

2007

The State of Utah by and through its Treasurer v.
Spring City, a municipal corporation, and Hyrum
Jensen, its Mayor, Claude Acord, Royal Allred,
Cutler Schofield, Henry Schofield and Virgus
Osborne, its Councilmen, and Charles A.
Thompson, Royal Allred, Virgus Osborne, Max
Blain, Lowell Hansen, Allen Beck and Henry Blaine
: Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

7942A

IN THE SUPREME COURT

of the

STATE OF UTAH

THE STATE OF UTAH by and
through its Treasurer,

Plaintiff and Appellant.

— vs. —

SPRING CITY, a municipal corpora-
tion, and HYRUM JENSEN, its
Mayor, CLAUDE ACORD, ROYAL
ALLRED, CUTLER SCHOFIELD,
HENRY SCHOFIELD and VIRGUS
OSBORNE, its Councilmen, and
CHARLES A. THOMPSEN, ROYAL
ALLRED, VIRGUS OSBORNE,
MAX BLAIN, LOWELL HANSEN,
ALLEN BECK and HENRY BLAIN,

Defendants and Respondents.

Civil No. 7942

BRIEF OF APPELLANT

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IN THE SUPREME COURT
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THE STATE OF UTAH by and
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— vs. —

SPRING CITY, a municipal corpora-
tion, and HYRUM JENSEN, its
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ALLRED, VIRGUS OSBORNE,
MAX BLAIN, LOWELL HANSEN,
ALLEN BECK and HENRY BLAIN,

Defendants and Respondents.

Civil No. 7942

BRIEF OF APPELLANT

STATEMENT OF FACTS

This is an appeal from a judgment and decree in favor of the several defendants, respondents here, entered and filed October 24, 1952 (R. pp. 46, 47), based upon the trial court's written findings of fact and conclusions of law (R. pp. 33-45) and dismissing plaintiff's complaint as well as declaring certain bonds issued by the defendant Spring City to be unconstitutional, void, and un-

collectible. For convenience the parties will be referred to as they appeared in the court below.

After a pre-trial, at which witnesses were sworn and testified, the case was submitted to the trial court for determination and decision by all parties upon the record there made. No jury was called or impaneled.

PLEADINGS

The complaint, as amended (R. pp. 26-30) alleged that the defendant Spring City, a municipal corporation, on January 15, 1948, issued, in a series of that date, negotiable coupon general obligation power and light bonds in the face amount of \$12,000.00, and in the form set forth as the complaint's exhibit "A"; that to the bonds were attached coupons for interest; and that the plaintiff, the State of Utah, by its Commission of Finance, paid the sum of \$13,498.67 for those bonds, representing principal, premium, and accrued interest; that the money was received by defendant Spring City, and used for corporate purposes. The complaint alleged that the defendants, Charles A. Thompsen, as mayor, Royal Allred, Virgus Osborne, Max Blain, Lowell Hansen and Allen Beck, as councilmen, and Henry Blain as recorder, were the duly elected, qualified and acting holders of those respective offices as they were constituted in the month of January 1948. All of the foregoing allegations were conceded, and incorporated into the findings.

The complaint further alleged, in six counts, grounds for relief upon the following causes of action: One, default in the payment of interest upon presentation of

certain coupons as they matured; Two, an assertion by the council of Spring City to the effect that the bonds to which the coupons were attached were themselves void; Three, that the State of Utah paid the sum of \$13,498.67 to the defendant Spring City under a mistake of fact, which mistake arose from the misrepresentation by the several individual defendants, then officials of the defendant Spring City, of certain material facts affecting the constitutionality of the disputed issue; Four, that those officials falsely and negligently misrepresented the facts upon which the alleged mistake was made; Five, that the defendant Henry Blain, City Recorder in January, 1948, misrepresented the financial condition of the city, upon which representation the plaintiff relied, to its detriment, and, in the event the disputed securities be declared void, to its damage; Six, that the defendant Spring City had and received from, to the use of, and therefore owes, the plaintiff, State of Utah, the sum of \$13,498.67.

Separate answers were filed by the defendant Spring City, and by the several individual defendants, who joined in one answer. Spring City in its answer denied that general obligation bonds, or legal bonds of any kind, were issued; denied that there was a fraudulent or actionable misrepresentation, and alleged that the bonds were void, having been issued pursuant to no election by qualified taxpayers and electors, and that the bonds were not within the revenues of the year in which issued. That there are no funds presently or potentially available through taxation or otherwise for the payment of the

alleged debt. The defendant Spring City counterclaimed for interest theretofore paid by that defendant to the plaintiff.

X In the joint answer of the several individual defendants, they deny the validity of the bonds; deny generally any actionable misrepresentation, or that there was any mistake or fraud in the inducement of the purchase of these bonds, and deny generally that the plaintiff states a claim against the individual defendants upon which relief might be granted; that the action is barred as against those defendants by the provisions of Section 104-2-24 (3) and Section 104-2-24.10, UCA 1943. [Now 78-12-26 (3) and (4) UCA 1953] Two of the individual defendants, however, by express reservation in their answer, do not deny the validity of the bonds. Those defendants, Royal Allred and Virgus Osborne, were in 1948, and now are, members of the city council of the defendant Spring City.

Issue was joined upon the validity of the bonds, the validity of coupons thereon, the presence of a cause of action for money had and received, and the personal liability of the several individual defendants.

PROCEEDINGS

At the pre-trial hearing, the mayor, members of the city council and the recorder of the defendant Spring City, as those offices were constituted at the time of the issuance of the questioned securities, were sworn and testified. Exhibits were submitted, stipulated to and admitted into evidence. The evidence adduced by the exam-

ination of the several witnesses was, as far as is material here, uncontroverted.

The Honorable L. Leland Larson, District Judge of the Seventh Judicial District, conducted pre-trial proceedings October 17, 1951. The pre-trial proceedings were continued until November 9, 1951, the court requiring the attendance of all defendants for examination upon the pre-trial. On November 9, 1951, the matter was submitted for decision and determination by the trial court.

EVIDENCE

The facts before the court are substantially as follows: The defendant Spring City, is a duly incorporated city of the third class in Sanpete County, Utah. In the year 1947, the assessed valuation of defendant Spring City was \$179,407.00. The proposed 1948 budget of the defendant Spring City, (Defendant's Exhibit 1) a public hearing upon passage of which was held December 13, 1947, lists expenditures anticipated in the year 1948 in the aggregate sum of \$16,091.08, exclusive of an anticipated expenditure of \$15,000.00 for "an electric plant pipeline" (line 40, Def. Sp. City's Exhibit 1) the cost of which was to have been obtained from "revenue on electric pipe bonds \$20,000.00." (line 18, Def. Exhibit 1) Among other proposed expenditures was a payment of \$5,100.00, termed in defendant's Exhibit 1 as "Ephraim Bank bond and interest". (Def. Exhibit 1, line 39)

As found by the trial court, the revenues of the city in the year 1948 equalled \$20,284.44.

