

1952

# L. Burt Bigler and Herbert K. Sloane v. Ray P. Greenwood et al : Brief of Involuntary Party Plaintiff

Utah Supreme Court

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Alvin I. Smith; Herbert F. Smart;

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IN THE SUPREME COURT  
**FILED** of the  
 NOV 20 1915 **STATE OF UTAH**

Clerk, Supreme Court, Utah

L. BURT BIGLER and HERBERT  
 K. SLOANE,

*Plaintiffs,*

— vs. —

RAY P. GREENWOOD, GEORGE W.  
 MORGAN and LAWRENCE A.  
 JONES, as Commissioners of Salt  
 Lake County, and as Directors of  
 the Salt Lake City Suburban Sewer  
 District,

*Defendants,*

and

SALT LAKE COUNTY SUBURBAN  
 IMPROVEMENT ASSOCIATION,  
 INC., a corporation,

*Involuntary Party Plaintiff.*

Case No. 7915

BRIEF OF INVOLUNTARY PARTY PLAINTIFF

**FILED**  
 NOV 20 1915  
 ALVIN I. SMITH  
 HERBERT F. SMART  
*Attorneys for*  
 SALT LAKE COUNTY SUBURBAN  
 IMPROVEMENT ASSOCIATION  
*Involuntary Party Plaintiff*

Clerk, Supreme Court,

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Case No. 7915

BRIEF OF INVOLUNTARY PARTY PLAINTIFF

STATEMENT

The Salt Lake County Suburban Improvement Association, Inc. was joined as an involuntary party plaintiff, by the plaintiff in this case.

The Association elected to file a separate petition and brief in this cause in order that the position of thousands of the residents affected by the sewer project would be before the court. It will be our contention that

not only was the act under which the Commission proceeded unconstitutional, and that the acts of the Commission thereunder were arbitrary, capricious and illegal but that, in addition thereto, the legislature of this State has enacted legislation designed specifically for the creation and financing of projects of the magnitude and character involved in this case.

It is our earnest belief that a sewer project in the area concerned should be constructed at the earliest possible date. It is the Association's conviction, however, that the need for a sewer is not so great that constitutional rights should be sacrificed and that an ill-conceived, patch work, method of financing under an outmoded act should be adopted. We have endeavored to raise and discuss every issue bearing on this question so that this Court may render a decision that will aid all interested parties and permit additional legislation to be introduced at the 1953 session, if needed.

### STATEMENT OF FACTS

Apparently there is no dispute between the parties as to questions of fact. The parties do disagree, we believe, as to the relevance and legality of certain ordinances, resolutions, and contracts. Because the record consists only of ordinances, resolutions, protests, and a stipulation, rather than a transcript, and because in the course of the brief, reference will be made to certain of these documents, we are outlining in chronological order the steps followed by the defendants.

On May 18, 1942, the Board of Commissioners of

Salt Lake County (hereinafter designated "Commission") adopted an ordinance regulating and controlling all public or private sewers in the County. (Ex. A) Under the terms of this ordinance, the owner of any improvement within 200 feet of a main or lateral sewer line must connect up with the sewer line or be guilty of misdemeanor. A connection fee of \$150.00 was imposed. Under Section 17 of the ordinance, moneys paid for connection fees or otherwise on said sewer system was to be placed in a general fund and the expenses of maintenance and operation were to be paid by the County out of the general fund.

On May 16, 1951, this ordinance was amended by providing that in lieu of the \$150.00 connection fee, the connection fee of \$100.00 per connection would be charged if applied for by an owner of ten or more residences. (Ex. N)

On September 9, 1946, the Commission adopted a resolution that it enter an order creating the special improvement district and designated the boundaries thereof. (Ex. B) The order was entered on the same date and the district was created under the authority of Title 19 Chapter 6A U.C.A. 1943. (Ex. C)

On January 20, 1947, the Commission accepted an offer to purchase \$2,750,000.00 (or such lesser amount as recommended by the engineer) of revenue bonds of the Board of County Commissioners. (Ex. D) Under the terms of the contract, sufficient number of signed service applications accompanied by deposits of \$50.00 per application would have to be secured, together with a

requirement of an additional connection charge of \$99.00 in cash of \$120.00 in deferred payments as to applications filed prior to letting of the construction contract; thereafter connection charge was to be \$140.00 in cash; the maximum interest cost was not to exceed  $3\frac{1}{4}\%$ ; it was estimated that it would be possible to retire the bonds in about 11 years; the minimum charge was to be \$2.00 per month.

On March 18, 1947, a Resolution (Ex. U) was adopted formally creating the district in order to provide for the installation of a complete system and plant within the boundaries of the district. Section 4 (Pg. 4, Ex. U) of said resolution provides in part as follows:

“\*\*\* It is contemplated that the charges to be made to the users of the system will constitute liens against the property in said district enforceable in the event of a default in the payment of such charges, based either upon the service application agreements to be signed by the owner of said property or otherwise.”

The resolution was, therefore, ordered to be filed for recording to give notice of such lien. Thereafter, an ordinance was adopted making it unlawful to construct, or for the owner or any other person to occupy any property for residential, commercial, or industrial use within 200 feet of any street, etc., in which a public sewer is then in existence and making it further unlawful for any owner not to connect with the public sewer to be built after notice is given that the public sewer is to receive connections. A violator of this ordinance is guilty of misdemeanor punishable with a fine not exceeding \$299.-



00 or by an imprisonment not exceeding 6 months or by both fine and imprisonment. (Pg. 9, Ex. U)

Next on the same date the Commission adopted what might be termed the bond resolution. The title of this resolution reads as follows:

"A resolution providing for the acquisition of a sanitary sewer system and treatment and disposal plant for the use of the inhabitants of the area in Salt Lake County known as 'Salt Lake Suburban Sanitary District': providing for the issuance of the bonds of Salt Lake County payable from the revenue to be derived from the operation of said sewer system: entering into certain agreements and making certain provisions for the security and payment of such bonds: confirming the sale and provide for the delivery of such bonds and entering into collateral agreements and provisions in connection with the foregoing."

The resolution in addition to adopting the provisions required in the agreement with the fiscal agents and purchaser of the bonds provided for the following:

The cost of the portion of the system to be initially constructed, including all incidental expenses, was estimated to be not in excess of \$2,750,000.00 (page 11). The guaranty fund should never exceed 10% of the principal amount. The original bond issue was to be \$1,400,000.00 becoming due \$50,000.00 each year for 28 years. The schedule of rates, initial service charge, and additional payments is set forth on Page 29. The ordinance providing for the discontinuance of privy vaults, septic tanks, and cesspools and for connecting to public sewers, supra, was to be maintained in force by the County. The Com-

mission was to require any owner delinquent for more than six months in the payment of the charges to cease to dispose all waste from his premises, and in order to enforce this provision, the Commission was to give notice to any public or private board supplying water to or selling water to the premise to cease supplying water, and if any public or private corporation did not cease supplying water to the premises the Commission shall be entitled to enter upon such premises and it shall through an agent of employe, shut off the supply water of such premises; the bonds were to be sold to Lauren W. Gibbs at set price as will result in an interest cost not in excess of  $3\frac{1}{4}\%$  per annum.

On April 2, 1947, resolution (Ex. E) was adopted appointing Caldwell, Richards, and Sorenson, as Consulting Engineers, and Koebig and Koebig as Associates on the design and construction of the project.

On May 16, 1947, a resolution was adopted appointing C. Earl Alsop, L. Burt Bigler, and Horace A. Sorenson as members of the Advisory Committee. (Ex. G)

On June 30, 1947, a resolution was adopted (Ex. H) providing that in the event that it is determined that the sewer was not to be constructed under the resolution and ordinance theretofore adopted, and that the project be abandoned, Trustee was to return all payments made by the owners.

On September 29, 1947 the Commission resolved to increase to \$3,250,000.00 the maximum amount of bonds which may be required to be purchased by the Fiscal Agent.

On January 9, 1948, (Ex. J) Commission by resolution accepted and agreed to the proposal of the purchasing, fiscal agent to extend the time for the delivery of the bonds, providing that the interest cost be increased from 3.25% to 3.72%.

On February 16, 1948 (Ex. K) according to the minutes of Commission, the Commission questioned whether it was feasible to proceed with the project.

On April 5, 1948, at a meeting attended by the Board of Commissioners, the County Attorney, Mr. Edward M. Morrissey and his Chief Deputy, Elliot W. Evans, a resolution was submitted by Mr. Evans which was thereafter adopted by the Commission. (Ex. L) The Commission in its preamble stated, "All bids for the construction of said sewer system has been rejected as being excessive and numerous objections to the construction of the proposed sewer system at this time and under the proposed method of finance thereof have been made to and received by the Board of County Commissioners and the Board of County Commissioners deem in (sic) inadvisable under present conditions to proceed with the construction of the sewer system in said Salt Lake County Suburban Sanitary District." and further, "many of said prospective users who have made payment of said initial payments are now requesting and demand the return of said initial payment." Thereupon it duly resolved to abandon the proposed acquisition of sewer system as provided in the resolution of March 18, 1947 and rescinded said resolution. The trustee was authorized and directed to return all initial payments.

Nothing further was done by the Commission in regard to this project for the next four years except to return to the fiscal agent a deposit of \$20,000.00.

On March 7, 1952, a letter dated January 31, 1952 of Robert E. Schweser was accepted by resolution of the Board of County Commissioners. (Ex. O)

Under the terms of this contract, it was recognized that the interest of Lauren W. Gibbs in a previous contract had been sold and assigned to Wacob-Bender Corporation and Robert E. Schweser Company. Instead of an outright sale, the assignees were to act as Fiscal Agent and agreed: "5—For such Revenue Bonds as may be issued to pay for the construction of the complete sewer facilities under the present district and which meet the above requirements, we guarantee to find a buyer at a price interest rate and maturity as approved as to legality by the aforesaid bond attorneys and by the engineer as to feasibility."

On March 10, 1952, (Ex. P), there was a recommendation that the Commission pass a resolution instructing the Engineer to proceed with a study of new construction in the district for the purpose of bringing the original plans up to date. Estimates of construction costs were to be prepared together with final plans and specifications.

On June 30, 1952, First Security Bank of Utah was appointed depository. (Ex. Q)

The minutes of August 25, 1952—(Ex. R) summarize the hearing held on the protest of Harrison Brothers. As is indicated "The financing of the proposed sewer was

discussed." The Chairman stated "all sound suggestions would be considered and incorporated into the plan wherever possible."

On September 12, 1952, (Ex. T), the Commission approved the letter addressed to the Engineer which directed them to proceed at once to advertise for bids for the construction of the County Sewer. The advertising was to start not later than September 19, so that the bids could be opened on October 20, 1952.

