

1952

L. Burt Bigler and Herbert K. Sloane v. Ray P. Greenwood et al : Brief of Defendants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF 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 SUBUR-
BAN IMPROVEMENT ASSOCIA-
TION, INC., a corporation,

Involuntary Party Plaintiff.

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Clerk, Supreme Court, Utah
Case No.
7915

Defendants' Brief

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District,

Defendants.

and

SALT LAKE COUNTY SUBUR-
BAN IMPROVEMENT ASSOCIA-
TION, INC., a corporation,

Involuntary Party Plaintiff.

Case No.
7915

Defendants' Brief

NATURE OF THE CASE

This is a petition for a writ of prohibition to determine the validity of the actions taken by the Salt Lake County Commission, to date, to create a sewer district and acquire a sewer system.

STATEMENT OF FACTS

The Statement of Facts by the petitioners is not acceptable. Petitioners confuse the issues by reciting things which they fear might be done, rather than confining themselves to the things which the County Commission has in fact done. They becloud the issues before the court by detailed discussions that do not relate to the legality of the actions taken. Therefore, the following additional statement is necessary to a clear presentation of the County's position.

At the outset, let it be noted that the County Commissioners are the duly elected representatives of the people. Certain powers and duties are conferred and imposed on them by law. There is no presumption that they are proceeding in violation of their duties and not every decision they make is subject to review by the courts. The validity of the statutes and proceedings under those statutes present the issues for determination. Matters of judgment placed by law in the Commission are not here material and a detailed discussion of such such matters only beclouds the issues.

The first ordinance mentioned by petitioners is an ordinance adopted on May 18, 1942, prohibiting the use of privies, cesspools, etc., in areas where a sewer system is available. This ordinance was not adopted under the statutes in question, nor is it a part of any of the sewer

proceedings. It preceded the first step in the formation of a sewer district by nearly five years. While we included this 1942 ordinance in the record at petitioners' insistence, and they have discussed it in some detail, we do not believe that it has anything to do with the issues here involved.

The first action of the County Commission relating to the creation of a sewer district was taken on September 9, 1946. On that date a resolution and order creating a district under Chapter 6(a) Title 19, were adopted. (See exhibits B and C.) Petitioners question the constitutionality of that statute, but there is apparently no challenge made by petitioners concerning the sufficiency of the steps taken under the statute to create a district. No such an attack could be made successfully. The order and resolution show that the required signatures were obtained and the required proceedings were followed, and the Legislature thereafter expressly validated all of the proceedings and any irregularities, if any there were, were cured by this validation act. (See Chapter 23b, Laws of Utah, 1947.)

The next action was taken on March 18, 1947. On that date three separate resolutions were adopted by the Commission. These three resolutions are bound together in the court files as Exhibit U. The first resolution adopted March 18, 1947, recites in its "whereas" clauses that the district had been created under Title 19, Chapter 6(a) on September 9, 1946, and that the commission de-

sired to ratify the creation of that district and to fix its boundaries with more certainty.

Petitioners erroneously refer to the resolutions of March 18th as "formally" creating the district. (Page 4, petitioners' brief) Petitioners then note that on April 5, 1948, the County Commission rescinded "*the*" resolution of March 18, 1947, (page 8, petitioners' brief) leaving the erroneous impression that the orders and resolutions creating the district were rescinded. We think it is important that the court bear in mind that only one of the three resolutions adopted on March 18, 1947, was rescinded. The other two (including the one ratifying the creation of the district) have never been questioned, and no attempt has ever been made to repeal or rescind them.

Since neither this nor the proceedings of September 9, 1946, were ever repealed or rescinded, the district has been valid and subsisting at all times since September 9, 1946. The assertion by the petitioners that there was no district in existence at the time some of the subsequent contracts were entered into and other proceedings were taken is simply not correct.

On page 5 of Exhibit U is the second ordinance of March 18, 1947, which in effect amended the 1942 sewer ordinance relating to the use of privies and cesspools where a sanitary sewer system was available. Then on page 8 of Exhibit U is the third resolution providing for the acquisition of a sewer system, and the issuance and sale of the bonds. Thereafter by Chapter 23(h) Laws

of Utah, 1947, the legislature validated all of the proceedings theretofore taken. This validation act was passed March 13, 1947, approved March 19, 1947, and became effective May 13, 1947.

A contract to sell the bonds for 3¼ per cent interest was entered into. (Ex. D) Engineers were employed. (Ex. E) Procedures were set up for the receiving of down payments on the system. (Ex. F) A trustee was selected and a citizens' advisory committee appointed. (Ex. G) The bonds were prepared for final printing, (Ex. K) and construction bids were received. (Ex. L) Signed applications for service were taken from 1510 persons and approximately \$85,000.00 was collected by way of down payments. (Ex. L and V, page 3)

On April 5, 1948, the County Commission determined that it should reject all of the construction bids, because excessive, elected not to issue the bonds, and provided for the return of the approximately \$85,000.00 to the applicants. The resolution adopted April 5, 1948, (Ex. L) in express words rescinded the third resolution adopted by the Commission on March 18, 1947. The action of the Commission to create the district, as taken on September 9, 1946, and confirmed March 18, 1947, and validated by the legislature, was left undisturbed.

On page 52 of petitioners' brief, they reiterate that the sewer district was abandoned. They admit on page 52 that no attempt has ever been made to dissolve the district. Still much of the brief is devoted to the asser-

tion that since the County Commission determined on April 5, 1948, that it would not proceed with construction and authorized the return of the monies collected, the district in some manner died, and the County Commission lost all power ever to do anything further in the premises. Whether intentionally or not, petitioners carefully avoid a discussion, either in the Facts or in the Argument, as to how the district "died" or ceased to exist. There has never been any resolution adopted or other action taken by the County Commission to dissolve or abandon *the* district. All that was abandoned was the construction program of 1947 on which bids had been received and down payments had been accepted. When the Commission decided that it would not proceed with construction, it became necessary to permit the return of the down payment to the applicants. This was done, but the district was not dissolved and it remained to this day as a valid, subsisting district with the Board of County Commissioners its governing authority.

Thus, in the spring of 1952, the district had full power to enter into any contracts germane to the acquisition of a sewer, and had the power to present to the people a further project. This was done. A proposed plan was prepared and engineering was completed. Twenty thousand informational pamphlets were distributed. Twenty-eight mass meetings were held. A letter was mailed to every property owner within the district and paid advertisements were placed in all the Salt Lake newspapers. Nearly all of the people were heard from, either in the form of protests or applications. As is set

forth in the answer of the County, in paragraph 12, there were less than 8700 existing structures in the district in the spring of 1952. Applications for service were received without protest from 6424 owners of these existing structures. An additional petition, containing 2645 signatures, (but not representing 2645 homes) was received and an additional 1210 applications were received for service to vacant lots.¹ It will be noted from the reply of the plaintiffs that these allegations are admitted.

One of the main criticisms which was made of the 1947 project was that it was "cut and dried" before the people were told about it. The bonds had already been sold. The engineers had been employed, and the bond resolution had been adopted, before the project was presented to the people. It was the County's desire to present this project to the people in full before adopting a final bond resolution. Because no final resolution had been adopted when the Commission presented its tentative plan to the people and solicited applications, petitioners say everything was illegal. They completely ignore the fact that the district itself still existed. With this district the Commission employed an engineer, fiscal agents and arranged for a depository. (Ex. O, P, and Q)

¹It must also be borne in mind that while many of the 6424 application cards were signed both by husband and wife, they were counted as a single application, because they were for service to a single structure. About 300 were for duplexes and apartments. These also were counted only as one. The 2600 protest signatures were just that and did not reflect 2600 structures. This is pointed up by the fact that the 6424 unprotested applications, the 390 protested applications, and the 2645 signature protests total 9459. There were only 8603 existing structures of all kinds within the sewer district. To this 9459 total must also be added the 1210 applications for service to vacant lots.

The district then presented to the people a detailed plan for the acquisition of a sewer. The people made various suggestions and objections. These were met (Ex. S) and then the people overwhelmingly (more than 75 per cent of the total) endorsed it in the form of signed applications for service. We seriously challenge the bald assertion of petitioners in the Statement of Facts that they represent "thousands of people" in the county.

The only other fact situation presented by the petitioners on which we desire to comment is the manner of signing for service. Petitioners assert that because of the ordinance making it a misdemeanor to use a cesspool, privy or septic tank where a sewer was available, all persons were coerced into signing up, and that the only manner in which they could sign up was to either give a lien on their property, or prepay eighteen months service. This is incorrect.