Pursuant to a resolution (State's Exhibit B) of Janu-

ary 5, 1948, duly passed by the unanimous affirmative vote of all councilmen, and for the recited consideration of an "immediate, imperative and pressing need of raising funds to the amount of \$12,000.00 for the purpose of extending and improving the power and light plant to be owned and controlled by the city" (paragraph, 1, p. 2, State's Exhibit B), the city issued its bonds designated City of Spring City Power and Light Bond Series of January 15, A. D. 1948 in the face amount of \$12,000.00 in the following form:

UNITED STATES OF AMERICA
STATE OF UTAH
SANPETE COUNTY
CITY OF SPRING CITY
Power and Light Bond
Series of January 15, A. D. 1948

KNOW ALL MEN BY THESE PRESENTS:

That the City of Spring City, in Sanpete County, State of Utah, hereby acknowledges itself to be indebted and for value received, hereby promises to pay to the bearer hereof the sum of ONE THOUSAND DOLLARS (\$1,000.00) in lawful money of the United States of America, on the 15th day of January,, at the Bank of Ephraim, Ephraim, Utah, with interest thereon at the rate of three and one-half percent ($3\frac{1}{2}\%$) per annum from date until paid, payable annually in like money on the fifteenth day of January in each year, said interest to maturity being represented by interest coupons hereto attached.

This bond is one of a series of twelve (12)

bonds of like date and amount, numbered from (1) to twelve (12) inclusive, for the aggregate sum of Twelve Thousand Dollars (\$12,000.00) issued pursuant to the provisions of Section 15-8-6, Utah Code Annotated 1943, and all other laws thereto enabling.

It is hereby certified, recited and declared that the entire indebtedness of said City hereby incurred, together with all other indebtedness incurred by said City for and during the year 1948, is not in excess of the taxes levied or to be levied for the current year.

It is hereby further certified, recited and declared that all conditions, acts, and things essential to the validity of this bond exist, have happened and have been done, and that every requirement of law affecting the issue thereof has been duly complied with, and this bond is within every debt and other limits prescribed by the Constitution and laws of said State and that the full faith and credit of said Spring City are hereby irrevocably pledged to the punctual payment of the principal and interest of this bond according to its terms.

IN WITNESS WHEREOF, said Spring City has caused this bond to be signed by its Mayor, its corporate seal to be hereunto affixed, and attested by its City Recorder, and the annexed coupons to bear the facsimile signature of the City Treasurer, as of the 15th day of January, A. D., 1948.

(s) Charles A. Thompson
Mayor

ATTEST:

(s) Henry Blaine
City Recorder

(SEAL)

The official capacity and the signatures of the persons signing the resolution and the bonds are not disputed.

None of the bonds were to mature until the year 1961. (Plaintiff's exhibit D-1 through D-12, photostatic copies of the bonds, and Plaintiff's exhibit B, the authorizing resolution). It is manifestly evident from the audit conducted (Plaintiff's exhibit F) and from the testimony, that the purpose of protracting amortization and discharge of the debt for the period of some 13 years was to enable the defendant Spring City to discharge existing indebtedness. Schedule "1" of the audit (Pls. Exhibit F) discloses that in the year 1961 there will remain only \$1,300.00 of general obligations of Spring City, exclusive of the disputed issue. In the testimony of Virgus Osborne, councilman in January 1948, beginning at line 18, page 91 of the transcript, the purpose of deferring the debt until 1961, it clearly shows, was in order to enable the City to conveniently meet all payments of principal:

Question: What impression did you have, as to what kind of bonds you were considering?

Answer: I thought they were revenue bonds.

Question: Why?

Answer: For one reason that on the \$13,000.00 and the \$12,000.00 that we borrowed, was about—and \$13,000.00 was paid off to the Bank of Ephraim, and these others were not to be paid until these were all paid up, that is this \$12,000.00

issue was not to be paid on, until the other issue was paid.

Interest was to be paid annually from date of issuance of the bonds until maturity of the bond to which coupons were annexed for interest payments. (Plaintiff's exhibit C, photostatic copies of the coupons)

On January 27, 1948, the plaintiff, State of Utah, by its Commission of Finance, purchased the bonds for the sum of \$13,498.67 representing principal, premium and accrued interest, all such sum being paid from the permanent school fund of the State Land Board. (R. p. 39) Until January 15, 1950, the defendant, Spring City, paid all interest payments as they became due and payable. On January 15, 1951, the state treasurer presented for payment the coupons of said bonds then payable in the total amount of \$420.00. Payment was refused and no payment or portion thereof has been made thereon. The defendant Spring City, and its present mayor and councilmen maintain that the bonds and coupons are void. They have refused and continue to refuse to make payment upon the interest coupons.

The trial court entered its findings of fact to the effect that the plaintiff held unpaid bonds issued by Spring City in the sum of \$14,500.00 in addition to the issue of \$12,000.00 subject of this litigation. (R. p. 41) The trial court found that the proceeds of the bond issue now in dispute were used for corporate purposes to the extent of \$12,000.00 and that \$1,398.67 was retained by Lauren W. Gibbs as his commission for the sale of the bonds pursuant to an agreement between Gibbs and Spring City.

(R. p. 43) The trial court found further that the defendant Spring City did not have on hand any funds for the payment of the face amount of the bonds in the year 1948, (R. p. 40) but found, rather, from an audit (State's Exhibit F) conducted by Wood, Child, Mann & Smith, accountants, that the defendant Spring City incurred a deficit in the year 1948 in the sum of \$2,067.90. (R. p. 40) The audit from which that finding was made however, has incorporated "proceeds from bond issues—\$24,766.33" in the receipts column, and "\$27,140.78 operation and maintenance—material" in the expenditure column. (Exhibit C of the audit, State's Exhibit F) It is submitted that the court erred in finding a \$2,067.90 deficit to have been incurred. The audit reflects proceeds of bond issues and expenditures from bond issue funds, neither of which have any bearing in a determination of current revenue and current expenditures as those terms are contemplated by the constitutional limits upon debt.

Based upon the finding that the "expenditures" for the year 1948 exceeded the "revenues" as the figure representing each appeared in the audit, the court concluded as a matter of law that Article XIV, Section 3 of the Constitution of the State of Utah had been violated. Upon the finding that the existing debt of \$14,500.00, plus the debt, subject of this litigation, of \$12,000.00, exceeded twelve percent of the valuation of taxable property in the city's corporate limits, as taken from the last assessment for city purposes, the trial court concluded that Section 4, Article XIV of the Constitution of the State of Utah also was violated.

The court further found that the individual defendants did not falsely or negligently represent to the plaintiff that all conditions, acts and things essential to the validity of the bonds existed, had happened, and had been done, and that if plaintiff did not know the financial condition of Spring City and did not know whether the bonds issued were within the constitutional debt limits, it should have known (R. pp. 40 & 41); and that the *defendants* were entitled to rely upon the opinion of the Attorney General of the State of Utah, and the legal advice of the *defendants'* bond broker and his attorney as to the validity of the bonds. (R. p. 42) The court found that although the bonds show upon their face that they purport to be within the revenues of the year 1948, yet the bond proceedings authorizing the \$12,000.00 bond issue do not provide for any tax or any other method for payment thereof. (R. p. 41) The court further found that the State of Utah was negligent in failing to determine the financial condition of Spring City in the year 1948. Upon those findings and conclusions, the court entered its decree that the plaintiff, State of Utah, is entitled to recover nothing on either of its causes of action against either or any of the defendants and that the Power and Light Bonds, Series of January 15, A.D. 1948, in the sum of \$12,000.00 are, as are the coupons thereupon, unconstitutional, void and uncollectible.

