ryegate were not acting in its behalf and had no authority to bind it by any act or failure to act in the premises. The town of Ryegate did not and could not promise to pay the contractor named for its work in constructing the improvements in District No. 4. What it did do, and all that it did do or could do, was to promise to deliver to the contractor the bonds of Special Improvement District No. 4 in payment for the work done and to make the assessment against the property in the district and pay the proceeds over to the contractor, and the contractor agreed to accept those bonds *as full payment therefor.*

It is true that in the Hitchcock case the cost of the improvements was ultimately to be paid by the owners of the property fronting thereon, but the city, by contract, was primarily liable for the payment of the cost of the improvement, and, as the court says:

> "The resort to the land owner is to be after the work has been done, after the expense has been incurred, and it is to be for the reimbursement of the city."

Such is not the law of this state.

Counsel have, at various places in their argument, advanced and expatiated upon the moral and equitable argument that the Town of Ryegate had obtained the benefit of the work done in the improvement district in question and that, therefore, this court should find some way of compelling the town to pay therefor. In the first place, this is an argument which should properly have been advanced in the suits wherein the town and county officers were enjoined from collecting the special improvement assessments to pay the bonds held by plaintiff. The property owners within the district were the persons actually and directly benefited by the construction of the water system. If anyone was morally obligated to the plaintiff herein it was the person whose property was included within the improvement district and assessed to pay the cost thereof. It appears in the "stipulation as to the facts" herein that the Lumbermen's Trust Company had its own counsel associated in the defense and trial of those actions; that judgments were entered and that no appeals were ever taken therefrom. (Tr. 6) It was in those suits that the equitable questions now presented should have been urged, particularly in view of the following situation:

Counsel in their brief make the general statement that Special Improvement District No. 4 of the Town of Ryegate "for prac-

tical purposes included the town." Just what counsel mean by "for practical purposes" we do not know. As a matter of fact, the district did not include all of the town. The Town of Ryegate is a small community and, as shown by paragraph M of the stipulation as to the facts (Tr. 56, 57), there are thirty business houses, certain public buildings and sixty-one residences in the town which are embraced within the district and thirty-five residences, four warehouses and sub-station of the Montana Power Company which are in the Town of Ryegate but are not embraced within the improvement district. Of that number there are thirteen residences and two warehouses which receive no benefit from the improvement district except fire protection and twenty-two residences and two warehouses which receive no benefit of any character from the water system. Only about one-sixth of the area of the town is in the district. (See map attached to appellant's brief.) If appellant were to recover in this action the relief sought, this property which is not benefited in the slightest degree by the water system and whose owners never had a chance, directly or indirectly, to be heard before the indebtedness was incurred, would be bound for its proportionate share thereof.

It is admitted that "plaintiff purchased said special improvement district bonds fom the Security Bridge Company with the knowledge that they were special improvement district bonds and with full knowledge of the laws of Montana governing the issuance of such bonds, the power of the defendant with reference thereto and the methods provided and authorized for the payment thereof." (Tr. 60). It occurs to us that the language of our supreme court in the case of Gagnon v. City of Butte, 75 Mont. 279, is particularly applicable. There it is said:

> "The plaintiff was chargeable with knowledge of the nature and terms of the city's obligation with respect to the bonds ,and to now permit him to hold the general taxpayers responsible because of the neglect of duty on the part of the city treasurer would be manifestly unjust."

Counsel devoted considerable effort in the trial of this cause to establish their claim that the officers of the defendant town were aware of the fact that the Security Bridge Company was selling the special improvement bonds to the plaintiff. All of the aldermen and city officers who were available at the time of the trial appeared and denied plaintiff's contentions in that particular, and when this court reviews the evidence in this case we believe it will be found that the positive statements of witnesses for the defendant preponderate over the extremely uncertain and indefinite recollections of Mr. Neal and Mr. Roscoe. (Tr. 206, 207, 230, 231, 232, 233, 234, 235, 236, 248, 249). Howevevr, be that as it may, counsel have absolutely failed to show what effect that fact of knowledge, if there were knowledge, would have upon this case. Manifestly, the officers of the Town of Ryegate knew that someone was furnishing the money to do the work. Whether that person was the contractor or someone else appears to us to have absolutely no bearing upon the question here involved. If it has any bearing, counsel have failed to indicate what it is.

SECTION 6 OF ARTICLE XIII OF THE CONSTITUTION OF MONTANA BARS THE RECOVERY OF ANY SUM BY APPELLANT.

POINT AND AUTHORITIES

When the contract for the construction of the water system was entered into the outstanding and unpaid indebtedness of the Town of Ryegate was $15,584.87. The assessed value of all property in the town was then $577,005.00. From that time

until the last special improvement district bond in question was delivered the indebtedness of the town increased and the assessed valuation of the property in the town decreased. (Tr. 27, 28). Three per cent of the assessed valuation of property in the town on date of contract was $17,310.15. Section 6 of Article XIII of the Constitution of Montana limits the indebtedness of towns to three per cent of assessed value of property in the town, unless an increase of indebtedness is authorized by the vote of taxpayers. Because of that constitutional limitation, appellant is not entitled to any relief in the case at bar.

Sec. 6, Art. XIII, Constitution of Montana; State v. City of Helena, 24 Mont. 521, 65 Pac. 99 (decided Dec. 17, 1900); Buchanan v. City of Litchfield, 102 U. S. 278, 26 L. Ed. 138; City of Litchfield v. Ballou, 114 U. S. 190, 5 S. Ct. 820; Butler v. Andrus, 35 Mont. 575, 90 Pac. 785; Palmer v. City of Helena, 19 Mont. 61, 47 Pac. 209; Palmer v. City of Helena, 40 Mont. 498, 107 Pac. 498; Lepley v. City of Ft. Benton, 51 Mont. 551, 154 Pac. 710; District Township of Doon v. Cummins, 142 U. S. 366, 12 S. Ct. 220; Hedges v. Dixon County, 150 U. S. 182, 14 S. Ct. 71; O'Brien v. Wheelock, 184 U. S. 450, 22 S. Ct. 354; City of Boston v. McGovern, 292 Fed. 705; McClintock v. City of Gt. Falls, 53 Mont. 221; City of Santa Cruz v. Wykes, 202 Fed. 361; Deer Creek Highway Dist. v. Doumecq Highway Dist., 281 Pac. 371; Mittry v. Bonneville County, 222 Pac. 292; Mayo v. Town of Washington, 29 S. E. 343; Eaton v. Shiawassee County, 218 Fed. 588; Atkinson v. City of Gt. Falls, 16 Mont. 372; 44 C. J. 1131; Lake County v. Rollins, 130 U. S. 662, 9 S. Ct. 651; Lake County v. Graham, 130 U. S. 674, 9 S. Ct. 651; City of Bozeman v. Sweet, Causey, Foster & Co., 246 Fed. 370; Smith v. Broderick, 40 Pac. 1033; Lamar W. El. & L. Co. v. City of Lamar, 26 S. W. 1025; Gould v. City of Paris, 4 S. W. 650; City of Tecumseh v. Butler, 298 Pac. 256; Zacary v. City of Wagoner, 292 Pac. 345.

ARGUMENT

With the issuance, sale and delivery of the general bonds of

the Town of Ryegate in the sum of $15,000.00 in April, 1920, the town had nearly reached its constitutional limit of indebtedness and when the assessment roll for that year was completed the indebtedness of the town was in excess of the constitutional limitation. (Tr. 27, 28, 59). If it should be held that the Town of Ryegate had become indebted to appellant in the sum of $45,602.00 on account of the purchase of the special improvement district bonds in question by the appellant from the contractor, then such debt was illegal and unconstitutional and no judgment may be entered in favor of appellant and against appellee.

Section 6 of Article XIII of the Constitution of Montana is as follows:

> "No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three (3) per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness, and all bonds or *obligations* in excess of such amount given by or on behalf of such city, town, township or school district shall be *void;* provided, however, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

It is admitted that on April 26, 1920, when the contract was entered into for the construction of the water works system for the town of Ryegate the outstanding and unpaid indebtedness of that town was $15,584.87, and that, as each installment of

the bonds of the district was delivered, this indebtedness was slightly increased, and on December 31, 1926, when this action was instituted, such general outstanding indebtedness amounted to $19,462.07. It also appears that on April 26, 1920, the valuation of all property within the Town of Ryegate was $575,-0005.00, which presumably would be based upon the 1919 assessment, as the assessed value for the year 1920 was $420,006.00. At the time this suit was instituted such assessed valuation was $370,949.00. (Tr. 27, 28, 59).

It appears, therefore, that in the spring and summer of 1920, when the contract for the construction of the Ryegate water works was entered into and the appellant purchased the special improvement bonds aggregating the sum of $45,602.42, the Town of Ryegate was already indebted up to nearly three per cent of the taxable property therein, and ever since the 1920 assessment has been indebted in excess of three per cent of its assessed value. If the defendant town is now to be charged with the payment of appellant's claim, the total amount of that indebtedness so to be imposed is in excess of the constitutional limit.

In the first place, we believe there is no doubt that the constitutional provision quoted above applies as a bar to all kinds of indebtedness, whether incurred under an express contract or under an implied or quasi contract, such as is here sought to be enforced in an action which the appellant designates as one brought in equity for money had and received.

Thus, in the case of State v. City of Helena, 24 Mont. 521, 65 Pac. 99 (decided Dec. 17, 1900), our court says:

> "The prohibition is against becoming indebted, —that is, voluntarily incurring a legal liability to pay, * * * 'in any manner or for any purpose,' when a given amount of indebtedness has previously been incurred. It could hardly

be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs, the liability is absolute, —the debt exists, —and it differs from a present, unqualified promise to pay only in the manner by which the indebtedness was incurred. * * * "

"In Buchanan v. City of Litchfield, 102 U. S. 278, 26 L. Ed. 138, and City of Litchfield v. Ballou, 114 U. S. 190, 5 S. Ct. 820, 29 L. Ed. 132, the construction placed upon that section of the Illinois constitution before the court in City of Springfield v. Edwards, and Law v. People, is approved. In the latter case, Mr. Justice Miller, speaking for the court, says: 'The language of the constitution is that no city, etc.' shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.' It shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose. No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law.' Such was the interpretation by the highest court in the land of this constitutional provision of the state of Illinois when our own Constitution containing a like provision was adopted."

"Our attention is called by counsel to the exceeding hardship of this case upon those whose money it is alleged has

supplied the city of Litchfield with a system of water works, the benefits of which are daily enjoyed by its inhabitants. *The defense is characterized as fraudulent and dishonest. Waiving all considerations of the case in its moral aspects, it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases.*"

The last paragraph quoted from that case is peculiarly pertinent to the contentions made by counsel for appellant.

The rule laid down in that case is referred to with approval in the following Montana decisions:

Butler v. Andrus, 35 Mont. 575, 90 Pac. 785; Palmer v. City of Helena, 40 Mont. 498, 107 Pac. 498; Lepley v. City of Ft. Benton, 51 Mont. 551, 154 Pac. 710; Palmer v. City of Helena, 19 Mont. 61, 47 Pac. 209.

In the case of City of Litchfield v. Ballou, 5 S. Ct. 820, 114 U. S. 190, the supreme court of the United States says:

"This is an appeal from a decree in chancery of the circuit court for the Southern district of Illinois. The suit was commenced by a bill brought by Ballou against the city of Litchfield. Complainant alleges that *he is the owner of bonds,* issued by the city of Litchfield, to a very considerable amount. *That the money received by the city for the sale to him of these bonds was used in the construction of a system of water-works for the city, of which the city is now the owner.* He alleges that one Buchanan, who was the owner of some of these bonds, brought suit on them in the same court, and was defeated in his action in the circuit court and in the supreme court of the United States, *both of which courts held the bonds void.* He now alleges that, though the bonds are void, *the city is liable to him for the money it received of him, and as by the use of that money the waterworks were constructed, he prays for a decree against the city for the amount, and if it is not paid within a reasonable time, to be fixed by the court, that the water-works of the city be sold to satisfy the decree.* The bill also charges that he was *misled to purchase the bonds by the false statements of the officers, agents, and attorneys of the city, that the bonds were valid.* * * * The

bonds were held void in the case of Buchanan v. Litchfield, 102 U. S. 278, because they were issued in violation of the following provision of the constitution of Illinois:

'Article IX.

'Sec. 12. No county, city, township, school-district or other municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness.'

It was made to appear as a fact in that case that at the time the bonds were issued the city had a pre-existing indebtedness exceeding 5 per cent. of the value of its taxable property, as ascertained by its last assessment for state and county taxes. The bill in this case is based upon the fact that the bonds are for that reason void, and it makes the record of the proceedings in that suit an exhibit in this. But the complainant insists that, though the bonds are void, he city is bound, *ex aequo et bono,* to return the money it received for them. It therefore prays for a decree against the city for the amount of the money so received. * * * But there is no more reason for a recovery on the implied contract to repay the money than on the express contract found in the bonds.

The language of the constitution is that no city, etc., 'shall be allowed to become *indebted in any manner or far any purpose* to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.' *It shall not become indebted. ...Shall not incur any pecuniary liability. It shall not do this in any manner; neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose; no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law."*

In the above case it was contended that although the bonds were void the city was liable for the money received and that if not repaid within a reasonable time the water works should be sold to satisfy the decree. The bondholder also alleged that he was misled in the purchase of the bonds by false statements of the officers, agents and attorneys of the city, that although the bonds are void, the city is bound, *ex aequo et bono,* to return the money it received for them and that there was an implied contract for the repayment of the money. These same questions are raised by appellant in the case at bar. They were all decided adversely to appellant in the Litchfield case.

To the same effect is the decision of the supreme court of the United States in Lake County v. Rollins, 130 U. S. 662, 9 S. Ct. 651, in which was involved the same constitutional question. In speaking of the provisions of the constitution, the court said:

> "If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizens is imperiled. * * * Neither can we assent to the position of the court below that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated '*compulsory obligations*'."

Again, in Lake County v. Graham, 130 U. S. 674, 9 S. Ct. 654, a similar question was before the supreme court of the United States with a like result. It was there held that purchaser of bonds, such as those involved in that case, is held to know the constitutional provisions and the statutory restrictions bearing on the question of the authority to issue them and that there was no estoppel as to the constitutional question because of recitals in the bond. The court said:

> "Otherwise it would always be in the power of a municipal body to which power was denied to usurp the forbidden authority by declaring that its assumption was within the law. This would be the clear exercise of legislative power and would suppose such corporate bodies to be superior to the law itself."

The rule laid down in those cases is approved in the following decisions:

> District Township of Doon v. Cummins, 12 S. Ct. 220, 142 U. S. 366; Hedges v. Dixon County, 14 S. Ct. 71, 150 U. S. 182; O'Brien v. Wheelock, 22 S. Ct. 354, 184 U. S. 450; City of Boston v. McGovern, 292 Fed. 705; Smith v. Broderick, 40 Pac. 1033; Lamar W. El. & L. Co. v. City of Lamar, 26 S. W. 1025; Gould v. City of Paris, 4 S. W. 650; City of Tecumseh v. Butler, 298 Pac. 256; Zacary v. City of Wagoner, 292 Pac. 345.

This court, in City of Bozeman v. Sweet, Causey, Foster & Co., 246 Fed. 370, held that a bond issue for water works and sewer purposes in excess of the constitutional limitation of three per cent must be authorized not only by a vote of the taxpayers in favor of the proposed issue but also by vote on the express question of an increase of the debt limit over the three per cent fixed by the constitution. This court said:

> "Without carrying the discussion any farther, our judgment is that the principle that statutes authorizing municipalities to incur obligations in excess of those which are ordinarily permitted to be incurred should be strictly construed."

Counsel for appellant seek to avoid the effect of the decision of the court in the Litchfield case, but the decisions of the supreme court of the United States in that case and in the other cases cited above have never been departed from and they present an insuperable obstacle to the granting of any relief to appellant.

Counsel for appellant, however, appear to advance two propositions, as follows:

(1) Under the provisions contained in the section of the constitution referred to there is no limit upon the indebtedness which may be incurred by a municipality to procure a supply of water.

(2) The legislature, by providing for the construction of water works under the special improvement district law, has, by some subtle, undefined means, enabled municipalities to evade or avoid the inhibitions contained in the constitution.

We will refer to these contentions in order.

In support of the first proposition advanced by appellant to the effect that under the express wording of the provision in the latter portion of Section 6 of Article XIII of the constitution there is no limit to the indebtedness which may be incurred by a municipality in securing a water supply, they call attention to the power of a town to supply itself and its citizens with water.

This may be conceded without affect upon the constitutional question involved, for, as is said in the Helena water case above referred to and in the case of Litchfield v. Ballou, supra, if an act is not done in accordance with the constitution "it shall not be done for any purpose, no matter how urgent, how useful, how unanimous the question." In other words, the question of necessity or expediency plays no part in the construction of the provision referred to.

Counsel also cite McClintock v. City of Great Falls, 53 Mont. 221, in support of their interpretation of the Montana constitution.

The nub of the rule laid down by our supreme court in that

case is contained in that portion of the sentence providing "except that it must have the approval of the taxpayers affected thereby."

While counsel are far from clear in explaining their position in this matter, we can only assume that they contend that in view of the constitutional provision referred to the Town of Ryegate had inherent power to become indebted to appellant and that the failure to submit the question to the vote of the taxpayers affected thereby simply constituted an irregularity which would not relieve the town from liability. In other words, apparently a distinction is attempted to be drawn between a case where the incurring of the indebtedness was *ultra vires* because the municipal corporation was without power and another case where it was invalid because the statutory formalities had not been followed. It will be noted that no authority whatever is cited in support of this important link in the chain of appellant's argument, and it is our contention that such a distinction is not permissible in this case.

Our constitutional provision is that the legislative assembly may extend the debt limit by authorizing municipal corporations to submit the question to a vote of the taxpayers to be affected. Acting thereunder, our legislature adopted Paragraph 64 of Section 5039 of the Political Code, providing that no indebtedness shall be incurred for the construction of a water works system "until the proposition has been submitted to the vote of the taxpayers affected thereby and the majority vote cast in favor thereof." The legislature also enacted Sections 5278 and 5281 of the Political Code for 1921, providing in detail how such elections should be called and held. Under similar constitutional and statutory provisions, we believe it is

always held that the failure to hold the election and to secure approval from a majority of the taxpayers is not merely an irregularity or informality which may be waived or overlooked, but, on the contrary, it goes to the very essential and fundamental question of power.

In the case of City of Santa Cruz v. Wykes, 202 Fed. 361, this court, in considering a similar constitutional provision of the State of California, said:

> "By the Constitution of the state of California (section 18, art. 11) it is provided:
>
> 'No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void.'
>
> This is an inhibition against which a municipality cannot incur any indebtedness exceeding in any year the income and revenue provided for it for such year except in a certain mode or manner prescribed. *The mode, therefore, becomes the measure of the power of the municipality to incur an indebtedness beyond the measure fixed by the fundamental law.* That is to say, before the city can incumber itself with such excess indebtedness, it must have the consent of two-thirds of its qualified electors to that purpose, and when it has obtained such consent, provision shall be made for collection of an annual tax sufficient to pay the interest on such indebtedness annually, and to create a sinking fund sufficient to discharge the principal within 20 years.
>
> The power to create the excess indebtedness does not abide with the municipality or its common council alone,

but with the assent of two-thirds of its electors. It is only when that assent is had that it may proceed."

