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Ezra J. Fjeldsted v. Ogden City, a Municipal Corporation; Ora Bundy, W.J. Rackham, and Fred E. Williams as City Commissioners of said City; Heber J. Heiner, City Treasurer of said City; and J.C. Littlefield, City Recorder of said City : Petition for Rehearing

Utah Supreme Court

SUPREME COURT

BRIEF

IN THE SUPREME COURT

of the State of Utah

EZRA J. FJELDSTED,
Plaintiff,

vs.

OGDEN CITY, a Municipal Corporation; ORA BUNDY, W. J. RACKHAM, and FRED E. WILLIAMS as City Commissioners of said City; HEBER J. HEINER, City Treasurer of said City; and J. C. LITTLEFIELD, City Recorder of said City,
Defendants.

No. 5381

PETITION FOR REHEARING

The defendants in this proceeding, respectfully but earnestly petition this Court for a rehearing in this case in order that the Court may more fully consider and determine some of the more important questions in this cause, and particularly the questions relative to limitations on the so-called "special fund doctrine," particularly in the light of new authority here just called to the Court's attention.

Counsel for the defendants appreciate that this Court has given considerable thought to the case. But it is belived, from a study of the decision, that the Court has not fully apprehended the relation of the conclusions it reaches to existing law set forth in its own decisions, and those from other jurisdictions, and that a further consideration of the cases, including those cited by the Court as the foundation of its own opinion, and some new authority now cited might result in the Court reaching another and different conclusion.

The Court also, counsel believes, is under some misapprehension as to the facts in the matter, as set forth by the petition and admitted by the demurrer, and we believe that clearer understanding thereof might affect the result.

RESUME OF OPINION

The Court recites at some length the pleaded facts, and it will not be necessary to weary the Court with any lengthy resume of the situation in that respect. Briefly stated the facts are simply:

1. That Ogden City is now indebted to such an extent that the proposed bond obligations would exceed the constitutional debt limit if they involve an indebtedness in the meaning that word bears under the provisions of the Constitution of Utah.

2. That an immediate and pressing need exists for the making of certain repairs, improvements and extensions to the waterworks system of Ogden, a system now in operation and already bonded, earning income sufficient to pay all the expense of its operation and maintenance, and to meet all payments of principal and interest on both the outstanding and the proposed bonded indebtedness as the same would fall due over the entire period of the proposed new loan.

3. That to make such a loan, the city proposes to retain in its waterworks fund all revenues thereof requisite for the purpose of meeting such new bond obligation payments, and that the effect thereof will be to discontinue the practice heretofore in force of transferring surplus, over expense of operation and ordinary betterments, and payment of such principal and interest on the present bonded indebtedness as the city has paid, to the general funds for use on matters wholly divorced from waterworks improvements.

4. That it also proposes to pay into that waterworks fund the reasonable value of the water used by Ogden City for public purposes.

FACTS OVERLOOKED

Two facts appear here which the Court, it appears to counsel have entirely overlooked, or misapprehended. One is that there is an urgent necessity for the mak-

ing of these improvements. The Court is bound to so hold, in the absence of any allegation in the petition controverting the ordinance in that respect.

We submit that in matters of a legislative character, such as passage of an ordinance, the finding by the legislative body of the existence of an emergency, or a necessity for the doing of anything, ordinarily is binding on the Courts. It may not substitute its judgment for that of the legislative body in that regard in the absence of clear proof of any ground upon which such a finding may be based. Here, the pleading failing totally to allege any fact impeaching the finding of the City Commission, as set forth in the ordinance, that there is "an immediate and pressing need" for raising funds to make these improvements, the Court is bound by that statement of the facts.

> Kenyon Hotel Co. vs. O. S. L. RR. Co. 62 Utah 364, 220 Pac. 382 33 A. L. R. 343.
>
> Ogden City vs. Leo 54 Utah 556, 182 Pac. 530, 5 A. L. R. 960.

The other fact which appears from the pleadings is that the income of the waterworks is amply sufficient to care for the obligations on the entire funded indebtedness so far as the same falls due during that period. That the Court has formed a mistaken view on this point appears from the language of the court, on the second page of its typed decision:

> "The estimate does not therefor include all the City's obligations on its bonds during the 15 year period mentioned."

Please note that the Court here assumes a fact neither pleaded nor necessarily implied from the pleading. The pleading distinctly recites that "the principal falling due" on the present bonded indebtedness for waterworks of Ogden City during the 15 year period in which the new loans are retireable is $375,000.00. The Court's assumption is based upon the theory that these bonds are all serial bonds running over a 40 year period. It overlooks the fact that prior to 1921, the statute (Compiled Laws 1917, Sec. 794) contemplated issuance of twenty year term bonds; that in 1921 this was changed to permit issuance of either term or serial bonds, having a maturity date of forty years, and that it is the record thus clearly disclosed, that Ogden City's bonds are not all serial in character, and that their terms are such that the non-serial bonds fall due in large part well after the fifteen year period expires. *It is the fact* as pleaded that the $375,000 of bonds falling due in the 15 year period is the whole of the principal on such bonds due in such period.

APPLICATION OF LAW TO FACTS

Summarized, the decision of this Court now written, upon the matter of the application of the special

fund doctrine to the admitted facts, and upon allied points of law, may be summarized as follows:

1. The case of Barnes v. Lehi City is affirmed and declared to be still the law of this jurisdiction. That is, a city may pledge the revenue from a plant, consisting of property it owns, and property it acquires, to cover the cost of purchasing the acquired property, without incurring a prohibited indebtedness.