STATEMENT OF POINTS

POINT I

THE BONDS, SERIES OF JANUARY 15, 1948, ISSUED BY THE DEFENDANT SPRING CITY, ARE CONSTITUTIONAL AND VALID.

1. The debt limit imposed by Article XIV, Section 3, Constitution of Utah, was not exceeded.
2. The debt limit imposed by Article XIV, Section 4, was not exceeded.

POINT II

THE CITY COUNCIL OF DEFENDANT SPRING CITY WAS AUTHORIZED AND EMPOWERED TO BORROW, UPON NEGOTIABLE BONDS, FUNDS TO BE USED FOR CORPORATE PURPOSES.

POINT III

IF THE BONDS, SERIES OF JANUARY 15, 1948, BE VOID IN THE ABSENCE OF AN ELECTION AUTHORIZING THAT ISSUE, PLAINTIFF IS ENTITLED TO RECOVER UPON THE THEORY OF MONEY HAD AND RECEIVED.

POINT IV

IF THE BOND ISSUE IS VOID, THE PLAINTIFF MAY RECOVER AGAINST THE ISSUING AUTHORITIES BECAUSE OF THE NEGLIGENCE OF THOSE OFFICIALS IN AUTHORIZING THE ISSUE.

ARGUMENT

POINT I

THE BONDS, SERIES OF JANUARY 15, 1948, ISSUED BY THE DEFENDANT SPRING CITY ARE CONSTITUTIONAL AND VALID.

The trial court, in its findings of fact and conclusions of law, determined that the bonds issued by Spring City, series of and dated January 15, 1948, were in excess of the debt limit imposed by Article XIV, Sections 3 and 4,

of the Constitution of the State of Utah, since no election at which the proposition to create the debt here disputed was submitted to the qualified and taxpaying electors.

1. The debt limit imposed by Article XIV, Section 3, Constitution of Utah, was not exceeded.

Article XIV, Section 3 of the Constitution, reads as follows:

No debt in excess of the taxes for the current year shall be created by any county or subdivision thereof, or by any school district therein, or by any city, town or village, or any subdivision thereof in this State; unless the proposition to create such debt, shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein, in the year preceding such election, and a majority of those voting thereon shall have voted in favor of incurring such debt.

The trial court found that in the year 1948 the expenditures of the defendant Spring City exceeded its revenues by the sum of \$2,067.90 as shown by an audit. (Plaintiff's Exhibit F)

At this point, we will assert that exception is taken to that finding, inasmuch as the audit has incorporated into the receipts and expenditures account, items which have no bearing upon the determination of the constitutional question of what is "current revenue" within the meaning of that term. The audit has included, on the "receipts" side of the account from which the court's finding was made, an item denominated "proceeds from bond issues—\$24,766.33;" and on the "expenditures" side of the same account, there appears "operation and maintenance—material—\$27,140.78."

Both of those items should be excluded from any accounting, the purpose of which is to ascertain the amount of current revenue over current expenditures. After this revision alone, the audit would then show that *revenues* for the year 1948 *exceeded* the *expenditures* by the sum of \$306.55. However, for reasons to be discussed hereinafter, we take the position that the overall relationship of expenditure to revenue is not material if the obligation disputed is incurred in fact *before expenditures and obligations being currently created have ~~not~~*, in the critical year, *exceeded* the *potential revenues* for the *entire year*. We therefore will not argue at this time the propriety of the trial court's finding that a deficit, speaking in terms of the questions with which we are now concerned, in fact occurred.

Upon that finding of a deficit, however, the trial court proceeded to determine that the municipality of Spring City had created a debt in excess of its revenue (including taxes for the year 1948), and that therefore, all outstanding obligations incurred in that year, remaining unpaid at the expiration thereof, became and were, *ab initio*, unconstitutional and void.

The findings of fact and conclusions of law were by the court. Included therein was a preamble in which the trial judge cites the case *Fritch vs. Board of Commissioners of Salt Lake County*, 15 Utah 83, 47 Pac. 1026.

We respectfully submit that the trial court erred in its application of the Fritch case to the facts here, invalidating the disputed bonds for the reason that Spring City *expended* more in 1948 than its *revenues* equaled

in that year. This holding becomes particularly objectionable when it appears that the claim of the State of Utah, purchasers of the disputed bonds, became fixed and definite upon January 15th, 1948. We submit that on January 15th, the 1948 debt limit of Spring City *could not have been exceeded*, even after applying to the sum of expenditures made and obligations incurred as a charge against 1948 revenues up to January 15, the further sum of \$13,498.67, the amount paid by plaintiff for the bonds we now consider. The total revenue of the City for the year 1948 was the sum of \$20,284.44. (R. p. 40) The word "taxes" in the constitutional provision above cited has been construed to mean "all potential revenues for the current year, from whatever source obtainable." *Muir vs. Murray City*, 55 Utah 368, 186 Pac. 433.

Moreover, we submit that by express recitation in the proceedings preliminary to the issuance of these bonds, (Plaintiff's Exhibit B, [resolution authorizing bonds] p. 2) there was an "immediate, imperative and pressing need of raising funds to the amount of \$12,000.00 for the purpose of extending and improving the power and light plant to be owned and controlled by the city in order to better serve the inhabitants," and that the further recitation that "the sum of \$12,000.00 may be raised at this time without incurring any indebtedness or liability by said city in excess of the revenue of the said city for the current year, 1948," contained in the resolution passed by the Spring City council January 5, 1948, (State's Exhibit B) was a statement to the effect that the procurement of \$12,000.00 was immediate, imperative and press-

ing to the extent of being a *required expenditure* in the year 1948. We contend further that the recital therein, to the effect that in procuring that amount, the City would not exceed the revenues of the City for the current year, 1948, was an implied, if not an express covenant on the part of the city council to forebear from a diversion of funds which might become available for the payment of these bonds. It would clearly appear that it became incumbent upon the city council after entering into that covenant, that they would not do any acts, allow any appropriations, or make any disbursements subsequent to the execution of that covenant which would destroy, alter or abridge their power and authority to create that debt. A purchaser of municipal bonds is entitled to rely upon a covenant of that tenor and import, and innocent holders may not be trapped by a subsequent diversion of funds in breach of that covenant.

It appears from the audit, (State's Exhibit F) that in the year 1948 there was paid to an obligee unnamed therein, the sum of \$5,000.00 for a "tax anticipation note". It is conceivable, though not in evidence, that that disbursement might have been unauthorized, and ultra vires for the reason that the obligation might itself have been void, as having been *incurred* in the year 1947 (or prior years) *after* the city had exceeded its debt limit by having expended in excess of its revenues for that year. If that expenditure was not a valid obligation, *it* could not have taken precedence over the obligation incurred by the issuance of the instant bonds.