On October 6, 1952, (Ex. V) a resolution was passed repealing the resolution adopted on April 5, 1948, rescinding certain proceedings pertaining to Salt Lake Suburban Sanitary District. The resolution reads as follows:

"NOW, THEREFORE, be it resolved by the Board of County Commissioners of Salt Lake County, Utah, that said resolution of April 5, 1948 purporting to rescind the proceedings theretofore adopted as set forth in the preamble heretofore is hereby declared to have been adopted by mistake and is hereby expressly repealed, rescinded, and held for naught and said proceedings of March 18, 1947 are hereby approved, ratified, and declared to be now and to before since March 18, 1947 in full force and exact in all respects as though said resolution of April 5, 1948 had never been adopted."

On the same date a resolution (Ex. W) was adopted amending the resolution of March 18, 1947. (Ex. U)

The material amendments will be discussed under the applicable section of our argument.

Thereafter on the same date a further resolution

(Ex. X) was adopted whose title is as follows :

“A resolution providing for the issuance of \$3,850,000 Salt Lake City Suburban Sewer Bonds, Series 1952, payable from the operation of a sanitary sewer system and treatment disposal plant in and adjacent to Salt Lake Suburban Sanitary District; entering into certain agreements and making certain provisions for the security and payment of such bonds and providing for the sale and delivery thereof.”

The material sections of this resolution will also be discussed under the applicable section of our argument.

It is assumed that all further action by the Commission has been stayed since the entry of this Court's order on October 8, 1952.

### STATEMENT OF POINTS

POINT 1. THERE IS NO STATUTORY AUTHORITY FOR THE COMMISSION'S ACTS.

POINT 2. THE STATUTES AND DEFENDANTS' PROCEEDINGS ARE UNCONSTITUTIONAL.

POINT 3. THE COMMISSION'S ACTS ARE ILLEGAL, ARBITRARY, AND CAPRICIOUS.

POINT 4. THE RESOLUTIONS ADOPTED OCTOBER 6, 1952 ARE ILLEGAL, VOID, AND BEYOND THE POWER OF THE COMMISSION.

### ARGUMENT

POINT 1. THERE IS NO STATUTORY AUTHORITY FOR THE ACTS OF THE BOARD OF COUNTY COMMISSIONERS.

The proposed project and the proposed financing are not within the express limitations contained in Title

19, Chapter 6a, Section 8, Utah Code Annotated, 1943.

The literal or grammatical meaning of the language employed by the Legislature in Section 8 of Chapter 6a of Title 19, U.C.A., 1943, leaves little room for speculation or debate concerning the legislative intent. In the preceding sections of Chapter 6a, *supra*, the Legislature has described the projects and special improvement districts that boards of county commissioners may create and operate and it has prescribed the methods by which the cost of such projects or special improvements may be provided. The methods of financing in such preceding sections are expressly limited to (i) the levying of assessments against the property benefited, or (ii) the imposing of fees, tolls, rents or other charges for the use of the improvements, or (iii) both. No general authority is conferred upon such boards to enter into any contracts to provide funds with which to finance such projects or special improvements or to pledge or hypothecate revenues in connection therewith. Then comes Section 8 which does confer a special or limited authority to borrow funds, to enter into contracts, to issue securities, and to pledge or hypothecate revenues as security for repayment of borrowed funds. This authority is expressly limited to matters "in connection" with the financing of such of said projects and special improvements (those previously described in Chapter 6a) "as may be appropriate and possible under the laws of the United States relating thereto." The phrase "laws of the United States" has only one meaning and that is "Acts of Congress." See cases cited in Words and Phrases, Perman-

ent Edition, Volume 24, pages 440-441, and in 1952 pocket supplement thereto, page 142. There can be no question that the power conferred under Section 8, *supra*, is limited by the plain language of the statute to the financing of such projects as may be appropriate and possible under Acts of the Congress of the United States. It is only "*in connection*" with such projects that the Board of County Commissioners of any county is authorized to enter into contracts with the Reconstruction Finance Corporation of the United States or with any other private or public agency, person, corporation or individual, for the purpose of providing funds with which to finance a proposed project or special improvement. It is only "*in connection*" with the financing of such projects and special improvements as may be appropriate and possible under Acts of the Congress of the United States that the Board of County Commissioners of any county is authorized to issue securities and pledge or hypothecate revenues for the payment of the principal and interest thereof.

The question immediately arises, of course, whether a literal construction of the language employed by the Legislature in Section 8 is a reasonable construction, that is, whether such literal construction is in harmony with the general purposes of the statute, and whether there were in existence at the time of its enactment any "laws of the United States," (Acts of Congress), relating to projects and special improvements of the type generally authorized by the chapter and which might require the borrowing of funds and the pledging or hypothecation



of revenues. It is submitted that there was in existence at least one Act of Congress, enacted, during the administration of President Hoover, which related to the financing of projects and special improvements of the type contemplated by Section 8, *supra*. That was the "Reconstruction Finance Corporation Act and Emergency Relief and Construction Act of 1932," Title 15, U.S. Code, Chapter 14, Section 605(b), popularly referred to as the "Emergency Relief and Construction Act of 1932." (Note July 21, 1932, C. 520, Section 201, 47 Stat. 711 et seq.) Section 605(b), *supra*, provided in part as follows:

"Section 605(b). Same; additional loans authorized - (a) Self-liquidating projects; convict labor

"The Reconstruction Finance Corporation is authorized and empowered.

"(1) To make loans to, or contracts with, States, municipalities, and political subdivisions of states, public agencies of States, of municipalities, and of partial subdivisions of States, public corporations, boards and commissions, and public municipal instrumentalities of one or more States, to aid in financing projects authorized under Federal, State or municipal law which are self-liquidating in character, such loans or contracts to be made through the purchase of their securities, or otherwise, and for such purpose the Reconstruction Finance Corporation is authorized to bid for such securities.

\* \* \*

"(6) \* \* \*

"For the purposes of this subsection a project shall be deemed to be self-liquidating if such

project will be made self-supporting and financially solvent and if the construction cost thereof will be returned within a reasonable period by means of tolls, fees, rents or other charges, or by such other means (other than by taxation) as may be prescribed by the statutes which provide for the project, \* \* \*

The foregoing provisions were construed in the case of Public Market Company of Portland v. City of Portland (1942), 130 P. 2nd 624, 171 Or. 522, amplified on rehearing, 138 P. 2nd 916, 171 Or. 522. The Oregon Court, in the latter opinion, commented as follows:

"The Emergency Relief and Construction Act of 1932 granted to it (the RFC) power to make loans only to aid in financing projects, such as a municipal market, 'which are self-liquidating in character,' 15 U.S.C.A. 605b (a) (3). By paragraph number (6) of that section the project 'shall be deemed to be self-liquidating if such project will be made self-supporting and financially solvent and if the construction cost thereof will be returned within a reasonable period by means of tolls, fees, rents, or other charges, or by such other means (other than by taxation) as may be prescribed by the statutes which provide for the project \* \* \*'. Although the statute does not preclude the corporation from taking the additional security of a general municipal obligation, if the project is otherwise eligible as a self-liquidating one (see Circular No. 3 of the RFC, Information for Prospective Applicants for Loans for 'Self-Liquidating' Projects under the Emergency Relief and Construction Act of 1932, February, 1933), still it is obvious that the purpose of the act was to relieve unemployment by financing self-liquidating projects during a period of de-

pression when, as we judicially know, municipal corporations and other public bodies were hard put to find tax moneys sufficient to meet even the ordinary expenses of government."

Section 605 (b), *supra*, was repeated by Act June 30, 1947, C. 166, Title II 206 (a) (c), 61 Stat. 208.

A mere reading of Section 8 of Chapter 6a, *supra*, with its reference to the Reconstruction Finance Corporation, to "self-liquidating projects," etc., together with Section 605(b) of the Emergency Relief and Construction Act of 1932, *supra*, can lead to no other conclusion than that the Utah Legislature intended by Section 8 to enable boards of county commissioners to take advantage of the opportunity to obtain loan funds from the Reconstruction Finance Corporation or similar Federal lending and that the powers conferred were carefully limited to those necessary for the accomplishment of that purpose and that purpose alone.

If anything further is required to convince the Court that Section 8 of Chapter 6a, *supra*, was intended by the Legislature to apply only to such projects and special improvements as might be financed under laws of the United States relating thereto, a review of the legislative history of the enactment of Chapter 6a, *supra*, and particularly of Section 8 thereof, as revealed by House Journal, Special and 20th Sessions of the Legislature of the State of Utah, 1933, should suffice. The measure was introduced in the Utah Legislature on February 13, 1933, as House Bill 101. As originally introduced, House Bill 101 did not contain the provisions which appear in

Section 8 nor was there any reference to the subject matter of Section 8 in the title of the bill as originally introduced. On the day of introduction it was read the first time and referred to the Committee on Irrigation, which committee, after consideration of the measure, reported it favorably on February 25, 1933, with amendments. One of the amendments added the words in the title of the bill after the word "both" and added at the end of the bill the present Section 8 of Chapter 6a, *supra*. It will be noted from the comment of the Oregon Court in Public Market Company of Portland v. City of Portland, *supra*, quoted above, that reference was made therein to circular No. 3 of the Reconstruction Finance Corporation, entitled "Information for Prospective Applicants for Loans for 'Self-liquidating Projects under the Emergency Relief and Construction Act of 1932,'" and that such circular was issued in February of 1933. Even though the legislative history of the act under consideration is not complete, there being no report of the proceedings of the Committee on Irrigation or of the reasons which prompted the addition of the present Section 8 or of debate on the measure, it may reasonably be assumed that the addition of the enabling provision was prompted by the receipt, in February of 1933 and after the introduction of the bill, of the Reconstruction Finance Corporation's Circular No. 3, referred to above, or of other publicity concerning the availability of loans to counties and other State political subdivisions under the provisions of the Emergency Relief and Construction Act of 1932.

It is clear from the foregoing that Section 8 of Chapter 6a, *supra*, conferred no authority whatsoever upon any board of county commissioners to enter into any contracts or to issue any securities or to hypothecate or pledge any revenues, other than "in connection" with projects or special improvements for which financing might be obtained through one of the authorized agencies of the Federal government, particularly the Reconstruction Finance Corporation. The authorization provided therein for the entering into contracts with "any other private or public agency, person, corporation, or individual," clearly is restricted to such contracts as might be necessary to the creation and operation of projects and special improvements "appropriate and possible under the laws of the United States relating thereto." It is common knowledge, of course, that Federal aid in the form of financing through the Reconstruction Finance Corporation, or similar agencies, is seldom 100% financing but usually involves the financing of a part of the cost by the borrower through other means. Moreover, it will be noted from the provisions of Section 605 (b) of the Emergency Relief and Construction Act of 1932, *supra*, that the Reconstruction Finance Corporation was authorized thereby to make loans or contracts to aid in financing local projects through the purchase of the securities of the political subdivision and was authorized to bid for such securities. This, of course, envisioned something other than direct loans and would entail the purchase of securities which involved contracts between the borrower and other persons, corpo-

rations, or individuals. The fact is inescapable, however, that the authorization contained in Section 8 of Chapter 6a, *supra*, for the entering into contracts with any other person, corporation, or individual, was expressly limited to such contracts as were "in connection" with such projects and special improvements as were "appropriate and possible under the laws of the United States relating thereto."