2. But if the property it owns is income producing, prior to acquirement of the new property, the income from the property formerly owned may not be pledged to pay the new obligation, and if the income comes from such scources or the new acquirements are of such character that the income from the old and the new may not be segregated, then the attempt to pledge the income, or any of the income from the combined old and new parts of the plant is not permissable, and a debt is created. For three reasons:

A. The city may not repudiate the obligation and let the seller retake his property, but in lieu thereof the City may be compelled to levy reasonable rates for water, to place them in the fund, and to pay from the fund on the new bond issues. Future City Commissions may not be thus coerced.

B. The revenues to be impounded in the fund are revenues of which the City now is the owner, and

which but for the new obligation would be available to meet other obligations of the City.

C. Revenues from taxation must be indirectly used to "feed the special fund", that is the waterworks fund.

(NOTE:—In the above counsel assumes that this Court will stand on the latter part of its opinion where it holds that the contractual provision, requiring raising of rates for water to a point sufficient to meet the obligations of the waterworks funds, is unconstitutional, and that the City, under the Constitution, can and must charge only such rates as are "reasonable." If that be the case, the argument advanced in the opinion of the Court on page 9 thereof, so far as it assumes the bondholder to have power to require raising of the rates, irrespective of their being reasonable, is obviously not tenable.)

If we correctly interpret the rulings of the Court, we desire to respectfully submit that the new decision upon the law of this subject finds little or no support in the decided cases, and substantially none in the cases which the Court cites in its opinion as relevant thereto. An analysis of these cases and of the opinion herein easily establishes this point, counsel believes.

ANALYSIS OF CASES CITED

The Court first affirms its opinion in the case of Barnes vs. Lehi City—74 Utah 321, 279 Pac. 878.

This is a case where a city, owning a waterworks plant, used solely for the supply to the city of its own lighting requirements, contracts an obligation for more machinery under the standard Fairbanks, Morse & Co. contract, with the intent of supplying electrical current to the public, and pledges the revenue from the sale of current to the public, *as well as moneys to be paid by it into the special fund it creates,*—such moneys to be paid by it covering the reasonable charge for the current used by the city—to the payment of the cost of such machinery. The seller retained title to the machinery until the same was paid for, and it may be assumed had the usual right of a conditional vendor to retake the property on default by the buyer—at least this Court so assumes in the present opinion although no such statement appears in the facts given in the case itself. The installments due on the purchase price are evidenced by "pledge orders", instruments signed by the City, evidences of debt if this be a "debt" in the constitutional sense, as much as are the proposed bonds of Ogden City. There is nothing in the reported case, and we venture to assert nothing in these "pledge orders" which indicates that these are not enforcible obligations except the limitations which require the holder to look to their payment from the "special fund" created from the revenue from the waterworks system,

and moneys to be paid by the city for the current it uses.

Please also note that in the current opinion this Court affirms the Lehi City case so far as it holds that the requirement for payment for the city's use of current does not change the character of the obligation and create a constitutional municipal "indebtedness."

We desire the Court to consider the implications of this case in the light of the current opinion, and of the other decided cases.

First: If Barnes vs. Lehi City be a correct statement of law, (which we do not wish to be understood as disputing) then the following parts of the Court's opinion in this case clearly are erroneous:

> "As already indicated, the contract approved by this Court in Barnes vs. Lehi City was such a contract as could be abandoned at any future time by the governing authorities of the city and the city would lose nothing of its owned property or income and would be under no obligation to make further payment. The Contractor would, under the express terms of the contract, take back its own property and retain the paid installments, which would represent merely the earnings from the contractor's property. No such results follow here. There is no way left open for subsequent Boards of City Commissioners to refuse to be bound by the debt obligation imposed by the bonds. The improvements and betterments are

> so built into the existing system that they could not be segregated. On the other hand the ordinance expressly provides that its terms and obligations may be enforced by appropriate action in law or in equity. The City is bound to pay the interest on or principal of the bonds and may by court action be coerced to raise or maintain the water rates sufficiently to meet such obligations, and to continue to divert revenues now owned by it, resulting from the operation of its waterworks system, into the special fund to pay the water revenue bonds and interest. This is a liability voluntarily incurred by the city by express contract, and which it is bound to pay in money, and therefor a 'debt'. Overall vs. City of Madisonville, 125 Ky. 684, 102 S. W. 278, 12 L. R. A. (N. S.) 433; 17 C. J. 1376."

It is erroneous in the following:

1: It assumes that the only remedy of the seller is recaption of his property. No such fact is stated in the opinion in Barnes vs. Lehi City. The writer has not examined the contract to determine if therein the seller expressly waived any remedy save recaption, but that fact, if it is a fact, clearly was not deemed of sufficient importance to be even noted in the Court's opinion in that case. And under Fairbanks, Morse & Company contracts, substantially similar to the Lehi contract, referred to in cases which this Court cites in its opinion, it is made clear that the seller does have another remedy, that he does have a power of "coercion"

and that such fact alone does not constitute the obligation an indebtedness.

Bell vs. City of Fayette 325 Mo. 75, 28 S. W. (2nd) 357.