Insofar as signing up for service was concerned, there were five methods available to any individual. First, the individual could pay his share in cash at the time he applied for service. Second, he could agree to pay his share in 24 equal monthly installments. Third, he could start out on a regular time basis and at any time within two years change his mind and pay off in full. Fourth, he could pay \$50.00 down and \$10.00 a month until he had paid \$150.00. Thereafter, he would pay the monthly service charge of \$3.00 per month until the project was paid for. If he used this time method of payment he could either, (a) agree that his unpaid bill is delinquent

more than six months, could be recorded as a lien against his property, or (b) he could prepay eighteen months service and did not have to agree to the lien. (See contract forms attached to County's answer.) He thus had four different methods by which he could apply for service without the lien provision. An arrangement was also worked out with the Department of Public Welfare, to pay not only the down payment, but the monthly service charge for any relief cases.

There is throughout petitioners' statement of facts and throughout petitioners' brief an attempt to leave the impression with the court that the Commission ran "rough-shod" over the wishes of the people and by a criminal ordinance coerced them into giving a lien on their property. The County fully presented its proposed plan to the people and listened to their suggestions and made changes to meet those suggestions and objections. (Ex. S) It heard from practically all of the people in the district. Five different methods of applying for service were available, only one of which called for a lien. Over 75 per cent of the people applied for service without protest. It obviously was easier to induce a person to make a protest which carried with it no responsibilities, obligations or liabilities than to induce the signing of an application with all of its obligations. The County Commission was extremely solicitous of the people's wishes. The argument to follow will demonstrate that its actions were entirely legal.

ARGUMENT

We will treat the points raised substantially in the order that they are developed in the brief of the petitioners.

POINT I. THERE IS STATUTORY AUTHORITY FOR THE ACTIONS OF THE SALT LAKE COUNTY COMMISSION IN CONNECTION WITH THE ESTABLISHMENT OF THE SALT LAKE CITY SUBURBAN SANITARY DISTRICT.

- (a) Regardless of what construction is placed on Chapter 6(a) Title 19, Utah Code Annotated, 1943, the validation act of 1947 confirms the Commission's power to issue revenue bonds.

Before joining issue with the petitioners on their specific discussion of Chapter 6(a), we desire to direct the court's attention to Chapter 23(b), Laws of Utah, 1947. By this chapter the legislature expressly recognized and confirmed the power of the County Commission to issue revenue bonds under Chapter 6(a), Title 19, Utah Code Anno. 1943. Thus, while defendants are confident that they did not exceed the authority of the statute under which they proceeded in providing for issuance of revenue bonds, they need not rely on that authority. Chapter 23(b), Laws of Utah, 1947, is all the statutory authority required for their actions prior to May 13, 1947. It expressly validated all proceedings, including the creation of the district.

The validating act expressly said that the action of any County purporting to create a sewer district and providing for the issuance of revenue bonds under Chapter 6(a) for the acquisition of sewer facilities, "are hereby validated, ratified and confirmed." The validation, ratification and confirmation was to take effect "despite any irregularities which may have occurred and despite any failure to observe any pertinent statutory requirement as to the filing of petitions, or otherwise." It further said that the Commission was authorized to proceed with the issuance of bonds thereunder, etc.

This statute clearly validates every procedure taken by any board of county commissioners purporting to act under the authority of Chapter 6(a). The validation act is more than a legislative opinion that procedures under consideration were within a previous grant of power; *it is in itself a retroactive grant of power if any is needed.* A validation act supplies the authority for the procedures validated, even if such authority had previously been totally absent. The only limitations on the curative power of the Legislature are constitutional limitations which did not here exist.

Plaintiff does not deny the complete curative effect of a validation act and the cases in great number support us in this regard. The general rule is stated in "McQuillan, Third Edition," Section 4.15 as follows:

"The general rule is that a legislature may validate an action of a municipal corporation if the legislature had power to authorize it in the first instance. It may cure the failure to comply with

statutory requirements which might have originally been dispensed with in the proceedings of municipal corporations.”

The rule has been expressly affirmed in Utah. See *Daggett v. Lynch*, 18 Utah 45, 54 P. 1095. In that case, Daggett County created indebtedness under certain warrants which were void because in excess of the County's statutory debt limit. The legislature possessed the power at that time to raise the debt limit of a County. After the warrants were issued, the legislature validated the warrants. The court held that the validating act authorizing the issuance of warrants was effective to render the warrants valid, even though at the time the warrants were issued they were void, because in excess of the debt limit of the county. In so holding, the court said:

“The legislature possessed the power, when the warrant was issued, to raise the debt limit, and the warrant having been issued in excess of that limit, the legislature might validate it. An act of a county void for want of authority may be validated by the legislature if it had the power before the void act was done to authorize it.”

In June of this year the Tennessee Supreme Court considered a curative act, subject to every attack now being made against Chapter 23(b), Laws of Utah, 1947, and more. The county had levied an ad valorem tax for general county purposes in excess of the maximum allowed by general law. The legislature then validated the excess, and stated the purposes for which the excess must be used. The court held the validating act constitutional.

It was also held that the act did not violate a provision prohibiting the suspension of general law for particular individuals. The court thus upheld, even in an ad valorem tax case, the propriety of retroactive ratification of an entirely ultra vires levy. See *Cinn. N. O. & T. O. R.R. v. Rea Company*, 250 S.W. (2d) 60.

See also, *in re Christensen's Estate*, (Utah), 54 P. 1095, *Hodges v. Snyder*, 261 U.S. 600, 61 L. Ed. 819, and the numerous authorities cited in "McQuillan, Third Edition," Section 4.15 in support of this rule.

It is, therefore, respectfully submitted that even if Chapter 6(a), as enacted in 1933, did not grant to the counties any power to borrow money and pledge revenues and issue bonds, the validation act of 1947 had the legal effect of a retroactive grant of power to the County Commission. The legislature clearly had the power to provide for revenue bonds, etc., in the first instance, (*Tygesson v. Magna Water District*, Utah, 226 P. 2d 157). The validation act leaves the creation of the district and the proceedings and the powers of the County Commission to borrow money and issue bonds unchallengeable. This is a complete answer to Point I of petitioners' brief, including the argument on implied repeal.

We believe that even without this legislative ratification, Chapter 6(a) gave adequate power to the Commission. We, accordingly, in the sections to follow, join issue with the petitioners' construction of the statutes. We do so, however, with the assertion that this issue in-

sofar as it relates to actions prior to May 13, 1947, is moot, because the validation act is itself an adequate grant of power.

(b) Chapter 6(a) Title 19 confers all of the necessary powers.

As said by our court in *Washington County v. Tax Commission*, 103 Utah 73, 133 P. 2d 564:

“ ‘But a statute is passed as a whole, not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every part or section so as to produce a harmonious whole’. Lewis Sutherland Statutory Construction, Second Edition, Volume 2, page 706.”

Article VI Section 23 of the Constitution provides that the subject of a statute “shall be clearly expressed in its title.” The purpose may be expressed in general terms and the purpose thus expressed is the “subject” of the act. *In re Monk*, 16 Utah 100, 50 P. 810. The title is thus important in determining the purpose of the act. The title as the act was originally introduced on February 13, 1933, House Journal page 365, provided as follows:

“An act authorizing boards of county commissioners to create flood control districts . . . and to create special improvement, water supply, sewer or sanitary district . . . and to provide for the cost of the acquisition and installation of such improvements . . . to be paid from assessments levied against the property within said district, benefited by such improvement or by fees, tolls,

rents, or other charges for the use of such improvements, or both.”

At the time the bill was thus entitled, it did not contain what is now Section 8 at all. Thereafter Section 8 was added and the title to the bill was amended by adding at the end thereof the following:

“And authorizing boards of county commissioners to borrow from the Reconstruction Finance Corporation or other agency where appropriate, according to law, the necessary funds and to secure and repay the same.”

This title did not restrict borrowing to federal projects. It expressly says that the act authorizes the district to borrow from the R.F.C. or other agencies.

Since, as petitioners point out, Section 8 of the Chapter did not appear at all in the bill as originally introduced, their construction would ascribe to the architects of the original bill a complete lack of legislative conception and a total lack of legislative purpose. If the only grant of power to borrow money were in Section 8, then the original bill, which lacked Section 8, in effect had no practical purpose. Districts when created have no current funds and it is nonsensical to assume a plan where laborers and materialmen wait for payment until a system is completed and tolls return the costs. Nor is it sensible to assume that special assessments could be payable by everyone on an expensive sewer project in one payment at the beginning of construction. To “provide” for a sewer, financing over a period of time was and is essential. The act must be given a sensible construction which will ac-

comply with the purposes sought by the statute. *Tax Comm. vs. Logan*, 88 Ut. 406, 54 Fed. 1197.