It should be here noted that the special and limited character of the authorization contained in Section 8, *supra*, furnishes the only plausible explanation of the failure of the legislature to make provision therein for the normal safeguards of the public interest, such as publication of notice, opportunity for protest, election on issuance of bonds, etc., which are contained in acts providing for the acquisition of improvements by special improvement districts and the issuance of bonds in payment therefor. Section 8, *supra*, contemplated nothing more than the obtaining of such Federal assistance as might be available, and it carefully restricted the authority granted to that which was necessary to enable boards of county commissioners to obtain such assistance. The Court may take judicial notice of the fact that this legislation came in the very depth of the economic depression that swept the country in the early thirties; that like the Emergency Relief and Construction Act of 1932, *supra*, which it complemented, its primary purpose was to relieve unemployment by financing self-liquidating projects during a period when local governmental units could scarcely meet their ordinary expenses of government,

and when the Federal government was virtually the only source of financial aid for public works. Aid and relief were needed with a minimum of delay, and the ordinary safeguards had to be foregone to enable municipalities to obtain the assistance promptly. But it is inconceivable that the legislature intended that such safeguards should be waived for all purposes and for all time. Indeed, when the Roosevelt Administration came into power and proceeded to enact other relief legislation providing for grants in aid and loans to States and political subdivision of states, the Utah legislature met in special session and provided further implemental legislation to enable counties, cities, towns, and any improvement districts to obtain financial aid from Federal sources, particularly under the so-called National Industrial Recovery Act and from the Federal Emergency Administration of Public Works. See Laws of Utah, 1933, Second Special Session, Chapter 22, effective August 8, 1933, Title 76A, Chapter 2, Section 1, *et seq.*, and Laws 1933, Second Special Session, Chapter 23, effective July 26, 1933, Title 76A, Chapter 2, Section 24, *et seq.*, These enactments were more comprehensive than Title 19, Chapter 6a, Section 8, *supra*, and supplemented the earlier provision which may be said to have had only a brief period of actual applicability since it was directed to the obtaining of relief under the Emergency Relief and Construction Act of 1932, *supra*, the functions of which were superseded by those provided under the National Industrial Recovery Act and similar enactments of the new national administration which came into power in March of 1933.

IF TITLE 19, CHAPTER 6a, SECTION 8, UTAH CODE ANNOTATED, 1943, AS AMENDED, WAS INTENDED BY THE 1933 LEGISLATURE TO APPLY TO SEWER PROJECTS, AND FINANCING, OF THE TYPE HERE IN CONTROVERSY, THEN SUCH SECTION MUST BE HELD TO HAVE BEEN REPEALED BY IMPLICATION BY SUBSEQUENT ENACTMENTS OF THE UTAH LEGISLATURE DEALING COMPREHENSIVELY WITH THE SAME SUBJECT MATTER.

If it is conceded, *arguendo*, that Section 8, *supra*, does authorize conventional revenue bond financing in connection with sewer projects such as that contemplated by the proposal here in controversy, it is submitted that such statutory authority has been superseded by subsequent enactments of the Utah legislature and must be considered to have been repealed by implication to the extent that it had application to the financing of the acquisition, construction, etc., of sewer systems.

The first subsequent legislation to be considered is Chapter 25, Laws of Utah, 1947, Title 19, Chapter 5a, Sections 1 to 23, inclusive, Utah Code Annotated, 1943, as amended, which was repealed by Chapter 24, Laws of Utah, 1949, Title 19, Chapter 5a, Sections 24 to 40, inclusive. A review of the title to this measure is sufficient to reveal that it was an attempt to deal comprehensively with the important matter of the creation and operation of "sewerage improvement districts" and the financing of the acquisition and construction of sewage facilities. This enactment, it will be noted, did attempt to provide the safeguards of the public interest, that is, the due process provisions for notice, public hearing, bond elections, etc., which are normally contained



in such statutes. Apparently, however, the provisions were deemed inadequate, because the 1949 legislature expressly repealed them and enacted in their stead an even more comprehensive statute with greater attention to constitutional rights and democratic procedures. Then in 1951, by Chapter 24, Laws of the State of Utah, 1951, the 1949 enactment was further amended and improved, with even greater emphasis upon protection of the property owners' rights.

It is submitted that there is an irreconcilable conflict between the provisions of Section 8, Chapter 6a, Title 19, *supra*, and those parts of the subsequent enactments hereinbefore cited, which relate to the financing of the construction and acquisition of sewer and sewage facilities. It cannot reasonably be concluded that the Utah legislature would have, in the subsequent enactments, dealt so carefully and comprehensively with the subject and striven so conscientiously to afford the necessary protection to the public interest, if it had at the same time intended to leave in operative existence an earlier provision dealing with the same subject which is so totally lacking in comprehensiveness and in desirable safeguards. The purpose of the later legislation certainly could be circumvented and defeated if there remained in existence a provision so general, so brief, and so deficient in the ordinary provisions for due process, to be availed of by a board of county commissioners which, for one reason or another, should find the provisions of the later enactment too burdensome, or otherwise unsuited to its purposes and objectives.

While it is true that this Court, like others, has in the past shown a proper reluctance to find a repeal by implication of an Act of the Utah Legislature, it should not hesitate to reach such a result when the earlier act and the later enactments on the same subject cannot by any reasonable construction be harmonized and given coterminous operative effect. This is particularly true in a case such as this where the public interest would be so vitally and adversely affected by a decision that the earlier act remains in operative existence and available as an alternative to the later and more comprehensive and satisfactory enactments.

The rule that is applicable here is well stated, with extensive citation of authority, in Sutherland, Statutory Construction, 3rd Edition, Horack, Volume 1, Section 2018, as follows:

“The intent to repeal all former laws upon the subject is made apparent by the enactment of subsequent comprehensive legislation establishing elaborate inclusions and exclusions of the persons, things and relationships ordinarily associated with the subject. Legislation of this sort which operates to revise the entire subject to which it relates, by its very comprehensiveness gives strong implication of a legislative intent \* \* \* to repeal former statutory law upon the subject \* \* \*.”

Thus it is seen that a complete revision of the subject matter of a statute reverses the ordinary presumption against an implied repeal. We have that here. We have also irreconcilable conflict and repugnancy if it is as-

sumed that the 1933 Statute was applicable to the type of financing here in controversy.

The Court should hold either (i) that Section 8, Chapter 6a, Title 19, is inapplicable to projects and the type of financing here in controversy or (ii) that, if applicable, such provision was repealed by the subsequent enactment of comprehensive legislation on the subject.

POINT 2. THE STATUTES AND DEFENDANT'S PROCEEDINGS ARE UNCONSTITUTIONAL.

Title 19, Chapter 6 is unconstitutional and void in that it is contrary and repugnant to Article I, Section 2, Article I, Section 7 and Articles VI, Section 29, Constitution of Utah.

Article I, Section 2 of the Constitution provides:

“All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.”

Article VI, Section 29 of the Constitution provides:

“The Legislation shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capitol site, or to perform any municipal functions.”

If a sewer district organized under Title 19, Chapter 6a, Utah Code Annotated, 1943, is an “arm of the government” not subject to the constitutional and statutory

debt limitations, as has been held in the case of *Tygeson v. Magna Water Company*, 116 Utah ....., 226 Pac. 2d 127, then the Court should hold that the Salt Lake City Suburban Sewer District is unconstitutional in that, under Section 8:

- (a) It is special commission assuming, supervising, or interfering with municipal functions in violation of Article VI, Section 29 and Article I, Section 2, Constitution of Utah.
- (b) By vesting supervisory and control power in the County Commission, the residents of the district are deprived of their political powers and the right to reform or alter the district, or remove the controlling officers, as the welfare of the district or the system may require in violation of Article I, Section 2 of the Constitution.
- (c) That Section 8, Title 19, Chapter 6a is unconstitutional and void in that it is contrary and repugnant to the 5th Amendment of the Constitution of the United States and to Article I, Section 7, Constitution of Utah, in that it deprives the residents and property owners in said district of their liberty and property without due process of law.

In the *Tygeson* case, *supra*, this Court in holding that a "district" created under Chapter 24, Laws of Utah, 1949, was not a "special commission" did so upon the grounds that once the County Commission had initiated the district, the commission function ceased, and the district board functioned autonomously from the Commission and hence was an "arm of government."

At page 130, of 226 Pac. 2d, the Court said:

Assuming, without conceding, that the term 'municipal functions' as used in Art. VI, Sec. 29, applied to the functions of counties as well as cities and towns, nevertheless, plaintiff's contention is not tenable. The management and control of the Improvement Districts and its properties and effects are by the Act vested in a Board of Trustees even though these districts are initiated by the county commission. Their operations will be separate and distinct from any of the functions assumed by the counties in those unincorporated cities or towns. Although these operations might be in the same territorial boundaries as the improvement districts, they will have no control over the property or effects of the counties or of the manner of the performance of any of the functions which the counties have assumed. These improvement districts are similar to the Metropolitan Water Districts and the Water Conservancy Districts. In the Metropolitan Water District Act the initiating agencies were the legislative bodies of the cities desiring the districts, in the Water Conservancy Act the district courts upon petition of a specified percentage of property owners were the agencies through which the districts could be established, whereas in the Improvement District Act under consideration the Legislature has seen fit to give the duty to the county commissioners of the counties in which it is desired to establish a district. In all of these acts once the initiating agencies have acted and a district has been formed their functions cease and the governing body of the district assumes full control of the district and its properties. This court has held that the Metropolitan Water Districts and the Water Conservancy Districts organized under those Acts were separate and dis-

distinct arms of the government and not special commissions, boards, private corporations or associations within the purview of the constitutional prohibition. See *Lehi City v. Meiling*, City Recorder, 87 Utah 237, 48 P. 2d 530 and *Patterick v. Carbon Water Conservancy District*, 106 Utah 55, 145 P. 2d 503. The fact that proceedings to initiate an Improvement District is left to the county commissioners of the counties in which the Districts can be formed might lend some support to an argument that a district would not be a separate and distinct arm of the government but merely be an arm of a county for the purpose of carrying out a county function, were it not for the fact that once the District is actually organized the county has no further connection with the District except the ministerial one of levying any taxes certified to it by the Board of Trustees, a duty of the county which is similar to that performed by it for Boards of Education under the provisions of Sec. 75-12-10, U.C.A. 1943. Once the District is formed the Board of Trustees have full control and supervision of the property and the conduct of affairs of the District. The District must have its own seal and its Board of Trustees may sue and be sued. Also the taxes which are certified by the Board to the county commissioners can be levied only on property within the District. If a District were merely an arm of the county then the general taxes levied whether used for benefits inuring to the District or not should be levied against all residents of the county rather than on those only within the District, just as soon as they are for other county functions. It being the duty of this court where possible to uphold the validity of an act rather than declare it unconstitutional, see *Lehi City v. Meiling*, City Re-

corder, supra, and Patterick v. Carbon Water Conservancy District, supra, we are of the opinion that an Improvement District is a separate arm of the government and not a mere adjunct of a county performing county functions."