This latter case expressly holds that under such contracts the seller either may retake his property, but may proceed by mandamus to enforce, (or coerce) the city to comply with its contract, maintain the special fund and pay the "pledge orders" issued under the contract therefrom. And it expressly holds that this does not create an indebtedness since the action is not on debt but to enforce a contractual right, i. e. the right to have the fund maintained and applied as agreed.

> "So Mandamus lies to compel payment of a claim against a special fund which is in existence and in the hands of the proper officer." 38 C. J. 769, and note No. 50 thereunder.

And there can be no question that mandamus will lie to compel the deposit of public funds in accordance with law. (38 C. J. 759)

In fact, as it clearly pointed out in decided cases, in Barnes vs. Lehi City a stronger objection to the rule of the special fund is to be found than in the Ogden case since there the obligee has his remedy, not only in mandamus, or other appropriate remedy to enforce

the contractual obligation, but has the additional remedy of taking from the city property in which it has acquired a valuable equity, where in practical effect new ground of coercion arises. We submit, in all fairness, that this coercion will apply as much to Lehi City, and will as likely tend to induce its officers to expend moneys from the general fund if requisite to retain their investment in the purchased machinery, as it would so operate had the moneys all be paid from the general fund.

The Court seems to intimate that there is something new, something contrary to the spirit of our institutions, in a legislative body, such as a city commission binding the corporate body it represents in such manner that the future commissioners may not be able to escape from that action. We cannot conceive that this court so intends to hold. Nor that it intends to hold that any contract involving future action by the city, creates an "indebtedness." If city commissioners may not bind their succesors in matters dealing with the city's affairs, then contracts such as Salt Lake City makes for furnishing water to residents in the county in exchange agreements are void. All bond issues of any kind, howsoever authorized, become nullities. Long term leases of property for public use may not be made. No "special fund" cases have been rightly decided,

since even in those cases, which we understand the court still to approve, such as

Winston vs. Spokane 41 Pac. 888;
Shields vs. Loveland 74 Colo. 27, 218 Pac. 913;
Shelton vs. City of Los Angeles 206 Cal. 544, 275 P. 421.

municipal corporations are bound by acts of present governing bodies as to their present acts.

Particularly may we call attention to the last sentence of this quoted language, and to the authority upon which the Court therein seems to hold that any "liability voluntarily incurred by the city by express contract, and which it is bound to pay in money" is a "debt".

The case of Overall vs. Madisonville there cited, which uses the quoted language does so apparently not with the intent of reaching an absolute definition of the term nor in any careful analysis of the phrase. The definition is given, more or less, in an "aside". The questions involved did not require further definition.

The definition from Corpus Juris is the general definition found under that phrase. There can be no quarrel with it as a general definition. But this Court has already adopted in Barnes vs. Lehi City, a much more restricted definition of this term "debt", holding that the word takes a meaning much less broad and

comprehensive than it bears in general usage. Nay, as we have pointed out, under the Lehi City Contract, that city assumed an obligation, payable in money, by express contract, and may be bound to its payment, so far as the special fund will admit.

The definition most often followed is that contained in Bell vs. City of Fayette, heretofore referred to:

> "The constitutional limitation on the debt which a municipality may incur contemplates a debt which must be paid by a resort to taxation."

To adopt the definition given by the Court, is to hold that in no case where "special fund bonds" have been issued, in payment for an entirely new system, all revenue of which is ascribed to the purchase, can anything arise other than by "debt" so that the "special fund doctrine" in all its branches, must willy nilly be repudiated by the Court.

We do not apprehend that the Court so intends.

STATE VS. CITY OF PORTAGE 174 Wis. 588, 184 N. W. 376.

This case is cited by the Court following its argument that if the special fund be made up of revenues from property owned by a city, a new obligation, altho limited to payment from such fund, is a debt. The Court

cites certain language therein which very aptly would apply to that ruling, if the Court correctly construes this case. But we beg leave to call to the attention of the Court the context in which this language is used.

In the Portage case, the statute required Wisconsin cities, upon order of the state Railroad Commission, to make purchase of or improvements to waterworks systems, and to give mortgages, in the nature of purchase money mortgages, upon the system as security for the purchase price. The Court first considers its own former decisions, involving cases where purchase of park lands, the purchase moneys being solely secured by a lien thereon, and not being corporate obligations, were held not void as creating indebtedness, and then referred to the case of Burnham vs. Milwaukee, 98 Wis. 128, 73 N. W. 1019, where the city acquired property upon which there existed a mortgage, which the city must pay "to hold and protect the interest acquired in it," in which case the Wisconsin Court held that the mortgage obligation became a city "indebtedness", because by non-payment thereof the city would lose property in which it had invested general fund moneys. Under these circumstances, the court held there was coercion, and that that was a distinguishable factor, using here cited language:

> The decision in the Portage case itself is based solely upon the ground that compliance with

> the order of the Railroad Commission "would result in mortgaging the city's existing waterworks to secure the payment of a corporate debt incurred after the works were acquired by the City."

This case is authority for no more than the rule that a city may not pledge property, (not revenue) it then holds to payment of an obligation, and still claim the obligation not to be a debt because "payable from a special funds."