We submit that before Section 8 was added, a grant of power adequate to the purposes of the act certainly was intended by the framers. When Section 8 was added, it was not intended to negate the powers previously conferred. It was rather to supplement than to supersede the powers already granted. Neither the title of the bill nor the express wording of Section 8 would require a construction which would limit the borrowing of money to federal projects. Even if Section 8 were to be so construed, Section 1 of the act was itself broad enough to permit it.

Section 8 expressly authorizes the borrowing from either public or private agencies, persons, corporations, or individuals. The construction placed upon this language by petitioners is far-fetched indeed. The section starts out by referring to county commissions "creating special improvements as hereinabove described." The "hereinabove described" can only refer to Section 1. Section 8 then goes on to say that such county commissions are authorized to create and operate such projects and improvements as may be appropriate and possible under the laws of the United States. The language contemplates the creation and operation of projects as authorized "hereinabove" under Section 1, and projects operated under appropriate laws of the United States. It then goes on "and in connection therewith" the County may enter into contracts with the United States or other private or public agency, person, corporation or indi-

vidual for borrowing money, issuing bonds, etc. This language clearly refers to both types of project. That is, those created "as hereinabove described" and projects created under appropriate laws of the United States. It does not matter what motivated the legislature to adopt Section 8, so long as the language which it adopted expressly permits borrowing from private agencies. The section as adopted expressly permitted borrowing from private sources. The amendment to the title of the act which was made when Section 8 was added declares its purpose to be to permit boards to borrow money from the R.F.C., or other agencies. If the language of Section 8 is to be construed as narrowly as petitioners request, there would be a serious doubt as to whether the description of the purpose contained in the title was not defeated by Section 8 as so construed. The title clearly says that its purpose is to permit the borrowing of money from the R.F.C. or other agency. Section 8 says that county commissions creating projects as "hereinabove described" (Section 1) may also create projects under appropriate laws of the United States, and in connection "therewith" (referring to both types of projects) the commission may borrow money from public or private sources. Such a construction meets with common sense and is in harmony with the purpose expressed in the title. It permits county commissions to carry into effect the objectives of the act, while the construction urged by the petitioners would render the act useless.

In view of the grants of power in Section 1 and the supplemental express grant of power in Section 8, there

can be little doubt that the County Commission had the power to borrow money. The granting of express power to enter into contracts with the United States is not new to Utah legislative procedure. Almost all of the water bills adopted by our Utah Legislature have so provided. (See, for example, the Utah Water and Power Board Act, Laws of Utah, 1947, Ch. 141, Section 4, Subdivision 8; the Water Conservancy Act, Section 100-11-14(e); the Local Improvement District Acts, Laws of Utah, 1951, Chapter 32, Section 11.)

But even if we were wrong as to the construction of both Sections 1 and 8, nevertheless, the legislative validation in 1947 was itself an express and direct grant of power to borrow from a private agency, to issue bonds and pledge revenues for repayment.

- (c) The Practical Construction given Chapter 6(a), Title 19, Utah Code Anno. 1943, by the County Commission is reasonable, and even if another were possible is entitled to judicial respect.

The Board of County Commissioners has construed Chapter 6(a) as a grant of power to finance a sewer project with private agencies by a revenue bond issue. The reasonableness of that construction, we believe, we have already made clear. The board's construction in 1947 and again in 1952 being reasonable, is entitled to judicial respect. See *Utah Power & Light Company v. Public Service Commission*, 107 Utah 155, 152 P. 2d. 542, where the court said at page 187:

“Consistent administrative interpretation over the years by the officers charged with the duty of

applying the statute and making each part work efficiently and smoothly are entitled to great weight by the courts."

See also Section 78, 42 Am. Jr. 392 in note 20, with some fifty cases supporting the statement that: "The practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration or enforcement is entitled to the highest respect from the courts."

- (d) When a Legislature readopts a Statute without change after notorious construction by officers charged with administering it, the presumption is that the Legislature knew of the construction and adopted it.

Closely related to the principle discussed under subdivision (c) hereof is the principle of law that when the legislature "readopts a statutory act without change after uniform and notorious construction by officers required to administer it, the presumption is that the legislature knew of such construction and adopted it in re-enacting the statute." *Utah Power & Light Company v. Public service Commission*, supra. We do not here have a legislative readoption of the statute, but there is through the validation act an express recognition by the legislature of the construction placed upon this statute by the County Commission. The statute recognizes expressly that county commissions had construed this statute to permit them to borrow money on revenue bond issues from private sources. Knowing that the county commissions had so construed it, the legislature ratified

this construction. We believe that this legislative recognition of the prior construction by the county commission is entitled to weight by the court in construing the statute, although we recognize that the principle of re-adoption of a statute is probably not directly involved as such.

POINT II. CHAPTER 6(a) TITLE 19 HAS NEVER BEEN REPEALED BY IMPLICATION OR OTHERWISE.

Repeals by implication will not be upheld from the single fact that acts passed at different times deal with the same subject matter, in whole or in part. The focal point of the inquiry is the intent of the legislature in the enactment of the alleged repealing act. (See 50 Am. Jur. 541, section 535) In determining that intent, there are a number of principles universally accepted, which are most helpful.

The paramount principle is that repeals by implication are not favored. This is a maxim announced by every court in the land. Early statements by the Utah Court are found in *University of Utah v. Richards*, 20 Utah 457, and *Neldon v. Clark*, 20 Utah 382. Even in the rare instances when the court has declared an implied repeal, it has expressed its deep antipathy toward such declarations. In *Western Beverage v. Hansen*, 96 P. 2d. 1105 (Utah 1939), the court said:

“Differences of time will be disregarded in construing a code if, by disregarding them and looking at the work as a whole, harmony can thereby

be produced, but if this proves impossible, and if, *after exhausting every scheme of reconciliation, there still remains a palpable and irrespressible conflict*, the Supreme Court is compelled in the absence of anything else indicative of legislative will, to determine the legislative will by adopting the latest declaration of the legislature.”

As noted in the quotation above set forth, there must be an “irrepressible” and “palpable” conflict. The mere fact that two acts co-exist on the same subject matter has never been held to be enough unless this irrepressible conflict exists. Not one single instance of conflict is pointed out by the petitioners and in fact none exists.

Further, the legislature here has affirmatively indicated that it did not intend to impliedly repeal Chapter 6(a). To begin with, the act which petitioners contend is an implied repeal of Chapter 6(a), was approved by the same legislature that adopted the validation act. The act relied upon by petitioners for the implied repeal is Chapter 25, Laws of Utah, 1947. The very same legislature passed the validating act on the very same day. See Chapter 23(b), Laws of Utah, 1947. Both acts were passed March 13, 1947. The so-called repealing act was approved March 17th and the validating act was approved March 19th. There is thus something in addition to the words of the statutes clearly indicative of legislative intent not to repeal. When enactments, allegedly in conflict, were enacted on the same day, the presumption against implied repeal is particularly strong. *Graham v. Goodell*, 282 U.S. 409. The same is true where the statute alleged to have been repealed is an important

law of long standing. *Attorney General v. Joyce*, 233 Mich. 619, 207 N.W. 863.

There is another rule which helps govern the courts in determining whether or not there has been an implied repeal. A statute in order to be held to constitute an implied repeal of an older statute must cover the entire scope of the act repealed so that the former may be intended as a substitute. Where the old statute contains subject matters not covered by the later statute, an implied repeal will not be assumed, because it leaves those other fields then without legislation. Thus, *in re Goddard*, 74 P. 2d 818, the court said that:

“for a law to repeal or supercede an earlier statute, the later law must constitute a revision of the entire subject, so that the court may say it was intended as a substitute.”

In *Tombstone v. Macia*, 245 Pac. 677, 46 A.L.R. 828, it was held that a statute permitting the issuance of municipal bonds for any lawful and necessary purpose was not repealed by the re-enactment of a prior statute authorizing the issuance of bonds for any purpose for which the municipality might grant a franchise. The court's reasoning was that a broad or general act could not be impliedly repealed by a narrower act. See also *People ex rel Palmer v. National Life*, (Illinois) 10 N.E. 2d. 398.

Certainly there was no attempt in 1947 to revise the entire subject matter of the 1933 act. Chapter 6(a) is

concerned with the creation of "Special improvement, water supply, sewer and sanitary districts . . . and flood control districts." The 1947 act only provided for systems for water and sewer systems.

Chapter 6(a) authorized the Commission to construct drains, levees and flood barriers in addition to the facilities necessary for water and sewer systems. The 1947 act did not.

Chapter 6(a) provided for financing through the levying of special assessments on the property benefited. The 1947 act did not.

Chapter 25, Laws of Utah, 1947, does not even contain the normal provision that "laws in conflict herewith are hereby repealed."