In the case at bar the Commission not only establishes the district, but thereafter has complete control over it. It alters, manages employees and other officers and exercises supervisory powers. It determines rates and charges. It determines who shall connect up and what fee, charge or penalty shall be imposed.

In *Lehi City v. Meiling*, 87 Utah 237, 48 Pac. 2nd 530, the Court held the Metropolitan Water District Act did not create a "special commission" even though the members of the Board were appointed by the government authorities, since the electors of the district voted on the establishment of that type of selection of its board members.

Under Title 19, Chapter 6, Section 8, the electors have no say regarding the establishment of the district, nor in the selection of officers.

The Commission is elected by and responsible to the people of the whole county. They are not elected by, nor are they responsible to, the voters of the district only. Thus the power to create the district and the power to control, operate and manage the system is vested in a board not responsible or accountable to the people . . . and the only people . . . who are concerned with fees, costs, financing, operation and control.

At page 548, of 48 Pac. 2nd, Justice Wolfe, in his concurring opinion in the *Meiling* case said:

“The Legislature has not set up an entity and directly given it powers. It has permitted the people of the various cities and towns which are to be included in the territorial limits of the entity to set up such an entity which when and if they do, may exercise certain powers. If the people choose not set it up, no power comes into being. The people, themselves, in the last analysis, have control of the situation.”

Sections 2 to 6 of Chapter 6a of Title 19, provide for an exercise of power, a voice by the people, and might possibly meet the rules laid down in the Tygeson and Meiling cases. In the case at bar, however, the commission chose to ignore these provisions and are proceeding solely under the authority of Sections 1 and 8. Sections 1 and 8 of the Act give the residents of the district no voice in its creation, size, obligation to be incurred, sharing of the burden, method of payment, operation or control, but leaves all these fundamental and basic rights to a commission not subject to selection, control or removal by residents of the district. We submit this constitutes a “special commission” within the inhibition of Article VI, Section 29 and deprives the residents of the district of the rights guaranteed by Article I, Section 2.

As heretofore stated, the Commission is acting solely under the provisions of Section 1 and Section 8 of Chapter 6a, Title 19.

Section 1 provides that a district may be created by the commission upon a petition by “10% of the people.” Who constitutes 10% of the people, whether they include



men, women or children is not known. Whether they must reside in the district or may reside outside the district in the county, or may reside anywhere in the state or whether they need be property owners in either the district, county or state is not known.

Section 8 provides for the borrowing of funds and the issuance of revenue bonds.

In neither Section are the following procedures provided:

- (a) No provision is made for a hearing on the creation of the district.
- (b) No procedure is provided for protesting the establishment of the district.
- (c) No procedure is provided for a property owner to protest having his property included in the district confines, if said property will not be directly benefited by the proposed improvement.
- (d) No provision is made for the filing and hearing of protests in connection with the issuance of bonds.
- (e) No election procedure is provided nor is any right given to vote whether bonds should be issued.
- (f) No provision is made for hearings in regard to the imposition of charges and regulations of rates.

Due process of law requires the above rights in the creation and financing of public improvements.

In *Argyle v. Johnson*, 39 Utah 500, 118 Pac. 487, relating to drainage districts, the Court at page 490 of 118 Pac. said:

“In giving legal effect to the foregoing principle in cases like the one at bar, it is not necessary that a hearing be had at any particular stage of the proceedings by which rights may be effected or that the hearing be had before a regularly constituted court of justice; but it is necessary that a hearing be given at some time and that the same be had before some officer, tribunal, board, or court to whom the person whose property is affected may present his evidence, objections and arguments, to the end that the officer, tribunal, board or court may be enabled to fairly and intelligently pass upon and determine the questions presented for decision.”

And commenting upon the Argyle case the court in *Lundberg v. Irrigation District*, 40 Utah 83, 119 Pac. 1039, stated:

“It was because the drainage law failed to give the landowner an opportunity to be heard before a proper tribunal who had power to hear any objection he might have against having his lands included within the proposed district, that impelled us to hold the drainage law invalid upon the ground that the landowner’s property may be taken without due process of law.”

In *Patterick v. Carbon Water Conservancy District*, 106 Utah 55, 145 Pac. 2nd 503, the Court speaking through Justice Wade, held the statutory provisions of Section 100-11-7, Utah Code Annotated, 1943, which provided for a filing of the petition protesting the creation of the district satisfied the due process provisions of the constitution. At page 508 Justice Wade states:

“Section 100-11-7, Utah Code Annotated, 1943 above quoted, provides for the filing of a petition

protesting the creation of the district and for the dismissal of the original petition in case it is signed by the requisite number of landowners of the required value. That Section also provides that any landowner within the district may contravert the facts alleged in the original petition and in case the court finds that the facts proved are not sufficient under the statute to justify the creation of the district that the original petition shall be denied."

Justice Wolfe in his concurring opinion stated at page 514 of 145 Pac.:

"It becomes evident that due process requires only that each landowner be given notice and a hearing before his lands are included within the boundaries of the district and before they are assessed for making the proposed improvement. He has no constitutional right to require a vote to determine whether the majority want such an improvement constructed. This latter is purely a question of legislative policy. A district could be organized without notice or hearing so long as each landowner was given a hearing on the question of whether his lands have been benefited and should be assessed to pay for the said improvement."

"While, as above indicated, due process does not require that affected landowners be given a chance to vote on the desirability of the constructing of the proposed improvement, it certainly is consistent with our principles of government to follow such a procedure. Thus before organizing conservancy districts and making other improvements which will be paid for by assessing the lands benefited, it is not surprising that legislatures often provide a procedure by which the

affected land owners can voice their disapproval, and if the objectors are sufficient in number, defeat the construction of the proposed improvement."

And in *Tygesen v. Magna Water Company*, supra, at page 132 and 133, of 226 Pac. 2nd, the court upheld Chapter 24, Laws of Utah, 1949, as against the contention that it violated the due process clause of the Constitution because the court found that ample opportunity was given to file objections and protests and have a hearing on said objections and protests before the property of the protestants could be included in the district for assessment purposes.

Neither Section 1 nor Section 8 of Title 19, Chapter 6a provides for any hearing, any protest or any determination of benefits to property before the obligation to pay is placed upon the property owner. And it is heretofore pointed out these are the only Sections of the Act under which the respondents have attempted to proceed in the case at bar.

THE ACTS OF THE COMMISSION IN PURPORTING TO ACQUIRE, CONSTRUCT AND FINANCE SEWER SYSTEM WERE ARBITRARY, CAPRICIOUS AND ILLEGAL AND DENIED THE RESIDENTS OF THE DISTRICT DUE PROCESS OF LAW.

Respondents may argue that due process under the "special fund" doctrine does not require adherence to procedures outlined in the next preceding argument since no-one is deprived of any right under a revenue bond financing scheme. However, it is our position that due process of law requires adherence to fundamental due

process whenever action is taken by a public body. While respondents have titled, called and represented the present plan as a revenue bond plan we contend that they have proceeded to adopt directly and indirectly the compulsory features incident to assessment financing and have so far departed from the limitations of the "special fund" doctrine that the present plan in effect is not under the "special fund" doctrine.

This Court has had occasion to construe the "special fund" doctrine in several cases:

Barnes v. Lehi City, 74 Utah 321, 279 Pac. 878;

Fjeldsted v. Ogden City, 83 Utah 144, 28 Pac. 2nd 144;

Wadsworth v. Santaquin City, 83 Utah 321, 28 Pac. 2nd 161;

Utah Power & Light Co. v. Provo City, 94 Utah 203, 74 Pac. 2nd 1191;

Utah Power & Light Co. v. Ogden City, 95 Utah 161, 79 Pac. 2nd 61.

In the above cited cases this Court has approved, with limitations, the "special fund" doctrine.

The "special fund" doctrine permits the financing of projects regardless of the statutory debt limitations, provided, the payment of the obligation incurred is made solely from the revenues earned by the project. Funds owned by an existing municipal utility may not be used to pay the obligations incurred in constructing an additional utility free from the debt limitations, Fjeldsted v. Ogden City, *supra*. Nor may a governing body of a

municipality or company pledge tax funds for payment of "special fund" revenue bonds. Cases supra.

Nor can such governing body do indirectly what it is prohibited from doing directly. In *Utah Power & Light Co. v. Provo City*, it is stated at page 1207-1208 of 74 Pac. 2nd:

"These bonds, being by their terms and by the ordinance authorizing their issuance, strictly revenue bonds, to be paid only from the revenues received from the sale of electrical power from the plant to be erected, may not, directly or indirectly, be a charge on, or paid from revenues derived from, taxation. This is the gist, the crux, and the basis of the special fund doctrine. Any other construction would make them a 'debt' within the constitutional inhibition, and void the whole issue. And since the city is, by the Constitution, prohibited from incurring debts beyond the specified limit, they cannot by subterfuge or indirection do that which they could not do openly and directly. The debt inhibition was written into the Constitution to protect the citizens from, and assure them that there would be no excessive tax burden imposed upon them. This because the duty of, and necessity for, payment of a tax is not optional or contractual, but a burden imposed not with the consent, but often against the will, of the taxpayer. There is the further reason that a tax becomes a lien upon the property of the taxpayer and may be a means of divesting him of his property. By its express terms the Constitution makes the limitations and inhibitions on the taxing power mandatory and prohibitory. Article 1, S. 26. If these provisions of the ordinance quoted above were construed to mean that the city must, or the manager of the plant could, fix rates for

power either on the citizens or on the city for power used by it, on a basis that must produce sufficient revenue to pay the interest and the bonds as they mature, regardless of the amount of power used or consumed, the city would be made a guarantor of the bonds, and not merely a guarantor of good faith in operating the plant. For the city to be a guarantor of the bonds, regardless of revenues received, would make the obligation a debt within the meaning of the Constitution. It is the fact that the bonds are only *payable* from the revenues of the utility, and *cannot, if any event* be paid from tax revenues, that takes them out of the debt limitation and upholds the special fund doctrine."