In the case of Deer Creek Highway District v. Doumecq Highway District (Ida.) 218 Pac. 371, the court said:

"Almost all of the authorities agree with the holding of this court in School District v. Twin Falls County, supra, that there can be no estoppel if the contract was expressly prohibited by the Constitution or statute, or if it was entirely beyond the power of the municipality. Appellant relies strongly on Argenti v. City of San Francisco, 16 Cal. 255, and Pimental v. City of San Francisco, 21 Cal. 351. While some of the language used in these opinions, isolated from the context, would seem to bear out appellant's contention, the decisions as a whole do not go the length of holding that there may be a recovery upon quantum meruit where a municipality has entered into a contract rendered void by express constitutional or statutory prohibitions. The true doctrine is expressed by Chief Justice Field in Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96, as follows:

'A municipal corporation, acting under a charter expressing the mode in which its contracts for the improvement of its property shall be made, cannot be rendered liable for improvements made in the absence of such contract, on the ground of an implied contract to pay for benefits received. *The law never implies an agreement against its own restrictions and prohibitions; it never implies an obligation to do that which it forbids the party to agree to do*'."

In the case of Mittry v. Bonneville County (Ida.) 222 Pac. 292, the court says:

"When an indebtedness is forbidden by the Constitution and statutes of this state without the authority of a bond election, and the people at such election authorize the commissioners to incur indebtedness in a certain amount, the commissioners cannot incur a valid indebtedness above such amount. For reasons given in Deer Creek Highway Dist. v. Doumecq Highway Dist., supra, and which need not be repeated here, any indebtedness above the amount in the courthouse fund was void and cannot be recovered on quan-

tum meruit or in assumpsit. Respondent, dealing with the county, was bound to take notice of constitutional and statutory limitations of its powers in regard to incurring indebtedness. Deer Creek Highway Dist. v. Doumecq Highway Dist., supra."

In Mayo v. Town of Washington (N. C.) 29 S. E. 343, the court says:

"To enable a municipal corporation to borrow money or to loan its credit for any purpose, except for the necessary expenses of the corporation, there must be an act of assembly passed and ratified, as required by the constitution, authorizing it to submit the proposition to the people. Bank v. Town of Oxford, 119 N. C. 214, 25 S. E. 966; Board of Com'rs. v. Snuggs, 121 N. C. - - -, 28 S. E. 539. And the question must then be submitted to and ratified by a majority of qualified voters thereof. It requires both the authority to submit the proposition and the ratification by a majority of the qualified voters to warrant the creation of the debt and the issue of the bonds."

A case directly in point is that of Eaton v. Shiawassee County, 218 Fed. 588, where the court says:

"If it is assumed that the entire $30,000 borrowed is sufficiently traced to an investment in the courthouse building, we meet the question whether it is possible for the lender to recover his money upon the theory of an implied liability or quasi contract or equitable liability, or whatever it may be called, when he cannot recover upon the contract which he actually made, because that contract was forbidden by law. Plaintiff concedes there could be no recovery on the contract. His position is that where a municipal corporation has received plaintiff's money and retains it or its benefits and had inherent power to borrow the money from plaintiff, but only failed in some statutory step, the municipality will not be permitted to keep the benefit and refuse to pay the money. This proposition is essentially based on the difference between cases where the borrowing was ultra vires because the corporation was without power, and cases where it was ultra vires because the active agents of the corporation were without power. * *

"Further study of the very numerous decisions now re-

viewed in the briefs of counsel suggests no occasion to modify this statement; and it only remains to determine whether the present case is within the rule or within the exception as stated by Judge Richards. We may properly assume, also, for the purposes of this opinion, that plaintiff's suggested distinction is a correct one, and that we may not say that 'the loan itself was one in excess of its authority to create a debt,' unless the lack of authority pertains to the inherent powers of the municipal corporation itself, as distinguished from the delegated powers of its officers and agents. This distinction will reconcile some of the seeming conflict in the cases; some, it will not; but, unless it exists and is properly here applicable, plaintiff confessedly has no case. Plaintiff says that since the county had the right to make this loan, if authorized by vote, the lack of a vote presents a defect of the second class; the power existed, but a prescribed step in its execution has been omitted. This theory will not reach such a constitutional limitation as that herein involved. The county of Shiawassee is a municipal corporation — a corporate entity. It is erroneous to say that this corporation has the power to make such a loan if only it proceeds in the right way, viz., by vote of the people. The electors are a body of individuals distinct from the corporation. The county, as an entity, has no power to compel a favorable vote of the people. The obtaining by the corporation of the right to such borrowing rests upon the discretion—even upon the caprice—of another body, the electors. Until that approval has been given, the county is as much without power as if the electors had no right to confer it. This view of the real source of power seems to us clearly to meet the position upon which alone plaintiff's case might otherwise perhaps stand. To accept the contrary view is to say that because a municipality may, on application, be granted additional, but now nonexistent, power, it shall now be deemed to have that power, though it has not applied and though its application, if made, might have been refused. It is clear to us that if plaintiff may recover indirectly, by an action for money had and received, money which the plaintiff has loaned in the face of such a constitutional provision, the substantial force of the prohibition is destroyed. Whether the money has been honestly ex-

pended for the real benefit of the county cannot be controlling, as the present case illustrates. The electors decided that the county should have and should become indebted for a $75,000 courthouse only. The board of supervisors thought that the county ought to have and ought to borrow therefor $125,000. If good faith and actual honest expenditures make the criterion, the control which the Constitution reserves to the voters is destroyed. We must conclude that this indebtedness 'was in excess of (the county's authority to create a debt,' and that the action, as one for money received and expended on the courthouse, cannot be maintained."

Under the authorities above referred to we feel there can be no question that cities and towns in Montana are only permitted to increase their indebtedness to an amount exceeding three per cent of the value of the taxable property therein by submitting that proposition and the total amount of the proposed increase of indebtedness to the vote of the taxpayers affected and securing their consent or approval by a majority vote on both questions. The failure to so submit such questions goes to the very question of their power to incur this indebtedness and does not, as counsel seem to contend, simply constitute a defect or irregularity in the exercise of a power granted.

Taking up the second question, we concede that special improvement obligations are constitutional, but we fail to see the application of that rule to the issues involved in the case at bar. Counsel for appellant are now contending that the Town of Ryegate, as a municipality, is liable for the debt of a special improvement district.

As a matter of fact, the general rule undoubtedly is that if a debt is to be paid out of a special assessment only and the city is in no way responsible therefor, the amount of such obligation does not increase the municipal indebtedness under con-

stitutional provisions such as ours, and on the other hand, if the city is ultimately liable for the payment of such indebtedness, the bar of the constitution intervenes.

In volume 44 of Corpus Juris, at page 1131, the rule, supported by citation of many cases from the different jurisdictions of the country, is stated in the following words:

> "A municipality may, without increasing its indebtedness within the meaning of constitutional limitations, contract an indebtedness payable out of the proceeds of a special assessment, provided, at the time of the making of the contract, no liability on the part of the city, other than to pay over the assessment when collected, is created."

Counsel cannot ride on horses going in opposite directions with any degree of success. If it is their contention that the debt, evidenced by their client's special improvement district bonds is an obligation of the Town of Ryegate, then the indebtedness of the town is increased beyond the constitutional limit and is therefore unenforceable and void. On the other hand, in order to avoid the bar of the constitution, they must concede that the Town of Ryegate is not indebted to their client, and thus fail in their suit.

Further, and as is clearly held in the cases of Litchfield v. Ballou and State v. Helena, supra, a municipality cannot do indirectly what it is unable to accomplish directly. If the Town of Ryegate could not in the year 1920 directly assume the obligation of appellant's claim as its indebtedness on account of the constitutional limits referred to, which is conceded on the first page of the "stipulation as to the facts" herein (Tr. 52), certainly it could not do so directly through the medium of void special improvement district proceedings.

Admittedly, the indebtedness sought to be imposed upon the

defendant town in this proceeding is, and at all times has been, wholly in excess of three per cent of the value of the taxable property therein, and the fundamental unescapable fact is that no election was ever held at which the voters to be affected thereby authorized the incurring of such excess indebtedness.

Without the holding of such election it was simply beyond the power of the town council of the Town of Ryegate to bind that town to pay the claim of plaintiff, whether that claim was for a direct or indirect, present or contingent liability.

DISCUSSION OF CASES CITED BY COUNSEL FOR APPELLANT ON CONSTITUTIONAL QUESTION.

POINT AND AUTHORITIES

None of the cases cited in appellant's brief on the constitutional question are controlling or persuasive.

> Edmonds v. City of Glasgow (Mont.) 300 Pac. 203; Prince v. Quincy, 105 Ill. 215, 21 N. E. 768; Mankota v. Barber Asphalt Co., 142 Fed. 329; Addyston Pipe & Steel Co. v. City of Corry, 46 Atl. 1035; Denny v. City of Spokane, 79 Fed. 719; Parker v. Butte, 58 Mont. 531, 193 Pac. 748; Sec. 5252, Revised Codes of Montana, 1921.

In Edmonds v. City of Glasgow (Mont.) 300 Pac. 203, plaintiff was the holder of a one-thousand dollar bond issued by defendant. A special election had been held ni the City of Glasgow, at which the Town of Glasgow was authorized to issue bonds in the sum of fifty thousand dollars for the purpose of constructing a water plant. Taxes were levied annually to pay the interest, but the principal was unpaid. After issuing the bonds, the town was indebted in the sum of $64,885.12, which was 11.41 per cent of its total assessed valuation. The specific question as to whether the city should incur a debt in excess of the three per cent limit fixed by the constitution had

not been submitted to the electors. Whether such submission was necessary has never been decided by the supreme court of Montana but was decided by this court in the City of Bozeman v. Sweet, Causey, Foster & Co., 246 Fed. 370, hereinbefore referred to. The question arose as to whether plaintiff was estopped from asserting that the bonds were illegal. The bonds recited that they are issued in accordance with a vote in favor thereof by more than a majority of the taxpayers in the town, pursuant to ordinances duly passed by the council and in all respects in full compliance with the provisions of the statutes and constitution of the State of Montana and that all things, acts and conditions required by the constitution and laws of the State of Montana have happened and been properly done and performed in regular and due form and done as required by law; that the total indebtedness of said town, including the bonds in question, did not exceed any constitutional or statutory limitation.

The city council of the town is the proper body to pass upon the results of all elections in the town and is therefore authorized to declare whether or not any proposal submitted to the electors or taxpayers has been duly adopted. It was for that reason that the bonds were declared legal obligations of the city.

It will be noted that the election authorizing such bond issue was held January 12, 1909, long before this court decided Bozeman v. Sweet, etc. Co., 246 Pac. 370; that the city did not contend that its officers did not have authority to make the recitals in the bonds in question. The suit arose over the refunding of said bonds and there was no disposition on the part of the city to have the issue declared illegal. The only question was whether an election had been held as required by

the constitution. As the town council was the proper body to canvass the vote and declare the result, it had the right to state in the bonds the result of such election and, having made such statement, an innocent purchaser for value had a right to rely thereon. Those were bonds of the city, and the officers, in issuing same, were acting for and on behalf of the city. That was not true in the instant case, when the Town of Ryegate issued the special improvement bonds in question. There is no statement in those bonds that any election was held or that those bonds, in addition to the indebtedness of the city then existing, did not exceed the constitutional limitation.

In the instant case we have no attempt on the part of the Town of Ryegate to submit the question of the debt incurred by the special improvement district in the sum of $45,000.00 to the taxpayers of the town, so the decision of the supreme court of Montana in the Edmonds case is not authority in support of appellant's contention as to the liability of the Town of Ryegate.

Prince v. Quincy, 105 Ill. 215, 21 N. E. 768, is cited by appellant. It was there held that under the constitution of Illinois which provides that "no municipal corporation shall become indebted in any manner" beyond a specified limit, a contract by a city whose indebtedness exceeds such limit to pay, in monthly installments, for water to be furnished for fire purposes, is void; also, "where no fraud or deceit was practiced by the city to induce plaintiff to enter into the contract, a refusal by the city to pay for the water, followed by use of the water as before, does not constitute a substantive, actionable tort." Syllabi.

In City of Mankato v. Barber Asphalt Paving Co., 142 Fed.

329, cited on page 138 of appellant's brief, the action was brought to impose a liability upon the city because it had failed to enact the necessary ordinance levying the special assessments to pay the contractor. The suit was against the city for damages for failure to perform that statutory duty. The court held that complaint need show only (1) The circumstances creating the duty; (2) the duty; and (3) the breach of the duty. There are no such averments in the complaint at bar.

No such action was brought by appellant in this case. There is no allegation that the town did not pass an ordinance making the necessary arrangements. The complaint alleges that the town paid the interest due on the bonds January 1, 1922 and thereafter refused to pay any interest thereon and has declared its intention of never paying the principal sum due on the debt evidenced by the bonds and has repudiated its debt *in toto*. No question was raised by the pleadings, agreed statement or evidence that the town was liable because of the falure to pass an ordinance or resolution making assessments to pay principal and interest on bonds. The Belecz case was not decided against the city because assessments were not properly made, but on the ground that the town never acquired jurisdiction to create the district, that the cost was in excess of the amount allowed by statute and that the contract price was increased because of discount on bonds." (Tr. 89, 90).

It does not appear in any of the cases cited by counsel that the statutes of the states in which those cases arose were similar to ours in requiring the entire cost of the improvements in the district to be paid out of assessments and that they should not be a charge against the municipality.

In Addyston Pipe & Steel Co. v. City of Corry (Pa.), 46

Atl. 1035, cited on page 138 of appellant's brief, the opinion of the court on the constitutional question was mere dicta, as the liability of the city was fixed by a subsequent contract, the validity of which was not questioned. Moreover, in that case the city had levied the necessary assessments on abutting and non-abutting property. The former assessments were paid, as well as some on non-abutting property. Some owners of assessments on such property enjoined the collection of such assessments. There the city council could have re-assessed the deficiency against the abutting lots, which were liable. No such situation exists here.

In Denny v. City of Spokane, 79 F. 719, the gravamen of the action was the neglect and failure of the officers of the city to create a fund out of which to pay the claims in question. (Page 720). Here there is no such question, as the assessments were levied. The town officials have done all they could in making the assessments. Any new assessments they might make would be subject to the same objections made against the original assessments.

On pages 140 and 141 of appellant's brief much is said as to the duty of the Town of Ryegate in making collections and that if the same were not collected because of invalid assessments the fault is that of the town and not of the bondholder; that under the Montana statutes the council had full right to make levies and assessments, to adjust assessments and to make re-assessments to the end that the lien of the bonds should be effective and valid. Counsel seem to overlook the fact that the collection of the assessments was enjoined in the Belecz case, not on the ground that the assessments were not properly made, but because of the fact that the town never had jurisdic-

tion to create the special improvement district in question. (Tr. 84 to 92).

The Montana law with reference to reassessments will be found in Section 5252, R. C. M. 1921, which reads in part as follows:

> "Whenever, by reason of any alleged non-conformity to law or ordinances, or by reason of any omission or irregularity, any special tax or assessment is either invalid or its validity is questioned, the council may make all necessary orders and ordinances and may take all necessary steps to correct the same and reassess and relevy the same, including the ordering of the work, with the same force and effect as if made at the time provided by law, ordinance or resolution relating thereto; and may reassess and relevy the same with the same force and effect as an original levy."

Here we do not have a state of facts covered by the provisions of that statute. If the town had acquired jurisdiction to create the special improvement district and the bonds of the district were valid and enforceable obligations, then the assessment made was in proper form. No question was ever raised on that score. No re-assessment made by the town council would have avoided the decision of Judge Horkan in the Belecz case.

In Parker v. Butte, 58 Mont. 531, 193 Pac. 748, cited by counsel for appellant, the only question considered was whether the city could refund its floating warrant indebtedness without submitting the matter to a vote of the people. The warrants did not exceed three per cent of the assessed valuation of the city.

APPELLANT'S CRITICISM OF ASSUMPTIONS OF JUDGE PRAY AND CASES RELIED UPON BY HIM.

The criticisms made by counsel for appellant will be found on pages 252 to 263, inclusive, of their brief.

It is claimed by counsel that Gagnon v. Butte, 75 Mont. 279, and other cases cited denied the bondholders' right to hold the city for failure to make collections because the statutes under which those cases were decided specifically denied any right against the city.

Prior to 1913 there were several acts in Montana with reference to making special improvements in cities. In 1913 Chapter 89 of the laws of that year, being "An act relating to special improvements in cities and towns, and repealing sections 3367, etc." was passed by the legislative assembly of Montana, codifying the laws of the state with reference to such improvements and apparently repealing all former acts. This chapter now appears as Sections 5225 to 5257, inclusive, of the Revised Codes of Montana, 1921. Section 5238, in subdivisions (a) and (b), provides two methods of payment of cost of such improvements, no part of which may be paid by the city except that "the city council, in its discretion, shall have the power to pay the whole, or any part, of the cost of any street, avenue or alley intersections out of any funds in its hands available for that purpose, or to include the whole or any part of such costs within the amount of the assessment to be paid by the property in the district." In Section 5240 it is provided that the city council "shall, by resolution, levy and assess a tax upon all property in any district created for such purpose, by using for a basis of assessment one of the methods set forth in section 5238 of this code." Section 5249 provides that bonds or warrants of such special improvement districts shall be substantially in the form set out in that section. This form provides that "this warrant (or bond) is payable from the collection of a special tax or assessment, which is a lien against the real estate

within said improvement districts as described in said resolution hereinbefore referred to. This warrant (or bond) is redeemable at the option of the city at any time there are funds to the credit of said special improvement district fund for the redemption thereof and in the manner provided for the redemption of the same." In the same section it is specified that said bonds shall be drawn against the special improvement district fund created for the district; that they shall be redeemed by the treasurer when there are funds in the special improvement district fund against which such bonds are issued; that the interest shall annually be paid out of such funds and if any are remaining they shall be applied in payment of principal; that the treasurer shall call in for payment outstanding bonds equal to the amount of said fund on a date fixed by the treasurer. In Section 5250, when warrants or bonds of the special improvement district are issued for work done, they shall be received in payment for not less than their face value. Section 5252 covers the conditions under which there may be a re-assessment, which, as we have heretofore pointed out, does not meet any such situation as we have in the case at bar.

The supreme court of Montana, in commenting upon that section, in School Dist. No. 1 v. City of Helena, 87 Mont. 300, in which an attempted re-assessment had been made, said on page 312:

> "The city attempts to justify this procedure under section 5252, Revivsed Codes 1921. We think this section does not authorize the re-assessment of any property in a special improvement district to make up for delinquent assessments against the property. Its provisions have to do with the correction of invalid or erroneous assessments by re-assessment. A re-assessment cannot be made unless authorized by statute, and then only in the manner provided."

As we have heretofore stated, the invalidity of the assessments made by the Town of Ryegate was not because of any error in the ordinance or resolution making such assessments, but because of the fact that the town council never acquired jurisdiction to create the improvement district.

No significance should be attached to the fact that in this codification of the special improvement district laws of the State of Montana some provisions were omitted which were formerly a part of the law with reference to special improvement districts. The costs of the improvement being made payable solely out of the special improvement district fund, the town council was barred as effectively from making any part of such cost a charge against the city as though the act contained an express provision that no part of the cost was to be borne by the city. The town was indebted up to the constitutional limit, which was not extended by the vote of the electors, and therefore the nonliability of the town was fixed as definitely as though stated in express terms in the act itself. If it had been the intention of the legislature to make the city liable under any circumstances, that intention would have to have been declared in the title and set out in the act itself, and even then it would have been unconstitutional.