It is respectfully submitted (1) That the legislature affirmatively indicated that it did not want Chapter 6(a) repealed, when it validated Chapter 6(a) and authorized expressly the County Commission to continue to proceed under Chapter 6(a) to issue bonds, etc.; (2) that Chapter 6(a) provides for several things not permitted under the 1947 act, thus demonstrating that the 1947 act was not intended to be a complete revision; (3) that the 1947 act does not even purport by its own language to repeal acts in conflict therewith; (4) that there is no irrepressible conflict in the two acts.

POINT III. CHAPTER 6(a) IS NOT UNCONSTITUTIONAL.

Petitioners challenge the constitutionality of Chapter 6(a) on the grounds, first, that it provides for a special commission assuming municipal functions in violation of Article VI, Section 29, of the Utah Constitution; second, that it vests supervisory control of district functions in the County Commission, which is not directly responsible only to the people of the district; and third, that it violates the due process clauses of the state and federal constitutions. In regard to Article VI, Section 29, petitioners assume without either discussion or citation of authority that the words, “municipal function” used in Section 29, include counties, and in the teeth of every decision ever handed down by the Utah Supreme Court on this point, petitioners contend that this district is a “special commission.” Petitioners are wrong on both points.

Section 29 prohibits the legislature from delegating to any “special commission” the power to interfere with any municipal improvement or to perform any “municipal functions”. Unless county functions are included in the term “municipal functions”, Section 29 will not apply here, because the sewer district does not, and under Section 1 of the sewer act cannot, include within its boundaries any city or town. The purpose of Section 29 is not to declare the sanctity of functions as such, but to protect the autonomy of cities. The Supreme Court has on many occasions indicated that it considered

the words "municipal function" to refer only to the functions of cities and towns. In *Logan City v. Public Utilities Commission*, 72 Utah 536, at 566, 271 P. 961, the court said that the purpose of this constitutional provision is to hold inviolate the right of self-government to "cities and towns", with respect to municipal improvements and performance of municipal functions.

In *Lehi City v. Meiling*, 87 Utah 237, 48 P. 2d. 530, the court held that a metropolitan water district was not a municipal corporation, and that it was not performing municipal functions within the contemplation of the Constitution. The court noted various definitions of the word "municipal". Mr. Justice Wolfe, in his concurring opinion, went into the subject in considerable detail. He states that a municipal corporation is defined as a corporation created for the purposes of government, or of or pertaining to a town or city. He then states that:

"Entities which are designed to distribute water, power, gas, or to dispose of sewage, deal in services, and, incidental to the distribution of service or of any kind of commodity, there must be regulation and administration; but this is not what we think of as government."

The question of whether a county's functions as such were intended to be protected by Article 29 was squarely raised in the *Tygesen v. Magna Water Company* case (Utah) 226 P. 2d. 127, and the court indicated that it had some doubt that it did, but did not squarely pass upon the question. See also *Union Pacific v. Public Service Commission*, 103 Utah 186, 134 P. 2d. 469.

There is, therefore, considerable doubt that the words "municipal function", as contained in Section 29, were in any event intended to protect the autonomy of counties. There is also considerable doubt that the ownership and operation of a sewer as such is a county's function. There is not a single county in the State of Utah, so far as we know, that owns or operates a sewer plant as a part of the county's function. Sewer systems and water systems are historically pursuits of cities and towns, and the right of a city or town to operate a sewer, water, light, etc. system could logically have been intended as the subject of protection by Section 29. Counties have not historically performed such functions, and, therefore, even if the court should hold that "county functions" were protected by Section 29, it should not hold that the operation of a sewer is a county function in which the county's right of self-government should be protected.

A more conclusive answer to petitioners' argument in regard to Article VI Section 29 is that this sewer district is not a special commission. This question of special commissions has been before the Supreme Court in numerous cases. In *Tygesen v. Magna Water Company*, supra, 226 P. 2d. 127, this question of whether an improvement district was a special commission was presented to the court. The court refused to determine whether Section 29 was intended to protect counties, because it said that the argument was conclusively met by the fact that the improvement district was not a special commission. The problem was also presented to

the court in *Lehi City v. Meiling*, supra, 87 Utah 237, 48 P. 2d. 530. In the *Meiling* case, at page 248, Section 29 was construed. The court said that a metropolitan water district is not a special commission within the meaning of Section 29.

The court then went on to say:

“It is contended the act is unconstitutional as an attempt to unlawfully delegate the power of taxation to a special commission and to interfere in city and town affairs in violation of the provisions of article 6, section 29.

“This contention cannot be sustained for the reason that the board of directors to whom the management and control of the district has been intrusted, and which is to exercise the powers and perform the functions of the public agency thus created, does not come within the designation ‘special commission, private corporation or association’ to which the inhibitions of the section apply. *Nor does the act provide for interference with any municipal improvement, money, property or effects. The power of control vested in the board of directors is over the property, improvements, money and effects of the district, and not that of any of the cities or towns whose territorial boundaries may be coincidental with that of the district or included therein.* The powers of the board are limited by the act to the levying of taxes for the public purposes mentioned therein.”

The same general proposition was set forth in *Tygesen v. Magna Water Company*, supra, where the court noted:

“Assuming, without conceding, that the term ‘municipal functions’ as used in Art. VI, Sec. 29, applies 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.*”

We submit that the controlling principle in those cases was that the district, when created, would not be administering the funds of the county, or any city which might be embraced within the district boundaries. Rather, the district was administering its own funds, properties, improvements and effects. That controlling principle is present in the instant case. The sewer district, which is created under Chapter 6(a) will not expend the money of the county, nor will it be controlling, managing or governing the county’s properties, effects or improvements. The portions of the quotes underscored above show clearly that this is the controlling feature.

Petitioners seek to distinguish those cases on the grounds that in the instant case the board of county commissioners becomes also the governing board of the district, while in the cases cited above the county com-

missioners were not the officers of the district created. This we submit is immaterial. The cases and authorities to follow will show that this practice of having the governing board of an existing political subdivision become the governing board of an improvement district is universally accepted and applied. All of the standard works and the courts have upheld the practice of having the members of the county commission become the governing board of improvement districts.

This practice is not unusual, even to Utah law. For many years the Supreme Court members also served as members of the Board of Pardons. The provisions making the judges of the Supreme Court members of the Board of Pardons did not convert the Board of Pardons into the Supreme Court, nor did the Supreme Court become the Board of Pardons. There were two separate legal entities. True, both were manned by the same individuals. But, when these individuals were sitting on the Supreme Court Bench, they functioned as the Supreme Court of the state. When the same individuals were sitting on the Board of Pardons, they functioned as the Board of Pardons, and the identity of the members did not merge the Board of Pardons and the Supreme Court into a single organization.

In many of the departments of the state, the same individuals sit in various separate capacities. The same persons are the Commissioners of Finance and also the members of the State Land Board, (See 82(c)-2-12, U.C.A. 1943). The three members of the engineering

commission are by statute the identical members who operate the State Road Commission, (82(c)-1-12), the State Aeronautics Commission (4-0-2, U.C.A. 1943) and the State Building Board, (10-0-1, U.C.A. 1943). It is thus absolutely contrary to uniform practice to argue that the district becomes the county and the county is merged with the sewer district, simply because the governing board of the county and the governing board of the sewer district is composed of the same individuals. The cases uniformly uphold our position in this regard. The rule as stated by the standard works is as follows: (17 Am. Jur. 794, Drains & Sewers, Section 27)

“The qualifications of officers of an improvement district and the manner in which they shall be chosen are matters which rest entirely within the discretion of the legislature (which) may designate an agency to appoint them or even delegate the administration of the district affairs to county or municipal functionaries either in whole or in part.” (And see 28 C.J.S. 254 to the same effect.)

In *Nunn v. Green Company*, 161 Iowa 26, 141 N.W. 2d. 716, the officers of a drainage district were, under the act, to be appointed rather than elected by the people. The court said that the manner in which the officers of a drainage district shall be selected rests entirely with the legislature. Thus, it is not essential to the validity of a statute allowing the organization of drainage district that it shall require the officers to be chosen by the electors of the district.

The power of appointment may be conferred on a judge, *Elliott v. McCrea*, 23 Idaho 524, and *Patterick v.*

Carbon Water Conservancy District, supra, and the duty of administering the affairs of a district may be imposed on the incumbent of an existing office. *Landowners v. People*, 113 Del. 296.. Although the Constitution makes districts legal entities, it is within the legislative discretion to provide that their affairs shall be administered by the existing municipal officers. *New Iberia v. New Iberia Drainage District*, 106 Louisiana 651, 31 So. 305.