DISTINCTION BETWEEN REVENUE AND PROPERTY

That there is a distinction between the action of a city in pledging revenue, and in mortgaging its currently owned property to payment of an obligation is clearly held:

> "We have no difficulty in reaching the conclusion that the bonds which it is proposed to issue are not debts within the meaning of the Constitution, if they are to be paid out of the income and revenue derived from the operation of the waterworks plant. *If the waterworks system could be taken to discharge the debts, then the bonds would create a prohibited, indebtedness.*"
>
> Bowling Green vs. Kirby (Ky) 295 S. W. 1004. Also Ward vs. Chicago (infra)

Please note that the Bowling Green case is almost squarely on all fours with the Ogden case. There the

city had a $600,000 plant in operation. It was inadequate, and extensions were planned costing $309,000-00. If this new obligation constituted "indebtedness" it exceeded the constitutional limitations. The City set up from its waterworks revenues 45% to care for operation and maintenance, 10% for depreciation, and 45% for payment of the new bond issue. (Please note that the water works revenues required for Ogden City to make payment of its proposed bond issue will be less than 45% of its net revenue after payment of all operating expense.) *The waterworks revenue had previously gone to general funds.* The Court had under consideration substantially all the cases cited in the Ogden Case, except Garret vs. Swanton, including the Illinois cases, but held that the pledging of the waterworks receipts for construction of waterworks, and "their transfer from the general to a special fund does not create a new indebtedness within the meaning of the Constitution." It then defines "debt" in the Constitutional sense, as follows:

> "If the bonds are issued, they are not the obligations of the municipality as a corporate entity. No tax can be levied to pay either the bonds or the interest thereon. The ordinance carefully provides that the bonds and interest must be paid out of the income from the operation of the waterworks plant. If the debt cannot be discharged in that manner, then it cannot be dis-

charged at all so far as the municipality is concerned. There is no power to impose a tax on the property within the city to discharge the obligations. If a city cannot be compelled to pay the debt, it is not an indebtedness falling within the provisions of either Section 157 or Section 158 of the Constitution."

CASES CITED ON "DEBT"

This Court cites numerous cases at the bottom of page 9 of its decision, in support of the view that the Ogden City facts are such as to make the proposed bond issue a "debt." We will pass argument on Garret vs. Swanton for the time, as it deserves special treatment, but taking the rest in order:

Hesse vs. City of Watertown 57 S. D. 325, 232 N. W. 53.

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This case is decided wholly on a question of statutory, not constitutional, objection. The statutes in question require, among other things, that the bonds issued be negotiable. The case refers to Bowling Green vs. Kirby, and expressly distinguishes that case by pointing out that the bonds were there issued were not attacked for want of statutory authority, but that the constitutional question only was involved in the Kirby case.

It will be kept in mind that this Court has held that there is no need of statutory authority for the issuance of the present bonds.

Hight v. Harrisonville 328 Mo. 549, 41 S. W. (2nd) 155.

This was another Fairbanks, Morse & Co. case. Here under substantially an identical contract with that found in the Lehi case the question involved was solely whether or not the requirement, that the city must pay into the special fund charges for the current it itself used, invalidated the contract. The court says:

> "Obligations dischargeable solely out of a special fund to the payment of which the general credit of the municipality is not pledged are nevertheless debts of the city for the purpose of the constitutional limitations if that fund is the product of taxation."

We do not assume that this Court in citing this case has any intention of overruling its decision in both the Lehi case and the Ogden case that the payment for the city's use of light or water does not make the obligation a debt. So we assume no further attention need be paid this case.

Campbell v. Arkansas-Missouri Power Co. 55 F. (2nd) 155.

We concede that this is authority against the position taken by Ogden City in this proceeding. BUT it is only such authority if this Court is willing to re-

verse itself, and concede Barnes v. Lehi City to be bad law.

In the City of Campbell case, that City in February, 1930, held a bond election to authorize expenditure of public moneys on erection of a power house, etc., for a lighting system. Less than two months later, on April 5th, 1930, it entered into a typical Fairbanks, Morse & Co. contract for machinery with which to equip that power house. This machinery, it is apparent on examination of the opinion, was an entegral part of the plant, requisite before any revenue could come from the plant. The Court says:

> "The defendant, Fairbanks, Morse & Co., made delivery of the machinery covered by the contract which was installed in the power house, on the foundations constructed by the city, and the plant was put in operation by the city in November, 1930."

This Court went far past this decision in the Lehi case. The City of Campbell only furnished a power house and foundations for use as a shelter and bed for the machinery if purchased. Lehi City furnished not only the power house and the foundations but also the existing distributing system as well. Yet this court sustained the power of this City to make that contract. We find no indications in the opinion before us that this court is any more disposed to follow the Camp-

bell case than it is to follow the Harrisonville case.

Zachary v. City of Wagoner 146 Okla. 268, 292 P. 345.

Another case which would justify overruling Barnes v. Lehi City, but which means nothing so long as that case remains settled law in this jurisdiction. It goes further, even, than the other cases, holding that a purchase of new electric light plant equipment, to be paid for solely from the savings in cost of operation to be effected through its installation, was prohibited. The Court repudiates the whole "special fund doctrine" so far as Oklahoma is concerned:

> "We are not unmindful of the rule followed in some jurisdictions that the purchase of property does not create an indebtedness if the purchase price is to be paid out of the income therefrom (citing cases) but we cannot follow such holding."

Even the limitations made by the Court in the current opinion go beyond this case, where clearly the payments came from income which the city would not have had in the absence of the new equipment.

Miller v. City of Buhl. 48 Ida. 668, 284 P. 843.