On page 256 of their brief, counsel call attention to the discussion of Judge Kenyon in Scott County v. Advance-Rumely, 288 Fed. 739, as distinguishing that case from Litchfield v. Ballou, 114 U. S. 190, 5 S. Ct. 820. There can be no doubt but that Judge Kenyon approved of the decision announced in the Litchfield case. On page 748 he said:

> "If the contract was one beyond the power of a county under any circumstances to make, then the keeping and

> using of the machinery would not constitute an estoppel, and the act of the county under such circumstances could not be ratified. * * * It has been held that under some circumstances a corporation can deny its power to act. * * * Litchfield v. Ballou * * * is a case where bonds were issued contrary to the provisions of the state constitution. The moneys secured by the bonds were expended by the city in erecting a water works. An attempt was made to have the amount imposed as a lien upon the public works. The court held that the holders of the bonds and agents of the city are participes criminis in the act of violating the constitutional prohibition and refused to enter a decree requiring the city to return the money. Here there was no power in the city to issue the bonds."

In Mercer County v. Eyer, 1 Fed. (2d) 609, the court, in discussing constitutional limitations, said:

> "Cases will occur where a breach of this constitutional limitation will be so plain and the circumstances so notorious that the lender would be likely to be put on notice and the presumption of good faith in reliance upon recitals would be unsafe."

On pages 256 and 257 of their brief counsel say that City of Santa Cruz v. Wykes, 202 Fed. 357, decided by this court in 1913, is an authority in appellant's favor, if it has any bearing at all. This assertion is not supported by the holding of the court. On page 364, after quoting the constitutional provision of the State of California, it said:

> "This is an inhibition against which a municipality cannot incur any indebtedness exceeding in any year the income provided for it in such year except in a certain mode or manner prescribed. The mode therefore becomes the measure of the power of the municipality to incur an indebtedness beyond the measure fixed by the fundamental law. That is to say, before the city can encumber itself with such excess indebtedness it must have the consent of two-thirds of its qualified electors for that purpose."

It is also to be noted that before the matter was disposed of

in this court the electors of the city assented to the indebtedness and the inhibition of the constitution was thereby removed.

On pages 257 to 260 of their brief counsel comment at great length on Moore v. Nampa, 18 Fed. (2d) 860, and its affirmation by the supreme court of the United States, 276 U. S. 536, 48 S. Ct. 340. A careful study of both decisions will disclose that the comments of counsel are not justified. There, as here, the bondholder did not purchase the bonds from the city. The suit was for tort on account of false certificate issued by the officers of the city, failure to make proper estimates of cost, recitals that all things required by law had been done in order to make the bonds a valid obligation. None of these contentions were sustained.

In what counsel are pleased to term "erroneous assumptions by Judge Pray" they call attention to his statement that "plaintiff contends that the town never acquired jurisdiction to create a special improvement district." That statement of Judge Pray is based upon the reply brief submitted by counsel for appellant in the trial of said cause. Therein counsel, referring to a statement made in our trial brief, said: "In this statement they (counsel for defendant) overlook the fact that the city never acquired jurisdiction to create a special improvement district and that the bonds issued were declared by the court to be invalid." It is only fair to say that this so-called reply brief was written by Mr. C. F. Gillette, of Salem, Oregon, on behalf of plaintiff, after the cause had been submitted to the court on briefs written by Messrs. Stewart & Brown, counsel for plaintiff, and ourselves. It is rather difficult to keep up with the shifting positions of the various counsel for appellant. In their original trial brief they stated that the special improve-

ment district had been created. They began an action at law for a straight money judgment, which apparently was converted into one for money had and received. Now, on appeal, they seek to recovevr something on numerous grounds never urged upon Judge Pray, not within the pleadings nor supported by the evidence in the case.

Counsel's criticism of Judge Pray's statement as to the general bond issue of the town for $15,000.00 is mere quibbling. (Page 261). He did say that the town "found that it could lawfully issue $15,000.00 in bonds as a direct obligation, and no more."

As elsewhere stated herein, counsel repeatedly assert that an election was held on the general bond issue. There is nothing in the record to justify such statement. On page 262 of their brief they twice make the statement that there was an election on the question of exceeding the three per cent limitation, without calling the court's attention to any statement in the record justifying such assertion. The contract was let April 26, 1920. The assessed value of all property in Ryegate was then $577,005.00. (Tr. 27). Three per cent of that amount is $17,310.15. On July 28, 1920, when the first bonds in question were issued, the general indebtedness of the town in excess of moneys in its general fund was $15,871.83, in which were included the $15,000.00 of general bonds (Tr. 28), so no election was necessary to authorize an increase of the constitutional debt limit of three per cent as to those general bonds. The record does not disclose that any election was held. If we assume that one were held it must have been such an election as is first mentioned in Subdivision 64 of Section 5039, Revised Codes 1921, which would simply be an election authorizing the issuance of

the bonds and not authorizing any increased indebtedness over the three per cent limit, because of the fact that no such increase was neecssary to make the $15,000.00 general bond issue legal.

THIS COURT MAY NOT CONSIDER QUESTIONS WHICH ARE NOT WITHIN THE ISSUES NOR CONSIDERED BY THE TRIAL COURT.

POINT AND AUTHORITIES

The only issue raised by the pleadings and considered by the trial court was whether plaintiff was entitled to a money judgment for the amount of principal and interest on its special improvement district bonds. None of the other questions now raised on appeal may be considered by this court, as they are not within the issues, were not presented to Judge Pray and were not considered or passed upon by him.

Sec. 618, 3 C. J. 718, 719 and 720; Sec. 625, 3 C. J. 730; Hull v. Burr, 244 U. S. 712, 34 S. Ct. 892; Dayton-Goosecreek Rly. Co. v. United States, 263 U. S. 456, 44 S. Ct. 169; City and County of Denver v. Denver Union Water Co., 246 U. S. 178, 38 S. Ct. 278; Rodriguez v. Vivoni, 26 S. Ct. 475; Bates v. Coe, 98 U. S. 31; Louisville & Nashville Railroad Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 32 S. Ct. 189; DeJohn v. Alaska Natunska Coal Co., 41 Fed. (2d) 612; Mayor, etc. of the City of Helena v. United States, 104 Fed. 113; United States v. Kettenbach, 208 Fed. 209; Duval Cattle Co. v. Hamphill, 41 Fed. (2d) 433; Thomas v. Kansas City Southern Rly. Co., 277 Fed. 708; Albany Perforated Wrapping-Paper Co. v. John Hoberg Co., 109 Fed. 589; Tuttle v. Claflin, 76 Fed. 227; Towle v. Pullen, 238 Fed. 107; Wolfberg v. State Mutual Life Assurance Co., 36 Fed. (2d) 171; Elkan v. Sebastian Bridge Dist., 291 Fed. 532; Potter v. Cincinnati I. & W. R. Co., 272 Fed. 688; In re Grosse, 24 Fed. (2d) 305; Commerce Trust Co. v. Chandler, 284 Fed. 737; Harding v. Giddings, 73 Fed. 335; Leathe v. Thomas, 97 Fed. 136; Addyston Pipe & Steel Co. v. City of Corry, 46 Pac. 1035.

General rules here applicable are stated by Corpus Juris as follows:

> "One of the most important results of the rule that questions which are not raised in the court below cannot be raised in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, and that the parties are restricted to the theory on which the cause was prosecuted or defended in the court below. Thus where both parties act upon a particular theory of the cause of action, they will not be permitted to depart therefrom when the case is brought up for appellate review." Sec. 618, 3 C. J. 718, 719 and 720.
>
> "As a general rule a party is bound in the appellate court by the theory pursued below with regard to the relief sought and grounds therefor, and he cannot obtain relief not asked in the court below or urge a ground for relief which was not presented there, especially where the new ground is inconsistent with the theory on which he proceeded at the trial." Sec. 625, 3 C. J. 730.

Equity cases decided by U. S. Supreme Court in which the above rules are followed include the following:

Hull v. Burr, 234 U. S. 712, 34 S. Ct. 892, —an action to restrain trustees in bankruptcy from asserting an established claim or interest in certain property, in which the court said:

> "As already mentioned, the specific prayer is that defendants may be restrained from asserting or claiming as trustees in bankruptcy, in any court or place, any right, title, or interest in the property. There is a prayer for general relief, but it was pointed out by the circuit court of appeals (207 Fed. 534, 544) that no right to relief other than by way of an injunction was brought to the attention of the district court or of the court of appeals upon the hearing. The general prayer should therefore be treated as abandoned." (Page 896).

Dayton-Goose Creek Ry. Co. v. United States, 263 U. S. 456, 44 S. Ct. 169, in which appellants sought an injunction

to restrain the Interstate Commerce Commission from enforcing provisions of the transportation act of 1920. The following is taken from the syllabi:

> "11. Appeal and error.—Question not raised below not considered on appeal. In suit to enjoin enforcement of a statute fixing public utility rates as unconstitutional, where the issue of confiscation in the returns permitted in earnings is not raised in complainant's bill, it is not before the appellate court.
>
> "12. Injunction.—Bill held not to raise issue of unconstitutionality of statute. In suit to enjoin enforcement of a statute, fixing public utility rates as unconstitutional, where complainant alleged that the values on which the return was estimated were not the true values, but did not allege what the true values were, such pleading did not properly tender the issue on the question of value."

City and County of Denver v. Denver Union Water Co., 246 U. S. 178, 38 S. Ct. 278. The following is contained in the syllabi:

> "3. Appeal and Error.—Contentions—Urging contention below.
>
> "A bill to enjoin the enforcement of a municipal ordinance fixing the rates for water permitted to be charged by complainant, on the ground that they did not afford a fair and reasonable compensation based on the value of complainant's property used in that service, and hence amounting to a taking of property without due process of law, alleged that complainant was entitled to have its property, devoted to public use of supplying the municipality and its inhabitants with water, remain unimpaired in value, and to receive for the water supplied and service rendered a reasonable return. The answer admitted complainant's ownership of a system of waterworks, and that it was entitled to have its property devoted to the public use of supplying the municipality, and its inhabitants with water, remain unimpaired in value, and receive a reasonable return therefor, and further alleged that the rates fixed by the ordinance were fair, reasonable, and just. The master's report showed that no question was made before him but

that the plant of complainant should be valued as a plant in use. Held, that it was not open to the municipality to urge on appeal that a large portion of complainant's property used in supplying water should be computed at its value disassociated from that service, because complainant was occupying the streets of the municipality at sufferance and might be excluded, for that contention, which substantially was that complainant's property should be computed at its junk value, was not raised below."

Rodriguez v. Vivoni, 26 S. Ct. 475, an action for partition of real estate. The following is taken from the syllabus:

"2. Appeal—questions reviewable—Questions not presented by the pleadings nor raised in the lower court will not be considered on appeal."

Bates v. Coe, 98 U. S. 31, suit in equity for infringement of patent, in which the court said:

"Two assignments of error, to-wit, the second and fifth, must not be passed over without comment. They are to the effect that the court erred in holding that the patentee was the original and first inventor of the respective improvements specified in the second and fourth claim of the patent.

"Two objections to those assignments of error exist, each of which is sufficient to show that they cannot be allowed: 1. That there is no such defense set up either in the answer or amended answer. Nothing can be assigned for error which contradicts the record, nor can an appellant be allowed to assign for error the ruling of the court in respect to any defense not set up in his plea or answer. Appellate courts cannot amend the pleadings, nor can they allow that to be accomplished by an assignment of error." (Page 47).

Louisville & Nashville Railroad Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 32 S. Ct. 189. The following appears in the syllabi:

"Appeal and Error—Objections not raised below.

"2. The objection that there was an adequate remedy at law where a common carrier refused to accept interstate shipments of intoxicating liquors destined to local option or

'dry' points in another state, and announced its purpose in such refusals, comes too late, if ever available, when first made on appeal."

The following cases were decided by the Ninth Circuit Court of Appeals:

DeJohn et al. v. Alaska Matanuska Coal Co., 41 Fed. (2d) 612, an action to determine the right of possession to coal land. The property, at the time suit was instituted, was in the actual possession of a receiver. The receivership court granted leave to the Matanuska Company to bring suit for the purpose of determining right to possession and ordered in several parties who were asserting adverse claims, including one Agostino, who claimed the right to exclusive possession. There were also certain funds in the hands of the receiver which Agostino claimed on appeal. In holding that this question was not before the appellate court, the court said:

> "There is some contention here by Agostino that he is entitled to the funds, or a part of the funds, in the receiver's hands, but that question was not properly in issue in the trial court, was not there decided, and hence is not before us." (Page 613).

In Mayor, etc. of the City of Helena v. United States, 104 Fed. 113, the cause came before the appellate court on an alleged error of the Circuit Court of the United States for the District of Montana in awarding a peremptory suit of mandate to compel the payment of a judgment recovered in said court by James H. Mills, receiver, against the City of Helena. The following is taken from the court's opinion:

> "It is objected that neither the petition nor the alternative writ show title in the relator. The petition alleges the recovery of the judgment in the United States circuit court for the district of Montana in favor of James H. Mills, receiver, but it is not alleged that the judgment has

been assigned or transferred to the relator. It is alleged, however, that the petitioner is beneficially interested in the subject matter of this proceeding and in the relief demanded as a taxpayer on property situate within the city of Helena, and as an owner and holder of said judgment. This allegation appears also in the alternative writ of mandate. No objection to the sufficiency of the petition was taken by demurrer or otherwise in the court below, and the answer of the defendants did not deny the allegation of the petition that the relator was the owner and holder of the judgment. The objection that the relator does not show title by assignment, not having been made in the court below, cannot be taken here. To hold otherwise would involve the exercise of original instead of appellate jurisdiction. This is not permitted to us. (Citing cases). Had the objection been taken by demurrer, the petition could have been amended in the lower court, and the assignment alleged. The omission must now be considered as having been waived. O'Reilly v. Campbell, 116 U. S. 418, 6 S. Ct. 421, 29 L. Ed. 669." (Page 115).

In the case of the United States v. Kettenbach, 208 Fed. 209, a suit by the United States to cancel and annul certain patents, the court said:

"1. It is contended by the complainant in this court that the patents described in these three cases should be declared fraudulent and void on the single ground that the evidence establishes the fact that the entrymen applied to purchase the lands described in their entries for the purpose of speculation. Section 2 of the Act of June 3, 1878, does require the entryman to set forth in his sworn statement, among other things:

'That he does not apply to purchase the same (the land) on speculation, but in good faith to appropriate it to his own exclusive use and benefit.'

"The definition of the word 'speculation' is given by Webster as 'the act or practice of buying land, goods, shares, etc., in expectation of selling at a higher price.' It may be conceded that, when the entrymen made entry of the lands in controversy, it was with the expectation that they would sell them at a higher price; but we are not

required to dispose of these appeals upon these words of the statute.

"The cases are not so presented in the bills of complaint and were not so tried in the court below. The charge in the bills of complaint is, in substance, that, at the time the entrymen made application to purchase the lands described in their entries, they had made an agreement with certain persons by which the title to the land which they were to acquire from the United States should inure to the benefit of persons other than themselves. Whether this charge was true or not was the question at issue in the court below, and to this issue the voluminous testimony we find in the record was directed, and is now before the court for the purpose of determining these appeals. It is this question, and this question alone, we must determine with respect to the 61 patents assailed in these cases." (Page 213).

The following are equity cases from other circuit courts of appeal:

In Albany Perforated Wrapping-Paper Co. v. John Hoberg Co., 109 Fed. 589, it was held that:

"Where a bill to restrain an alleged infringement of a trademark was based on the theory of the fraudulent use of certain trade-names, and was dismissed for want of equity, it cannot be alleged on appeal that a case was made out of a fraudulent and unfair competition in trade." (From syllabus).

In Tuttle v. Claflin, 76 Fed. 227, the court held that:

"Where the pleadings are silent on the question of whether complainants marked their article as 'Patented,' or notified defendants of their alleged infringement, as required by Rev. St. Sec. 4900, and that question was never actually raised or decided in the circuit court, it is then too late for defendants to make the point upon appeal from the final decree." (From Syllabus, page 227).

On this point the court said:

"It is too late to raise for the first time in an appellate court technical questions of pleading or proof which are

> not jurisdictional in their character, and which were not raised either in the pleadings or before the trial courts, where defects might have been remedied, and which must therefore be considered to have been waived." (Page 237).

The case of Harding v. Giddings, 73 Fed. 335, involved, among other things, a certain agreement not set up in the pleadings. It was offered in evidence and objected to as not within the issues. The lower court reserved the question of admissibility of the agreement and upon appeal the record failed to show what decision had been made by the court as to the admissibility of the agreement. On this point the court said:

> "We are further of the opinion that because the agreement was not set up, either by bill or answer, in the pleadings, and was not considered or passed upon by the court of original jurisdiction upon the hearing, this court cannot consider or give effect to it." (Page 341).

The following cases are to the same effect:

> Duval Cattle Co. v. Hemphill, 41 Fed. (2d) 433; Thomas v. Kansas City Southern Ry. Co., 277 Fed. 708; Towle v. Pullen, 238 Fed. 107; Wolfberg v. State Mutual Life Assurance Co., 36 Fed. (2d) 171; Elkan v. Sebastian Bridge Dist., 291 Fed. 532; Potter v. Cincinnati, I & W. R. Co., 272 Fed. 688; In re Grosse, 24 Fed. (2d) 305; Commerce Trust Co. v. Chandler, 284 Fed. 737; Leathe v. Thomas, 97 Fed. 136; Addyston Pipe & Steel Co. v. City of Corry, 46 Pac. 1035.

The complaint was evidently framed on the theory of money had and received. (Tr. 1 to 9). No reason is stated for bringing the action, except the total failure to pay interest or principal of bonds after January 1, 1922. (Tr. 8).

The answer contains a general denial of any liability (Tr. 25) and affirmatively avers that the bonds were payable only out of special improvement district assessments. (Tr. 27). Defendant also pleaded that, if the bonds in question were held

to be a general liability of the town, the constitutional and statutory limit of indebtedness of the town would be exceeded, and therefore they were void and they and the debt evidenced by them illegally and unconstitutional. (Tr. 28).

Other defenses pleaded in the answer were (1) that the bonds were sold for 80 per cent of their face value, (2) that the Security Bridge Co., in accepting said bonds from the town, and plaintiff, in purchasing them from that company, knew that the Town of Ryegate was not liable for the payment of either principal or interest of such bonds, and (3) that the assessments made for the payment of the bonds were adjudged null and void in suits brought by property owners to restrain their collection, because the town had not acquired jurisdiction to create the district. (Tr. 29 to 34).

Plaintiff in its reply denied that the bonds and the indebtedness so evidenced were in excess of the constitutional limit, if they were held to be general obligations of the town, denied that the bonds were sold for 80 per cent of their face value, denied that plaintiff and Security Bridge Co. knew that the town was not liable for the payment of the bonds when they were accepted and purchased, admitted knowledge of the institution of suits by property owners to have such assessments declared invalid, and admitted that the decrees entered therein prevented the collection of the principal and interest upon the special improvement district bonds.