We take further exception to the trial court's appli-

cation of the Fritch case to the facts here, particularly in light of a case decided immediately after the Fritch case, *Pleasant Valley Coal Company vs. County Commissioners, Salt Lake County*, 15 Utah 97, 48 Pac. 1032. In that case the question was upon the liability of the county to pay to the plaintiff the price agreed for coal delivered in the month of December, 1896. In 1897 a claim therefor was presented by the plaintiff. Contention of the county commissioners was that at the time of the furnishing of the coal the county had already exceeded its limit of indebtedness. The court said:

The material question to be determined is whether *at the time of the furnishing of the coal*, Salt Lake County had *already exceeded the limit of its indebtedness* which it was allowed to create by law.

Although the question in that case involved the effect of the Constitution of Utah becoming operative during a fiscal period in which the debt limit of the county was disputed, the *ratio decidendi* of that case is still to the effect that the validity of an obligation is determined not as of the end of the year but as of the time *when the liability is incurred*. The court there said:

To refuse to acknowledge and pay a just debt is a thing to be discouraged and should not be aided by judicial construction. Such thinking dispels confidence, ruins credit and casts a reproach upon government. * * * Counsel for the appellant insists that some of the questions raised in this record was decided in the case of Fritch vs. Board 15 Utah 83 [hereinabove cited] and, it appears, adversely to the views herein expressed * * * that

case, while it affected the same warrants was imperfectly before the court and therefore cannot be regarded as conclusive in this and insofar as it conflicts herewith is hereby overruled.

It is respectfully submitted that, although not affirmatively stated in the decision of the Pleasant Valley Coal Co. case, one of the views of the Fritch case to be overruled was the disregard in the Fritch case of the question as to the financial condition of the county *at the time the liability was incurred*.

It is therefore respectfully submitted to this court that at the time these bonds were issued, January 15, 1948, the city of Spring City had not exceeded its constitutional debt limit; nor had it expended, disbursed, appropriated or pledged funds in excess of its revenues for the year 1948, *even after* it had incurred an obligation to pay to the State of Utah the sum of \$13,398.67. Spring City impliedly covenanted not to thereafter permit the diversion of funds so as to invalidate this obligation, by reciting that they were within their debt limit. Their *subsequent* acts of disbursement and acts of creating debt, not those authorizing *this* disputed debt, were ultra vires, unconstitutional and void.

We submit that if, as of the date this obligation became fixed, the debt was not in excess of the constitutional limit, then there is no objection to making the date for payment of those bonds a time in the future when the city could do so conveniently from the revenues from the system and from general taxes and after other existing general obligations and encumbrances upon utilities

of the city had been paid and satisfied.

Appellant further excepts to the application of the Fritch case to the facts here, particularly in respect to the court's interpretation of that case as holding that

No debt which cannot be paid from the revenues of the current year shall be created without a bond election and that bonds issued by the city against the current revenues of the year and without a bond election are payable solely out of such current revenues and are unenforceable against the revenues of any other year. (Taken from trial court's preamble to findings, R. p. 35)

In *Muir vs. Murray City*, 55 Utah 368, 186 Pac. 433, ^{this} court said:

This section of the constitution [Article XIV, Section 3] undoubtedly prohibits a municipality from creating an indebtedness in excess of the revenue for the current year unless the proposition is submitted to a vote of the qualified electors and approved by the majority thereof; but the inhibition goes only to the question of excess amount and not to the time of payment. *If the amount of indebtedness is limited to the revenue of the current year, we know of no constitutional objection to providing for payment after the year expires.* (Italics added)

In that case Murray City borrowed from the plaintiff the sum of \$1200.00 payable in four annual instalments evidenced by four promissory notes, one payable in one year, one payable in two years, one in three years, and the last in four years. The defendant City had paid two of these notes as the same came due but thereafter repudiated the remainder of the debt, and when sued there-

on the defendant City counterclaimed for return of the payments made on the first two notes on the theory that the City by incurring such obligation and making it payable in years subsequent to that in which the debt was incurred had violated Article XIV, Section 3 of the Constitution in that no election had been held. No evidence was submitted on the question whether the \$1,200 debt exceeded the anticipated or realized revenue of the year in which the debt was incurred. The court assumed, in the absence of proof, that the debt was within the anticipated revenue of the year, and held that the plaintiff should recover judgment against the City. We quote from the opinion of the court on page 372 of the Utah Reports:

* * * If the amount of the indebtedness is limited to the revenue of the current year, we know of no constitutional objection to providing for payment after the year expires. * * *

Although it is not clear from the opinion whether the later notes evidencing the debt were to be paid from income for years subsequent to that in which the debt was incurred, an examination of the abstract of the record and briefs of counsel before the Utah Supreme Court indicate that in fact such was the case.

In the case of *Dickinson vs. Salt Lake City, et al*, 57 Utah 530, 195 P. 1110, the court again announced and followed this rule, "Any failure on the part of the city authorities to levy a tax necessary to repay such indebtedness could not defeat the indebtedness or render it any less a legal and binding obligation against the city

(cases cited).” In the case of *Scott, County Auditor vs. Salt Lake County, et al*, 58 Utah 25, 196 P. 1022, the court once again cited and followed the Muir case. See page 28 of the Utah Reports. It may thus be seen that the Utah Supreme Court has already ruled upon this question and has decided that the constitutional expression “no debt in excess of the taxes for the current year shall be created” without an election is an inhibition which runs only to the incurring of the debt and not to the time of payment thereof. Inasmuch as the \$12,000 debt created by Spring City January 15, 1948, was well within the revenues for the year 1948, anticipated at that time, and was slightly more than half the revenues actually realized for the year 1948, we submit that the provision for repayment for such debt in later years, and the failure to provide a tax for retirement thereof, does not render the debt void.

If then, the constitutional prohibition does not extend to the time of payment, it is immaterial that general obligations issued and created by a municipality include a provision for payment in a year subsequent to the year in which they are incurred.

In 41 A.L.R. Page 810, the general rule respecting payment by municipalities for permanent improvements is stated thusly:

Most courts hold that a [constitutional] provision against a municipality exceeding in any year its current revenue does not prevent it from paying for the construction of a permanent improvement out of the revenue of a year subsequent to that in which it was erected if a contract on which

the claim is based was valid when it was made. The fact that for some reason the amount called for was not paid *in the year in which the liability was incurred does not affect the right to recover it if the claim was originally a valid one.* (Italics added)

Thus, in *Wilson vs. Gaston* (1914) 141 Ga. 770, 82 S. E. 136, wherein it appeared that a valid contract had been made and performed in 1912, but that the warrant issued to pay for the work done was not honored in that year, the court said:

When the warrant fell due, all moneys in the treasury provided for its payment had been applied to other purposes, on account of unusual expenses which the treasurer had paid indiscriminately, without any participation or consent upon the part of the Gallion Iron Works Company; and the warrant was not paid. It was not contended that the commissioner was unauthorized to buy piping for constructing culverts in the public roads, but only that he was unauthorized to create a debt therefor within the meaning of the Constitution. The validity of the contract was not destroyed by reason of the diversion of the funds provided for its payment, under the circumstances above enumerated; but, notwithstanding such diversion, the obligation of the county to pay continued to exist.