Petitioners' next argument is founded on Article I, Section 2 of the Constitution, which provides that the political power is inherent in the people. The argument of petitioners seems to be that because the County Commission is elected by the people of the county as a whole, rather than merely by the smaller sewer district, the people have been deprived of the right of free government contrary to Article I, Section 2 of the Constitution. This article and section have never been construed so as to make the governing body of an improvement district directly responsible only to the people, of that district, by election; again petitioners' argument flies right in the teeth of the existing cases. This article and section were before the court in *Patterick v. Carbon Water Conservancy District*, 106 Utah 55, 145 P. 2d. 503. The court there upheld the constitutionality of the Water Conservancy Act. Under the Water Conservancy Act, the governing board is appointed by the district court, rather than being elected by the people. Thus, the right of the people to elect a governing board was held not to be guaranteed by the constitutional provision relied upon.

Further, in a conservancy district it would be a rare instance in which the people included within a conservancy district were identical with the people voting for the district judge who appointed the governing board. In the *Patterick* case, the conservancy district was only as broad as Carbon County, whereas, the Seventh Judicial District includes several counties. Further, under the Water Conservancy Act, counties from different judicial districts may be included within the same conservancy district. Thus, a conservancy district could embrace Salt Lake and Davis counties. The proceedings would be held in only one district court and one district judge would appoint the governing members. In such an instance, if the proceedings were initiated in Salt Lake County, the people of Davis County would not have a vote, even on the judge who appointed the board members, still the *Patterick* case said the Water Conservancy Act is constitutional.

In the *Meiling* case, *supra*, Article I, Section 2 was raised, because the district members were appointed, rather than elected. Justice Folland said:

“Objection is urged that the members of the board are not elected by the electors of the district, but are appointed by the governing authorities of the cities or towns as representatives of such municipalities. We, however, find no provision of the Constitution which limits the power of the Legislature to provide for the governing or control of such public agencies by officers selected in the manner provided rather than by election.”

Thus, on at least two occasions our Utah Supreme Court has reviewed the argument now made by petitioners. Petitioners do not cite a single case which upholds them. Further, their argument is contrary to the uniform practice in almost every department of government in the state. The members of the Department of Agriculture are appointed by the Governor. The department functions only on persons engaged in agricultural pursuits. If we followed petitioners' argument, the appointive power (the Governor) should, therefore, be elected only by people engaged in agricultural pursuits or else every function of the agricultural department deprives the people of their right of self-government guaranteed by Article I, Section 2.

We submit that the proper construction of Article I, Section 2 is to guarantee to the people the right to elect members of the legislature and to have vested in the legislature the legislative branch of the government. The legislature then has the power to carry into effect all proper legislative functions. Sewage disposal, water conservancy, flood control, and like improvement districts are problems of general public concern; they have importance beyond the geographical limits of the particular district. They call for the exercise of legislative power. The legislature may act directly with reference to a particular problem or it may delegate that authority to an administrative agency either elected or appointed. There is no case nor authority which will uphold the position of the petitioners, that the governing board of the district must as a matter of constitutional law be

directly responsible only to the people within the district. Their objection was expressly repudiated in both the *Patterick* and the *Meiling* cases, and as said by Judge Folland, the court was unable to find any provision which limits the power of the legislature "to provide for the governing or control of such public agencies by officers selected" by election rather than by appointment.

(a) Chapter 6(a) Does Not Violate the Due Process Clauses.

We now come to the argument of petitioners that Chapter 6(a) fails to accord to the people of the district due process of law. In support of this contention petitioners cite four cases, to wit: *Argyle v. Johnson*, 39 Utah 500, 118 P. 487; *Lundberg v. Irrigation District*, 40 Utah 83; 119 P. 1309; *Patterick v. Carbon Water Conservancy District*, 106 Utah 55; and *Tygesen v. Magna Water Company*, 226 P. 2d. 127. None of these cases involves a revenue bond issue. Each of them involves the power to levy a special assessment, which becomes a lien on the land by order of the district, or the district has the general power to levy ad valorem taxes. Due process of law in regard to districts levying special assessments or imposing general taxes does require notice and an opportunity to be heard at some time prior to the lien becoming effective.

Petitioners recognize that there is a difference between these tax and assessment cases on the one hand and revenue financing, or special fund cases, on the other. They argue that this case should fall within the prin-

ciples laid down in the special assessment or tax cases, rather than under the cases cited by petitioners on page 33 of their brief.

The only reason cited by petitioners in support of their contention that this revenue bond financing should not be controlled by the revenue bond cases is that here some of the people under the application for service have agreed that their delinquent bill may become a lien against the property. They say that these people were coerced into connecting on to the sewer by a criminal ordinance and they erroneously say the people were compelled as a condition to connecting on to said system to give a lien on their property. Thus, say petitioners, the county is attempting to do indirectly what the law will not permit the county to do directly. That is, forcing a lien on the property without notice or an opportunity to be heard.

The chief basis of the claim of coercion is that there is an ordinance requiring persons to connect to a sewer system where available. No authority is cited by petitioners to challenge the legality of this ordinance. The ordinance was enacted first in 1942, five years prior to any attempt to create a sewer district. At the time the ordinance was passed, there were other sewer systems in the county. There can be no question concerning the power of the County Commission to pass such an ordinance.

Enforcement of uncompensated obedience to a regulation passed in the legitimate exercise of the police

power is not the taking of property without due process of law.

This question was squarely presented in *Hutchinson v. Valdosta*, 227 U.S. 303, 57 L.Ed. 520. The case is directly in point. There, the city of Valdosta required all persons residing in the city to connect to a sanitary sewer. Mrs. Hutchinson claimed that the statute was unconstitutional, that extreme and arbitrary measures were used to compel her to connect, without giving her notice or a hearing, and without bringing condemnation proceedings to have her premises declared a nuisance to public health.

The facts showed that the city was an inland town, built high on a pine ridge, with no swamp nearby. The city's population did not exceed 5,000-6,000 and covered an area of two miles. The city passed an ordinance requiring property owners "residing upon any street along which sewer mains had been laid, within thirty days after the passage of the ordinance, to install water closets in their houses and connect the same with the main sewer pipe, and to provide the closets with water, so that they may be ready for use in the ordinary and usual way, and such persons shall not be permitted to use or keep on their premises a surface closet." The ordinance goes on to condemn as a nuisance any house which does not have a closet and provides that any owner who does not comply is subject to a fine not exceeding \$200.00 or a jail sentence.

Mrs. Hutchinson had a wooden building with "room sufficient only for her own family." To comply with the ordinance she would be compelled to build an addition to the house for installation of the bathroom and also to go to the expense of connecting with the sewer. This, she alleged, would cost her a considerable sum of money. The city was threatening to arrest her for non-compliance. The part of the city where she resided was thinly settled. She alleged that there was no necessity on account of health or sanitation for her to install a water closet or to connect with the sewer.

The court said that it was clear that she had had no notice nor opportunity to be heard before the commencement of the proceedings to force her to connect. She said that the ordinance "was passed and the proceedings against her taken (in violation of) the Fourteenth Amendment to the Constitution, because it provides neither for notice nor an opportunity to be heard before the premises are condemned and the owner required to comply with its provisions."

The court said:

"The ordinance does not violate the Fourteenth Amendment of the Constitution of the United States. According to the bill the city is given the power through its mayor and council 'to enact such rules and regulations for the transaction of its business and for the welfare and proper government thereof,' as the mayor and council may deem best; and the bill shows that the courts of the state decided that the ordinance was within this delegation of power. It is the commonest

exercise of the police power of a state or city to provide for a system of sewers, and to compel property owners to connect therewith. And this duty may be enforced by criminal penalties. *District of Columbia v. Brooke*, 214 U.S. 138, 53 L. Ed. 914, 29 S. Ct. Rep. 560. It may be that an arbitrary exercise of the power could be restrained, but it would have to be palpably so to justify a court in interfering with so salutary a power and one so necessary to the public health. There is certainly nothing in the facts alleged in the bill to justify the conclusion that the city was induced by anything in the enactment of the ordinance other than the public good, or that such was not its effect."

The rule as thus stated by the United States Supreme Court is stated to be the general law by 9 Am. Jur. 210, *Buildings*, Section 14, where the rule is stated as follows:

"Statutes and ordinances compelling owners of buildings to install water closets and to connect their premises with public sewers when not plainly unreasonable or arbitrary are also within the police power. An arbitrary exercise of this power may be restrained, but it must be palpably so to justify a court in interfering with so salutary a power and one so necessary to the public health. The fact that it will cost money to comply with such a law is not a sufficient reason for declaring it invalid where the expenditures required are reasonable and fair. Nor is it usually necessary that notice and an opportunity to be heard be given to a property owner before the passage of the law, or before an order enforcing compliance therewith is made."