In the "Stipulation as to Trial and Facts" it is admitted that the town could not legally and constitutionally issue sufficient general bonds to cover the entire cost of installation of water system; that the district was created for the purpose of raising the additional necessary funds (Tr. 52, 53); that the object of

the issuance of the general and special improvement district bonds was the installation of complete water works for the town and a portion of its inhabitants (Tr. 53); that the Security Bridge Co. accepted the general and special improvement district bonds in payment of cost of installation of the water system (Tr. 54, 55); that the Security Bridge Co. sold said bonds at 85 per cent of their par value to plaintiff (Tr. 55); that more than one-third of the residences and five other buildings in the town are not in the district, a portion of which have fire protection, but that 22 residences and two warehouses in the town do not have such protection (Tr. 57); that the water system is operated at a loss (Tr. 57, 58); that the interest on the district bonds to January 1, 1922 was paid out of district assessments and no part thereof out of any town funds (Tr. 58; that the allegations of Subdivision II of appellee's answer as to indebtedness of town and of assessed value of the property in the town are true (Tr. 59; that Paragraph one of subdivision IV of the answer as to the precautions taken by the town council to assure the legality of the bonds are true (Tr. 59); that Paragraph one of Subdivision IV of the answer as to the precautions taken by the town council to assure the legality of the bonds are true (Tr. 59; that practically all of the averments of paragraph two of that subdivision of the answer are true (Tr. 59, 60); that Security Bridge Co. purchased said district bonds with the knowledge that they were special improvement district bonds, with full knowledge of the laws of Montana governing their issuance, the powers of appellee with reference thereto and the method provided for their payment (Tr. 60); that suits wre brought by various property owners as alleged in Subdivision V of the answer; that the pleadings

and decree attached as exhibits to the answer are correct copies of the originals; that similar suits were filed by other property owners in which the pleadings and decrees were similar; that appellant had its own counsel associated in the defense and trial of those actions and that no appeal was ever taken from said decrees (Tr. 60); and that appellant's name does not appear in the minutes, records and files of the town, except in copies of letters of the town clerk remitting some of the bonds in question to the appellant at the request of Security Bridge Co.

The record is barren of any request of appellant for findings. No suggestion was ever made to Judge Pray that his decision did not cover the questions submitted, nor was any motion or request made that he make findings upon any of the points now on appeal urged for the first time.

Judge Pray correctly stated the only question before him in the first sentence of his decision. (Tr. 94). Again, he clearly states appellant's contention on pages 95 and 96 of the transcript. So, on page 98 of the transcript he states the issue tried in these words: "While plaintiff cannot now recover upon the contract, the question remains can it lawfully recover from the town as on an implied contract for money had and received. * * * Plaintiff claims to have no recourse against the property of the district because of a decision of the state court, from which no appeal was taken." After considering the various authorities cited by counsel, Judge Pray concluded his opinion or decision as follows:

> "It is, of course, manifest that the town had exceeded its constitutional limit of indebtedness but I cannot agree with counsel that under the circumstances here there would be a general liability on the part of the town and that the calling of an election to authorize additional indebtedness

should be treated as a mere formality and that the failure to call it would amount to no more than an irregularity. On the contrary there was no power at all on the part of the town to incur such excessive indebtedness without the previous authorization of the qualified voters.

"After consideration of both sides of the issues the court feels obliged to hold that the Town of Ryegate did not become indebted to plaintiff on account of the special improvement district bonds delivered to it. In accordance with these views judgment will be entered for the defendant with costs."

It is to be noted that in no part of his opinion does Judge Pray even intimate that any question was involved or submitted to him other than the one mentioned.

The evidence, in addition to the "Stipulation as to Facts," will be found on pages 155 to 251 of the transcript. None of it raises any question other than the issue of a general liability on the part of the town and as prayed for in the complaint.

Assignment of errors Nos. I, VII and VIII relate to the one and only issue before the court and that is whether there was any general liability on the town for the payment of the amount claimed by the appellant. Nos. II, III and IV cover matters that were merely mentioned by Judge Pray in the course of his opinion and were not considered by him as any basis for his decision. His remarks about notice to property owners, estimated cost and protest might be omitted from his opinion without changing the result or detracting in the least from his decision. In other words, his decision is amply supported by his other findings or the reasons given for conclusion. There were no such findings as referred to in Nos. V and VI.

There is nothing in the record upon which any claim for relief can be predicated other than the one question of the general liability of the town for the indebtedness of the district.

Under the foregoing authorities and the facts as disclosed by the record no other question may be considered upon this appeal. If plaintiff desires to test the theories of its counsel now advanced for the first time, it should do so in a new action or suit under suitable pleadings.

While not a part of the record, the court could more clearly ascertain what was tried and submitted to Judge Pray by having the briefs filed in the trial court certified and filed herein.

THERE WAS NO PRIVITY BETWEEN APPELLANT AND APPELLEE AND THEREFORE APPELLANT CANNOT RECOVER HEREIN.

POINT AND AUTHORITIES

Appellant purchased the bonds in question from the contractor to whom they were issued in full payment of the contract price of the work done by the contractor. The appellant paid no money to the town. There was no enrichment of the town treasury because of money paid by the appellant to the contractor. Consequently, there was no privity between appellant and the town, so appellant may not recover herein.

> Hedges v. Dixon, 150 U. S. 183, 14 S. Ct. 71; O'Brien v. Wheelock, 184 U. S. 450, 22 S. Ct. 354 on 370-371; Aetna Life Ins. Co. v. Town of Middleport, 124 U. S. 534, 8 S. Ct. 625 on 626 to 629; German Ins. Co. v. City of Manning, 95 Fed. 597 on 606; Otis v. Cullom, 92 U. S. 447 on 449; City of Henderson v. Winstead, 215 S. W. 527 on 528; Swanson v. City of Ottomwa, 106 N. W. 9.

This is a suit for money had and received. The record shows that Mr. Roscoe, an officer of the contractor and acting for the contractor, purchased the general bonds of the town and that the contractor took said general bonds and the special improvement district bonds issued by the town in full payment of the contract price of the work done by the contractor. Ap-

pellant purchased both the general and improvement district bonds from the contractor. (Tr. 54-55-60). No where in the town records does appellant's name appear in connection with the entire transaction (Tr. 60-61) nor did any of the town officials then know that appellant was purchasing the bonds from the contractor. (Tr. 205-6-8, 230-2-3-4-5-6, 248). As the result of the purchase of said bonds by appellant from the contractor, there was no enrichment of the town terasury.

Upon the trial it was admitted by appellant that the town had no authority to create the special improvement district (Tr. 97-98) and that collections on the bonds could not be made because of the decisions in the Belecz and other suits. (Tr. 50).

There was no privity between the appellant and the Town of Ryegate in the purchase of the bonds by appellant and, under the authorities cited above, there can therefore be no recovery by appellant.

The rule contended for by appellee is well stated by the supreme court of the United States in Aetna Life Ins. Co. v. Town of Middleport, 124 U. S. 534, 8 S. Ct. 625, where the court said:

> "The bill then charges that said supreme court, while holding the bonds to be void, did not deny, but impliedly admitted, the validity of the appropriation by the town, and insists that by the issue and delivery of said bonds to the railroad company, and their sale by that company to the present complainant, it is thereby subrogated to the rights of action which that company would have on the contract evidenced by the vote of the town, and the acceptance and fulfillment of the contract by the railroad company." (Pages 626-7).
>
> "The circuit court held that the statute of limitations was a bar to the present suit, and dismissed the bill on that ground.
>
> "But we regard the primary question, whether the com-

plainant is entitled to be substituted to the rights of the railroad company after buying the bonds of the township, a much more important question, and are unanimously of opinion that the transaction does not authorize such subrogation." (Page 627).

"In the present case there was no borrowing of money. There was nothing which pretended to take that form. No money of the complainants ever went into the treasury of the town of Middleport; that municipality never received any money in that transaction. It did not sell the bonds, either to complainant or anybody else." (Page 628).

"One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that, being forced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason, be subrogated to such rights as the creditor, whose debt he has paid, had against the original debtor. As we have already said, the plaintiff in this case paid no debt. It bought certain bonds of the railroad company at such discount as was agreed upon between the parties, and took them for the money agreed to be paid therefor. But, even if the case here could be supposed to come within the rule which requires the payment of a debt in order that a party may be subrogated to the rights of the person to whom the debt was paid, the payment in this case was a voluntary interference of the Aetna Company in the transaction. It had no claim against the town of Middleport. It had no interest at hazard which required it to pay this debt. If it had stood off, and let the railroad company and the town work out their own relations to each other, it could have suffered no harm and no loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction, or have paid this money, except the ordinary desire to make a profit in the purchase of the bonds. The fact that the bonds were void, whatever right it may have given against the railroad company,

gave it no right to proceed upon another contract and another obligation of the town to the railroad company." (Page 629).

The decision ni that case was quoted with approval in Hedges v. Dixon, 150 U. S. 183, 14 S. Ct. 71, and also in German Insurance Co. v. City of Manning, 95 Fed. 597 on 606.

In Otis v. Cullom, 92 U. S. 447, the supreme court of the United States, on page 449, said:

> "Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank-notes. The seller is liable ex delicto for bad faith; and ex contractu there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage-ground upon which it would have placed him."

Again, in O'Brien v. Wheelock, 184 U. S. 450, 22 S. Ct. 354, the same court said:

> "We think that the evidence fails to show that Palms relied, or had the right to rely, on the acts, or assurances, or silence, of any of these different classes of landowners, and was thereby misled. He purchased the bonds, not of the landowners, or any of them, nor from the levee commissioners, but in the open market, and on the advice of counsel as to the legality of the proceedings. The landowners who participated in any way in the creation of the drainage district were as vitally interested in the matter as any purchaser of bonds could be, and they acted equally in the mistaken belief that the law was valid. It would be a novel idea, as the supreme court of Illinois remarked in Holcomb v. Boynton, 151 Ill. 300, 37 N. E. 1033, 'in the law of estoppel that the doctrine should be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act void and open to the inspection of all'." (Page 370).

" * * * and besides Palms, as a purchaser of bonds in the open market, was a stranger to the work." (Page 371).

"Here no bonds were ever sold by the commissioners to Palms or anyone representing him. They were delivered to the contractors and were taken in payment at 90 cents on the dollar of their face value. If the acts of any of the landowners created any equities against them it was in favor of the contractors, and these equities could not be asserted by Mr. Palms, unless by subrogation, which could not be availed of." (Page 371-2).

There is authority to the same effect in the state courts. In City of Henderson v. Winstead, 215 S. W. 527, the Court of Appeals of Kentucky said, on page 528

"As to the appeal in the suit instituted by the bank a question different from that in the Winstead Case is presented. It did not purchase the bonds held by it from the city, but received them by assignment or transfer from Eichel, who in turn had gotten them from Bray, the original purchaser; neither Bray nor Eichel is a party to this appeal. It is difficult to tell from the bank's petition whether it is seeking a recovery on the bonds, or in assumpsit; but in either event its case must fail. The bonds are void, issued as they were under an unconstitutional statute, and hence created no obligation upon the city. The bank is in exactly the same position as was the appellant in Cohen v. City of Henderson, supra. The city did not receive any money from the bank.

"To support an action for money had and received there must be some privity existing between the parties in relation to the money sought to be recovered."

In Swanson v. City of Ottomwa, 106 N. W. 9, it appears that

"The holders of the bonds also appeared and admitted their purchase of the bonds from the Chicago, Fort Madison & Des Moines Railroad Company and pleaded that they purchased the same in good faith before maturity and without knowledge of any defenses thereto * * * and further ask that in the event the bonds were held invalid they have judgment against the city for the amount they paid the rail-

road company for said bonds as for money had and received for its use and benefit." (Page 10).

It was contended that appellant was entitled to recover on the common counts as for benefits conferred upon the city. The court called attention to the fact that the bonds were delivered by the city to the railway company, that the railway company sold them to the appellants, that the railway had purchased the depot grounds and paid for them out of its own money. The original owner of the grounds had received his money and was making no complaint, just as in this case the contractor is making no complaint. That if any benefits had been conferred by the bondholders upon anyone it was upon the railroad company. That the city's act was a pure donation and as the original owner has received his money, no equities can be worked out through him.

SCOPE OF REVIEW

As elsewhere pointed out in this brief, the scope of review by an appellate court is limited by the issues presented to and considered by the trial court. Matters not brought to the attention of the trial court and not considered by it are not subject to review in the appellate court.

POINT AND AUTHORITIES

Only such issues as were presented to the trial court and passed upon it may be considered on appeal.

> Kansas City Life v. Shirk, 50 Fed. (2d) 1046; Wilson v. Merchants L. & T. Co., 183 U. S. 121, 22 S. Ct. 55 on 58; U. S. Trust Co. v. New Mexico, 183 U. S. 540, 22 S. Ct. 172 on 174; Sec. 274b. U. S. Judicial Code; Sec. 398 U. S. C. A.

This subject is treated by counsel for appellant at pages 50 to 57, in their brief.

It is to be noted that under Section 274 B of the Judicial

Code, Section 398 U. S. C. A., the decision of an appellate court must be made upon the record. No authority is given to present new issues or theories to the appellate court.

The true rule is stated in Kansas City Life v. Shirk, 50 Fed. (2d) 1046:

> "In a jury waived case, where the parties make and file an agreed statement of the ultimate facts, or the court makes and files special findings of the ultimate facts, the sufficiency of such facts to support the judgment presents a question of law reviewable on appeal. * * *
>
> "However, where a case tried before the court, a jury being waived, upon agreed facts, such agreed facts, if the ultimate facts of the case as contradistinguished from mere evidentiary facts, may be examined on review for the purpose of determining whether such ultimate agreed facts, on which the case was heard and determined, support the judgment rendered." (Page 1047).

The court also quoted with approval from the opinion of Mr. Justice Peckham in Wilson v. Merchants L. & T. Co., 183 U. S. 121, 22 S. Ct. 55 on 58, where

> "Mr. Justice Peckham, delivering the opinion for the court, said:
>
> 'The result of the decisions under the statutes providing for a waiver of trial by jury, and the proceedings on a trial by the court (Rev. St. Secs. 649, 700) is that when there are special findings they must be findings of what are termed ultimate facts, and not the evidence from which such facts might be but are not found. If, therefore, an agreed statement contains certain facts of that nature, and in addition thereto and as part of such statement there are other facts of an evidential character only, from which a material ultimate fact might be inferred, but which is not agreed upon or found, we cannot find it, and we cannot decide the case on the ultimate facts agreed upon without reference to such other facts. In such case we must be limited to the general finding by the court. We are so limited because the agreed statement is not a compliance with the statute.

'As to what is necessary in special findings or in an agreed statement of facts, the authorities are decisive. It is held that upon a trial by the court, if special findings are made, they must be not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties; and if the finding of facts be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions; and in such case the bill cannot be used to bring up the whole testimony for review, any more than in a trial by jury. * * *

'It has, however, been held that where there was an agreed statement of facts submitted to the trial court and upon which its judgment was founded, such agreed statement would be taken as an equivalent of a special finding of facts. Supervisors v. Kennicott, 103 U. S. 554, 26 L. Ed. 486. But as such equivalent, there must of course be a finding or an agreement upon all ultimate facts, and the statement must not merely present evidence from which such facts or any of them may be inferred'."

Again, the court quoted with approval from the opinion of Mr. Justice Brewer in U. S. Trust Co. v. New Mexico, 183 U. S. 540, 22 S. Ct. 172 on 174, as follows:

" 'An agreed statement of facts may be the equivalent of a special verdict or a finding of facts upon which a reviewing court may declare the applicable law, if such agreed statement is of the ultimate facts, but if it be merely a recital of testimony or evidential facts, it brings nothing before an appellate court for consideration. * * *

'Under all the authorities, this distinction between cases tried on agreed ultimate facts, and the finding of the ultimate facts in a case, and a statement of the evidential facts, is kept clearly in mind in determining the right of an appellate court to review the findings made for the purpose of determining whether the judgment rendered is supported by the facts found or agreed'."

In conclusion, the court, in Kansas City Life Ins. Co. v. Shirk, supra, said:

"Hence, whether the same (agreed facts) supports the

> judgment, in the absence of a declaration of law requested of the court, denied and exception saved, there is no right of review of any question of law saved for review in this court and this court is powerless to review the case."

In the case at bar there was no "declaration of law requested of the court, denied and exception saved, so there is no right of review of any question of law." At most, all that may be reviewed is the question whether the judgment is sustained by the ultimate facts as shown by the "Stipulation as to Facts" and the admission of the parties.

On pages 53 and 54 of their brief, counsel for appellant quote from Judge Pray's opinion as to defendant's statement of the issue. They should have also quoted his statement as to the contention of appellant immediately following their quotation on pages 53 and 54 from a portion of the opinion by Judge Pray. (Tr. 96, 97). He there said: "Plaintiff contends that the town never acquired jurisdiction to create a special improvement district and that the bonds issued were by the court declared to be invalid."

The record does not disclose that any requests for findings of fact or conclusions of law were made by counsel for either party. These statements as to the contention of both parties are not in the record. They must have been assumed by Judge Pray from the briefs.

Plaintiff asserted that the town never acquired jurisdiction to create the special improvement district. That was the finding of Judge Horkan in the Belecz case. (Tr. 89). He also held that the assessments were null and void. (Tr. 90, 91). Appellant, in the trial court, adopted that finding of Judge Horkan by stating that the bonds in question were by the court declared to be invalid. (Tr. 97). Appellant having taken the

position before the trial court that the town never acquired jurisdiction to create the district, cannot now be heard in contending otherwise. In other words, the sole question before this court is as to whether the record sustains Judge Pray's conclusion that the town had exceeded its constitutional limit of indebtedness and that under the circumstances as disclosed by the record the town did not become indebted to appellant on account of the special improvement district bonds delivered to it. (Tr. 111).

We admit that only the first coupons on the district bonds have been paid, but the record is silent as to what has been paid on the general bonds, so the statement as to payments on page 59 of Appellant's brief is inaccurate.

In the case of Douglas County Commissioners v. Bowles, 94 U. S. 104, 110, in which the supreme court of the United States said "common honesty demands that a debt thus incurred should be paid," the facts are not at all similar to those shown by the record in the case at bar. The same is also true of Tulare Irrigation Dist. v. Shepard, 185 U. S. 1.

RIGHT TO DETERMINE ENTIRE CASE IN EQUITY.

Under this sub-head counsel for appellant discuss the question of a supposed trust and an accounting as to the balance in such trust, which counsel state is "as to any balance which has been collected from special improvements but not paid to the bondholders." (Page 173 of brief).

We assume that counsel refer to their statement on pages 102 and 103 of their brief, where they say: "We do not hesitate to say emphatically, and charge the defendant with the fact, that it has collected assessments, which moneys have not been

accounted for to the bondholders, and which it now has in its possession, or has appropriated for purposes other than that prescribed in Ordinance No. 29, passed June 9, 1920. We challenge defendant to make its showing to the contrary. We do not know what amounts have been so collected as to dollars and cents, but we do not believe, nor will the court believe, that the Town of Ryegate collected on account of assessments precisely in dollars and cents the exact amount to the penny sufficient to pay the interest coupon of January 1, 1922, and no more. We charge here and now that the Town of Ryegate has collected substantial sums which it has failed to pay or to tender as for interest or on account thereof."

Counsel do not seem to be at all chary in making assertions for which there is no basis in the record. It is difficult to understand their reasons for such statements. They can scarcely expect this court to go outside the record in order to render a decision favorable to appellant. Nevertheless, we are at a loss to conjecture what other motive they may have in making such unfounded statements.