. . . After default in payment of the warrant the county was in the condition of having a valid, overdue obligation, and without funds to meet it. What was the duty of the county under these circumstances? The law provides that a tax may be levied to pay the legal indebtedness of a county due, or to become due during the year, or past due.

Civ. Code, Section 513 (1). 'When debts have accumulated against the county, so that 100 percent on the state tax, or the annual amount specially allowed by local law, cannot pay the current expenses of the county and the debt in one year, they shall pay off as rapidly as possible, at least 25 per cent every year.' Civ. Code, Section 507. The contention of the plaintiff, as presented by the pleadings and evidence, was that the debt could not be paid at all out of the taxes raised in 1913 [the year after the contract was executed]. It was neither contended nor made to appear that the debts against the county were so large that this liability could not be paid in 1913. Under the foregoing circumstances it appears that there was a legal liability against the county, no funds with which to meet it, but power in the commissioner to provide for its payment by levy of a tax in 1913. The county authorities should levy a sufficient tax and pay the debt.

It appears throughout the record, transcript and exhibits that the bonds here disputed were not to begin maturing until the year 1961. (State's Exhibits D-1 through D-12, photostatic copies of the bonds, R. p. 33) This provision for payment at a date some 13 years in the future was for the purpose of allowing the city to amortize existing indebtedness and allow for the payment of these bonds after current bonded debt had been discharged. (Tr. p. 91) In the official audit (State's Exhibit F) there appears "Schedule Number 1" a statement of the bonded indebtedness of Spring City as of December 31, 1949. As appears from that schedule, in the year 1961 there will remain total bonded debt, upon general obligations of the city, only \$1,300.00, in addition to the in-

debtedness disputed in this litigation. Section 10-8-87, Utah Code Annotated 1953, provides that a city may levy "not to exceed 3.5 mills to construct and maintain gas works, electric light works, telephone lines, state railways and bath houses." Section 10-7-9 provides that a city council may levy a tax sufficient to pay interest and to constitute a sinking fund for the payment of principal upon bonds issued for the purpose of supplying the city with, *inter alia*, "artificial lights * * * as shall be owned and controlled by the municipality." Section 10-7-9 further provides that:

"Whenever bonds shall have been issued for the purpose of supplying any city or town with artificial light, water or other public utility, the rates of charges for the service of the system or plant so constructed may be made sufficient to meet such payments in addition to operating and maintenance expenses and taxes shall be levied to meet any deficiencies.

It is respectfully submitted that in the year 1961, Spring City shall have had ample opportunity to amortize existing indebtedness to the extent of being fully capable of paying, conveniently, and without hardship or excess taxation, the bonds in dispute here.

Clearly the Wilson case, *supra*, could be given application here, particularly where the proceeds of the bond issue now disputed have implemented the revenue raising power, and decreased the necessity for maintenance of old facilities of the power and light system, benefited by the sale of the instant bonds.

In *Lawrence County vs. Lawrence Fiscal Court*, 130

Ky. 587, 113 S.W. 824, the court upheld an order of the county authorities that a claim during previous years should be paid, saying:

Even if it should be conceded that the claims alluded to in the order of the October term of 1906 of the fiscal court, which is the subject of this suit, were those allowed in 1903 or 1904, it would not follow that the order is void. It is not charged, nor is it pretended, that the claims allowed in 1903 or 1904 were in excess of the income or revenues provided for either of those years. It is not necessary to the validity of a municipal indebtedness that the municipality shall have made provision for its payment. The inhibition is against creating an indebtedness in any year that the municipality is unable to pay out its resources for that year. If the liabilities incurred, say in 1903, did not exceed the income and revenues provided by law,—that is, the maximum which under the law the county was authorized to levy in taxes,—plus any available funds it had on hand, then nothing subsequently occurring could render the liability void as being in contravention of Section 157, *supra*. If the county had collected the taxes levied for the purpose of paying its liabilities incurred in 1903, but had in some way lost the money before it paid its debts, that fact could not affect its liabilities. It would remain bound until payment, or otherwise legally discharged. See to the same effect *Camden Clay Co. vs. New Martinsville* (1910) 67 W. Va. 525, 68 S. E. 118.

The case there cites with approval *Scott vs. Salt Lake County*, *supra* 58 Utah 25, 196 Pac. 1022.

We submit that if the trial court's decision to the

effect that (1) debt may not be protracted to a year other than the one in which incurred, and (2) that subsequent diversions of funds in the year in which the debt is created, even if the subsequent diversions are for necessary corporate purposes, operate to destroy, abridge, and avoid the debt created, then the well known form of commercial obligation, the "tax anticipation" bond or note is placed in serious jeopardy.

That ruling would unseat and disturb numerous transactions currently subsisting as valid and enforceable obligations. Obligations created in anticipation of taxes have become accepted as a form of obtaining short term credit for taxing subdivisions, used by practically every governmental unit having the power to borrow. They are, by definition, a means of temporary financing in anticipation of current taxes, and from the proceeds of which the funds derived are to be used for the purposes for which the taxes are levied and assessed. 43 Am. Jur. Public Securities and Obligations, Sec. 11, 13. If they are payable out of taxes to be levied and collected, they are "general obligations" of the taxing unit. 43 Am. Jur. pp. 493 to 495. If they are general obligations, they are a debt within the meaning of the constitutional provisions. *Fjeldsted vs. Ogden City*, 83 Utah 278, 28 P. 2d 144. "Obligations created in anticipation of taxes" necessarily implies that the taxes are not yet collected—possibly not levied and assessed. Clearly the intent in creating that debt is for the purpose of obtaining operating revenue after current revenues have been found insufficient—

payment of which debt is to be made in a year subsequent to that in which incurred.

If the taxing unit could so avoid debt and liability, either of the city, or as individual officers of the city, they could channel the taxes when collected into other funds, budgets, or forms of expenditure or debt, to leave no tolerance of current revenue over current expenditures, and then, by a ruling such as has been made in the trial court, avoid the consequences of the obligation incurred previously. Thereafter, it would not be required of the various municipalities, school districts, or counties, to pay such debts, but rather it would be required of them *not* to pay those debts. The payment would be the satisfaction of an unconstitutional obligation, therefore a gift, *ultra vires*, and void.

Appellant is apprehensive that a rule other than the one urged would do violence to existing contracts and obligations, disrupt the accepted practices of commercial financing adopted by custom and long usage, and corrupt the credit of, and the security market for, government and its subdivisions.

We respectfully submit that, the debt being valid when created, and there being no objection to protracting the time for payment if valid when created, Section 3 of Article XIV of the Constitution has not been violated.