In the instant case no election was ever held. No district was created by vote, no bond issue was ever authorized by the electors. No provision for lien or penalty was authorized by the electors.

The Commission without passing any resolution or ordinance had two types of application forms prepared. One provided for a lien on the property if charges became delinquent. (Exhibit 1) The other, alternative application (Exhibit 4), provides that to escape the lien provision the applicant had to post bond or cash equal to 18 months advance payment. (Estimated at \$54.00 assuming the charges do not increase.) Statements were made that an ordinance (Exhibit U) under criminal penalty would compel residents to connect up to the sewer. Reference was then made that the ordinance would provide for a lien in any event. (Exhibit U)

It was stated under the plan if a resident did not sign

an application form by the 31st day of July (later by "gracious fiat" extended to August 31st) it would cost such resident \$100.00 more to then apply for the service. What choice did a resident have?

Among the essentials of the "special fund" doctrine is that the people voluntarily subscribe to the project and voluntarily subscribe to the offered service. In *Utah Power & Light Co. v. Provo City*, supra, this Court speaking through Justice Wolfe said at page 1196 and 1197 of 74 Pac. 2nd:

"\* \* \* we well might have taken such view of it, for if the framers of the numerous constitutions wherein a debt limit was included had been asked, 'do you mean this provision to cover a case where a city or town may be able to provide its inhabitants with services by the construction of projects which will not be a charge against taxes but which may be built entirely by the proceeds of bonds which provide that their only source of payment shall be from the revenues of the project?' The answer we may well imagine would be, 'we mean these debt limiting provisions as a protection against burdening the tax-paying inhabitants with too great a load and at the same time to prevent cities from obligating themselves for expenditures for any current year beyond the current revenue which it may reasonably be expected they will during that year obtain, but we certainly would not want to prevent the people of any city from obtaining the fruits of community life by preventing them from enjoying those services which they may obtain by *voluntary* payments for the services to a project built by monies loaned by persons willing to look altogether to the income derived from such services *voluntarily*



subscribed for by the inhabitants'." (Italics ours)

The plan advanced by the defendants is an attempt to coerce the residents into doing what the commission could not do directly.

The defendants' coercive plan reduced to its shortest form is:

1. You residents have no voice in creating the district.
2. You residents are compelled by ordinance to connect to the system, with penalty for failure to so connect.
3. You sign an application which will put a lien on your house for failure to pay . . . or keep 18 months' advance payment on desposit at all times.
4. Sign up by August 31, 1952, or we will assess you \$100.00 penalty . . . and force you by ordinance to sign up anyway.
5. If any charge is unpaid, we will shut off your culinary water.

What choice, what voluntary action was left to the residents when the commission presented its scheme to the residents?

What method could be more arbitrary? What scheme could be more coercive? What plan could be more capricious?

The residents were denied due process in that the proposed plan did not attempt to assess the obligation to pay proportionate to the benefits received.

In the "plan" not only were the requirements of Section 2 to 6 of Chapter 6a not followed, but the only

charges made are against those who have homes in the district and are compelled to connect up to the system. No charge is made against those owning vacant lots fronting upon the sewer line, even though such lots may be greatly benefited and their market value greatly enhanced, the owner of such vacant lot or lots is not required to pay one red cent of the cost. Due process of law requires the equal sharing of the burden in proportion to the benefit received. The present plan is discriminatory and illegal.

The financial burden for constructing the plan is placed upon 8600 home owners. The system itself is designed for a capacity of 40 to 45 thousand homes. The owners of the vacant property wherein it is thought that ultimately an additional 30,000 or more homes will be built are not required to pay 10c in financing a system from which they will be direct beneficiaries. In other words, the plan proposes to saddle upon approximately 19½% of the total capacity of said sewer system, the burden of paying for a system designed not only for themselves, but for the other 80%.

It may be argued that the cost per home owner will be reduced as the area increases in population. Such a theory asks the home owners of the district to assume an obligation beyond their capacity to pay on the assumption that later others will help them pay. Whether economic conditions will prevail which will continue the building program that has prevailed in the last six years is not known. Whether economic reversals, recessions or even depression may be our lot in the near future is

not known. What is known and what would become legally binding upon 8,600 home owners is the obligation to construct a system designed for more than 40,000 homes and the requirement of pledging their property for its payment, come what may. No satisfactory answer has been given to this question, and others raised in the Holladay Petition, by the County Commission.

In *Brown v. City of Denver*, 7 Colo. 305, 3 P. 455, the Court said:

"The doctrine of the authorities is that whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of, taking it, the owner must have notice of the proceeding, and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be, by virtue of which his property is to be taken—whether administrative, judicial summary, or otherwise—at some stage of it, and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed must be given. Otherwise the constitutional guaranties above cited are infringed.

"Learned dissertations upon the meaning of the phrase, 'due process of law' have been written by judges and lawwriters, but as applicable to summary proceedings of the character under consideration, its meaning is comprehended in the foregoing paragraph. If the law authorizing the proceedings provides for notice to the owner of the property to be specified time or place, before a board or tribunal competent to ad-

minister proper relief, in order that he may be heard concerning the correctness of the charge before it is made conclusive, the constitutional requirements are satisfied. But when the validity of a law or ordinance is questioned without such notice or hearing, the objection is not obviated by proof that a hearing has been had, as a matter of form, in the case. Nor does it satisfy the constitutional requirements that the assessment is fair and just. A valid assessment cannot be made under an invalid law or ordinance, and its constitutionality is to be tested not by what has been done under it, but by what it authorizes to be done by virtue of its provisions."

The Michigan Supreme Court in the case of City of Port Huron v. Jenkinson, 6 L.R.A. 54 stated:

"No legislative or municipal body has the power to impose the duty of performing an act upon any person which it is impossible for him to perform, and then make his non-performance of such a duty a crime, for which he may be punished by both fine and imprisonment. It needs no argument to convince any court or citizen, where law prevails, that this cannot be done; and yet such is the effect of the provisions of the Statute and by-law under consideration."

THE COMMISSION HAS ACTED ARBITRARILY, CAPRICIOUSLY AND UNLAWFULLY.

1. In creating an indebtedness in excess of that permitted by Article XIV, Section 4, Constitution of Utah.
2. In creating a bond indebtedness in violation of the procedures required by Title 19, Chapter 10, Section 1, Utah Code Annotated, 1943.

We have heretofore set out the argument that Title

19, Chapter 6a establishes a "special commission" in violation of Article VI, Section 29 and Article XI, Section 5 of the Constitution. Should the Court hold, however, that the act does not create a "special commission", but authorizes the County Commission to perform a County function, then said action of the Commission is invalid as creating a debt in excess of that permitted by Article XIV, Section 4 of the Constitution and for incurring a bonded indebtedness in contravention of Title 19, Chapter 10, Section 1, Utah Code Annotated, 1943.

We have heretofore pointed out that the present plan does not conform to the "special fund" doctrine, since the residents are compelled to accept the offered service and guarantee payment of the charges, and thereby guarantee payment of the bonds, by liens against their property. The lien, in effect, pledges the property in payment of the bonds. It is stipulated that the assessed valuation of the district is 22 million dollars. Section 4, Article XIV of the Constitution limits the indebtedness of the County to 2% of the assessed valuation of taxable property. The proposed indebtedness of 8 million dollars for the sewer system is thus in excess of such limitation. Further, a bonded indebtedness must be created by election pursuant to Section 19-10-1, Utah Code Annotated, 1943. No election has ever been held as therein required.

Should the Court hold that the district is quasi-municipal, or "an arm of the government" not subject to the debt limitation of the constitution and the statute,

the Court should still find the proposed plan as invalid for failure to follow the statutory provisions under which the district was created and by which assessments may be made against property under Title 19, Chapter 6a.

Sections 2 through 6 of Chapter 6a provide the method for assessment of property to finance the projects permitted therein. Admittedly these methods, procedures and limitations were not followed in the present plan.

The only defense the defendants can have is that assessment is not the method pursued. We contend not only is it assessment, but assessment to which all who benefit do not pay equally and in many cases beneficiaries are not required to pay at all.

The essence of assessment is the levying of a charge against property for a benefit inuring to the property and which assessment becomes a lien against the property.

The plan of defendants is the assessment of a charge (connection fee and monthly service charge) against a home owner for a benefit, which charge, if not paid, becomes a lien against the property.

In the usual assessment payment is made by the owner and the lien discharged. In the present plan the lien attaches if payment is not made and is discharged when paid. In both cases, if payment of the assessment or charge is not paid the property may be sold to satisfy and discharge the lien. If there is a difference between these two, we submit it is a difference of form

and color and not of substance.

The following cases support the proposition that in order to create a lien the authority of the Legislature is necessary and the mere regulation by the company or district is not sufficient:

Turner v. Revere Water Co., 171 Mass. 329,  
50 N.E. 634, 40 L.R.A. 657;

Linne v. Bredes, 43 Washington 540, 86 P. 858,  
6 L.R.A. (N.S.) 707;

Covington v. Ratterman, 128 Ky. 336, 108  
S.W. 297, 17 L.R.A. (N.S.) 923.

It is generally held that in construing the legality of a bond issue the Constitution and Statutes are more strictly construed when the bonds have not been issued and sold.

In Stearn v. Fargo (North Dakota), 122 N.W. 403,  
26 L.R.A. (N.S.) 665:

"It may be stated as a rule that, in considering the legality of a proposed bond issued by a City, Courts construe the Constitution and statutes more strictly than they are construed in determining the validity of bonds already issued and disposed of. (21 Am. & Eng. Enc. Law, pp. 33, 45)."

The instant case in our opinion is one in which the "special fund" doctrine has been stretched to the point, which, if upheld by this Court, would be used as an artifice to do those things which are forbidden by the Constitution. This thought has been expressed in the case of Colorado Central Power Company v. Municipal Power Development Co., 1 Fed. Supp. 961:

"The so-called 'revenue bonds' may be described as an artifice or scheme to do that which the Constitution declares to be against public policy and attempts to forbid. It should not be encouraged."

IF A LEGISLATIVE ACT IS VAGUE, INDEFINITE, UNCERTAIN, AND AMBIGUOUS, IT MAY BE HELD UNCONSTITUTIONAL AND INVALID. THIS IS AN ADDITIONAL GROUND WHY THE ENTIRE ACT SHOULD BE HELD UNCONSTITUTIONAL.