Appellant did not ask for an accounting. It did not claim that any special assessments had been collected which were not paid to the bondholder. It made no request of Judge Pray for an accounting or for an order to require an accounting. As we have shown elsewhere in this brief no such question was before the trial court. The only controversy before it was as to whether there was a general liability against th town on account of the bonds in question.

Counsel seem to be aggrieved because appellee did not make a record sufficient to establish the fact that appellant was entitled to some relief. It is most unusual for appellant to com-

plain because appellee did not make a case for appellant. In fact, this is our first experience of that kind.

Whether any assessments were collected and not paid to the bondholder cannot be determined from the record. It is silent on that question. It is equally silent as to whether any coupons or bonds were presented for payment after January 1, 1922, or whether any demand for payment was ever made by the bondholder. If any additional assessments were in fact collected, we are sure that the town will pay same to the bondholder upon presentation of the coupons, without any suit for an accounting. At least, it might be well for appellant to make such presentment and demand before complaining for the first time in an appellate court without any record on which to base its assertions.

Under Section 2269, R. C. M. 1921, taxes and other demands may be paid under protest and the taxpayer may then institute an action to recover the payments so made. It is possible that judgments were so made and such actions instituted. If so, judgments were doubtless rendered in favor of the taxpayers. As payments were made to the bondholder January 1, 1922, it is easily conceivable that there may not have been sufficient funds on hand to pay such judgments in full.

Again it is quite conceivable that, as suits were begun in January, 1922 (Tr. 60) by a considerable number of the property owners in the district to enjoin the collection of the assessments, the other property owners in the district took the same action to prevent collection of assessments against them in 1922 and thereafter. Certainly it was not incumbent upon the appellee to prove the negative of a question not raised by appellant.

On page 178 of their brief counsel state: "Now defendant

has seen fit to plead its trust relation, and has exhibited the declaration of a trust in its ordinances, but it showed no accounting therefor other than the annual water revenues."

The so-called accounting for annual water rentals must refer to paragraphs (6) and (7) of "Stipulation as to Facts" found on pages 57 and 58 of the transcript. They were inserted in order to show that the system was not profitable in answer to an allegation in paragraph XIII of the complaint (Tr. 8) as follows: "That said defendant town and the inhabitants thereof now have and are using and receiving the income and benefits from valuable property totally and wholly built and constructed from moneys of this plaintiff had and received, and used by said defendant town and its officers for such public purpose, all of which moneys so had and used being evidenced by said bonds before herein referred to." That allegation was denied in the answer. (Tr. 25).

If appellant thought that there was any trust relationship between it and the town, that question would have been raised by proper pleading and proof. It is now too late.

The cases cited by counsel under this sub-head are not applicable to the facts in this cause.

We come now to consideration of the plans proposed by counsel as "Suggestions of Adjustments." (Tr. 180 to 184).

PLAN A

This plan is not even a suggested adjustment. If adopted, it would require the town to pay the full amount of the cost of the district bonds to the appellant. It is fully covered by our brief, upon the constitutional limit of indebtedness which the town might incur.

PLANS B AND C

These two proposed plans may be discussed together. That part of the specifications relating to payments is set out on pages 32 and 33 of appellant's brief. It is there stated that "the town now has available from the proceeds of general obligation bonds $15,000.00 in cash to apply on the construction * * * of the water system. After deducting the preliminary expenses, this money will be paid to the contractor in cash for the construction of the reservoir, pump house, pumping plant * * * and such of the main water line * * * as it will cover. The balance of the water system is to be paid in special improvement district bonds drawn against Special Improvement District 4 in the Town of Ryegate, Montana."

Costs per lineal foot for improvements of the kind in question are provided for in Section 5226, R. C. M., 1921. The last sentence thereof contains the following:

> "Provided, however, that the whole cost so assessed shall at no time exceed the sum of $1.50 per lineal foot, plus the cost of the pipe so laid, of the entire length of the water mains laid in such district."

It will be seen that the suggestion in Plans B and C that a portion of engineering expenses, costs of printing bonds and of preliminary expenses cannot be made a part of the charge against the district unless they be included in the $1.50 per foot in excess of actual cost of pipe. This is also true as to costs of hydrants. In other words, the cost of the hydrants, engineering, bond printing and preliminary expenses, together with the actual cost of laying the pipe, must not exceed $1.50 per foot.

The entire record is silent as to the cost of the pipe, except the statement of Judge Horkan in his findings of fact in the Belecz case. On page 87 of the transcript he states "that the

cost of said pipe so used was not in excess of $17,726.47." It should be noted that he does not state what the actual cost was and there is nothing in the record from which such actual cost may be determined. As the amount of pipe mentioned by Judge Horkan covers all of the pipe laid, including the main lines, as well as the lateral distributing lines within the district, there are no means of ascertaining from the record the amount of pipe that could have been legally charged to the district.

The court's attention is called to the copy of the map of the Town of Ryegate attached to appellant's brief. From that it will be seen that the well and reservoir are situated some distance from the exterior lines of the district and that they are on opposite sides of the town. A considerable portion of the pipe mentioned by Judge Horkan is in the pipeline from the well to the reservoir and from the reservoir back to the district, where it connects with the lateral distributing lines.

Upon the record, as made, no court could determine how much of the entire pipeline was required to connect the reservoir with the well and the lateral distributing lines in the district with the reservoir so that it would be impossible to make any proper computation under either Plans B or C.

PLAN D

It is difficult to understand Plan D or how much counsel would charge to town or how much to district. They admit that their computations are not accurate, because of the state of the record. As the case was not tried on the theories underlying any one of the four suggested plans, it is easily understood why the record is not complete so as to sustain appellant's belated contentions. Counsel have embarked upon a fishing excursion, such as is never countenanced by the courts. Records

must be made in the trial and not in the appellate courts.

As Plan D concludes with the statement "Balance due from town itself—$3,042.76," it would seem that that is the amount counsel would have the court find as owing from the town to the appellant. They say on page 184 of their brief: "There is no doubt ofthe town's liability to pay small excesses developed in connection with such improvements when the complete results cannot be foreseen" and cite Salt Lake City v. Smith, 104 Fed. 457, in support of that statement. That was a case brought by the contractors against the city for claimed extras, because of necessary alterations in the work and is in no way applicable to the facts and issues in the case at bar.

If we are correct in concluding that counsel, under Plan D, would ask for a judgment against the town for $3,042.76, we call the court's attention to the fact that such judgment would increase the debt of the town beyond its constitutional limit, which may not be done, as heretofore pointed out by us.

THE BELECZ CASE

POINTS AND AUTHORITIES

The correctness of the decision of Judge Horkan in the Belecz case was not an issue in the trial of the case at bar and is not now properly before this court for review. However, Judge Horkan correctly decided that case in favor of the plaintiffs therein on the ground that the Town of Ryegate never acquired jurisdiction to create the special improvement district in question.

> 49 C. J., Sec. 333 (2) Pages 265 and 266 and cases there cited; Hough v. Rocky Mountain F. Ins. Co., 70 Mont. 244-248, 224 Pac. 858; Estate of Schuk v. Hauck, 66 Mont. 50-61, 212 Pac. 516; McEwin v. Union Bank & Trust Co., 35 Mont. 470, 90 Pac. 359; First Nat. Bank v. Silver,

45 Mont. 231, 122 Pac. 584; Secs. 3413 to 3417, inclusive, R. C. M. 1907; Sec. 3418, R. C. M. 1907; Chap. 89 Session Laws of 1913; Chap. 142 Session Laws of 1915; Chap. 175 Session Laws of 1919; Shapard et al. v. City of Missoula et al, 49 Mont. 269 on 279-280 (Decided June 8, 1914); Evans v. City of Helena, 60 Mont. 577, 199 Pac. 445; Vol. IV McQuillan on Municipal Corporations, Sec. 1796.

We do not concede the contention of appellant that this court may consider matters which were not submitted to the trial court, as has been stated heretofore in this brief. The Belecz case was not pleaded in the answer for the purpose of having the trial court pass upon the issues involved therein, but simply to show why assessments of the district had not been paid. It is admitted in the "stipulation as to facts" that the Belecz and other similar suits were brought and that Exhibits 3, 4, 5 and 6 attached thereto are, except as to formal parts, true copies of the complaints, answers, replies and decrees in said suits. (Tr. 60 and 68 to 92).

In its reply, appellant admits that the decrees in those cases have prevented the collection of the principal and interest of the bonds in question. (Tr. 50). That admission shows that appellant understood that the purpose of pleading the Belecz and other suits was to show why the district assessments were not paid. Appellant did not then challenge the correctness of the decisions in those cases. Neither did it then contend or even intimate that those decisions were not binding upon appellant or that Judge Pray might pass upon the issues involved in those cases.

Under "Defenses Offered by the Town of Ryegate," page ....., we quote from the transcript, showing that the holding of Judge Horkan as to the invalidity of the special improvement

district bonds was not only never presented to or considered by Judge Pray but the correctness of the decision of Judge Horkan was assumed by counsel for appellant, as well as by Jugde Pray, and that there was then no question but that those bonds were illegal and void; that counsel for appellant then took the position that the town never acquired jurisdiction to create the special improvement district; that appellant then claimed to have no recourse aaginst the property of the district because of Judge Horkan's decision, holding hat the bonds of the district were illegal and void, and that counsel for appellant then disclaimed any intention of trying to establish the legality of such bond issue. (Tr. 94, 96, 97, 98, 179).

True it is that appellant in its reply denies that it has any knowledge or information sufficient to form a belief as to certain allegations of appellee's answer. (Tr. 50). However, in the "stipulation as to facts" appellant admits that it had its own counsel associated in the defense and trial of those suits, so its denial of all matters connected therewith must be ignored.

The general rule is stated in Corpus Juris as follows:

> "Facts either actually or presumptively within the knowledge of defendant, or which relate to personal transactions of defendant, cannot properly be put in issue by a denial of knowledge or information sufficient to form a belief. * * * When facts which are readily accessible to defendant, by reason of being in the public records, are sought to be put in issue, this form of denial is improper." 49 C. J. Sec. 333 (2) Pages 265 and 266 and cases cited.
> Hough v. Rocky Mountain F. Ins. Co., 70 Mont. 244 on 248, 224 Pac. 858; Estate of Schuk v. Hauck, 66 Mont. 50-61, 212 Pac. 516; McEwen v. Union Bank & Trust Co., 35 Mont. 470, 90 Pac. 359; First Nat. Bank v. Silver, 45 Mont. 231, 122 Pac. 584.

Whether this court may pass upon the correctness of the de-

cision of Judge Horkan in the Belecz case, which was not presented to the trial court, we submit that that ruling was correct. The grounds upon which the plaintiffs in that case sought to enjoin the collection of the assessments in question were five in number, as follows:

1. That the description of the character of the improvements to be made in such special improvement district as set out in the resolution of intention to create said district, did not contain a sufficient description of the general character of the improvements to be made as required by law; that the only description used was "the construction of pipes, hydrants and hose connections for irrigating appliances and fire protection," while as a matter of fact the general purpose of the creation of the district was to install a complete system of water mains and water works for the entire Town of Ryegate.

2. That the cost of the improvements in said district far exceeded the sum of $1.50 per lineal foot, plus the cost of the pipe laid.

3. That no notice was given of the letting of the contract for said improvements; that the same were estimated to cost $28,350.00; that the contract price thereof was $52,829.35, and that the actual cost of the improvements, including engineering and other expenses, amounted to $57,619.22.

4. That the contractor took the warrants of the district in payment of his contract price; that in so doing he allowed a considerable discount on the bonds and added such discount to his bid; that this fact was known to the Mayor and Town Council at the time the contract was let, and thereby the cost of the work was greatly increased to the improvement district.

5. That the owners of a sufficient number of lots protested

against the creation of the district, and that interested parties, including the contractor, paid the Chicago, Milwaukee & St. Paul Railway Company, one of the protestants, the sum of $2500.00 to induce it to withdraw its protest; that it did withdraw its protest and thereby left an insufficient number of lots whose owners were protesting against the creation of the district, and thereby made their protest ineffectual.

INSUFFICIENCY OF DESCRIPTION

We desire to call the court's attention to our various statutory provisions with reference to creation of special improvement districts, with a history of the enactment of the same, so as to demonstrate to the court that the proceedings had in the creation of this district were under a statute designed solely for the purpose of authorizing the "construction of pipes, hydrants and hose connections for irrigating appliances and fire protection," and not for the purpose of establishing a general system of water works.

Until repealed by the Sixteenth Legislative Assembly of Montana, special improvement districts for the purpose of constructing or acquiring a system of water works or to lay extensions to water mains were governed by Sections 3413 to 3417, inclusive, of the Revised Codes of 1907. It will be observed that those sections did not provide for any other public improvement. Section 3418 provided for certain other special improvements in municipalities.

The Thirteenth Legislative Assembly passed Chapter 89, which provided at great length how special improvements other than the establishment of a water system or the laying of additional water mains, should be constructed and paid for in the towns and cities of Montana.

Among other improvements it included "pipes, hydrants, hose connections for irrigating and appliances for fire protection," the very things which were set out in the resolution of intention as the improvements which were to be made in the district in question. Nowhere in that chapter can be found any provision from which it may be inferred that it was intended to cover the construction of an entire system of water works. The very fact that Sections 3413 to 3416, inclusive, of the Revised Codes of 1907, having to do with the construction of a water system, were not repealed, although a large number of the sections immediately preceding and following said sections were repealed, indicates clearly the intention of the legislature not to make Chapter 89 cover the construction of a water system for any town or city.

This chapter was amended by Chapter 142 of the Fourteenth Legislative Assembly, but the sections of our Revised Codes in question were in no wise amended or repealed. No attempt was made to have the amended act cover the creation of an entire water system. It was still restricted to the establishment or acquisition of "pipes, hydrants, hose connections for irrigating appliances, for fire protection."

It was not until the Sixteenth Legislative Assembly, in Chapter 175, amended section 2 of the aforesaid chapters 89 and 142, by adding thereto the words "water works, water mains and extension of water mains," and specifically repealed sections 3413 to 3417 inclusive, of the Revised Codes of 1907, that the creation of special improvement districts for the purpose of establishing a system of water works was covered by this general law.

Resolution No. 10, a copy of which is attached to the com-

plaint herein, (Tr. 10), which is the resolution of intention in question, in section 6 states the character of the improvements to be" the construction of pipes, hydrants and hose connections for irrigating appliances and fire protection."

There can be no question from a perusal of this resolution, that the town council was acting under Chapter 89 of the Session Laws of 1913, and Chapter 142 of the Session Laws of 1915, and that in all probability the town council then had no knowledge that section 2 of those chapters had been amended by Chapter 175 of the Laws of 1919, then just recently enacted.

The notice to the public of the construction of pipes, hydrants and hose connections for irrigating appliances and fire protection could not be notice that the town intended to establish a complete water system, including pumping plant.

The resolution of intention not having given notice of the character of the improvements intended to be made, was not a compliance with our statutory law, and therefore, the town council failed to acquire jurisdiction to proceed with the organization of such district and the construction of a water works system.

> "The statute having defined the measure of the power granted, and also the mode by which it is to be exercised, the validity of the action of the legislative body of the municipality must be determined by an answer to the inquiry whether it has departed substantially from the mode prescribed. Particularly is this true when it is engaged in making street improvements, the expense of which is to be a charge by assessment upon the property included in a special improvement district. The power to proceed at all is a restricted and qualified power and may be exercised only upon the terms granted. The law on the subject is well settled, so well, indeed, that no municipal officer should be ignorant of it, or fail to understand that

> a special improvement district cannot be created without observance of every requirement of the statute on the subject. * * * *Nor is the proceeding aided in any way by the failure of any property owner to file with the city clerk his written objection to the regularity of the proceedings, within sixty days after the letting of the contract.* The conclusive presumption of waiver, declared in section 13 of the Act is predicated upon the passage of the resolution of intention and the publication of the required notice as a condition precedent; and, though the section may be regarded as having a curative purpose and may accomplish this purpose so far as regards other irregularities in the proceedings, *it cannot supply jurisdiction when it has not been acquired by observance of the antecedent steps necessary to acquire it.* (Page & Jones on Taxation, Sec. 981; Comstock v. City of Eagle Grove, 133 Iowa, 589, 111 N. W. 51; Smith v. City of Buffalo, 159 N. Y. 427, 54 N. E. 62.)"
> Shapard et al v. City of Missoula et al, 49 Mont. 269 on 279-280 (Decided June 8, 1914).

Our supreme court, in Evans v. City of Helena, 60 Mont. 577, 199 Pac. 445, had under consideration the question of the sufficiency of the description of the character of the improvements to be made in a similar resolution of intention. It quoted from Section 3 of Chapter 89 of the Laws of 1913, as amended, in part as follows:

> "Which resolution shall designate the number of such district, describe the boundaries thereof, and state therein *the general character of the improvement or improvements which are to be made.*"

Commenting upon what was necessary to describe the improvements in compliance with the statute, the court said:

> "It would require a very strained construction of language to hold that 'incidental work' to paving, by implication, includes the several subjects embraced in the contract, each of which constitutes a class or a distinct city improvement."

The City of Helena had attempted to include the installment

of storm sewers, extension of parking, tearing out old curbing and installing new curbing under the words "incidental work" to paving. The court went on to say:

> "From the resolution of intention and notice given to the taxpayers affected in connection with the creation of improvement district No. 125, no one can reasonably be held to have been advised by the general designation of paving and 'incidental work' that any improvement other than the paving of the streets was designed or intended, for within the district large portions of territory have already been included in parking, curbing and sewer districts. * * * It is the established rule of law that the city council, in the resolution of intention, must describe the character and nature of the improvements, with sufficient particularity in order that the taxpayers affected may be fully advised, and the improvements to be made must correspond substantially with those set forth in the resolution of intention and no material change or departure therefrom can be made. * * * These proceedings have for their ultimate purpose the subjecting of the property within the district to taxation to bear the cost of the improvements. They are *in invitum,* and in recognition of these facts the Legislature has provided a complete, but direct, plan of procedure designed to protect property from confiscation and at the same time permit beneficial improvements to be made. * * * Any one or all of the several improvements contemplated may be included in the resolution of intention but each separate character of improvement must be embraced by specific mention and at least a general description. * * * But where the improvements about to be made are essentially different from those authorized by the resolution, and the cost of the same is materially increased, the courts will interfere, although as regards the work to be done a substantial compliance with the resolution is all that is necessary."

See also IV McQuillin on Municipal Corporations, Section 1796.

A careful consideration of our statutory provisions with reference to improvement districts, the history of the legislation

with reference to the construction of water systems under the improvement district law, and the interpretation of our supreme court in the cases cited with reference to the necssary information to be furnished by the resolution of intention, seem to admit of only one determination, and that is that the improvements made were not covered by resolution No. 10, and therefore the town council of Ryegate had no jurisdiction to create the district and to install such improvements.

COST IN EXCESS OF $1.50 PER FOOT

It was provided in Section 3413 of the Revised Codes of 1907 that the whole cost of a water system should not exceed $1.50 per lineal foot, of the entire length of the water mains laid in the district. No such provision was contained in any other act of the legislature until the construction of water mains and a water system was included under Chapter 89 of the Laws of 1913, and Chapter 142 of the Laws of 1915, by the amendments thereto contained in Chapter 175 of the Laws of 1919. In that chapter, section 2 is as follows:

> "Provided however, that the whole cost so assessed shall at not time exceed the sum of $1.50 per lineal foot, *plus the cost of the pipe so laid,* of the entire length of the water mains laid in such district."

This section is word for word the provision in Section 3413 supra, with the addition of the words underscored.