2. The debt limit imposed by Article XIV, Section 4, was not exceeded.

The trial court found that at the time plaintiff purchased the disputed bonds the defendant had outstanding general obligations in the sum of \$14,500.00. Those obli-

gations were evidenced by unpaid bonds issued by Spring City and held by the plaintiff, the State of Utah. It found that the additional issue of \$12,000.00 constituted a debt which was in excess of the debt limit which Spring City could incur with bond elections. (R. p. 41) The court concluded from that finding that the maximum debt limit of Section 4, Article XIV of the Utah Constitution had been exceeded. That section reads as follows:

When authorized to create indebtedness as provided in Section 3 of this Article, no county shall become indebted to an amount, including existing indebtedness exceeding two per centum. No city, town, school district or other municipal corporation, shall become indebted to an amount, including existing indebtedness, exceeding four per centum of the value of the taxable property therein, the value to be ascertain by the last assessment for State and County purposes, previous to the incurring of such indebtedness; except that in incorporated cities the assessment shall be taken from the last assessment for city purposes; provided, that no part of the indebtedness allowed in this section shall be incurred for other than strictly county, city, town or school district purposes; provided further, that any city of the first and second class when authorized as provided in Section three of this article, may be allowed to incur a larger indebtedness, not to exceed four per centum and any city of the third class, or town, not to exceed eight per centum additional, for supplying such city or town with water, artificial lights or sewers, when the works for supplying such water, light and sewers, shall be owned and controlled by the municipality. (As amended November 8, 1910)

The trial court in its findings at page 41 of the Record, stated:

* * * That at the time plaintiff purchased said bonds the plaintiff held unpaid bonds issued by Spring City in the sum of \$14,500.00. That the additional issue of \$12,000.00 purchased by plaintiff constituted a debt, held by plaintiff, which was in excess of the debt limit which Spring City could incur with bond elections, all of which it knew or should have known.

The trial court clearly applied the old formula in computing the maximum debt limit of the City of Spring City, which formula qualified the word "value" in the constitutional provision by the word "assessed." Under that method of computation, the old formula would limit their power to obligate the city to the sum of \$21,528.84, including existing indebtedness.

In the case of *Board of Education, Rich County School District vs. Passey*, 246 Pac. 2d 1078, Utah, this court said:

The language of Article XIV, Section 4 is clear and unambiguous. It establishes as a debt limitation four per centum of the value of the taxable property in the district. The word "value" is not limited or qualified by any adjectives. It does not read "assessed value" or specify any other particular kind of value. The word "value" standing by itself can have only one meaning, viz, the full worth or actual value—not a fractional share thereof.

The constitutional provision above cited (Art. XIV, Section 4) provides that a city may incur an original aggre-

gate indebtedness of four per cent, and an additional eight per cent, "for supplying such city or town with water, artificial lights or sewers" of the value of the taxable property within the corporate limits of the municipality. In supplying the city with artificial lights the defendant Spring City qualified to obligate the city to the extent of twelve per cent of the value of the taxable property therein, section 4 providing that they may so do "when authorized as provided in Section 3 of this Article." The qualification of the city under Section 3 has been discussed hereinabove in subheading 1.

If the County Assessor's assessment figure for the year 1947 is used as a basis for computing the debt limit of Spring City, the city could incur themselves to an amount equal to twelve percent of a figure, forty percent of which is \$179,407.00, thus making their maximum debt limit under Article XIV, Section 4, the sum of \$53,822.10.

Attention of the court is invited to Section 59-5-1, Utah Code Annotated 1953 as amended by Chapter 102, Laws of Utah, 1947, which provides :

All taxable property must be assessed at forty percent of its reasonable fair cash value. * * *

It is submitted that this 1947 amendment was merely a legislative recognition of a pre-existing condition, of which, it is submitted, courts may take judicial knowledge. 78-25-1 (3) Utah Code Annotated 1953; *State Board of Land Comrs. vs. Ririe*, 56 Utah 213, 190 Pac. 59. It is respectfully requested that this court take judicial knowledge of the following records of the Utah State Tax Commission, an executive department of this state.

From those records, the overall state property tax assessments in the State of Utah were as they appear opposite the respective year in which the assessment was made:

| | |
|------|------------------|
| 1945 | \$671,281,023.00 |
| 1946 | \$655,895,447.00 |
| 1947 | \$681,586,560.00 |
| 1948 | \$765,371,793.00 |
| 1949 | \$823,749,300.00 |

It will be noted from those figures that the practice of assessing property at forty percent of its actual value was the customary, common, and accepted practice in the State of Utah prior to 1947 inasmuch as there is no substantial increase reflected in the assessment for the year 1947, nor for subsequent years. It is clear then, that the 1947 assessment roll showed that the fair cash value of the property within the corporate limits of Spring City was an amount, forty percent of which equalled \$179,407.00. The actual value of the taxable property in Spring City, \$448,517.50, would permit an aggregate debt of \$53,822.10, (12% of the value) and some \$27,322.10 in excess of the then existing indebtedness of Spring City in the amount of \$14,500.00, together with the debt now disputed in the sum of \$12,000.00, and there clearly was no violation of the provisions imposing maximum debt contained in Article XIV, Section 4.

POINT II

THE CITY COUNCIL OF DEFENDANT SPRING CITY WAS AUTHORIZED AND EMPOWERED TO BORROW, UPON NEGOTIABLE BONDS, FUNDS TO BE USED FOR CORPORATE PURPOSES.

Among the powers and duties of all cities enumerated

in Chapter 8, Title 10, there appears the following:
10-8-2:

They [city councils of cities] may appropriate money for corporate purposes only and provide for payment of debts and expenses of the corporation * * * May purchase, receive, hold property, real and personal for the benefit of the city * * * improve and protect such property * * * provided that it shall be deemed a corporate purpose to appropriate money for any purpose which * * * will provide for the safety, preserve the health, promote the prosperity and improve the morals, peace, order, comfort and convenience of the inhabitants of the city.

Section 10-8-6 provides:

They may borrow money on the credit of the corporation for corporate purposes in the manner and to the extent allowed by the constitution and the laws and issue warrants and bonds therefor in such amounts and forms and on such conditions as they shall determine.

Section 10-8-14 provides:

They may construct, maintain and operate * * * electric light works * * *.

Vol. 43 Am. Jur., Public Securities and Obligations, Section 39, states:

There are cases undoubtedly in which it is proper and desirable that a limited power to issue long term, interest bearing negotiable bonds should be conferred on a political subdivision, as where some extensive public work is to be performed the expense of which is beyond the immediate resource of reasonable taxation and capable of being fairly and justly spread over an extended

period of time. * * * Where the power is clearly given and securities have been issued in conformity therewith, they will stand on the same basis and be entitled to the same privileges as public securities and commercial paper generally.

Section 40 following says:

* * * The general power to issue bonds must be taken to authorize bonds in the usual form of such well known, commercial obligations.

It is clear from the express wording of the statute and the commentaries upon similar statutes that the city council of Spring City had authority to issue bonds and in accordance with customary and usual form they may be long term bonds. There being no constitutional objection to a city creating debt payable in a subsequent year as has been hereinabove considered, there is an express statutory authority for the issuance of bonds of that character.

POINT III

IF THE BONDS, SERIES OF JANUARY 15, 1948, BE VOID IN THE ABSENCE OF AN ELECTION AUTHORIZING THAT ISSUE, PLAINTIFF IS ENTITLED TO RECOVER UPON THE THEORY OF MONEY HAD AND RECEIVED.