See also *New Orleans Public Service Commission v. New Orleans*, 281 U.S. 682, 74 L.Ed. 1114 and *Atlantic Coastline Railroad v. Goldsboro*, 232 U.S. 548.

The ordinance requiring persons to cease using privies, cesspools, etc., is thus a perfectly legitimate exercise of the police power. It is legislative in nature. Legislative due process does not require notice or hearing. *Utah Power & Light vs. P.S.C.*, 107 Utah 155, at 168. This legislative power has been granted to county commissioners by Section 19-5-36, Utah Code Annotated, 1943, which provides:

“They may make and enforce . . . all such local . . . sanitary regulations as are not in conflict with general laws.”

And by Section 19-5-49, which provides:

“They may make such provision for the preservation of health in the county . . . as they may deem necessary and provide for paying the expenses thereof.”

See also Sec. 19-5-80 and 19-5-82 on Health Officers, and Section 19-5-87 authorizing enactment of enforcement ordinances.

The distinction which petitioners thus try to make to take this case out of the general holdings of the revenue bond cases and place it under the principles of the assessment cases simply is not sound. No one's constitutional rights were abridged or impaired by the ordinance requiring a connection. The discussion to

follow will demonstrate that no one was coerced into giving a lien on his property, nor is there anything "palpably" arbitrary or unreasonable about the sewer ordinances.

The case is controlled by the principles announced in the so-called special fund cases cited on page 33 by petitioners, to wit: *Barnes v. Lehi City*, 74 Utah 321, 279 Pac. 878; *Fjeldsted v. Ogden City*, 83 Utah 144, 28 P. 2d. 144; *Wadsworth v. Santaquin City*, 83 Utah 321, 28 P. 2d. 161; *Utah Power & Light Co. v. Provo City*, 94 Utah 203, 74 P. 2d. 1191; *Utah Power & Light Co. v. Ogden City*, 95 Utah 161, 79 P. 2d. 61. No notice or hearing is required, because no lien is created by the district. Any lien which might become effective is a pure matter of contract, and while the ordinance requiring a connection is coercive, five separate application contracts were available—four of which had no lien agreement. Even the one which agreed that the bill *might become* a lien did not place a lien on the property. The lien became effective only when the bill was 90 days or more delinquent and could not be recorded as such until six months delinquent. Of course, no one would contend that a lien can not be created by contract.

In the case of *Utah Power & Light Co. v. Provo City*, 94 Utah 203, 74 P. 2. 1191, the court said on page 216 that where the power is given to a city to issue revenue bonds and no method of executing it are linked with the grant of power "any reasonable means which will effectuate that purpose is lawful." The court also noted on

page 225 that it was of the opinion that in the absence of a legislative requirement that a revenue bond be submitted to a vote of the people, that the city did not have to do so. All of these special funds cases involving Article XIV, Section 3, presented the question of whether a revenue bond created "a debt". Having held that it did not, the necessary conclusion then had to be drawn that it did not have to be submitted to a vote of the people.

In the instant case, Section 1 of the act expressly authorized the district to acquire systems and to pay for the same from tolls and charges or from assessments, or both. Section 8 authorized the district to issue bonds. Section 8 authorized the district to fix rules and regulations for the use of the facility. Nowhere is there a requirement that the matter be submitted to the people for a vote of approval. Because in the sale of revenue bonds, the district does not pledge the private property in the district nor obligate itself to assess or tax the property of the district, nor create a burden on the property in the district, it is not taking property, and the due process clauses simply do not apply.

In the *Utah Power & Light Company* case, cited above, the matter had been submitted to a vote of the people, although the court held that such would not have been necessary, because the bonds involved were revenue bonds. Here the County Commission did go to the people with the plan, even though such would not have been necessary. In a special election, it is notorious that only

a very small percentage of the people express themselves. The percentage is often lower than 10 per cent. In the manner adopted by the County Commission here, we have heard from nearly 100 per cent of the people, either in the form of a protest or an application for service, and over 75 per cent of all the people affected have applied for service without protest. Like in the *Utah Power & Light* case, this consultation with the people would not have been necessary under any constitutional requirements, but the consultation with the people does not change the legal effect of the proceedings, nor does it cut down the legal power of the Commission. Such was the square holding of the *Utah Power & Light* case.

Mixed up with the argument on due process are conglomerate assertions and suggestions that the sewer plan itself throws an oppressive burden upon the people. Of course, the *Hutchinson v. Valdosta* case, supra, which expressly holds that an ordinance compelling people to connect to a sewer is constitutional, places one limitation on its holding. If the requirement is palpably oppressive and highly unreasonable and in cost so high as to be confiscatory, then requiring a connection might be restrained. Petitioners neither allege nor argue that the plan is so palpably oppressive as to be confiscatory, but they do hint that it places an unfair burden on the initial subscriber. The basis of the Supreme Court holding that enforcement could be restrained would not rest upon the failure to hold hearings prior to the enactment. Legislative enactments do not require notice and hearing. *Utah Power & Light v. Public Service Commission*, 107 Utah

150. The basis of its unconstitutionality would be that because it was so oppressive, people could not reasonably comply and it would amount to a confiscation of property without compensation. It was upon this basis that utility rates fixed by public regulation were sometimes declared to be unconstitutional. Rate-making, of course, was legislative, and the manner of fixing rates being legislative, could not be held to lack the essentials of procedural due process. *Utah Power & Light v. Public Service Commission*, supra, 107 Utah 155, 168. But if the final result of the rate was so high as to be confiscatory, then it would amount to a taking of property without compensation.

Petitioners have not contended that the down payment and monthly service fee are so high as to confiscate the people's property and render the statute unconstitutional. As noted above in the Statement of Facts, the contract forms (which are attached to the County's answer) permit any individual to connect to the sewer for a \$50.00 down payment, \$10.00 a month for an additional ten months and \$3.00 a month when service is commenced. The ordinance even permits the individual to finance the cost of building the line from the street to his house. If he desired, the district would build this line, and he could pay the cost of building that line at the rate of \$10.00 a month. Therefore, any individual could connect to the sewer, have the line completed to his house and could receive service with a down payment of only \$50.00. The \$10.00 per month payment would run either for ten months, if he built his own line, or

about 25 months if the district built his house line. Thereafter, the charge was \$3.00 per month.

As noted above, there was no requirement that he give a lien to secure payment of his bill. Even on the time basis outlined above, he could post \$54.00 (18 months' service charge) and there was no agreement to give a lien. He could pay \$750.00 for the privilege of hooking on to the sewer and would never thereafter be required to pay anything toward the sewer's cost. He had the assurance that if others who paid on a time basis finally paid less than this \$750.00, the difference would be refunded to him. He could finance the \$750.00 from private sources. He could finance it with the district in 24 equal monthly payments. He could start out on one of the time bases mentioned and later decide to pay the entire \$750.00. Even the contract to give a lien did not create a present lien. The lien became effective only if he failed to pay his bill, and permitted it to remain in default 90 days or more.

In relief cases, an arrangement was made for payment of the connection fee and monthly service charge by the Department of Public Welfare. The \$750.00 total cost for a sewer system and a treatment plant is, as the petitioners well know, well within the limits of such costs throughout the nation. It is, therefore, easy to understand why they have not contended by an analysis of the facts that the ordinance of 1942, which required persons to connect to a sewer system was so oppressive as to confiscate property. It is, therefore, respectfully

submitted that there was nothing unconstitutional in requiring the people to discontinue privies, cesspools, and septic tanks in the concentrated areas of Salt Lake County, and the authorities cited above conclusively uphold the legislative power of the county to so provide. The basis of payment was such that no person could justifiably claim that the cost of complying with the ordinance was so burdensome as to be confiscatory and, therefore, unconstitutional.

On page 37 of the brief they complain of five things and then say that nothing could be more unreasonable and oppressive than this. In conclusion, therefore, on this due process point, we desire to give attention to the five matters raised on page 37 of petitioners' brief.

They first complain because they had no voice in the creating of a district. The cases cited above under the discussion of the effect of the legislative validation hold that the legislature could by legislative fiat create a district and fix its boundaries. They also hold that the legislature may delegate the right to create a district and that it is only when the district attempts to impose a tax or a lien against the property by way of a special assessment, that a hearing is required. In this case, the creation of the district was ratified and confirmed by the legislature, which would have had the power in the first instance to create it without notice or hearing, and the failure on the part of the residents to have a larger voice in the creation of the district has not deprived them of any constitutional right. The County

Commission, to whom the petition for creation of the district was presented, was duly elected by the people of the County, and Section 1 gave the County Commission discretion as to whether it would create a district, even if the requisite number of people petitioned for its creation. In all respects the statutes were followed in the creation of the district. If there were any irregularities (and none is pointed out by petitioners), those irregularities were cured by legislative validation. As to the right to have a voice in the creation of the district see, in addition to the cases cited under Point I, *Seliah v. Hoskins*, 222 U.S. 522; *Little River Drainage*, 236 Mo. 94, 139 S.W. 330.