This case also repudiates the "special fund" doctrine in tot,. It is decided wholly on the authority of

Feil v. Cour D'Alene, (129 Pac. 643, 42 L. R. A. (NS) 1095) in which the Idaho Supreme Court held that under the Idaho Constitution, containing the word "liability" as well as the word "indebtedness" in the limitation sections relating to cities, the former word had a wider meaning than the latter, and that the cases upholding the special fund doctrine had no application in Idaho.

Fox v. Bicknell 193 Ind. 537, 141 N. E. 222.

In this case, the Indiana Supreme Court expressly upheld the special fund doctrine, the case involving solely the creation of a fund from the income of an entire plant purchased, to retire the bonds issued to cover the purchase price. In the opinion it points out that general taxes cannot be levied to pay the debts, that there is no pledging or mortgaging of property it already owned, no pledging of income it was entitled to receive, etc., but does this solely in distinguishing the case from other cases, including Schnell v. Rock Island, (232 Ill. 89, 83 N. E. 462, 14 L. R. A. (NS) 874) now no longer law in Illinois on the point in question. It does not hold that the presence of any of these factors would change its decision. We submit that there is here neither any required finding, nor any intent to hold that the facts presented in the Ogden case would involve a "debt."

It is interesting to note that Garret vs. Swanton relies almost wholly for its authority upon City of Campbell v. Arkansas-Missouri Power Company (supra.) It finds no other support, and cites no other case except Schnell v. City of Rock Island (supra). While numerous citations of cases are given in the quoted portion of the Campbell and Rock Island cases, none of those cases are themselves assigned as authority, and the Court will note from the previous part of this brief that most of them are not in any wise applicable in a state which recognizes the special fund doctrine. Even the language quoted from the Fayette case had reference to a situation wholly different from that presented in the California case or here. (See citation from McQuillin, Munc. Corp. Sect. 2389 with reference to which that quotation occurs.)

Frankly, the writer thinks that the California court desired to depart from the special fund doctrine, and having evolved the theory of the danger that the special fund must be fed attempted to support it by authority, even though the authority had to be finely strained.

Of course this does not apply to the citation of the Rock Island case. The Illinois Court concedes that in Illinois the special fund doctrine has no application. It says:

> "The argument that no indebtedness is created where the obligation is to pay under some fixed and definite scheme, from some particular fund, which is pledged for payment, is sustained by decisions of other courts; but after so many years of judicial construction, extending from the case of Springfield v. Edwards, 84 Ill. 626, to Lohdell v. Chicago, 227 Ill. 208, 81 N. E. 354, it is not necessary and we would not enter anew upon a discussion of the meaning of our Constitution."

Neither Schnell v. Rock Island, (nor also Joliet v. Alexander, 194 Ill. 457, 62 N. E. 861) are law even in Illinois, in view of the decision in Ward vs. Chicago, hereafter referred to at length.

SUMMARY OF CASES CRITICIZED

It thus appears that, of the cases which the Court cites in support of its opinion that the bonds Ogden City would issue will constitute a debt, the Harrisville Case, the Campbell Case, the Wagoner case and the Buhl case are not such authority, but are authority that the Barnes v. Lehi case is wrong. The Watertown case would seem to be authority for power to incur such an obligation where statutory provisions do not prevent, since it seems to agree with the Bowling Green case, and the case of Fox v. Bicknell is not decided on the point at issue here. That leaves only Garret v. Swanton, and its decision is founded on an

even weaker line of citations, for a state which recognizes the "special fund doctrine" at all, than is the Ogden case; let alone the novel theory of the California court as to feeding of special funds, which in any case is applicable to a situation the exact opposite of that before us here, as we will show, later.

Before this Court used the language we have had under criticism, it referred to the Lehi City case, and cited as similar cases the Fayette case and

Jones v. City of Corbin, 227 Ky. 674, 13 S. W. (2nd) 1013.

Yet this Corbin case is far more than authority for the Lehi City case—we think at least it is squarely authority for the case now before this court. There the city authorities created a special fund, and directed that into it be set apart 15% of the revenue of a public utility it then owned for the purpose of purchasing new equipment. After some three or four months, income at the rate of $1500 per month from this scource having created some $7000.00 of funds, it used that as a down payment on the equipment and pledged the 15% of its gross revenues to the payment of the balance.

It seems aparent from the facts before the Court in the Ogden case that the amount Ogden City may

have to pay annually on the proposed bond issue will not so greatly exceed 15% of its gross revenue as to materially alter the situation in this case from the Corbin case.

FEEDING OF THE SPECIAL FUND

This Court seems, at least impliedly, to have adopted the theory on which its opinion is based primarily on the case of Garrett v. Swanton . As noted above, that attempts to lay down a principle restricting application of the special fund doctrine to cases where there is no need of "feeding the special fund."

The decision in this case, primarily, rests upon the theory that the city of Santa Cruz had placed itself in a position where it must "feed the special fund" from general revenues. There the city had in effect an ordinance which already obligated the special fund created in its waterworks department to meet the payments on principal and the interest on its current bonded debt. (13 Pac. (2) 729, col. 2.) It argues that "if the water fund be depleted by the payments made to Fairbanks, Morse & Co. for the pumping plant, the fund created for the payment of interest and principal on the bonds will be depleted," and "since such bonds are a general obligation of the city, the taxpayers must at all times be ready to feed the special fund if the income is not sufficient to pay both interest and principal on the

bonds and the payments to Fairbanks, Morse and Company. It follows, of course, that, when this contract was executed, the taxpayers became indirectly liable to pay the amount thereof."