In 2 Dillon, Municipal Corporations, Fifth Edition, page 1547, Section 961, is announced the rule allowing recovery by a bondholder on the theory of money had and received by the issuer from the purchaser when, for some reason, the bonds issued by a municipal corporation are void. We quote therefrom:

If a municipal corporation sells and disposes of negotiable instruments purporting to be bonds,

the transaction is a loan to the municipality. The municipality is in the market as a borrower and receives the money in that character, notwithstanding the transaction assumes the form of a sale of its securities. If it has power to borrow money or to incur debt for the purposes for which the bonds are issued, and the ground of invalidity urged against the bonds is that the city had no power to issue bonds which are negotiable in form, or that it had not authority to make bonds payable in the form and manner adopted, the transaction resulting in the transfer of the consideration for the issue *justifies a recovery* against the municipality *as for money of the plaintiff* had and received by it. The principal upon which a recovery has been sustained under such circumstances is the broad obligation to do justice which rests upon all persons, natural and artificial; in consequence of which it has been declared that if a municipality obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation. The action is justified under the forms of the common law on the ground that it is an action for money of the plaintiff had and received by the municipality, being money paid by mistake or upon a consideration which happens to fail, or money got through imposition. But if the municipality has not received any consideration for the issue of the bonds, the foundation for an action to recover a debt owing by the municipality does not exist, and an action by the purchaser or holder of the bonds against the municipality will not lie. The right to recover against the municipality as for money had and received also implies capacity on the part of the city to contract debt or to borrow money.

The record shows without dispute that the defendant Spring City received from the State of Utah for the bonds in question the sum of \$13,498.67. The record further shows that the money thus received was applied by the city to purposes for which Spring City may validly appropriate and for which it may properly incur debts. Moreover there is no question in this case as to whether all parties were acting in good faith under a belief that the bonds were valid and proper. If the bonds sued upon be void as violative of the Utah Constitution, Article XIV, Section 3, then it cannot be said but that these bonds were issued and purchased upon a mistake made by all parties, honestly and in good faith. We believe that upon these facts the plaintiff is entitled to restitution of the money paid apart from the express contract on the theory of money had and received, and that the better reasoned authorities will support this view.

The case of *Commercial Trust Company of Hagerstown vs. Laurens County*, 267 Fed. 901 (D.C., S.D. Georgia W.D. 1920), is in point. The constitution of Georgia provided, "No such county, municipality, or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose to be held as prescribed by law." The defendant County had incurred a debt totaling \$75,000.00 by resolution, on the theory that it was made to meet a "casual and temporary deficiency of revenue." One-fifth of one

per cent of the assessed valuation of the defendant County amounted to \$18,720.00. The court, therefore, held that the notes evidencing the debt were void. The Federal District Court of Georgia held that the holders of these notes could recover upon the theory of money had and received. We quote from the opinion :

While, as we have seen, the county could not lawfully borrow money to meet these warrants, but must wait for the coming in of the taxes laid therefor, the loan is void only for the defect of power, and is not an act punished by any law. The maxim in pari delicto does not apply. While the money does not by its mere reception become public money, for the treasurer's sureties are not even liable for it on his bond (cases cited) nor is the treasurer entitled to commissions for handling it (cases cited) yet when actually applied by the county officers to its lawful use the county becomes liable for it, not on any express or inferred contract, but ex aequo et bono to the extent only that it is so used (cases cited). This remedy seems appropriate, where the lender's money is directly used by the county through its proper officers in the extinguishment of lawful claims against the county, or in purchases it then might lawfully make.

The district court of the southern district of Florida in the case of *Olds vs. Town of Bellair*, 41 F. Supp. 453, (1941) held similarly. The statute creating the defendant City gave to that city the power to issue and sell its bonds for constructing municipal improvements "Provided, such issue and sale of bonds shall be ratified by a majority of the qualified electors of said town who are tax-

payers and who paid taxes on their own property in the town of Bellair Heights, assessed and levied for the calendar year prior to that in which said election is held and actually voting in an election to be held for that purpose." The city officials held a bond election before the time in which that statute could become operative and issued its bonds based upon that election. The court in an action subsequently brought to recover on those bonds held that the bonds were void because the law requiring an election was not followed. However, it permitted the bondholder to recover the actual consideration paid for the bonds (in this case they were purchased at a discount) on the theory of money had and received because the records showed that the money had been paid by the plaintiff, received by the city and expended for purposes within the powers of the city, all in good faith.

In the case of *Bank of Cameron vs. Aleppo Township*, 13 Atl. 2d 40, 338 Penn. 300, (1940), the Supreme Court of Pennsylvania had before it a similar question. The constitution of Pennsylvania required that when a debt is incurred, an annual tax must be provided sufficient to pay the interest and principal of the debt within thirty years. A statute required that the township file for public record its financial statement prior to incurring debts. These provisions were not complied with when the defendant township issued certain negotiable promissory notes for the purpose of highway improvement. In an action brought to recover the amount of the loan the court, in allowing recovery, stated:

There can be no question that in Pennsyl-

vania, where a municipality issues an express contract or formal obligation which is void because of the failure of its authorities to comply with the constitutional and statutory requirements here involved, an action for money had and received by the lender of the money will lie. There is an implied obligation resting upon the municipality to pay back what was lent to it in good faith; *Ohlinger v. Maidencreek Township*, 312 Pa. 289, 167 A. 882, 90 A.L.R. 1227.

The court further announced the same rule in *McGregor's Estate vs. Young Township*, 38 Atl. 2d 313, 350 Penn. 93, (1949). We quote headnote 6 to that case from the Atlantic Reporter:

Where municipality, such as township, borrowing money, issues express contract or formal obligation, which is void because of its authorities' failure to comply with constitutional and statutory requirements that provision be made for annual tax sufficient to pay interest on and principal of indebtedness within 30 years and that financial statement be filed, action by lender for money had and received lies, as implied obligation rests on municipality to pay back amount lent to it in good faith for lawful purpose.

The Supreme Court of South Carolina in the case of *Craig, et al vs. Bell, et al*, 46 SE 2d 52 (1948), decided a similar question. In that case the trustees of a school district had, on the assumption that certain statutes gave them the authority, incurred a debt for the purpose of constructing a building, and had given therefor its promissory note. The court held that the trustees had no such authority but that the holder of the note could recover on

the theory of money had and received. We quote headnote 9 to that case from the Southeastern Reporter :

Where trustees of school district erroneously but in good faith and on advice of school authorities, believed that certain statutes gave them authority to borrow money, and debt of school district to lender was incurred in utmost good faith, school district was legally obligated under the principle of money had and received, and trustees could then legally deliver a new note and substitute it for the invalid note which the lender held.

In the case of *Octonoco County vs. The Town of Townsend*, 246 NW 410 (Wisc. 1933), the Wisconsin Supreme Court had before it the question whether, when an over-all levy limit is placed on a political subdivision, this limit includes a levy for debt payment. Though this question is not exactly in point here, we quote the language of the Wisconsin court to show its attitude toward municipal debt however it may be incurred :

The whole trend and history of the decisions of this court are as favorable to the collection of municipal indebtedness as any system can well be. It is thoroughly established in this state that a municipality that has received and used the moneys of creditors cannot escape the repayment of such moneys because of any invalidity in the bonds issued for the payment thereof.