Before a district may be created by a board of county commissioners with provisions for special improvement district assessments or with provisions of financing through revenue bonds, "10% of the people must petition for any such improvement." Section 19 6A-1, U.C.A. 1943. But what is meant by "10% of the people"? This jurisdictional requirement is vague, indefinite, uncertain, and ambiguous for several reasons.

First, it cannot be determined from the section whether "10% of the people" means 10% of the people living in the entire county, or 10% of the people living in that part of the county outside of the incorporated cities and towns in such County, or 10% of the people in the proposed district. Any one interpretation could be valid depending upon the type of proposed district.

Secondly, no rule is given as how the 10% is to be calculated. Certain tests could be used, such as the latest general census, the number of registered voters, the number of people owning property. Coupled with this inadequacy is the uncertainty as to the time of the count. Thus if a census count governs, the population



could increase greatly in a possible period of nine years from the latest general census. During such a period, population could double. On the other hand if the count is based upon taxpayers, a more current tabulation would result in a more accurate count.

Thirdly, countless interpretations have been given to the word "people." Which one of the following definitions did the legislature mean?

The aggregate or mass of the individuals, *Solon vs. State*, 114 S.W. 349; a political society comprising the entire population of all ages, sexes, and conditions, *Ex. Rel. Elder vs. Sours*, 31 Colo. 369, 74 P. 167; persons generally, an indefinite number of men and women, folks, population, or part of population, *In re Silkman*, 84 N.Y.S. 1025, 88 App. Div. 102; those who by the existing constitution, are crowned with political rights, *Koehler vs. Hill*, 60 Iowa 63, 50 N.W. 609; inhabitants of State, *White vs. Larrimore and W. Irrigation Co.*, 1 Colo. App. 480, 29 P. 906; qualified voters, *State vs. City of Albuquerque*, 31 N.M. 576, 249 P. 242; the free white male inhabitants, above the age of twenty-one, *State vs. Boyd*, 31 Neb. 682, 48 N.W. 739.

Although by judicial interpretation, it may be determined what the legislature meant by this phrase, we submit that a jurisdictional requirement such as this cannot be stated in such general terms. Whether or not the persons who have allegedly petitioned to create the district in question qualify under the definition that might be adopted is highly questionable.

The County Commission adopted as its criterion the

people living in the district. This interpretation would establish a criterion in conflict with Section 19-6A-3 which limits the right to protest to persons owning property in the district.

Section 19-6a-2 to Sections 19-6A-7 inclusive dealing with special assessment districts are rather detailed and are not subject to the same objections as Sections 19-6a-1 and 19-6a-8.

The latter section we have discussed previously as to the limited applicability thereof. Unless such an interpretation is followed we submit that the term "projects and special improvements as may be appropriate and possible under the laws of the U. S. relating thereto, as self liquidating projects" is anything but clear.

The Legislature did not mean the projects and improvements to be those which complied with Federal laws in the sense that they were not illegal under any Federal statute. On the other hand if the Legislature were referring to projects and special improvements under the R.F.C., Public Works Administration or the other emergency relief measures, the language used fails to indicate such a reference.

CHAPTER 23 B, LAWS OF UTAH, 1947 (THE "CURATIVE" ACT) IS UNCONSTITUTIONAL AND VOID IN THAT IT IS CONTRARY AND REPUGNANT TO THE PROVISIONS OF ARTICLE VI, SECTION 26 AND OF ARTICLE XI, SECTION 5 OF THE CONSTITUTION AS ATTEMPTING TO GRANT UNLAWFUL PRIVILEGES, IMMUNITIES AND FRANCHISES TO THE SALT LAKE CITY SUBURBAN

SANITARY DISTRICT AND IS A PUBLIC LAW ENACTED WHERE A GENERAL LAW WOULD BE APPLICABLE.

Later in the brief in our discussion of the resolutions of the commission we illustrate that Chapter 23 B is not prospective in application and does not cure or validate the actions taken by the commission during 1952. The present argument is directed only at the unconstitutionality of Chapter 23 B.

Title 19, Chapter 6 a, Section 1 provides the board of county commissioners of any county may create special improvement, water supply, sewer or sanitary districts outside of incorporated cities and towns, and flood control districts inside or outside of incorporated cities and towns in such county.

This Section authorizes the creation of several different types of improvement districts.

Chapter 23 B, Laws of Utah 1947, relied upon as validating omissions and irregularities in the creation of the Salt Lake City Suburban Sanitary Sewer District, is a special act attempting to validate irregularities and omissions in the creation of sanitary districts only. No attempt is made to validate irregularities or omissions in the creation of any other type of improvement district.

The only sanitary district ever attempted under Title 19, Chapter 6 a is, as far as we know, the Salt Lake City Suburban Sanitary Sewer District.

State ex rel Richards v. Hammer, 42 N.J. Law 435, Nov. 1880.

\* \* \* the true principle requires something

more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction upon which the classification is found must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation.'

Nichols v. Walter, 33 N.W. 800, 802.

"\* \* \* or, to state it differently, though not so well, the true practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggest the necessity or propriety of different legislation with respect to them."

In Lyte v. District Court of Salt Lake County, 90 Utah 369, 61 Pac. 2nd 1259, rehearing denied, 90 Utah 377, 62 Pac. 2nd 1117, the Court had before it an analogous situation.

Section 104-21-31 provided:

"The information or indictment must charge but one offense, but the same offense may be set forth in different forms under different counts . . ."

By Section 189 of the Liquor Control Act of 1935,

the Legislature permitted two offenses of the Act to be charged in one complaint. The Court held this provision of the Act to be unconstitutional as special legislation.

In confirming its opinion, the Court on rehearing said, page 1118, of 62 Pac. 2nd:

“\* \* \* What apparent natural reason, or reason suggested by necessity, is there for permitting more than one offense to be charged against one suspected of having offended against the Liquor Control Act (Laws 1935, c. 43) that does not apply to those suspected of having committed some other kind of offenses? What necessity or propriety is there in charging two or more offenses against one who is believed to have offended against one or more of the provisions of the Liquor Control Act that does not equally apply to those accused of committing offenses against other acts? We are at a loss to find any substantial reason for making a distinction between the number of charges that may be included in one complaint involving an infraction of the Liquor Control Act that is not equally applicable to many, if indeed not all classes of offenses.”

What apparent natural reason, or reasons suggested by necessity, is there for permitting validation of irregularities and omissions in the proceedings for creation of one improvement district, that would not exist for another? Should not all, or none of the irregularities and omissions in all improvement districts be validated?

The Legislature by limiting its validating act to

sanitary districts only and excluding from the validating act, the validation of proceedings of the other districts mentioned in the general law attempted to grant special immunities, privileges and franchises to the Salt Lake City Suburban Sewer District, and by such act enacted special legislation where a general act was applicable. It is clear that the only purpose of this act was to validate the irregularities of the sewer district at issue; accordingly, to give any effect to the Curative Act would be to infringe the constitutional provision that "corporations for municipal purposes shall not be created by special laws."

POINT 3. THE COMMISSION'S ACTS ARE ILLEGAL, ARBITRARY, AND CAPRICIOUS.

It must be recognized that a Board of County Commissioners does not have unlimited powers. If the Commission is acting in a special capacity, such as trustees of an improvement district, it must follow either the procedures outlined in the enabling legislative act or if no rules of procedures are outlined, some semblance of order must be observed. The usual method of carrying into effect a commission's powers is through resolutions or ordinances. We shall discuss later what must be adopted as an ordinance, but at the very least the Commission, as the district's officials, could act only at legally called meetings and proceed to transact the affairs in accordance with usual procedures by passing orders or resolutions.

An examination of the exhibits will show that until

April 5, 1948 such a course was followed. On that date the Commission, having considered the problem for over a year, faced with overwhelming opposition from those who were to pay the costs, and unable to construct because of excessive costs had the authority and was justified in taking action to abandon the project and to rescind any formal action previously taken. The fact that the County Attorney was present at the meeting and that the rescinding resolution was presented by his Chief Deputy conclusively proves that the legality of the action had been duly considered. Even if certain contracts with third parties had become vested, the Commission could and did do everything possible to "kill" the project. In so doing it followed procedures recognized by authorities.

Thus in the case of *Michigan v. Brassman*, 11 N.E. 2d 538, the Supreme Court of Indiana after stating that vested rights of contract could not be interfered with by a subsequent rescinding resolution held:

"We do not, however, hold that the original resolution could not be rescinded by the subsequent resolution in so far as parties who had no vested rights under the original resolution are concerned. See *Dillon Mun. Corp.* Sect. 314 (Sect. 584 in 5th Ed.) and authorities there cited."

This Court in the case of *Keigley v. Bench*, 63 P. 2d 262, recognized the validity of the rescinding resolution of Provo City Commission by holding that a referendum on a resolution that had been rescinded would be a useless act.

See also *State v. Funk* (Ore.), 209 P. 113, where it

was held that such power must be inherent in order to prevent an imposition through fraud, accident or mistake.

To all intents and purposes the district sewer project remained abandoned for four years. Then the present Commission was prevailed upon by the fiscal agent (Ex. O) to revive it. One of our main criticisms of the Commission is that action was not taken immediately to dissolve the skeleton district created on September 9, 1946 and abandoned on April 5, 1948 either by resolution, declaratory judgment, or legislative action. If such action had been taken, a new district could have been created and the sewer could have been constructed under Chapter 5a of Title 19—the latest legislative procedure. Instead the Commission proceeded as if the April 5, 1948 resolution had never been adopted and as if it had full authority and jurisdiction to do anything the fiscal agent and the engineers recommended.

During the entire year of 1952 up to October 6, 1952 no formal action of any kind whatsoever was taken to revive the project. Although the minutes of the Commission during this period show that it did enter certain agreements with the fiscal agents, the engineers, and the depository, it at no time authorized any Commissioner or any agent of the Commission to call public meetings, issue literature, and offer agreements. However, the Commission arbitrarily did issue pamphlets and demanded the people living in the district to sign applications under threat of penalties. It was during this period that defendants' exhibit 1 through 5 were



circulated. No formal action approving these exhibits was taken by the Commission. Informally, through newspaper ads. and finally by publication the people were notified of different deadlines for filing applications. We submit that these so-called applications and contracts are nullities. At this late date it is impossible to learn whether the applications, the contracts and the contractual provisions contained therein, which we believe were the handiwork of the fiscal agents, have been formally approved by the Commission. We are only certain of the fact that they are an example of a coercive method promoted by the defendants to secure applications under threat of penalty and now have been approved only in the sense that they are being used as an argument why the project should proceed. We repeat, that to date, the Board, either acting as a Commission or trustees of the district has taken no formal action either by motion, resolution, or order to approve or accept these agreements.