It seems to us that the material difference between the ordinances in effect in Santa Cruz and in Ogden City makes the reasoning of the California Court inapplicable on this point. In both cases, the outstanding bonds are obligations of the general fund. But in the Santa Cruz case, the ordinance of that city *requires* that the special waterworks fund make payment of the principal and interest on the bonds; in the Utah case the ordinance does not so provide, and merely *permits* the City Commission to provide for payment therefrom *in its discretion.* The Ogden outstanding bonds are not now, and never have been charges upon anything except the tax revenues of the city.

We come again to the argument which this Court dismisses rather hastily and, we think, illadvisedly, in the opinion under discussion. There is, and the Court agrees with us, no reason why Ogden City,—as it in fact now is doing— cannot retain the whole of its waterworks revenue in its special fund, levy taxes and make payment of its principal and interest on outstanding bonds, and pay into that fund the reasonable charges for the water it uses itself. No obligation of

any kind rests upon the city to use any of its water-works income for any purposes, other than maintenance and minor betterments.

There is then, in the Ogden City case, no question of feeding a special fund from general revenue. What Ogden City has been doing, perhaps illadvisedly, is to feed its general funds from special revenues. Instead of setting up depreciation accounts, and acquiring reserves from which to keep its system in repair, it has used the money which came in for other municipal purposes.

Meantime its main transmission system, consisting of two pipe lines, is in dangerous shape. The old pipe line, after forty-five years of use, lets 20% of the water supply leak away, not only wasting the water, but perhaps endangering the city's rights to preserve it, and certainly placing the city in a position where slides due to leakage may result in damage to private property and such actions against the city as have heretofore reached this very Court.

Its great mains, leading from its reservoirs, also nearly half a century old, leak away another 10% to 15% of all the water supplied to them, causing sinking of pavement, and other damage, and depleting the city's resources, while the pumps at the artesian wells run at constant expense to bring forth water to make

up these losses. Summer water uses draw the present reservoirs down to such dangerously small reserves that the fire hazard is extremely high, and the city has escaped disaster by narrow margins on more than one occasion.

And with all this, the city fathers have blithely poured into various other forms of municipal expenditure the revenues of the waterworks system which should have been used to prevent depreciation and build up funds with which to make the improvements needed. Perhaps with good reason at that! For this court knows that one administration, which seeks to save funds, must realize that it will be met with defeat at the polls from candidates who would use the saved funds to lower taxes. The whole political system is so shaped as to make the voluntary accumulation of a proper reserve for caring for such a situation as Ogden City now faces impossible, as a practical matter.

These arguments, so far as based on the city's current situation, are probably not within the pleadings to the extent that they detail facts presently existing. But the Court is bound to know that there is an urgent public necessity for the doing of the improvements which the bond issue would admit. The Court must realize, indeed knows as a matter of law, that

the City if it cannot borrow as it seeks to do, must conserve at long last its waterworks revenues, must probably in view of the urgency existing levy taxation to the limit of its powers to raise funds to make the needed improvements.

We submit then that any argument based upon the assumption that the taxes of the city will be in the least reduced by the failure of the bond issue to carry is pure theory with no foundation in fact. It seems novel to counsel that any court, would be entitled to assume the continued existence of any such state of facts with regard to handling of the public moneys. This Court, we think, should rather assume that the taxpayer's condition will be better if the cost of the improvements to be made are spread over 15 years by a bond issue, rather than paid for in four or five years from increased taxes and complete use of all waterworks funds for that purpose.

But the Court advises us that there is a difference between the city retaining its water rates for such use, as it lawfully may do, as that is expenditure for a lawful purpose, and use of exactly the same means to pay off moneys obtained to do the needed work at once, while materials and labor are cheap, as a unit, saving the losses inevitable to piecemeal carrying on of such a project. This the Court tells us, is incurring a "debt".

May counsel respectfully submit to the Court that it merely argues in a circle when it so declares. The question before the Court is whether or not there is a "debt" created. One ground for such a ruling lies in this "special fund feeding" theory. We point out that the theory cannot apply, because we do not feed the special fund, we merely cease to feed the general fund improvidently with special fund revenue. And the Court replies that that makes no difference, "debt" is created. The argument assumes the very fact it is designed to establish.

AUTHORITY SUPPORTING CITY'S POSITION

The effect of the preceding argument is of course pointed towards destructive criticism of the court's viewpoint. The Court may properly criticize us unless we add to this matter of constructive character. This we haste to do, and we desire to call the court's attention:

First, to new authority, not heretofore cited, or where cited, not so definitely called to the Court's attention as to sufficiently aid the Court.

Second, to one new line of reasoning from the authorities which we think worthy of consideration as a rule establishing a line of demarcation in the decided opinions.

Schnell v. Rock Island, and the case on which it is based. Joliet v. Alexander, as we have pointed out, mark the extreme limits of the rule contra to the Ogden City position. These cases are cited in almost every decision which this Court has mentioned in its opinion. In them can be found the only clear basis for the opinion in Garrett v. Swanton. We call the Court's attention to the fact that the Supreme Court of Illinois has repudiated the doctrine of these cases, at least so far as the same applies to the identical situation now before this Court:

Ward v. City of Chicago, 342 Ill. 167, 173 N. E. 810.