The second complaint, to wit, that there was a criminal ordinance which required connection to the sewer, is adequately met by the square holding of the Supreme Court in *Hutchinson v. Valdosta*, supra.

The third complaint that applicants were required to put a lien on their house or keep an eighteen months' advance deposit, is founded upon a mis-statement of fact. There were five, not two, methods of applying for service. Only one of the five provided for a lien if the bill became 90 days delinquent. The lien was a matter of contract and did not involve the concept of due process. All of this has been set forth in detail above, and will not be repeated here.

The fourth protest is that there was a \$100.00 increase in the connection fee for persons who did not

sign for service by a stated deadline. The \$100.00 increase, about which they so bitterly complain, was adopted for the purpose of protecting those who sign up for service at the beginning. If they are not given any protection, any individual with a vacant lot could refuse to make any contribution toward the initial cost of the sewer until some future date, when he elected to build a house. If at that time he could connect on to the system at exactly the same connection fee as was paid by the initial subscriber, he would receive the benefits of a system partially paid for by others. A subscriber initially connecting to the system would pay \$150.00 down and \$3.00 a month for twenty years, before the system was paid for. A subscriber connecting ten years from now, if permitted to do so, would pay the same \$150.00 down, but would pay the \$3.00 per month for only ten years. To avoid this the County Commission declared that it would periodically increase the amount of the connection charge, so that any individual coming in at a future date would be required to pay his share of the total cost. An initial subscriber would pay \$150.00 down and \$3.00 a month for twenty years. Fifty cents of this \$3.00 would be necessary for operation and maintenance. The other \$2.50 would go to pay the interest and principal on the bonds. Thus, during that twenty years this individual would pay on the bonds an additional \$600.00, which together with his down payment would make the cost of the sewer to him \$750.00. A person coming in ten years later would pay only for ten years and thus would pay only \$300.00 on the bonds at

the \$3.00 monthly payments. If his down payment were also fixed at \$150.00, he would get the sewer for \$450.00, instead of the \$750.00 paid by the initial subscriber. By raising his connection fee, he can be required to carry his fair share. There is nothing arbitrary or capricious in such a plan, and Section 9 of the act expressly gives the district the power to fix tolls and charges and provide rules and regulations.

The complaint then is made that the \$100.00 increase coming at such an early date goes beyond what is necessary to equalize the payments. This is true, but any individual who expects to build a house in the next two or three years will be induced to subscribe for service now if he can get it for \$150.00 rather than wait two or three years if he knows that at that time the down payment will be \$250.00. Thus, by having a substantial early increase in the amount of the connection fee, prospective builders will be induced to sign for service now. The \$100.00 increase has in fact had that effect, because over 1200 vacant lots have applied for service. This spreads the initial cost of the sewer over more people and reduces the total amount which ultimately will have to be paid by the initial subscribers.

Tied to the complaint on the \$100.00 increase is the assertion that early subscribers are required to build and pay for a system large enough to meet future growth. This again is a misstatement of the plan. As the new connections come in, they will, as noted above, carry their portion of the sewer cost, from an increased con-

nection fee. Payments made by them will be used to pay the bonds off before maturity. Also, in anticipation of growth in the area, more bonds were made payable in the later years. The initial subscribers will pay off only a small portion of the bonds. Reference to Exhibit V, page 11, will show that only \$25,000.00 in the bonds will become due in 1955 and 1956; \$50,000.00 per year from 1957 to 1979; \$100,000.00 a year from 1980 to 1981; \$150,000.00 per year from 1982 to 1986; and \$600,000.00 the last year, 1987. This staggering of the bond maturities was done for the sole purpose of freeing the initial subscriber from carrying the entire cost of a sewer system which was built large enough to meet the needs of an expanding population.

Thus, the contention by petitioners that the initial subscribers are having to pay a disproportionate share of total costs is simply not true. The \$100.00 increase has a legitimate and proper purpose in the bond proceedings. It does have the effect of inducing people to sign for service and start carrying their burden of the cost from the beginning, but if they elect to wait, they then will pay their fair share of total cost. Petitioners are inconsistent in complaining about the \$100.00 increase, while in the same breath complaining that vacant lot owners are not being brought in and early users are being required to pay a disproportionate share of the costs. Those connecting in subsequent years will be required to pay their fair share of the total cost. The increased connection fee will be used to pay the bonds ahead of maturity and relieve the burden from the initial

subscriber. The maturing dates set on the bonds throw the major portion of the cost on "tail end" when the expanded population is connected to the system.

The last thing complained about on page 37 is that if the bills aren't paid, the culinary water will be shut off. The sewer district does not own nor control the water supply going to the residents of the sewer district. The most it can do is request cooperation of a water company in this regard; and this request could hardly render the proceedings void.

The Commission Has Not Unlawfully Permitted the District to Exceed Its Debt Limit.

Every case which has been presented to the Supreme Court in the entire history of the state on the question of debt limits for districts of this kind has resulted in a decision that these districts are not subject to the constitutional debt limits. No case to the contrary is cited by petitioners. The cases holding that districts of this kind are not controlled by Article XIV, Sections 3 and 4 of the Constitution are *Lehi v. Meiling*, supra; *Tygesen v. Magna Water Company*, supra, and *Patterick v. Carbon Water Conservancy District*, supra.

The cases also all hold that the debt limits do not in any event apply to revenue bond financing, because a debt which is payable entirely from the revenues of a new project is not a debt within the meaning of the section, even if this district were a political subdivision within the meaning of that provision. The argument as to

the applicability of Section 19-10-1 falls in the same category. Petitioners' assertion that there is no substantial difference between revenue and assessment financing simply ignores the great body of law on that question.

This court has on numerous occasions held that where projects are financed solely from revenues earned by the project, there is no necessity for an election on the bond issue, (*Utah Power & Light Co. v. Provo City*, supra), the indebtedness incurred is not a debt within the limitation of the constitutional prohibitions, and the requirements of due process as to notice and hearing which are required in assessment or tax cases do not apply.

POINT IV: CHAPTER 6(a) IS NOT SO VAGUE, INDEFINITE, AMBIGUOUS, OR UNCERTAIN THAT THE LEGISLATIVE INTENT IS NOT DETERMINABLE, PARTICULARLY SINCE THE VALIDATION ACT CONFIRMS THE INTERPRETATION PLACED UPON THE WORDS NOW CLAIMED TO BE CONFUSING.

Petitioners contend Chapter 6(a) is so vague as to violate the Utah Constitution, Article V. No authority need be cited, certainly, for the general proposition that the Supreme Court must, where possible, uphold the validity of an act, rather than declare it unconstitutional. With specific reference to the objection of vagueness, this Court has said, in *Tygesen v. Magna Water Company*, supra :

“It is the duty of courts to interpret and construe statutes, and only where the statute is so vague that the meaning of the legislature cannot be ascertained or understood therefrom will they refuse to enforce an act. They will not substitute what they think ought to be the law for ambiguous terms in the act, nor will they declare an Act invalid because it has not been expressed as aptly or clearly as it could have been had different terms been used. Instead the courts will use every authorized means to discover and give an Act intelligible meaning. Only when it is impossible to resolve the doubts will an Act be declared invalid for uncertainty or vagueness. See *Nowers v. Oakden*, 110 Utah 25, 169 Pac. 2d. 108.”

Plaintiff points to two terms of the act as uncertain, ambiguous or vague. The first is the word “people” in the phrase “10% of the people must petition for the improvement” in Chapter 6(a), Section 1. Perhaps the exact legislative intent would be difficult to determine if no extra-statutory assistance were available, but such assistance is available. A petition was filed with the commission, and its signatures were accepted by the commission on a definite criterion, according to the plaintiff (page 45 of brief). The legislature then validated the proceedings by which the district had been established. It thereby confirmed as the legislative intent the administrative interpretation placed upon the inculcated phrase.

Petitioners next aver that they are not sure what is meant by “appropriate and possible under the laws of the United States” in Section 8 of Chapter 6(a). Peti-

tioners' first point was that the phrase could only refer to a particular federal act. We do not agree that Section 8 attempts to limit the district only to negotiations as provided by any federal act, but we admit having been swayed by petitioners' argument that part thereof quoted was inserted to call attention to a way of financing projects provided by a particular federal act. Even if the phrase is entirely ignored, however, the act is complete and workable.