NOTICE OF LETTING AND COST

Where it was estimate dthat the improvements would cost $28,350.00 and no notice was given of the letting of the contract for the construction of said improvements, and the contract price agreed upon was $52,829.00, and the actual cost of the entire work, including engineering services, etc., amounted to $57,619.00, the court should interfere for the protection of

the property owners even after the construction of the improvements.

DISCOUNT ON WARRANTS

It is the settled law of this state that warrants or bonds may not be taken by a contractor in payment of special improvement district work when any discount is made thereon, even though such discount is covered up by an increase in the bid of the contractor for the work, rather than in a discount offered for the warrants or bonds themselves. Where the contractor increases his bid in order to cover such discount, and it is known to the municipal authorities that he has done so, that fact invalidates the entire proceeding. Evans v. City of Helena, 199 Pac. 448.

PURCHASE OF WITHDRAWAL OF PROTEST

While we have no authority on this question, we submit to the court that public policy will not permit a contractor and others interested in public improvements to purchase the withdrawal of certain protests so as to bring the number below that required by law in order to defeat the construction of the desired improvements. Such corruption is only a little less than the bribery of officials and should be punished by the court by denying to the contractor and those interested with him, the fruits of such corrupt manipulation.

On page 141 of their brief, counsel for appellant say: "The state of the record being so meager with respect to the proceedings brought in the Belecz case, and no evidence having been offered in the case at bar to prove the assertions made by the plaintiffs in the Belecz case, this court has too scanty a record to justify findings as made by Judge Horkan in the Belecz case."

If appellant was not satisfied with the record as to the Belecz case and had any desire to question the correctness of Judge Horkan's decision, which the record fails to show, its counsel should have presented that matter to the trial court by appropriate pleadings, proof and request for findings. Having failed to do so, it may not now complain.

However, the record is sufficient to show that the decision of Judge Horkan was correct.

On pages 246 and 247 of the transcript is set out the final estimate of the engineer as to the cost of the entire system. It there appears that the excavation at the reservoir, concrete at reservoir, reservoir complete, excavation at well, pumping equipment, pump house and extra rock excavation cost $16,500.90, none of which was any part of the expense of "pipes, hydrants, hose connections for irrigating and appliances for fire protection," for the construction of which it was attempted to create the special improvement districti n question. In addition thereto, frost casing, fifteen per cent profit on same, printing bonds and engineering expenses totaled $3,707.83, which was not a proper charge against the district, or at least a considerable portion thereof was not a proper charge against the district. These two totals aggregate $20,208.73. It is admitted on page 181 of appellant's brief that only $12,016.82 derived from the general bond issue was used in payment of cost of the system, the remainder thereof, $2,983.19, having been expended for preliminary expenses and other deductions. That being so, $8,191.91 of the aggregate of the above totals was charged to the district. In addition thereto, there was the cost of building the pipeline from the well to the reservoir and from the reservoir back to the district, which, as we have heretofore pointed out, cannot be

determined from the record, but it must have been a considerable sum and certainly was not a proper charge against the district.

Clearly the resolution of notice of intention to create the district did not cover the cost of any part of reservoir, well, pipeline from well to reservoir and from reservoir to district and certainly not a considerable portion of the other expenses mentioned above, and therefore the Belecz case comes clearly within the rules announced by the Supreme Court of Montana in Shapard v. City of Missoula, 49 Mont. 269 (decided June 8, 1914) and Evans v. City of Helena, 60 Mont. 577, 199 Pac. 445.

In the absence of any record upon which Judge Horkan based his other findings and in the absence of any proof to show that his findings were not correctly made upon the record in the Belecz case, the presumption should be indulged that his findings were correct and that the district never was legally created.

Counsel for appellant discuss the case of Evans v. Helena, 60 Mont. 577, 199 Pac. 445, at great length in an effort to show that it was not authority for Judge Horkan's decision.

The evidence in the Belecz case is not before this court. The presumption must be indulged that it supported the findings of Judge Horkan. On pages 89 and 90 of the transcript he found:

> "That the Town Council of the Town of Ryegate in awarding the contract for said improvement knew that the contract price was increased by reason of the fact that the bonds issued in payment therefor would have to be disposed of at less than par and knew that the bid would have been a lower bid and the contract price lower if the bonds could have been sold at par, and that for this reason

the proceedings of the Council in letting said contract were null and void."

Counsel state that "the record discloses that the same contractor installed the sewerage system" and cites page 212 of the transcript in support of that assertion. On page 212 of the transcript is set out the method of payments contained in the specifications and there does not appear therein or elsewhere in the transcript any statement in support of that assertion of counsel. The fact is that the sewerage system was never constructed and the sewer bonds were never sold. While there is no direct statement to that effect in the transcript, it may be inferred from the admission of counsel for appellant, as shown in the "Stipulation of Facts," (Tr. 59), that all of the allegations of Subdivision II of answer of appellee, except as to a part not here material, were true. In that subdivision of the answer (Tr. 27-28) is set out the general indebtedness of the Town of Ryegate at vavrious dates, the maximum debt at any one time being $17,180.35, so it is very apparent that the sewer bonds were never issued; otherwise the town debt would have exceeded thirty thousand dollars.

THE RIGHT TO SUE A TOWN FOR A JUDGMENT BASED ON SPECIAL IMPROVEMENT OBLIGATIONS, TO BE SPECIALLY ENFORCED UNDER THE FEDERAL PRACTICE.

The authorities cited on this portion of appellant's argument merely relate to the question of procedure in the Federal courts, holding that inasmuch as a writ of mandamus is only granted in aid of an existing jurisdiction, a judgment is a necessary preliminary to obtaining such a writ. The Federal courts have accordingly held that in a proper case a judgment might be entered against a county or municipality, even where such county

or municipality is not itself liable for the debt, the judgment to be enforced, if necessary, not by execution but by mandamus to compel a proper levy. These authorities simply determine the procedure in Federal court in the event the bond issue itself is valid.

In connection with the same argument, counsel again call attention to 5252 Revised Codes of Montana, 1921, providing for reassessment where the original assessment is invalid by reason of some omission or irregularity in the assessment. As pointed out elsewhere, herein, there is no contention in this case that the assessment was invalid because the assessment itself was not properly made; it is our contention that the town never acquired jurisdiction to create the district and the provisions of No. 5252 are accordingly inapplicable.

RES JUDICATA AND STARE DECISIS

POINTS AND AUTHORITIES

I.

In the trial of this case counsel for appellant conceded the correctness of Judge Horkan's decision in the Belecz case and may not now be heard to question it. That case was correctly decided by Judge Horkan under decisions of the supreme court of Montana.

> Shapard et al v. City of Missoula et al, 49 Mont. 269, 141 Pac. 544; Evans v. City of Helena, 60 Mont. 577, 199 Pac. 445.

It is stated by Judge Pray in his decision that appellant, upon the trial, claimed that the Town of Ryegate "had no authority to resort to the special improvement district plan to make the improvements and, although bonds used in payment of the work were illegal and void, nevertheless the town, having the general

power to make such improvements and having received and retained the benefits of the improvements and the construction thereof, is liable as upon an implied contract. * * * That the town never acquired jurisdiction to create a special improvement district and that plaintiff claims to have no recourse against the property of the district because of a decision of the state court." (Tr. 95, 96, 97 and 98). Having taken that position in the trial court, appellant may not now be heard to contend otherwise.

The decision of Judge Horkan is amply supported by the decisions of the supreme court of Montana.

Where the city council has not acquired jurisdiction to create a special improvement district, property owners are not required to protest within sixty days after the letting of the contract. Their failure to do so cannot supply jurisdiction when it has not been acquired by observance of the antecedent steps necessary to acquire it. Shapard v. City of Missoula, 49 Mont. on 279-280, 141 Pac. 544 (Decided June 8, 1914). It will be observed that the Shapard case was decided six years before appellant purchased the bonds in question from the contractor.

Thereafter the supreme court of Montana, in Evans v. City of Helena, 60 Mont. 577, 199 Pac. 445, decided that the city did not acquire jurisdiction to create a special improvement district where the description of the improvements to be made was not in substantial compliance with the statute. The description in the resolution of intention adopted by the Town of Ryegate was "the construction of pipes, hydrants and hose connections for irrigating appliances and fire protection" when, as a matter of fact, the construction of a complete water system was contemplated by the town and was installed. Certainly there was

as much difference between the description of the proposed improvements in the resolution of intention and the improvements actually made as there was in the Evans case.

II.

Even where the decision of a state court is rendered after the rights of a claimant have attached, the federal courts, where there is any doubt, will render judgment in conformity with such decisions of the state court.

> Burgess v. Seligman, 107 U. S. 20; Yazoo & M. V. R. Co. v. Adams, 21 S. Ct. 729, 181 U. S. 580; Flash v. Connecticut, 109 U. S. 371, 3 S. Ct. 263; New Orleans Board of Liquidation v. Louisiana, 179 U. S. 622, 21 S. Ct. 263; Kuhn v. Fairmont Coal Co., 215 U. S. 345, 30 S. Ct. 140; Messinger v. Anderson, 225 U. S. 436, 32 S. Ct. 739; Eaton v. Shiawassee County, 218 Fed. 588; Perkins v. Boston & A. R. Co., 90 Fed. 321; Holden v. Circleville L. & P. Co., 216 Fed. 490; Hiland Park Mfg. Co. v. Steel, 232 Fed. 10.

Counsel for appellant devote twenty-three pages of their brief (pp. 63-85) to their argument that the rules of res judicata and stare decisis are inapplicable to this case, although no such contention was made in the lower court. In explaining this portion of their argument, counsel suggest that Judge Pray "has labored under the impression, in part at least, that the issues made in the state court were determinative of the law in the trial of the case at bar" although "it is difficult to put one's finger on the specific assumption in the trial court's decision." (Page 84 of appellant's brief).

In view of the position taken by counsel for appellant upon the trial of this cause, as pointed out above, Judge Pray had the right to assume that Judge Horkan's decision in the Belecz case was correct. Counsel for appellant in the trial having ad-

mitted or claimed that the town council had no authority to create the special improvement district in question, that it never acquired jurisdiction to create such district, that the bonds were invalid and that the plaintiff had no recourse against the property of the district because of Judge Horkan's decision (Tr. 95 to 98), Judge Pray rightfully relied upon such admissions and claims of counsel for appellant. He was not called upon to review the decision of Judge Horkan or to pass upon the question as to whether or not the district had been legally created. That question was not before the trial court and therefore should not be considered in this court.

Appellant cites a number of authorities in support of the rule that federal courts have concurrent jurisdiction with state courts in the interpretation of state statutes where the construction of the statute has not been settled in the highest court of the state prior to the fixing of the federal litigant's rights. Conceding this rule, it is equally well settled that where a statute has been interpreted by the state court between the date of the accrual of the litigant's rights and the trial in federal court, the federal courts will "lean towards an agreement with the state courts if the question seems to them balanced with doubt." This rule is well stated in the principal case relied upon by appellant, —Burgess v. Seligman, 107 U. S. 20, from which counsel quote at length at pages 81 to 84 of their brief. The portion here applicable reads as follows:

> "So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued.

But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts."

In the case of Yazoo & M. V. R. Co. v. Adams, 21 Supreme Ct. Rep. 729, the rule was again stated by the United States Supreme Court as follows:

> "and the settled rule of this court is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the state statute which has been adopted by the court of last resort in that state." (p. 730)

Other decisions of the United States Supreme Court to the same effect include the following:

Flash and others v. Connecticut, 109 U. S. 371, 3 Sup. Ct. Rep. 263.

New Orleans Board of Liquidation v. Louisiana, 179 U. S. 622, 21 Sup. Ct. Rep. 263.

Kuhn v. Fairmont Coal Co., 215 U. S. 345, 360, 30 Sup. Ct. Rep. 140.

Messinger v. Anderson, 225 U. S. 436, 32 Sup. Ct. Rep. 739.

The case of Eaton v. Shiawassee County, 218 Fed. 588 is particularly applicable to the facts in this case. On this question this court said:

> "If we adopt plaintiff's alternative theory that the money should be treated as having been borrowed to pay running expenses, then we are met with a decision of the Supreme Court of Michigan in McCurdy v. Shiawassee County, 154 Mich. 550, 118 N. W. 625. This case involved another loan made at about the same period, of money to meet current expenses, and the Supreme Court of Michigan held

that the county and the board were wholly without constitutional power to borrow the money, and that the county was not liable either on the theory of implied promise or on the theory of equitable liability for money had and received. Since this decision determines the extent and character of the power of one of the political subdivisions of Michigan, and so is a construction of the Michigan Constitution, it is authoritative in this court. Claiborne Co. v. Brooks, supra. It is true this decision was made after the date of the loans here involved, but that is not controlling. The case is not one where there has been a settled rule in state or federal court regarding the construction of state Constitution or laws, where rights have been acquired in reliance on such construction, and where, therefore, the Supreme Court refuses to follow a later state decision inconsistent with that rule. Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

"In the present case, when Mr. McCurdy made these loans, there had never been any settled construction by the federal courts in Michigan or by any court of the Michigan Constitution in this respect. The question was at best one unsettled in Michigan, and one untouched by the federal court. There is an entire absence of that analogy to equitable estoppel, which alone would justify us in declaring that, as against plaintiff's rights, the Michigan Constitution does not mean what the Michigan Supreme Court says it means." (pp. 592, 593).

Other Federal decisions holding that the Federal courts will lean to an agreement with the State courts if the question is balanced with doubt, include the following:

Perkins v. Boston & A. R. Co., 90 Fed. 321.

Holden v. Circleville Light and Power Co., 216 Fed. 490, 494.

Hiland Park Manufacturing Co. v. Steel, 232 Fed. 10.

QUANTUM MERUIT

POINT AND AUTHORITIES

Section 6 of Article XIII of the constitution of Montana makes any and all obligations of a town in excess of three

per cent of the taxable value of the property in the town void. Because of that constitutional provision, appellant may not recover on the theory of quantum meruit or implied contract or upon any other theory.

> Great Northern Utility Co. v. Public Service Commission, 88 Mont. 180 on 219, 293 Pac. 294; Hitchcock v. City of Galveston, 96 U. S. 341; Sub. 64 of Sec. 5039, R. C. M. 1921; Chap. 56, Part IV, R. C. M. 1921; Deer Creek Highway Dist. v. Doumecq Highway Dist., 218 Pac. 371 on 373; Mittry v. Bonneville County, 222 Pac. 292 on 293; Mayor v. Planter's Bank, 108 S. E. 480; Hampton v. Board of Com'rs., 43 Pac. 324; Richardson v. Grant County, 27 Fed. 495; Gillette-Herzog Mfg. Co. v. Canyon County, 85 Fed. 396.

Appellant's discussion of the liability of appellee in quantum meruit will be found on pages 185 to 213 of its brief.

We must confess that we cannot see the application of Section 1 of Article III, Section 1 of Article IV and Section 1 of Article V of the constitution of Montana.

It is true that under the decisions of the supreme court of Montana the constitution of the state is not a grant of power but rather a limitation upon powers exercised.

It was said in Great Northern Utility Co. v. Public Service Commission, 88 Mont. 180 on 219, 293 Pac. 294, that

> "The constitution of Montana is not a grant of power but rather a limitation upon powers exercised by the several departments of the state government."

The court then cited the other cases referred to on page 186 of appellant's brief. We fail to see wherein they are at all applicable to any of the issues involved in this case.

We concede that a town in Montana has the *power* to install a water system if the constitutional and statutory provisions with reference to an election are complied with but we do not

concede that it is the *duty* of the town to do so.

In the numerous cases cited by counsel for appellant under this heading only two or three of them make any reference to the doctrine of quantum meruit, and those are not in point.

Counsel frequently refer to the case of Hitchcock v. Galveston, 96 U. S. 341. Indeed, it might be said to be their leading case. Therein the City of Galveston agreed to pay the contractor in bonds of the city. The contractor started the work and at the end of forty-six days was stopped by the city. (Pages 343-4). The court said:

> "The resort to the lot owners is to be after the work has been done, after the expense has been incurred, and it is to be for the reimbursement of the city." (Page 348).

The chartef of the city prohibited it from borrowing more than fifty thousand dollars for *general purposes.* The court held that it was evident "that the provision could not have been intended to prohibit incurring indebtedness exceeding the sum named. It is in no sense a limitation of the debt of the city." Building sidewalks was held not to be included under the term "*general purposes.*" (Page 349). The city had power to enter into the contract and the city itself agreed to pay the contract price and was therefore liable. (Page 350). Certainly that case is no authority in support of appellant's contention in view of the facts as disclosed by the record.

It seems to us that counsel's argument in this part of their brief is based entirely upon their assertion that an election was held, not only upon the authorization of the fifteen thousand dollars of general bonds but also of exceeding the three per cent limit of the constitution. This assertion is made on page 193 of the brief and frequently in other portions of their brief. They concede, on page 193, that "the printed record does not

include a transcript of the election proceedings under which these bonds were authorized and issued." That is not only true, but the transcript is barren of any suggestion that any election of any kind was ever held in connection with the water works system of Ryegate.

In the "Stipulation as to Facts" (Tr. 52) appellant admits that "because of the small assessed value of all property within its corporate limits it (the town of Ryegate) could not legally and constitutionally issue sufficient general bonds to cover the entire cost of such installation."

> "It seems clear that because of the constitutional inhibition the town was unable lawfully to contract for the installation of a water system without the approval of the taxpayers." (Tr. 97).
>
> "The town apparently set about to accomplish in a lawful manner indirectly what it could not lawfully do directly without an election and favorable majority vote." (Tr. 98).
>
> "If, in this instance, the proper officers had been authorized to enter into the contract on the part of the town after submitting the question to a vote of the taxpayers as required by law and receiving favorable action thereon, there would be no question whatever as to the liability of the town." (Tr. 99).

On pages 99 and 100 of the transcript, Judge Pray refers to the statutory provision under which the town might secure a water works system, the first being under paragraph 64 of Section 5039 of the Code of Montana, 1921, which results in a general obligation of the town after a favorable vote of the taxpayers, and to the district method under Chapter 56, Part IV of the same code.

> "This (the district plan) was the plan adopted by the town for the balance of the necessary funds, and it failed." (Tr. 100).
>
> "One dealing with the agents of a municipality is bound

to know the limits of its power. When the Town of Ryegate issued fifteen thousand dollars in general bonds as a direct obligation of the town those dealing therewith well know, or should have known, that the city could contract no greater indebtedness at that time for the purpose in view." (Tr. 103).

"With no such constitutional inhibition, it was within the general powers of the town to construct a water supply, but in the instant case no such general power existed upon the part of the town until conferred upon it by the taxpayers of the town. To begin with, it had no power at all and in order to acquire it an election must be held to determine whether such power should or should not be granted." (Tr. 104).

"From the evidence, there were many taxpayers outside of the district who were not benefited by the water system and who were given no opportunity to be heard on the question of creating the indebtedness." (Tr. 109).

"It is, of course, manifest that the town had exceeded its constitutional limit of indebtedness but I cannot agree with counsel that under the circumstances here there would be a general liability on the part of the town and that the calling of an election to authorize additional indebtedness should be treated as a mere formality and that the failure to call it would amount to no more than an irregularity. On the contrary there was no power at all on the part of the town to incur such excessive indebtedness without the previous authorization of the qualified voters." (Tr. 111).