Chicago owned and operated its waterworks system. The State of Illinois passed a statute which authorized that city to sell waterworks certificates of indebtedness to the extent of $12,000,000.00, stating on their face that they were payable solely from the revenues of the waterworks sytem, "for the purpose of paying the cost of improving and extending the waterworks system."

Chicago then passed an ordinance providing for certain improvements. This ordinance (1) created a special fund into which the revenues of the waterworks system is to pass; (2) provided that from it mainten-

ance and operating expense should be paid; (3) provided that there should be also paid from it "obligations of the city heretofore issued that are payable by their terms from such revenue, whether in the form of certificates, bonds or otherwise," and the certificates issued under the provisions of the ordinance for the proposed improvements and repairs.

The question of whether or not such bonds constitute "indebtedness" under the Constitution of Illinois is directly raised in the case. The Court first calls attention to its own decision in Maffitt v. City of Decatur, 322 Ill, 82, 152 N. E. 602, where it had held valid an obligation to pay a corporation compensation from water rates for lands flooded by the city in constructing a dam for its waterworks system. The City of Decatur had exhausted its bonding power under general law, and could not buy the lands, so it instigated the formation of a corporation to buy the lands, and make such a contract. After considering the Decatur case, the Court says:

> "It is apparent that the general situation in the present case is similar to that in the Decatur case, and that the obligation which it is proposed to create here cannot be said to be, from the standpoint of the City fundamentally different from the one which was there involved. There the city already had a complete water system in operation, but the addition of new elements was necessary

if it was to be made adequate to meet the city's growing needs. (As in the case of Ogden City's new reservoir.) Here the proposed new elements take a different form but their purpose is the same.

"There the existing disposition of water rents was done away with and all moneys received from the system went into one fund out of which certain operating expenses were taken. Although the value of the addition to the plant was no greater than that of the remainder of the plant exclusive of the addition, *an apparently arbitrary percentage of nine-tenths* of the remainder of this fund was then alloted to the water company which financed this addition. *Here all revenues received from the water system is to be deposited in a separate fund, out of which are to be paid all maintenance and operating expense, and the remainder is to be available to pay back those who finance the proposed extensions by purchasing the certificates.*

"There the amount coming into the water fund was dependent upon rates fixed by the city, and the amount in the water fund here will be determined in the same manner. There compensation for the water company came solely from the water fund thus created and no obligation to pay was imposed upon the City. Here no portion of the plant is pledged for payment and holders of certificates have no recourse save out of the proposed water fund. That the obligation of the city arose there out of a simple reciprocal contract, (as in Barnes v. Lehi City) whereas here it would be represented by documents in the form of negotiable notes can make no difference so far as

the question at issue is concerned. If no indebtedness within the constitutional limitation was created there, no substantial reason exists for saying that any would be created here.

"The main reliance of appellant is upon the case of Joliet v. Alexander—(supra). The City of Joliet, owning a system of waterworks, had passed an ordinance providing for extensions thereto. To pay for these extensions water fund certificates were issued. These certificates were secured by a mortgage which covered both the existing system and the extension constructed under the ordinance. The Court properly held that an indebtedness within the constitutional prohibition was created. Counsel for the appellant lay considerable stress upon certain language of the opinion to the effect that *indebtedness within such constitutional prohibition may be .. created .. by .. pledging .. an .. existing.. income of the city.* Arguing that in the present case there can be no way of determining how much income would be attributable to the enlargement of the system when made or how much would be attributable to the new rates when put into effect; that the so-called new income cannot be segregated from the present income; that the present income will thereby be taken away and lost; and that so cutting it off and pledging it will create an indebtedness within the meaning of the language invoked. (How concise a statement of the petitioner's position in this proceeding.)

"The position thus taken seems to be that pledging the water fund creates indebtedness with-

> in the constitutional prohibition unless the pledge is confined to such precise income as can be directly traced to the particular new physical element of the plant to pay for which the obligation secured was issued, leaving the original income intact and usable by the city for other purposes altogether. The Decatur case is decisive against the soundness of such a position. There the income from the original plant was in effect cut off and lumped into the fund resulting from the operation of the plant as enlarged. *It is not apparent that any effort was there made to preserve such original income intact or exempt it in any manner or degree from the claim of the water company or that moneys made available to the water company under the contract were at all limited to income traceable to the elements of the plant which it had financed.*" (Interpolations and italics are ours.)

Please note: That Schnell v. Rock Island, and the case of Joliet v. Alexander upon which it bases its opinion, is the foundation of every case adversely limiting the special fund doctrine where any question of the use of other property of the city, or income, is based. The Joliet case is the sole authority for the Schnell case. The Schnell case in turn, and particularly its quotations from the Joliet case, is the underpinning of the whole line of authority adverse to the Ogden bond issue in any respect.

Counsel for defendants apologizes to the Court for being so belated in calling its attention to this decisive

opinion. His excuse is simply that the Illinois cases had been so strongly against the position taken by the city that he had not deemed it worth while to run them down. The other cases hereafter cited are partly of recent vintage, and found by inspection of a digest published since the argument of this cause, in part cases which now seem in point in the light of the Court's opinion, but did not seem so formerly, and some to which we think the Court gave insufficient weight in the present opinion.