At any rate, by using "every authorized and intelligible means to discover and give (this) act intelligible meaning", it can easily be judicially interpreted without fear of offending the Utah Constitution. No other item as to vagueness is raised by petitioners.

POINT V: CHAPTER 23(b) LAWS OF UTAH, 1947,
IS NOT REPUGNANT TO ARTICLE VI, SEC-
TION 26, OR ARTICLE XI, SECTION 5 OF THE
UTAH CONSTITUTION.

Petitioners' objection is that Chapter 6(a), Title 19, authorized the creation of many kinds of districts, but that Chapter 23(b) purported to cure defects in the organization of sewer districts only. Petitioners say Chapter 23(b) is, therefore, a special law, or that it creates a corporation for municipal purposes.

Article VI, Section 26, prohibits the legislature from enacting any special laws in certain enumerated cases only. Petitioners apparently believe subsection 16, which prohibits special laws, "Granting to an individual, asso-

ciation or corporation any privilege, immunity or franchise," applies to the facts in this case. We submit that the Salt Lake City Suburban Sanitary District is not an individual, association or corporation. It is a political subdivision (*Patterick v. Carbon Water Conservancy District*, supra). Nor did Chapter 23(b) grant any franchise, immunity or privilege. Even if it were true that Chapter 23(b) is a "special law" (which it is not) therefore, petitioners have not cited a constitutional prohibition which applies. There is no constitutional provision which prohibits the validation by a special law of proceedings under a general law.

But Chapter 23(b) is not a special law. It is a statute general in terms purporting to validate the proceedings of any sewer district attempted to be created under Chapter 6(a), Title 19. Petitioners say that the Salt Lake City Suburban Sewer District was the only one affected "as far as we know". An act general in terms is presumed to be general (*Kennedy v. Meyer*, 103 A. 44). The mere fact that only one entity is affected by a curative act is of no moment. *Kennedy v. Meyer*, supra, involved a curative act validating any contract for the construction of a tunnel which any county had entered into. Only one county had entered into a contract for the construction of a tunnel. The court held the statute was a general statute. In *McSurely v. McGrew*, 18 N.W. 415, the legalization of the acts of county supervisors in releasing the county treasurer from liability for loss

of funds deposited in a bank which failed was upheld. Only one treasurer was affected.

The plain fact is, of course, that curative acts are not the evil the Constitutional Convention attacked in adopting the provision cited by petitioners. Remedial statutes are and long have been recognized legislative tools. To some extent, they are similar to special acts, in that they can only affect particular, existing persons, obligations or entities, and the exact ones affected can always be determined at the time the curative act is passed. But it is often stated flatly that such laws are not special. (*Barnett v. State Mineral Board*, 192 So. 701 and cases previously cited.) If such acts had been abhorrent to the convention, they could have been prohibited by name.

So far as Article XI, Section 5, is concerned, it does not purport to apply to improvement districts, and it has been held by this Court not to apply to improvement districts. (*Patterick v. Carbon Water Conservancy District*, supra.)

In the Sixth Edition of Cooley's Treatise on the Constitutional Limitations, the question of remedial or retrospective laws is dealt with, and we quote the following from page 455 of Chapter 11 of that work:

“There is no doubt of the right of the legislature to pass statutes which reach back to change or modify the effect of prior transactions provided retrospective laws are not forbidden eo nomine by the state constitution.”

A typical case in which the principle has been recognized is *Sanger v. Bridgeport*, 124 Conn. 183, 198 A. 746, 116 A.L.R. 1031, wherein as shown by the syllabus, the Supreme Court of Connecticut said:

“Remedial statutes may be retrospective in operation provided they do not impair contracts or disturb absolute vested rights, but only to confirm rights already existing and in furtherance of the remedy, and by curing defects afford or add to the means of enforcing existing rights or obligations; and if the irregularity sought to be cured consists in a mode or manner of doing some act which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.”

Petitioners cite no cases in support of the notion that a validating act must validate all proceedings which have been attempted under a prior law if it is to validate any of them. They state no reason for such a restriction on legislative activity. There is none.

POINT VI: THE EFFECT OF THE REPEALING RESOLUTION OF OCTOBER 6, 1952, WAS AT LEAST TO RESTORE THE LAW AS IT WAS BEFORE THE ORDINANCE REPEALED BY THAT RESOLUTION WAS ADOPTED.

McQuillan, 3rd Edition, Section 21.42, cites cases from nine jurisdictions, including the United States (*U. S. v. Philbrook*, 120 U.S. 52) in support of the following statement:

“A rule, supported by many cases and probably the common law rule, is that the repeal of a repealing statute or ordinance restores the law, without formal words of revival, as it was before the repealing statute or ordinance, unless it is otherwise provided in the enactment repealing the repealing statute or ordinance.”

There are no statutory or constitutional restrictions on the power so to revive a once existing legal situation. The resolution of October 6, 1952, clearly states the intent of the Commissioners to revive the legal situation which obtained before the resolution of April 5, 1948. The procedure by which repeal of the repealer was attempted (resolution) was of the same magnitude as the procedure (resolution) repealed and rescinded. The only possible conclusion under the cases is that the status of the Salt Lake City Suburban Sanitary District proceedings have been, at least since October 6, 1952, exactly what it was on April 4, 1948.

The proceedings in connection with the sewer between April 5, 1948, and October 6, 1952, do not depend on any ordinance or resolution. The district, (which was an existing political entity) was not repealed by the resolution of April 5, 1948. It had express power to enter into contracts, as it did with an engineer, a fiscal agent and people in the district. That is all the district did. So far as the many hearings held and informative pamphlets distributed are concerned, they were just as informative and just as well attended and received as if the resolution of April 5, 1948, had never been passed.

Ws submit that the only sensible way for district officers to operate is as the officers of the Salt Lake City Suburban Sanitary District have in this case.

1. A district is established, the object of which is the installation of a sewer facility. This was done September 9, 1946, and no attempt has ever been made to dissolve, abandon or rescind this action.

2. The governing authority contracted with an engineer to determine cost and feasibility.

3. The governing authority contracted with a fiscal agent to devise the best and least burdensome way to finance the project.

4. With a workable plan, they now go to the people; they schedule mass meetings, distribute pamphlets and explain a proposed plan.

5. They ask the people to indicate their approval of the plan by their willingness by contract to subscribe for the services and pay for them as proposed.

6. Now the governing authority can intelligently construct an ordinance with reference to a bond issue, knowing the project is feasible, how much it will cost and how many people can be relied upon initially to contribute to the revenues which are the pledge supporting the bonds.

The procedure was orderly and in the best legislative tradition, get the facts as accurately and completely as

possible, and then act on them. Statutes may require that the fact-finding process be one of hearing, protest, etc., but they needn't, and Chapter 6(a) doesn't.

Petitioners contend the contractual provisions of the subscription applications would not be effective unless the Commission formally approved them. Such action is necessary and the Commission can and will approve and accept these agreements. Petitioners suggest that some kind of formal action is necessary to indicate that a district intends to contract; that it has seen and understands the provisions of a particular contract; that it is now entering into a contract, and that a contract entered into is now approved. This is just so much palover. The people have applied for service. The district will formally accept.

We do not contend that Chapter 23(b), Laws of Utah, 1947, the curative act, has prospective effect. It is, however, legislative confirmation of the creation of the district and the initial bond proceedings. It also is a confirmation by the legislature of the administrative interpretation previously given Chapter 6(a), Title 19, by the Commission. So far as subsequent acts of the Commission with reference to the district have been consistent with that interpretation, therefore, they have statutory authorization invigorated by Chapter 23(b). Defendants do not rely on the validating act for authority to make the amendments which petitioners detail on page 60 of their brief; they rely on Chapter 6 (a), Title 19, Utah Code Annotated, 1943.

Particular attention is directed to the argument appearing in capital letters on page 62 of petitioners' brief. It is that the district officers can possibly do something illegal in the future. The usual rule is that a court will not consider such an argument, and that there will be time enough to enjoin or restrain such an act if, as and when it happens. In *Wicks v. Salt Lake City*, 208 Pac. 538, this Court responded to such an argument:

“Plaintiff does not contend that it manifestly appears that the act of 1921 attempts to authorize the creation of a debt in excess of the limit fixed by the Constitution, but the contention seems to be that there is a vague and remote possibility that a literal compliance with the law may at some time result in the creation of (such indebtedness.

“To hold (an act) unconstitutional on some vague theory that in its operation there is the barest possibility of an infringement of the Constitution is going further than any case which has heretofore come under my observation.”

See also the discussion by Mr. Justice Wolfe in *Patterick v. Carbon Water Conservancy District*, *supra*, on the time set for the hearing.

It is respectfully submitted that the plan is legal and reasonable and the writ of prohibition should be denied.

Respectfully submitted,

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