We do not deem it necessary that it be determined at this time whether any contracts or agreements entered into by the Commission with the fiscal agent, the engineer, or other third parties impose any liability on Salt Lake County or the district. We do contend, however, these agreements are without binding effect, having been approved when the district itself was defunct and abandoned.

That the first resolution adopted by the Commission on October 6, 1952 should be given any effect, is questionable. Definitely it cannot have any retroactive

effect. See Dillon Municipal Corporations, 5th Edition, Volume 2, page 920:

“A repeal of a repealing ordinance, reviving the original, does so only from the date of the reviving ordinance. It has no retroactive effect. Rutherford v. Swink, 96 Tenn. 564.”

The defendant's attempt by resolution to say that the original resolution of March 18, 1947 has been in full force and effect is without any significance or legal justification. An analogy would be if the 1947 legislature had passed an act, the 1949 legislature then specifically repealed the act, and thereafter the 1951 legislature attempted to re-enact the act with amendments and a provision that to all intents and purposes the act was to have been in full force and effect during the entire period of the repeal.

A legislature, and we presume, a county commission can under certain circumstances re-enact a law or revive a resolution but neither a legislature or a county commission has the power to turn back the clock and by edict, declare its enactment has had a four year retroactive effect.

What purpose did the promoters of the “plan” have in mind in threatening a \$100.00 penalty, when they knew that no such penalty was then in effect or would be proposed in the final resolution, except to force, intimidate, and coerce residents to sign up immediately?

Another objection to the \$100.00 penalty is the fact that it is in conflict with the county ordinance duly adopted May 18, 1942. This ordinance, which was amend-

ed as recently as May 16, 1951, provides for \$150.00 connection fee, which fee must be paid into the general fund. Either the County must amend this ordinance and delete this provision, or the connection fee collected by the district will not be part of the district's revenue. The district's ordinances and resolutions have always declared the connection fee should be payable only to the district. However, until this general ordinance is repealed, it will take precedence over any so-called agreement or resolution passed by the county commission in its capacity as district trustees. It is our position that because the ordinance provided no penalty and because it was the only law in effect at the time the applications were distributed and demanded, any fee or penalty in conflict with the May 18, 1942 ordinance was illegal.

If we assume that the resolution of April 5, 1948 was not effective (a concession which we are not willing to make), the only authority under which agreements could be submitted for sewer connections and under which penalties could be imposed was the resolution of March 7, 1947. But the defendants did not purport to be acting under the authority of the provisions of this resolution; to the contrary the connection fee and the penalties conflict with the provisions of this resolution. See page 29 (Ex. U) which sets up an initial service charge of \$50.00 payable in advance, plus an additional payment of \$99.00 in cash or \$120.00 payable in four installments; if applications are filed after the letting of the construction contract, the additional charge is

increased from \$99.00 (cash) or \$120.00 (credit) to \$140.00 in cash at \$41.00 (cash) or \$20.00 (credit). The delinquent date was the prior to letting of the first construction contract, not some arbitrary date.

Not only do the provisions of the agreement for the connection fee and the penalty conflict with both the ordinance of May 18, 1942 and the abandoned resolution of March 17, 1947 but they do not conform to the applicable provisions of the master resolution adopted October 6, 1952. The penalty in this resolution is fixed in the amount of \$50.00 or 33⅓% of the connection fee. The penalty does not become effective if the "agreement is executed prior to the letting of the first construction contract." Arbitrarily the first penalty date had been set at July 31, 1952. Thereafter it was moved up to August 31, 1952 and subsequently in regard to a favored few it was moved up to September 20, 1952.

Defendants' answer alleges "that numerous mass meetings wre held concerning financial plans proposed by the county."

As we have previously cited this Court has emphasized that voluntary participation is a feature of the Special Fund Doctrine. We have argued that the act under which the defendants have proceeded is unconstitutional because it deprives the people of their rights. An unconstitutional inadequacy of the act cannot be remedied by gratuitous concessions of the defendants, such as holding mass meetings and accepting protests. Even these gestures were meaningless. To merely hold mass meetings and explain the plan is hardly due pro-

cess. The inadequacy of the procedure was emphasized if one attended such a meeting. It is true that the general plan was outlined, yet the representatives of the defendants could not and did not refer to any single order, resolution, or ordinance to substantiate their representations because no resolution was in effect at the time the meetings were held. No proposed ordinance or resolution was available for study. It was not until October 6, 1952 when the resolutions were finally adopted that the people had anything concrete to protest. The project and the method of financing of March 17, 1947 had been rescinded and abandoned so it would have been useless to protest the provisions of this resolution. What protests were filed, such as the protest of the Holladay Group, incorporated as part of the defendants' answer, could only object to a nebulous proposal which admittedly was subject to changes and amendments. At this time the proposed resolution or ordinance was not made available to the public for inspection; no engineering plan or report was on file and the plans and specifications themselves had not been completed.

The hearing on August 25 (Ex. R) recognizes that the protests were in regard to an "outline" of a sewer plan. At said hearing the fiscal agents and the defendants admitted that as of that date the total amount of the bond issue had not been determined, the maturity dates had not been decided upon, and argued that the objections to tentative plans were without foundation

because it was possible that the final plan would be changed.

Finally, the objections which were raised at the mass meetings, those filed by the Holladay Group and those expressed at the hearings were merely taken under advisement. No provision was made for applying under protest, yet as is admitted in defendants' answer, "in excess of 390 individuals" signed under protest and the Holladay protest contained 2645 signatures. Thus in spite of the fact that 44% of the owners of existing structures filing applications signified they protested the plan, no formal ruling was rendered on the filed protests and no announcements or rulings were made after the public hearing. Instead without advance notice the defendants' plan was hurriedly adopted on October 6, 1952. All of the objections previously raised in the Holladay petition and all of the arguments advanced at the public hearing were ignored, thereby nullifying the democratic expressions of the very people who will be forced to pay the costs.

Again we cite the illegality of imposing upon 8600 property owners the financial burden of paying for a system designed for 45,000 connections (Holladay protest). We submit that it is arbitrary and capricious to compel under threats of criminal and financial penalty a person, such as a veteran, struggling to meet the payments on his purchase money mortgage on his little home, to agree to pay upwards of \$1,200.00 for the sewer and at the same time permit an owner of vast, unimproved acreage to pay nothing, if he chooses, for

the enhancement in value to his property by the improvements financed by others.

POINT 4. THE RESOLUTIONS ADOPTED OCTOBER 6, 1952 ARE ILLEGAL, VOID, AND BEYOND THE POWER OF THE COMMISSION.

We shall now turn to the resolutions of October 6, 1952.

We have previously analyzed the resolution of April 5, 1948 (Ex. L) and we respectfully ask the Court to read this resolution should there be any doubt whether the 1948 Commission was advised as is denied by the first resolution (Ex. V). We have disputed the power to amend a resolution after it has been legally rescinded. We do not claim that the Commission could not have passed a resolution on October 6 which incorporated all of the sections of the March 18, 1947 resolution but we do claim that the Commission could not do this indirectly for the sole purpose of taking advantage of the so-called Curative Act of 1947.

There might be some justification for the amendment of the original resolution if it were determined soon after the adoption thereof that certain details of a resolution could be improved by amendments. However, it must be recognized that there was a span of 6 years between the date of the original creation of the district and more than 5½ years between the date of the original bonding resolution and the amending resolutions, and that more than four years had passed from the date of the abandonment of the project.

If the district had proceeded as originally planned

and changes in detail had been required, an amendment would be in order. However, the facts were, that regardless of the rescinding and abandoning resolution, all parties interested considered the project dead. Vested rights, if any, of third parties had expired. There was no justification or valid reason to adopt this first resolution.

It is apparent that the defendants are attempting to claim the benefits of Chapter 23B Laws of Utah 1947, the Curative Act. Even assuming, arguendo that the March 17, 1947 resolution could be revived, the amending resolution of October 6, 1952 and the third resolution do not come within the validating provisions of this act. The act was meant to correct any errors and irregularities. It was not intended by the legislature to validate any subsequent ordinances or resolutions. The only authority given the board under the act is, "to proceed with the issuance of the bonds thereunder and to make such changes in the details of said bonds as it may find necessary." An analysis of the original resolution as purportedly amended by Ex. W, called the Master Resolution, and implemented by Ex. X, the resolution providing for the issuance of an additional \$3,850,000 bonds, clearly demonstrates that the defendants are not merely making changes in the details but are attempting to push through an entirely new project.

The following are some of the amendments the defendants have assumed are "changes in details":

*COST*—The estimate has now been increased from \$2,750,000.00 to \$8,000,000.00.



*AUTHORIZED ISSUE*—Authorized revenue bonds has been increased from \$2,750,000.00 to \$6,600,000.00.

*PREMIUM*—Premiums have been changed from \$10.00 per bond redeemed in 1958 up to \$20.00 for each bond redeemed after 1961 to \$50.00 if redeemed prior to 1957 and \$20.00 if redeemed after 1972.

*MATURITIES*—Originally the bonds became due \$50,000.00 per annum over a 28 year period beginning 1950 and ending 1977; under the amendments \$50,000.00 in bonds are due in the years 1955 and 1956; \$100,000.00 is due per annum for the next 22 years; \$200,000.00 is due in 1980 and 1981; \$300,000.00 per annum is due for the next five years—1982-1986; \$600,000.00 is due in 1987. Maturity dates are provided for only \$4,600,000.00 in bonds; therefore, \$2,000,000.00 of the authorized issue must hereafter be given maturity dates.

*CALLABLE RIGHTS*—Originally, bonds were callable for redemption during the first 9½ years without premium. This right was cancelled.

*IMMEDIATE SALE*—The original resolution provided for immediate sale of \$1,400,000.00 in bonds. The amending resolution provides for immediate sale of \$4,600,000.00 in bonds.

*EXCESS AUTHORIZATION*—The amount authorized in excess of the amount proposed to be issued has been changed from \$1,350,000.00 to \$2,000,000.00.

*METHOD OF SALE*—Originally, the resolution provided for an absolute sale to Lorrin W. Gibbs at a maximum fixed interest cost of 3¼%; the amendment provides for a sale “in such manner and on such terms

as may be provided or approved by the Board of County Commissioners." There is no limitation on the maximum interest and the bonds can be sold below par.