It is very apparent that there was no proof whatever of any election having been held and that the case was tried upon that theory. The admission of counsel for appellant in "Stipulation as to Facts," on page 52 of the transcript referred to above, precludes appellant from now contending that any election was held on the general bond issue, on the extension of the constitutional limit of indebtedness or upon any question relating to the construction of a water works system in the Town of Ryegate.

Not only did appellant fail to make any request for findings on the question of an election, but after Judge Pray rendered his decision, which is now considered as his findings of fact, counsel for appellant did not make any objections to his numerous statements to the effect that no election was ever held; neither did they save any exceptions to the court's finding on that question, nor did they predicate any errors thereupon in their specification of errors. (Tr. 254-256). They cannot now be heard to urge a reversal on their mere assertion that an election of some kind was held. Without such election, their whole argument on quantum meruit falls.

While a letter from John C. Thompson, an attorney of New York City, was introduced in evidence, it does not seem to have been incorporated in the transcript and we have no means of verifying the quotation therefrom on page 194 of appellant's brief. Assuming that quotation to be correct, the opinion of Mr. Thompson cannot be accepted as proof of the validity of the special improvement district bonds; neither is it evidence of any election having been held. As Mr. Thompson holds that the bonds mentioned by him are "valid and legally binding obligations of the Town of Ryegate, Montana," he doubtless was referring to the general bond issue of fifteen thousand dollars. However that may be, appellant can base no right to relief herein on that opinion.

Counsel also state that appellant furnished the money for doing the work in the Town of Ryegate with the full knowledge of the town. This is denied by every witness who was a town official at the time the bonds were issued, and all such officials who were available upon the trial of the action were called as witnesses.

The rule as to recovery on quantum meruit as to constitutional provision is well stated by the Idaho supreme court in Deer Creek Highway Dist. v. Doumecq Highway Dist., 218 Pac. 371 on 373:

> "Almost all of the authorities agree with the holding of this court in School District v. Twin Falls County, supra, that there can be no estoppel if the contract was expressly prohibited by the Constitution or statute, or if it was entirely beyond the power of the municipality. Appellant relies strongly on Argenti v. City of San Francisco, 16 Cal. 255, and Pimental v. City of San Francisco, 21 Cal. 351. While some of the language used in these opinions, isolated from the context, would seem to bear out appellant's contention, the decisions as a whole do not go the length of holding that there may be a recovery upon quantum meruit where a municipality has entered into a contract rendered void by express constitutional or statutory prohibitions. The true doctrine is expressed by Chief Justice Field in Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96, as follows:
>
> 'A municipal corporation, acting under a charter expressing the mode in which its contracts for the improvement of its property shall be made, cannot be rendered liable for improvements made in the absence of such contract, on the ground of an implied contract to pay for benefits received. The law never implies an agreement against its own restrictions and prohibitions; it never implies an obligation to do that which it forbids the party to agree to do'."

That case was cited by the supreme court of Idaho in Mittry v. Bonneville County, 222 Pac. 292 on 293, where it was held that when an indebtedness is forbidden by the constitution and statutes without the authority of an election and a certain indebtedness was authorized by vote but the indebtedness incurred was largely in excess of that authorized there could be no recovery for such additional indebtedness. The court said:

> "When an indebtedness is forbidden by the Constitution

and statutes of this state without the authority of a bond election, and the people at such election authorize the commissioners to incur indebtedness in a certain amount, the commissioners cannot incur a valid indebtedness above such amount. For reasons given in Deer Creek Highway Dist. v. Doumecq Highway Dist., supra, and which need not be repeated here, any indebtedness above the amount in the courthouse fund was void and cannot be recovered on quantum meruit or in assumpsit. Respondent, dealing with the county, was bound to take notice of constitutional and statutory limitations of its powers in regard to incurring indebtedness. Deer Creek Highway Dist. v. Doumecq Highway Dist., supra."

"A municipality cannot be held liable upon an implied contract for the value of any benefits received by it under a contract made with one of its officials, where the municipality is expressly forbidden to make such a contract. Such a contract, being void, cannot be ratified by an acceptance or use by the municipality of the benefits furnished thereunder." Mayor v. Planters' Bank, 108 S. E. 480.

"It is contended by the plaintiff that, notwithstanding the contract under which the services were performed was null and void, still, as the services were performed by him at the request of the board, he is entitled to his compensation therefor, upon a quantum meruit. * * *

"And the case under consideration is an apt and instructive illustration of how little regard has been paid by boards of county commissioners of this state to the provisions of the constitution and the statutes. * * *

"The plaintiff cannot recover in this case upon any implied contract to pay for services, for the reason that there was no authority vested in the board to make the contract under which the services were performed. * * *

"If the board were not originally authorized (as they were not) to make the contract, no liability can attach upon any ground of implied contract." Hampton v. Board of Comm'rs., (Ida.) 43 Pac. 324 on 325-6.

"By the first section of an act of the Indiana legislature, which took effect August 24, 1875, it is provided that 'it shall not be lawful for any board of county commissioners in this state to make any contract for the construction of any court-house, jail, or any other county or

township building or monument, until plans and specifications have been adopted by such board. * * *

"But the plaintiff insists that, upon the averment that the board of commissioners, acting for the county, had received and was in the enjoyment of the work done and materials furnished by him, he is entitled, upon the common count, to recover the quantum meruit. * * *

"The common count or claim to recover a quantum meruit must rest upon an implied promise or liability; but where a municipal body is required to make certain contracts in a prescribed way, and forbidden to make them in any other way, there is left no room for an implied obligation." Richardson v. County of Grant (Ind.) 27 Fed. 495 on 496.

"Whatever may be drawn from these authorities, the case of Litchfield v. Ballou, 114 U. S. 190, 5 S. Ct. 820, is decisive of this case. Waterworks had been constructed, and bonds issued in payment, which having been held void because issued in violation of a constitutional provision similar to ours, it was asked that the city be required to refund the money paid for them or surrender the waterworks. The court distinctly held that, the contract having been made in violation of the constitution, there was 'no more reason for a recovery on an implied contract to repay the money than on the express contract found in the bonds,' and granted no relief whatever. * * *

"When the contract is absolutely and directly prohibited by some statutory or constitutional enactment, the contract is void, and it cannot be enforced either as an express or implied contract. * * *

"While courts prefer enforcing contracts when honestly made and complied with, and to require all parties to pay for what they have the benefit of, yet they cannot and should not disregard such positive constitutional prohibitions as warned the parties in this case against the consummation of this contract. Unfortunately, there is so much ardor in the commercial world to transact business that the heed which should be given the law is obscured by the enticing profits of a business transaction. Important constitutional provisions for the protection of the people—and there is none upon the statute books of Idaho more important than the one in question, must be enforced, and

those who are so heedless as to violate them must bear the consequences. Judgment for defendant." Gillette-Herzog Mfg. Co. v. Canyon County (Ida.) 85 Fed. 396 on 398-9.

The principles announced by the courts in the decision of the cases cited by us in our discussion of the effect of Section 6 of Article XIII of the constitution of the State of Montana are applicable to the question of quantum meruit or implied contract. As the constitution makes all obligations of the town in excess of three per cent of the value of the taxable property therein void, appellant is not entitled to recover upon any theory.

RECITALS IN BONDS

POINT AND AUTHORITIES

The Town of Ryegate is not estopped from denying liability to the appellant by reason of the recitals in the bonds in question.

Sections 5033 (Subdivision 3), 5034 (Subdivisions 3, 4, 5 and 8), 5083, 5205, 5206, 5207, 5211, 5214, 5278 to 5281, inclusive, of the Revised Codes of Montana, 1921; Buchanan v. Litchfield, 102 U. S. 278; Edmunds v. City of Glasgow, 300 Pac. 203; Dixon v. Field, 111 U. S. 83, 4 S. Ct. 315-319; Lake County v. Graham, 130 U. S. 654, 9 S. Ct. 654-656; District Township of Doon v. Cummins, 142 U. S. 366, 12 S. Ct. 220-221 and 224; Hedges v. Dixon County, 150 U. S. 182, 14 S. Ct. 71-73; Sutliff v. Board of County Commrs., 147 U. S. 230, 13 S. Ct. 318-321; Moore v. City of Nampa, 276 U. S. 536, 48 S. Ct. 340-341.

The following principles are established by the Supreme Court of the United States:

If bonds contain recitals that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit, then the city *might* have been estopped from disputing the truth of such representations.

Estoppel does not arise except upon matters of fact which

the corporate officers had authority by law to determine and certify.

A certificate reciting actual facts and stating that thereby the bonds were conformable to the law, when they were not, does not work an estoppel.

Where the indebtedness evidenced by bonds exceeds the constitutional limit, the purchaser has no right to rely upon the recitals in the bonds.

Where the recitals in the bonds pretend to state facts which, by statute, are required to be entered upon the public records, the municipality is not concluded by such recitals.

Recitals that merely reflect opinion as to the legal effect of the bonds are not actionable and furnish no support for bondholders' claim against the municipality.

The sections of the code of Montana cited above were a part of the Montana Codes of 1907 in effect at the time of the issuance of the bonds in question. They are referred to by their 1921 number rather than by the number in the Codes of 1907 or amendments thereto adopted in 1911 and 1913 and in force when the bonds in question were issued. Under these code provisions, the assessed valuation of the property in the Town of Ryegate and its indebtedness were matters of public record.

> "The assessment made by the county assessor for state and county purposes is the basis of taxation for cities and towns for the property situated therein." Section 5205.
>
> "It is the duty of the county assessor, in making the assessment book, to designate therein the real and personal property, stating each separately and distinctly, situated within the cities and towns of the county." Section 5206.

When requested, it is the duty of the county assessor to furnish the towns within the county with a complete certified

copy of his assessment book, so far as it pertains to property within the limits of said town. Section 5207.

It is the duty of the county clerk to make a duplicate of the corrected assessment book for each city in the county which requires its rteasurer to collect its taxes. Section 5211.

The county treasurer of each county must collect the taxes levied by all *towns* in his county. Section 5214.

It is the duty of the town clerk "to enter in a book kept for that purpose the date, amount and person in whose favor, and for what purpose, warrants are drawn." Section 5033, Sub. 3.

The town treasurer must make monthly reports to the council, showing the state of each particular fund and the moneys recevied and disbursed by him during the preceding month, keep the books and accounts of the town in such manner as to correctly present the condition of the finances thereof, keep separate account of each fund and keep a register of all warrants paid. Section 5034, Subdivisions 3, 4, 5 and 8.

The issuance of general bonds of a town is covered by Sections 5278 to 5281, inclusive, from which it appears that public records must be kept of all general bond issues.

Moreover, prior to the time that the bonds in question were delivered to the appellant it had purchased from the contractor the general bond issue of the town in the sum of $15,000.00, so that it had actual knowledge of the bonded indebtedness of the town at that time and by referring to the records of the town could easily ascertain its warrant indebtedness and by referring to the assessment roll of the county could easily determine the assessed valuation of the property in the Town of Ryegate at that time.

The case of Buchanan v. Litchfield, 102 U. S. 278, was an action on assumpsit:

> "The declaration, besides a count upon the coupons themselves, contains the usual counts for money lent and advanced, and for money had and received." Page 279.

The bond in question contained this recital:

> "This bond is issued under authority of an act of the General Assembly of the State of Illinois, entitled 'An Act authorizing cities, incorporated towns and villages to construct and maintain water works,' approved April 15, 1873, and in pursuance of an ordinance of the said city of Litchfield numbered 184, and entitled 'An Ordinance to provide for the issuing of bonds for the construction of the Litchfield waterworks,' approved Dec. 4, 1873."

The court said, on page 290:

> "As, therefore, neither the Constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their 'existing indebtedness,' it would seem that if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of the city that the requirements of the Constitution were met, —that is, that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit, —then the city, under the decisions of this court, *might* have been estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds."

It is to be noted that in the case of Edmunds v. City of Glasgow, (Mont.) 300 Pac. 203, commented upon at great length by counsel for appellant, the bonds there in question contained recitals similar to those suggested in the above case, which is not the case in this suit.

In commenting upon the effect of recitals in bonds, the Supreme Court of the United States, in County of Dixon v. Field, 111 U. S. 83, 4 S. Ct. 315 on 319, said:

"All parties are equally bound to know the law; and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when, judicially speaking, they were not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law. Otherwise it would always be in the power of a municipal body, to which power was denied, to usurp the forbidden authority, by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself. And the estoppel does not arise, except upon matters of fact which the corporate officers had authority by law to determine and to certify."

That statement was quoted with approval in Lake County v. Graham, 130 U. S. 654, 9 S. Ct. 654, on page 656.

In District Township of Doon v. Cummins, 142 U. S. 366, 12 S. Ct. 220, the bonds contain the following recital:

"This bond is executed and issued by the board of directors of said school-district in pursuance of and in accordance with chapter 132, Laws 18th Gen. Assem. Iowa, is in accordance with the laws and constitution of the state of Iowa, and in conformity with a resolution of said board of directors passed in accordance with said chapter 132 at a meeting thereof held 9th day of July, 1881."

On page 224 the court said that the bondholder knew:

"that the district, in issuing them, exceeded the constitutional limit, as appearing by public records of which he was bound to take notice, and that it intended still further to exceed that limit. Under such circumstances he had no right to rely on the recitals in the bonds, even if these could otherwise have any effect as against the plain provisions of the constitution of the state."

So also in Hedges v. Dixon County, 150 U. S. 182, 14 S. Ct. 71 on 73, the court said:

"Again, the constitution of the state having prescribed the amount which the county might donate to a railroad company, that provision operated as an absolute limitation

upon the power of the county to exceed that amount; and it is well settled that no recitals in the bonds, or indorsed thereon, could estop the county from setting up their invalidity, based upon a want of constitutional authority to issue the same. Recitals in bonds issued under *legislative authority* may estop the municipality from disputing their authority, as against a bona fide holder for value; but, *when the municipal bonds are issued in violation of a constitutional provision,* no such estoppel can arise by reason of any recitals contained in the bonds."

In Sutliff v. Board of County Commissioners, 147 U. S. 230, 13 S. Ct. 318, the bonds contained these recitals:

"This bond is one of a series of five thousand dollars, which the board of county commissioners of said county have issued for the purpose of constructing roads and bridges, by virtue of, and in compliance with, a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of, and in compliance with, an act of the general assembly of the state of Colorado entitled 'An act concerning counties, county officers and county government, and repealing laws on these subjects,' approved March 24, A. D. 1877; and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond." Page 318.

In passing upon the legal effect of such recitals, the court, on page 321, said:

"The case at bar does not fall within the Chaffee Co. v. Potter, and cannot be distinguished in principle from Dixon Co. v. Field or from Lake Co. v. Graham. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here two facts are to be shown, —the valuation of the property, and the amount of the county debt. But, as both these facts are equally required by the statute to be entered on the public records of the county, they are both facts of which all the world is bound to take notice,

and as to which, therefore, the county cannot be concluded by any recitals in the bonds."

Where each bond stated:

"that respondent acknowledges itself to be indebted and promises to pay bearer the sum stated; it contains recitals to the effect that all the things by law required in respect of the creation of the district, the construction of the sewer, and the issue of the bond in order to make it a valid obligation of the city have been done,"

the court held:

"Recitals that merely reflect opinion as to the legal effect of the bonds or of the statements therein are not actionable and furnish no support for petitioner's claim." Moore v. City of Nampa, 276 U. S. 536, 48 S. Ct. 340-341.

APPELLANT'S POSITION HEREIN IS NOT EQUIVALENT TO THAT OF A BONA FIDE HOLDER.

POINT AND AUTHORITIES

It is admitted by counsel for appellant that the bonds in question are not negotiable instruments. That admission is in accordance with practically all of the authorities. The question of the good faith of a bondholder is not involved in the case at bar, where the bonds were not negotiable instruments and the indebtedness evidenced by such bonds would exceed the constitutional limit of indebtedness, if they were held to be obligations of the town.

King Cattle Co. v. Joseph, 199 N. W. 437 on 438; Smith v. Pacific Improvement Co., 172 N. Y. S. 65 on 71-72.

ARGUMENT

The question of the *bona fides* of the holder applies only to the owner of a negotiable instrument. The holder of a special improvement district bond is not a holder in due course. The bonds in question refer to the resolution creating the district

and "all laws, resolutions and ordinances relating thereto in payment of the contract in accordance therewith. * * * This bond is payable from the collection of a special tax and assessment which is a lien against the real estate within said improvement district as described in Resolution No. 14, as well as in Resolution No. 10, passed and adopted December 30th, 1919. This bond is redeemable at the option of the Town of Ryegate at any time there are funds to the credit of said special improvement district fund for the redemption thereof." (Tr. 17). These recitals put the purchaser on notice that he must look to the proceedings to see whether the town acquired jurisdiction to create the district and is chargeable with knowledge of any jurisdictional defects in the proceedings. He is also chargeable with knowledge that there is no liability on the part of the town to pay the bond and that he must look solely to the district fund for payment.

On this question the supreme court of Minnesota, in King Cattle Co. v. Joseph, 199 N. W. 437, said: on page 438:

> "A purchaser of a note or bond does not acquire the rights of a holder in due course unless the instrument is complete and regular upon its face, section 5864, G. S. 1913 (section 52, Uniform Neg. Inst. Act); hence when the language of a bond not only refers to the provisions of the trust deed securing it, but makes the bond subordinate to the conditions of the deed, the bond shows upon its face that it is not a complete and regular negotiable instrument. A purchaser cannot determine from a mere inspection of the bond that it contains an unconditional promise to pay a sum certain at a fixed or determinable future time, but must examine the deed to ascertain the precise nature of the obligation of the maker of the bond. Hull v. Angus, 60 Or. 95, 118 Pac. 284."

In discussing a similar question, the supreme court of New

York, in Smith v. Pac. Improvement Co., 172 N. Y. S. 65, said, on pages 71 and 72:

> "It will thus be seen that the merger of 1899 was consummated under a statute which made one of the conditions of such merger that the constituent corporations should remain in being for the purpose of meeting obligations of creditors and lienors; that they should continue to exist that they might sue or be sued in respect to prior engagements; and that the properties should be subject to the lien of prior incumbrances or of such judgments as should be procured against the corporations. In accepting this privilege the corporations must be deemed to have accepted the conditions imposed, and persons investing in the securities of the consolidated corporation, or in the certificates of its receiver, must be presumed to have known the law, and to have purchased their securities in the light of the statutory provision above quoted."

The cases cited by counsel for appellant on this question (pages 6 0and 61 of their brief) are not in point.

In Caldwell v. Guardian Trust etc. Co., 26 Fed. (2d) 218, mere irregularities were relied upon to defeat the bondholder.

In Board of Education v. James, 49 Fed. (2d) 91, the holder of the bonds was assumed to be a *bona fide* holder. It does not seem to have been questioned. The bonds there involved were an issue of a school district and seem to have been negotiable.

The bonds under consideration in Presidio County v. Noel-Young Bond Co., 212 U. S. 58, were negotiable and the holder was presumed to be a *bona fide* holder. No question was raised on that score.

In State v. West Duluth, 78 N. W. 115, it does not appear that the question of the *bona fides* of the holder was involved. What the court did hold was that the payment of ten per cent of the face of the bonds for brokerage fees, etc. under the circumstances in that case was not a violation of the statute

which forbade the sale of bonds for less than their face value.

In Cuddy v. Sturtevant, 190 Pac. 909, the holder of the bonds purchased them from the person to whom they were originally sold for less than par. It was held that the city was estopped to deny their validity in the hands of an innocent purchaser.