Sowell v. Griffiith (Tex) 294 S. W. 521
Bowling Green v. Kirby (supra)
McCuthcin v. City of Siloam Springs (Ark.) 49 S. W. (2nd) 1037
Johnson v. City of Stuart (Ia.) 226 N. W. 164
Searle v. City of Hautun (Colo.) 271 Pac. 630.

In Sowell v. Griffith, under the city charter a fund was created to which went all of the waterworks revenues, and from which was paid the cost of operation and maintenance, and the amounts due and outstanding on bond issues for the plant. The charter provided that any surplus could be used for general fund purposes to reduce taxes. The case represents a close parallel to the Ogden decision, but is stronger against us in that when the attacked obligation was sought to be incurred, the city had previously issued obligations against the fund. The Texas court find the provisions

consonant with the constitution in that the proposed issuance of obligations against this special fund do not constitute "debt".

McCutchin v. Siloam Springs.

The city built a light plant in 1918, issuing bonds to provide means for its construction and installation. When the proposed obligation came up, these bonds had been paid, and the net revenue belonged to the city, which owned in addition to the plant 25 miles of distribution system, and other property used to produce revenue in the system. It was proposed to build a new power plant with new equipment on land belonging to the city, and to pay for the same by impounding the revenue of the entire system, above cost of maintenance and operations, the improvements being found to be necessary because the old power house and plant were obsolete, if not fairly well worn out. The proposed obligation was attached under a constitutional provision. (Amendment No. 10) prohibiting incurrence of "indebtedness" in excess of current revenues, which it was admitted would occur if the obligation represented "indebtedness." The Court flatly holds that no such indebtedness arises. The case does not discuss at length the application of revenues presently held, but points out that the city authorities

might deem the expenditures necessary to preserve current revenues.

Johnston v. City of Stuart.

This case stands exactly on all fours with Barnes v. Lehi City EXCEPT that the Iowa town had a going plant from which it was in receipt of revenues, a fact which is completely without effect on the ultimate decision of the court.

Bowling Green v. Kirby.

This case has been so extensively gone into before that further comment would seem unnecessary. It squarely supports our view and is the most cited case thereon.

Searle v. Hartun.

A situation squarely on all fours with that here is presented. The Court points out that in every case, except that of Schnell v. Rock Island, which is decided contra to the right of the city to proceed, a mortgage or pledge of property was in some wise involved. It says:

> "We see, however, no difference in substance between a promise or pledge of the future income of property which now has an income, and the promise or pledge of the future income of property which now has none. If one would make the sum secured a debt, the other would. In either case, the income is produced by property already

> owned by the City, which seems to be the condition condemned by the cases cited by plaintiff on this point."

Reviewing briefly this part of the argument, may we again submit that the departure of the Illinois Court, in its overruling of the Joliet case, seems to us to weaken if not destroy the effect of all the authority extant which in any wise supports the present opinion of the Court; that the Chicago case, the Arkansas case, the Iowa case, the Kentucky case, the Texas case and the Colorado case comprize highly important additions to the cases supporting the view Ogden City takes herein. In the light of this authority, largely first called to the Court's attention, we feel entitled to assert that the overwhelming weight of opinion is adverse to the decision of this Court as now written, and to ask that that opinion be re-examined.

Second, as to new matter, may we ask the Court to consider, as is done is some of the cases noted, the effect of its decision as to extensive repairs. We may assume for this that the Courts such as North Dakota, which have followed the former Illinois ruling, would still presist in spite of Ward v. Chicago. But in none of them is there raised a question of the right to incur such obligations for the purpose of making necessary repairs to the system for the purpose of preserving the income it now yields. Clearly if the mains and

the canyon pipe line fail, the City will be without revenue. In that case, would this Court hesitate to approve incurring of obligations to repair the mains, or pipe lines, in order that the revenue might be restored? If not, upon what ground of public policy is there to be found reason for prohibiting use of the same means to prevent such failure and to protect and assure continuation of present revenue. The point is touched on in one or more of the cases herein cited, and will not be amplified, but we call to the Court's attention that even in the North Dakota case of Wilder v. Murphy, (218 N. W. 156) where the use of income of existing dormitories, where pledged to pay for construction of entirely new and separate structures is forbidden on the authority of Schnell v. Rock Island, no question of repairs to existing dormitories, required to preserve their income yield was involved. And that in Lang v. Cavalier, 288 N. W. 825, recently decided, the North Dakota court departs materially from its position in the Wilder case.

In closing, we direct the Court's attention again to the fact that in Barnes v. Lehi City this court has approved the use of property, already owned by the city, in earning revenue to be applied towards payment of a new obligation. We further call attention to the fact that this was revenue producing property, in that it saved to Lehi City the cost of purchasing cur-

rent and distribution thereof from private interests. We call attention to the fact that this present revenue, this saving, was lost to the taxpayers under the court's then decision, since it affirmed the right of the city to make payment therefor from general taxes into the special fund to be used to pay the new obligation. And consistently with that opinion, we again ask the Court to reconsider the present decision which seems to us utterly inconsistent with affirmation of the Barnes case.

We submit:

That the decided cases do not support the opinion of the Court upon the point in question; that in view of the holding by the court that any rates must be reasonable, (and clearly to be reasonable they must neither be too high nor too low) there can be no unlawful coercion exercised upon future city authorities; and that the bond issues should be sustained, and rehearing granted.

STUART P. DOBBS,

ATTORNEY FOR DEFENDANTS.