(IT WAS THIS LATTER CHANGE AND THE FUTURE ACTION THAT MIGHT RESULT THAT WAS ONE OF THE MAIN CAUSES FOR THE SALT LAKE COUNTY IMPROVEMENT ASSOCIATION TO BE ORGANIZED AND TO APPEAR IN THIS CASE. WE DO NOT CLAIM THAT THE DEFENDANTS DELIBERATELY GAVE THEMSELVES THIS UNLIMITED POWER. THE FACT REMAINS, HOWEVER, THAT THE FISCAL AGENTS, OBLIGATED TO FIND A BUYER AND PERMITTED TO BUY THE BOND THEMSELVES, COULD LEGALLY PURCHASE THE BONDS AT A PRICE WITH SUCH INTEREST RATE AS WOULD BE VERY DETRIMENTAL TO THE PROPERTY OWNERS OF THE DISTRICT. FOR EXAMPLE, IF THE BONDS ARE ADVERTISED FOR PUBLIC SALE AND NO BIDS ARE RECEIVED THE FISCAL AGENTS COULD OFFER TO BUY THE BONDS "AT A PRICE, INTEREST RATE, AND MATURITIES" FIXED BY THEM. THE ONLY CONDITION ACCORDING TO THE CONTRACT IS THAT THE PRICE, INTEREST RATE, AND MATURITIES MUST BE APPROVED AS TO LEGALITY BY THE FISCAL AGENT'S BOND ATTORNEY AND BY THE ENGINEERS AS TO FEASIBILITY. UNDER THIS CONTRACT (EX. O) THE SALT LAKE COUNTY COMMISSION HAS NO RIGHT TO REFUSE SUCH A BID).

We have objected strenuously to the affirmative acts of the defendants which were adopted without legal justification. We now must point out in which particulars the defendants have failed to act, and because of such failure, their resolutions are invalid.

We respectfully refer the Court to the three resolutions (Exhibits U, W, and X). An attempt to arrive at a coherent analysis of them confuses even experts. Instead of one detailed resolution the reader must start with an outmoded plan, which is then altered piecemeal by another resolution, and further supplemented by a fragmentary addendum. The result is sixty-three pages of inconsistencies, a patch-work conglomeration, which a project of this magnitude does not deserve. If we compare the result with what authorities recommend, we are appalled. The reasons clarity is essential was stated in the case of *Miller et al. v. State*, 83 Ga. App. 135, 62 S.E. 2nd 921:

“Such a resolution must reasonably show the nature, kind and location and such other facts as will with reasonable fullness and definiteness describe and define the undertaking including the estimated costs thereof. Another reason why these facts should appear in the resolution is that the citizens of the municipality have the right to object to the validation of the certificates on the grounds that the project is unreasonable or unsound and possibly others.

“The approximate fixing of the costs is as vital a part of the resolution as the authorization of the certificates.

“While no tax can be levied to pay for such

an improvement to be financed by revenue certificates, the fixing of water and sewerage charges amounts in most ways to the same thing. A water user has as much interest in his water rate as he has in the proposed assessment or tax for an improvement affecting him by additional assessments.

“Unless a reasonable degree of definiteness is required in the ordinance, the door is left wide open for one of two undesirable consequences, one is that a project may be carried out substantially different from the one or more fixed or alternative plans or parts of plans originally contemplated, or the selection of the project may be delayed to an inferior authority contrary to law.”

Our Commission could not be more definite because the engineers had not prior to the resolution submitted for their study an engineering feasibility report. (See stipulation dated November 13, 1952). It is no wonder, therefore, that in Section II (unamended) of Ex. U they have provided; “The cost of the portion of the system which is to be initially constructed, including all incidental expenses hereafter specified, is estimated to be not in excess of \$2,750,000.00,” yet suddenly, on page 27, Ex. X, the total estimated cost is hiked to \$8,000,000.00. While this may be a nice round figure it does not come within one and half million dollars of the estimate advanced by the engineers and represented as the cost by defendants at the mass meetings (Stipulation dated November 12, 1952). We wouldn't want to accuse the Commission of planning to spend the differ-

ence between \$6,111,076 and \$8,000,000, or \$1,888,924 on the fiscal agents' fees, attorneys' fees, and interest during construction. We, therefore, can only conclude that an arbitrary figure has been selected in order to give them unlimited leeway.

Our Legislature has required that an engineer's report be submitted as to feasibility before bonds may be issued by municipalities. See Sections 15-7-40 and 100-10-4, U.C.A. 1943. Under sections 19-6A-8 revenue bonds may be issued to finance "the proposed project or special improvement." We submit this power should be construed strictly and that the Commission's authority to issue bonds should be limited to the actual cost of the project, and the total authorization should not exceed a sum equal to the engineers' estimate less the estimated initial payments. Such a strict construction is called for in passing on bond laws in connection with proposed issues not yet in the hands of third parties. See *Stearn v. Fargo*, *supra*, page 43.

Evidently defendants recognized that they were authorizing an issue of \$2,000,000.00 in excess of what was needed because the right to determine maturities and optional features is reserved. This proviso in and of itself renders the remainder of the resolutions meaningless. How can a prospective buyer of the bonds with fixed maturities and options be certain that the Commission will not after he has bid, offer for sale \$2,000,000.00 of bonds falling due prior to those he is about to purchase? In effect this is the same as mortgaging property and reserving the right to place a later mort-

gage of equal parity with another mortgagee, but the latter mortgage will become due earlier. Such a mortgage would demand a high rate of interest or an excessive premium. Likewise reserving the unlimited right to issue \$2,000,000.00 excessive bonds, no matter how the funds are to be used, cheapens the value of those first issued and will only result in ultimately the public paying exorbitant interest costs and premiums.

Every principle of due process was violated by the defendants by the manner in which they adopted the resolutions on October 6, 1952. Basically instead of proceeding by resolution, an all-inclusive ordinance should have been adopted. The action taken that date was, in our opinion, the most important legislative enactment ever attempted by any Board of Salt Lake County Commissioners. Therefore the pronouncement of this Supreme Court in the case of *Keigley v. Bench*, supra, is significant:

“Of course, accurately speaking, an ordinance is the proper designation for legislative action.”

We respectfully submit that this Honorable Court implement this recent opinion by adopting the views of the Supreme Court of Arkansas which decided in the case of *Van Hovenberg v. Holeman*, 201 Ark. 370, 144 S.W. 2nd 718 that a “resolution” or “order” is not a law, but merely the form in which the legislative body expresses an opinion, and an “ordinance” prescribes a permanent rule of conduct or government, while a “resolution” is of a special and temporary character. Acts of legislation by a municipal corporation which

are to have continuing force and effect must be embodied in "ordinances" while mere ministerial acts may be in the form of "resolution" and where character requires an act to be done by ordinances, or where such a requirement is implied by necessary inference, a resolution is not sufficient, but an ordinance is necessary.

We admit our error in our petition in erroneously denominating the bond "resolutions" of March 17, 1947 and October 6, 1952 as "ordinances." At all mass meetings and in all correspondence of the defendants it was stated that an "ordinance" would be eventually passed. We still believe that although the commission has designated these enactments "resolutions," they are in fact ordinances. As such they should have been adopted in accordance with the provisions of Section 19-11-1, U.C.A., 1943. Apparently the only reason they were not adopted as ordinances was that they would not have to be published and so that they could be ordered to take effect immediately. This section has no emergency provision, similar to the clause in Section 15-6-12, U.C.A., 1943, applicable to municipalities.

The basis for this right of publication and the limitations on the use of emergency enacting clauses has been the subject of many texts and decisions.

McQuillan on Municipal Ordinances states:

"The provision is in the nature of a limitation upon the legislative and ministerial power. It is intended to enable the public to acquire knowledge of the ordinance before it shall become operative for any purpose. Where persons are

made liable to penal consequences it is a hardship if they are not seasonably informed." (Page 46).

"Due notice of contemplated action upon the part of the municipal authorities is a wise and salutary rule, and is rigidly enforced by the courts as a fundamental constitutional right. Provisions respecting publication and sufficient notice are generally held mandatory, and hence failure to publish in substantially the manner prescribed renders the ordinance or resolution void." (Page 248).

"The people are to be informed of the regulations which are to govern them, and time as well as publication is material. The legislature wisely put stress both upon the mode of promulgation and upon the length of time to be allowed, and it would be wrong to abridge this time by construction." (Page 46).

In a recent case, *Bonnie v. Smith*, 147 P. 2nd 777, the Supreme Court of Oklahoma ruled on this issue in connection with an ordinance establishing a sewer district. There too the ordinance contained an emergency clause and was not published. The court ruled that the ordinance was void and that the town was without jurisdiction to proceed:

"Since the creation of these districts and the apportionment of the cost thereof to the properties affected is not an inherent power that can be exercised by municipalities in the absence of statutory grants of such power must be explicit and must be strictly construed, and must be strictly applied against the exercise of the power in any manner save in the most literal sense within the meaning of the language of the statutes, *American-First Nat. Bank v. Peterson*, 169 Okl. 588,



38 P. 2d 957, we cannot overlook the failure to publish this ordinance on the theory it was an emergency ordinance."

Also the Supreme Court of Washington has frowned upon this unauthorized procedure in the case of *Robb v. Tacoma*, 28 P. (2nd) 327:

"There is quite a difference between the issuance and enforcement of orders, generally, to abate a nuisance or to prevent the spread of a threatened epidemic, on the one hand, and on the other, an order compelling a city to install a vast sewage system necessitating a bonded indebtedness of \$3,000,000.

"Furthermore, we do not think that an emergency, as contemplated by the statute and our decisions, is presented by the pleading in this case. The condition complained of did not suddenly appear, but had been a recurring topic of discussion for a long time, as appears by the answer."

The defendants' surreptitious enactment of these resolutions without publication was a deliberate attempt to circumvent limitations and restrictions imposed by the Legislature "for the purpose of protecting the community, the people, from hasty, ill-conceived, fraudulent, or questionable ventures of officials serving short terms and who may wish to put over some pet scheme or "child" of their own. On important matters the people must not be left unadvised or their will ignored."

Justice Larson in *Utah Power & Light Co. v. Provo*, 74 P. 2nd 1191.

## CONCLUSION

We have gone to some lengths to convince the Court that construction and financing of a sewer system should not proceed under the present plan.

We submit that there is justification for holding either that the Commission adopted the wrong statute, or that the statute adopted is unconstitutional, or that the defendants acted illegally, arbitrarily, and capriciously, or that the bonding resolutions are illegal, void, and beyond the defendants' power.

Accordingly, this court should enter a permanent writ of prohibition enjoining the Board of Salt Lake County Commissioners from the proceeding to acquire a sanitary sewer system under the name of Salt Lake City Suburban Sewer District.

Respectfully submitted,

ALVIN I. SMITH  
HERBERT F. SMART  
*Attorneys for*  
SALT LAKE COUNTY SUBURBAN  
IMPROVEMENT ASSOCIATION  
*Involuntary Party Plaintiff*