The Northwestern Bank v. Centerville, 143 Fed. 81, it seems that the bonds were negotiable and that the owner was a *bona fide* holder.

In all of the above cases, as well as in Troy Bank v. Russell County, 291 Fed. 185, Flagg v. School Dist., 58 N. W. 499 and Fairfield v. School Dist., 116 Fed. 838, no special improvement district bonds were involved. They were all direct issues of the municipalities.

In Dakota Trust Co. v. City of Hankinson, 205 N. W. 990, the contractor was engaged in constructing a public improvement. During the progress of the work the city council approved estimates of the city engineer and made partial payment to the contractor in the form of warrants. The city council was authorized to issue such warrants to the contractor upon partial performance of his contract. The contractor did not completely perform his contract. The warrants were purchased by a third party before the contractor defaulted in his contract. Because of the default of the contractor the city did not levy special assessments to pay such warrants and it was held that the city was liable for the payment of the same. The court said, on page 994:

> "When, during the course of performance, partial estimates are allowed from time to time upon the report of the engineer and warrants are issued, the city has effectually made a representation that the contractor, through

partial performance, is entitled to that portion of the consideration incorporated in the estimate and the approval. It retains the withheld portion of the consideration and the contractor's bond as security for the uncompleted part of the contract. * * * So where the city, having by resolution of its city council declared the contract to have been so far performed that the contractor was entitled to a stated portion of the compensation, and it having given to it written evidence of its right to be satisfied pro tanto out of funds which it was the city's duty to raise, is precluded, as against any person relying upon a representation, to assert the contrary."

In Long Beach School Dist. v. Lutge, 62 Pac. 36, under a contract for the erection of a school building, monthly estimates were made as to the value of the work done and warrants were drawn by the school trustees in favor of the contractor for seventy-five per cent of such estimates. The warrants had been sold by the contractor and materialmen furnishing materials for the building attempted to enforce their claims against the school district as entitled to priority of payment over such warrants. The court said, on page 38:

"The presentation of these claims of materialmen created no liability against the school district which could increase its contract liability. The contract, as we have seen, required monthly estimates to be made by the architect of the value of the work done * * * and the trustees were to draw a warrant in favor of seventy-five per cent of such estimate. * * * If these materialmen, who have, since the abandonment of the contract by Lutge, given notice of their claims, had given such notice before the order was delivered, the plaintiff would have been required to retain the amount thereof, as well as of future estimates, sufficient to pay them, and that would have been the extent of plaintiff's liability. * * * That the subsequent breach of the contract by Lutge could not affect the right of the assignee to require the payment of the order whenever there should be funds applicable to its payment and that the materialmen who gave notice of their

claims after the order was issued to the contractor and assigned to the intervenor could not hold the plaintiff or the assignee liable for the money represented by it, is conclusively settled."

It is clear that neither of these cases supports the contention of appellant.

We especially call the attention of the court to the fact that the *bona fides* of the bondholder is not an element to be considered where the constitutional debt limit has been exceeded, as is shown in the cases cited by us under "Section 6 of Article XIII of the Constitution of Montana Bars the Recovery of any Sum by Appellant." Page 19 of this brief.

THE TOWN OF RYEGATE IS NOT GENERALLY LIABLE TO THE BONDHOLDER. IT DID NOT FAIL TO PERFORM ITS DUTY IN MAKING THE NECESSARY ASSESSMENTS FOR PAYMENT OF COSTS OF IMPROVEMENTS.

These matters are discussed by counsel for appellant on pages 104 to 134 of their brief. The points urged therein are fully covered elsewhere in this brief and we will, under this sub-head, content ourselves with comments upon cases quoted from by counsel for appellant.

Nowhere in the record is there any proof, or even suggestion, that the ordinance or resolution levying the assessments were not properly passed. The invalidity of such assessments was not because of anything the town council failed to do after the contract in question was entered into. Judge Horkan's decision was based wholly upon lack of jurisdiction on the part of the town council to create the special improvement district in question. This fully appears from the "Stipulation as to Facts."

An agreed statement of facts voluntarily made and submitted to the trial court is binding upon the parties and the court.

> "It was competent under the statute, *supra,* for the attorneys representing the plaintiff and the defendant to stipulate the facts. The stipulation having been voluntarily made and submitted to the court, counsel for defendant cannot be heard to urge the objection they now make." Read v. Lewis and Clarke County, 55 Mont. 412-419; 178 Pac. 177.

The testimony does not add to or detract from the "Stipulations as to Facts" herein. It (the testimony) and documentary evidence not included in the "Stipulation as to Facts" does not tend to establish any of appellant's numerous contentions. They do not furnish any grounds for the various forms of relief that appellant on appeal claims to be entitled to. Appellant admits that the facts agreed upon are not as complete as it would like them to be, but blames appellee for not making a more complete record. As appellant, not appellee, was seeking recovery, it was incumbent upon appellant to see to it that the record included every fact upon which it might base its claims for judgment.

> "This case was submitted to the lower court on an agreed statement of facts, and it was stipulated that the agreed statement contained all the facts in the case. That the lower court was, under such circumstances, obliged to draw its legal conclusions from such facts alone is well settled in this jurisdiction.
>
> "It is further well settled, and this is made apparent by the opinions delivered in the cases just quoted from, that to sustain a judgment for the plaintiff, the agreed statement must show all the facts necessary to his recovery." Billings Hardware Co. v. Bryan, 63 Mont. 14-18 and 19; 206 Pac. 418.

On page 111 of their brief counsel for appellant assert that it is clear by the admissions of the pleadings and the stipula-

tions of the agreed facts that the district was regularly and legally created. We call the court's attention to Judge Horkan's decision, which is a part of the "Stipulation as to Facts" and appears on pages 147 to 153 of the transcript. On page 152 he expressly holds that the town council of Ryegate never acquired jurisdiction to create the improvement district.

On page 112 of their brief, counsel discuss the obligation of the town to make assessments and reassessments, if necessary. This matter is fully covered in other portions of our brief.

Certainly the town had the right to act in accordance with the decrees of Judge Horkan, especially as appellant brought no suit or action in Federal Court, under its claimed right to do so, to secure a contrary ruling. So long as Judge Horkan's decision remains in force and there is no other adjudication as to whether the district was legally created, the town officials would have been in contempt of court if they had acted contrary to that decision. The mandate of that decision was from a court having *actual* and not *apparent* jurisdiction, as counsel assert on page 113 of their brief.

On pages 122 and 123 of their brief counsel again discuss the effect of statutory changes as to the improvement district laws of Montana, which we have discussed elsewhere in this brief.

While mandamus would not lie on January 1, 1922 against the Town of Ryegate because of the payment of interest coupons on that date, the appellant should have commenced an action for a writ of mandate or other appropriate relief on January 1, 1923, when the second year's interest on the bonds was not paid, if Judge Horkan's decision was wrong or if

appellant thought so. Evidently the conclusion of appellant that that decision was incorrect was arrived at after the appeal was taken in this case.

In Phliadelphia Co. v. New Whatcom, 19 Wash. 225, 52 Pac. 1063, cited by counsel, the first assessment was invalid and the city council made a reassessment sufficient to pay the principal, but not the interest, of the warrants. The law permitted only one reassessment. The court held that, because of the city council not making assessments sufficient to pay interest, the city was liable for its neglect of duty. No question of the constitutional debt limit was involved; neither had the courts of Washington held that the district was not *legally* created.

In Barber Asphalt Paving Co. v. City of Denver, 72 Fed. 336, page 126 of brief, the city contracted with the company to pay for a portion of the pavement by special assessments against abutting property, by a sum of money the street railway companies had agreed to pay the city and that the balance of the cost was to be paid by the city. The city did not attempt to enforce payment of the stipulated payment from the railway companies and the court held that the city was liable to the contractor for that amount, —hardly a case in point here.

In Mankato v. Barber Asphalt Co., 142 Fed. 329, there was no question of the legality of the creation of a district. The city refused to levy the assessments and because thereof it was held liable to the defendant contractor.

The same is true of Bates County v. Wills, 239 Fed. 785, where the further fact appears that the contract did not provide from what fund the cost was to be paid and the city had no power to make a general levy for the purpose of payment. So also of Oklahoma City v. Orthwein, 258 Fed. 190.

In Barber Asphalt Co. v. Harrisburg, 64 Fed. 283, the city had the power to pave its streets and to pay the cost out of its treasury, —not so in the case at bar.

Elsewhere we comment at length on Hitchcock v. Galveston, 96 U. S. 341, and show wherein it is not applicable to the facts in this case.

In the following cases, cited and quoted from by counsel for appellant, the city officials had refused to make the necessary assessments and the city was held liable:

> Reilly v. Altoona, 19 N. E. 508; Dennis v. Willamina, 157 Pac. 799; O'Neil v. City of Portland, 113 Pac. 655; Jones v. Portland, 58 Pac. 657; Little v. Portland, 37 Pac. 911; Commercial Bank v. Portland, 33 Pac. 532.

We comment on Addyston Pipe Co. v. Corry, 197 Pa. St. 41, and on Mankato v. Barber Asphalt Co., 142 Fed. 329, on pages 38 and 39 of our brief.

Denny v. City of Spokane, 79 Fed. 719, was decided upon the authority of McEwan v. City of Spokane (Wash.), 47 Pac. 433, where the court, on page 434, said:

> "There is an attempt to plead an indebtedness by the city beyond its charter limit but we think no such indebtedness was pleaded." Page 434.

In only one of the above cases was the question of constitutional limit of indebtedness involved. Counsel for appellant place much reliance upon the case of Ft. Dodge El. L. & P. Co. v. City of Ft. Dodge, 89 N. W. 7. At one portion of their brief they state that the constitutional provision with reference to limitation of debt was the same in the Iowa constitution as in Montana, except as to percentages, and argue that, Montana having taken its constitutional debt limit provision from the constitution of Iowa, we must have adopted also the construc-

tion placed thereon by the supreme court of the State of Iowa. That section of the constitution of Iowa is not set out in full in the Fort Dodge case and is not accessible to us. However, we call the court's attention to the fact that Section 12 of Article IX of the Constitution of Illinois, set out in full in City of Litchfield v. Ballou, 114 U. S. 190, 5 S. Ct. 820, is almost in the exact words of the constitutional provision of Montana, except as to percentages and approval vote of taxpayers. As we have elsewhere pointed out in this brief, the decisions of the Supreme Court of the United States in that case and in Buchanan v. Litchfield, 102 U. S. 278, are decisive as to the question of the general liability of the Town of Ryegate.

Contrary to the contention of counsel for appellant, the State of Montana did not adopt the construction of the supreme court of Iowa in the Fort Dodge case. This fully appears from the decision of our court in State v. City of Helena, 24 Mont. 521, 65 Pac. 99 (decided December 17, 1900), from which we quote at length on pages 22 and 23 of our brief. It appears that at that early date the supreme court of Montana followed the decision in Buchanan v. City of Litchfield, *supra,* and City of Litchfield v. Ballou, *supra.* After quoting from those decisions, our supreme court said:

> *"Such was the interpretation by the highest court in the land of this constitutional provision of the State of Illinois when our own constitution, containing a like provision, was adopted."*

In the Fort Dodge case the court held that the constitutional limit as to debt did not apply where the city had the power to make valid assessments and did not do so. In the instant case the town council of Ryegate does not have the power to make

any valid assessments because of lack of jurisdiction to create the district.

At times it has been the contention of appellant that it should recover as upon an implied contract to pay, on which point the Fort Dodge case furnishes it no support.

In the Fort Dodge case the court said, on page 9:

> "But intervener contends that the city is liable for the amount represented by certificates issued against the assessments of the plaintiff, which, as we have seen, are invalid. If the city had no authority to assess any portion of the cost of this improvement to plaintiff, then the entire amount which was assessed to plaintiff might have been included in the assessment to abutting property owners, and certificates representing such assessments would have been valid. * * * This is not a case where the city undertook to do something which it could not do, and which the party contracting with it was bound, as matter of law, to know it could not do. Here the city could have done what it agreed to do (that is, have made a valid assessment on abutting property for the entire cost of the improvement not directly assumed by the city), and it failed to do so."

In Gable v. City of Altoona, 49 Atl. on page 371, the court said:

> "The cases on this subject are conflicting. See Dill. Mun. Corp. (4th ed.) Secs. 480-482 and notes. They show that there is no disposition of the question which is wholly free from difficulty."

As we have heretofore pointed out, the supreme court of Montana took the opposite view and decided otherwise at an early date in State v. City of Helena, 24 Mont. 521, 65 Pac. 99. See page 119 of our brief.

DEFENSES OFFERED BY THE TOWN OF RYEGATE

These are discussed by counsel for appellant at pages 213 to 246 of their brief.

As we point out in our discussion of the Belecz case, it was not pleaded in the answer for the purpose of having the trial court pass upon the issues involved in that case, but simply to show why assessments of the district had not been paid and that, in its reply, appellant admitted that the decree entered in that case prevented the collection of the principal of and interest on the bonds in question. (Tr. 50). The entire transcript is barren of any suggestion that Judge Pray ever passed upon the correctness of the rulings of Judge Horkan in the Belecz case or that that question was ever presented to the trial court.

The following quotations from the transcript are proof of the fact that the question of the validity of the special improvement district bonds was never presented to or considered and passed upon by Judge Pray:

> "The purpose of this action is to establish a liability against the Town of Ryegate, Golden Valley County, Montana, on an implied contract for the balance due on the construction of a water supply system, which otherwise would have been paid from bonds issued by a special improvement district of that town, had the entire issue not been declared illegal and void, after the water supply system had been fully constructed." (Tr. 94).
>
> "Plaintiff claims * * * that the Town of Ryegate had general authority to procure a water supply and construct a complete waterworks system and therefore contends that since the city had general power and authority to do the work and construct the improvements embraced in the special improvement district in question, although it had no authority to resort to the special improvement district plan to make the improvements and although bonds used in payment of the work were illegal and void, nevertheless, the town, having the general power to make such improvements, and having received and retained the benefit of the improvements and the construction thereof, it is liable as upon an implied contract." (Tr. 95-96).
>
> "In commenting on the foregoing statements of the issue

of law involved plaintiff contends that the town *never acquired jurisdiction* to create a special improvement district and that the bonds issued were *by the court declared to be invalid.*" (Tr. 96-97).

"Plaintiff claims to have no recourse against the property of the district because of a decision of the state court, from which no appeal was taken, declaring the bonds of the district illegal and void." (Tr. 98).

"Whether it be held, as contended by plaintiff, that there was no grant of power under the statute conferred upon the municipality to install and pay for a waterworks system, as provided in chapter 56 of Part IV, Political Code of Montana (1921) * * *" (Tr. 98).

"By the COURT.—Are you starting out to establish the legality of the bond issue.

Mr. BROWN.—No, your Honor. Before you can recover for money had and received, we have got to bring home to the defendant the knowledge that it was our money that was had and received and used." (Tr. 179).

It is significant that appellant, in its prayer for relief, asks for a money judgment equal to the face of the special improvement district bonds, with interest thereon from the date to which interest had been paid and made no suggestion that any other issue was involved in the case. (Tr. 9).

The appellee, in its prayer, simply asked that "plaintiff take nothing by this action." (Tr. 34). No additional or other relief was asked in the reply. (Tr. 51).

There is no suggestion in the pleadings or the prayers attached thereto that any issue was involved except for a money judgment for the full amount of the face of the bonds, with interest.

As we have said, the record shows that the legality of the special improvement district bonds was not presented to the trial court and was not considered or passed upon by Judge Pray, and we therefore do not consider it necessary to further

consider the argument of counsel for appellant on the alleged "defenses offered by the Town of Ryegate."

While we think it entirely immaterial, we call the court's attention to the fact that there is not even a suggestion in the record of the installation of any sewerage system, as stated by counsel on page 240 of their brief.

We likewise call the attention of the court to the fact that the record does show that appellant purchased the general bonds of the Town of Ryegate, even though counsel for appellant, on page 241 of their brief, state that it is not the holder of any of those general bonds, which statement is not based upon any fact appearing from the record.

If appellant sincerely believes that the decision of Judge Horkan in the Belecz case was incorrect and that it may have the validity of the special improvement district bonds passed upon by the federal courts, it should begin an appropriate action or suit for that purpose.

CONCLUSION

This cause was tried upon the theory of money had and received and a judgment was asked by appellant for the face of the special improvement district bonds, with interest thereon. The right of the appellant to recover such money judgment was the only issue presented to or considered by Judge Pray. There is no allegation in the complaint or reply upon which appellant may predicate its claim for any judgment other than on the theory of money had and received; neither does the record contain any evidence or admissions of facts upon which an appellate court could render any judgment in favor of appellant upon any one of the many theories now advanced, but none of which were submitted to Judge Pray.

Any judgment in favor of appellant would have to be borne in part by the owners of property within the corporate limits of the Town and outside of the district. Only a very small portion of the town property outside of the district derives any benefit whatever from the construction of the water system. As shown by the map of the town, the district comprises less than one-sixth of the entire area of the town. The owners of approximately five-sixths of the entire area of the Town of Ryegate had no voice in the installation of the water system except possibly a vote on the question of the issuance of the $15,000.00 general bonds. They had no right to protest against the creation of the district. The injustice sought to be done to them is most glaring. They had, and have, if appellant prevails, no chance to protect themselves and their property. The protection afforded by the constitution of Montana will be taken from them. A crushing burden without benefits will be imposed upon them in violation of the constitution should appellant prevail herein.

The complaint avers that interest on the bonds was paid on January 1, 1922, that no further payments have been made and that the town has declared its intention of never paying the principal. (Tr. 8). Doubtless a payment on the principal of the bonds was to have been made on that date, as required by Section 5240, Revised Codes of Montana, 1921. The bondholders doubtless knew on January 1, 1922 that there was a default in payment of principal on that date; certainly on January 1, 1923 it knew that there was a default in payment of any interest or principal on that date. If the bondholder, being a non-resident of Montana, is entitled to sue in the federal courts for the various forms of relief now advanced by its

counsel, it had that right on January 2, 1922 and certainly not later than January 2, 1923. More than eight years, probably nine years, elapsed before appellant ever asserted any of the rights now contended for, save only its right to a money judgment as prayed for in its complaint. The statute of limitations has run against any such relief except the one asked for in its complaint. Section 9027 to 9041, Revised Codes of Montana, 1921.

In addition to the bar of the statute, appellant has been guilty of laches in not instituting appropriate proceedings for the enforcement of its claimed rights now asserted for the first time upon appeal.

We respectfully urge that the only question which, on the record and under the authorities cited, may be considered on this appeal is whether or not appellant is entitled to a money judgment against the Town of Ryegate, as prayed for in its complaint in violation of the constitutional provisions of Montana and that the long line of decisions of the supreme court of the United States on similar questions which we have cited and quoted from prohibit such recovery by appellant. The record fully sustains the decision of Judge Pray and should be affirmed.

Respectfully submitted,

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No. 6564

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

13

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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REPLY BRIEF FOR APPELLANT

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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Attorneys and Solicitors for Plaintiff and Appellant.

March 16, 1932.

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.

Filed 1932

..... Clerk

BILLINGS GAZETTE, BILLINGS, MONTANA

No. 6564

In the United States
Circuit Court of Appeals
For the Ninth Circuit

LUMBERMEN'S TRUST COMPANY,
a corporation,

Appellant.

—vs.—

THE TOWN OF RYEGATE,
a municipal corporation,

Appellee.

Petition for Rehearing and Brief in Support thereof

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.