Under these decisions the municipality is liable to any creditors for money had and received and anyone who has loaned money to the municipality which has been received and used by the municipality for municipal purposes, may recover of the municipality, and the amount of the judg-

ment so recovered must be placed upon the next tax roll and collected with other moneys.

There are cases denying recovery on the theory advanced here. The better reasoned of these cases denying recovery are on facts not before this court; that is, recovery is uniformly denied where the money received for the evidences of indebtedness is not used for public purposes or for purposes within the power of the municipality in the first instance. Other cases deny recovery where the debt limit is exceeded, at least to the extent of such excess on the grounds that there is an entire *want* of power in a city to exceed debt limits, regardless of how the money is spent.

This court has had occasion to rule upon the question of restoration to the aggrieved party of the consideration with which he parted on an invalid contract. In *Moe vs. Millard County School District*, 54 Utah 144, 179 P. 980, this court allowed fixtures, purchased upon a void contract by the School District, to be removed from the premises, although stating that they believed them to have become annexed to the realty. The court said:

It might be conceded that most, if not all, of the property sought to be removed by this action would be classed as fixtures in a contest between parties where the application of the rules of law governing fixtures was admitted, such as between landlord and tenant, mortgagor and mortgagee, etc. * * * (citing cases) But we cannot see how the doctrine of fixtures becomes applicable to this case so as to prevent a recovery of the property here sought.

then again at page 151, of 54 Utah:

* * * When it is conceded that the plaintiff has no other remedy, [to prevent removal] would clearly be a subversion of the purpose for which the constitutional and statutory provisions in question were framed, and would permit the taxpayers of the defendant school district improperly because unnecessarily, to shift the burden of the education of the children in the district to the shoulders of those who in good faith have furnished the material for the completion of the school building, to the extent of the value of this property, which we think they would not desire, nor should they be permitted to do.

In so ruling, the court saw fit to abrogate, when circumstances such as in this case were present, a settled rule of law pertaining to the distinction between real and personal property for the movability thereof.

In the Muir case above cited, the briefs of the prevailing party relied heavily upon the theories of unjust enrichment and money had and received. We cite *Muir vs. Murray City*, 55 Utah 368, 186 P. 433, first, for the proposition that the obligations themselves were in that case validated. We believe the opinion to be clear and unambiguous in holding that the constitutional prohibition goes to the *amount*, and *not* to the *time* of payment. But we cite the case secondly, alternatively, for the theory upon which a portion of the case was argued, and possibly decided—that of quantum merit, unjust enrichment, and money had and received. A reference to the points upon which the prevailing party in his brief relied will indicate as much. The first point was “Municipal

Power and Duty to be Honest." The second point was "Estoppel," urging:

A municipality cannot acquire property under an invalid contract and plead the invalidity as a defense, and also retain the property.

And in the conclusion:

From the authorities cited, it is seen that courts grant relief in cases like this, upon the ground of money had and received, estoppel or ratification, but more often upon the principle of justice, square dealing and equity.

(All citations to briefs in *Muir vs. Murray City*, *supra*, taken from volume 277, Abstracts and Briefs [cases No. 3356-3374], Utah State Library).

We respectfully submit that the facts before this court warrant recovery by the plaintiff against Spring City in any event for the money paid to Spring City for its bonds issued January 15, 1948. The city received the money from the state, all parties acting in good faith. Moreover the city had the *power* to incur such debt, and the authority to expend moneys for the purposes the money so received was expended. Justice, equity and good conscience are in favor of the plaintiff, and Spring City should not in good conscience be allowed to keep the money so received and the benefits therefrom derived and at the same time escape liability on the debt thus created because an election was not held.

POINT IV

IF THE BOND ISSUE IS VOID, THE PLAINTIFF MAY RECOVER AGAINST THE ISSUING AUTHORITIES BECAUSE OF THE NEGLIGENCE OF THOSE OFFICIALS IN AUTHORIZING THE ISSUE.

The bonds in issue recite :

It is hereby further certified, recited and declared that all conditions, acts, and things essential to the validity of this bond exist, have happened and have been done, and that every requirement of law affecting the issue thereof has been duly complied with, and that this bond is within every debt and other limits prescribed by the Constitution and laws of said State and that the full faith and credit of said Spring City are hereby irrevocably pledged to the punctual payment of the principal and interest of this bond according to its terms.

This representation is also contained in the minutes of the action taken by Spring City authorizing this issue, and these minutes show that all the then city officials voted for such issue. By this very act and by offering these bonds to purchasers, these officials were representing that all necessary steps had been taken to constitute these bonds valid and binding general obligations of Spring City. That is, these city officials were representing to any and all prospective purchasers that the bonds were issued only after "every requirement of law affecting the issue thereof" was properly complied with and that these bonds were "within every debt and other limits prescribed by the Constitution and laws of" the State of Utah.

Furthermore, the record shows (Plaintiff's Exhibit A), that a financial statement in the form of an affidavit was executed January 8, 1948, signed by the defendant Henry Blain, as City Recorder, and bearing the seal of Spring City, which affidavit recites that the assessed valuation of Spring City for the year 1947, as equalized, was \$179,407.00. This affidavit further recited that the outstanding general obligation bonded indebtedness of Spring City was at that time \$9,500.00, and that the anticipated revenue for Spring City for 1948 was in excess of \$15,434.92.

The plaintiff as a prospective bond purchaser relied upon these representations and we believe that plaintiff was entitled to rely thereon. If these facts and conclusions set forth in the representations were not true, then the plaintiff bondholder may possibly, on legal principles, be denied recovery as against the Spring City corporation. However, it is our position that, if these representations were not true, there was a duty upon the then mayor, councilmen and recorder to ascertain, before authorizing the bond issue and selling it, that they were not true. That is, we believe that a city council when creating a debt of the city has a duty, not only to the city, but to prospective bond purchasers to represent the facts of the financial condition of the city and of the steps taken preparatory to the selling of its bonds, and this duty is not to act negligently. In this case, if the facts are not as represented, these city officials acted negligently in their duty toward plaintiff as a prospective bond purchaser, and the plaintiff, therefore,

should recover for the damages caused by such negligent representations.

In the case of *First National Bank of Key West vs. Filer et al.* (Fla. 1933), 145 So. 204, 87 A.L.R. 267, the Florida Supreme Court has so held. In that case a board of public instruction, without authority and "without an affirmative vote of the qualified voters being first had and obtained" purchased a school site, and in part payment thereof executed and delivered three notes for \$2,000 each. The notes had not been paid, an action had been brought earlier thereon, and they had been declared void. In this case the holder of the notes proceeded against the members of the board personally on the theory that they were individually liable therefor. The Supreme Court of Florida allowed recovery on the theory that the individual members of the board by issuing the notes without authority to bind the board thereby, were personally liable in *tort* to the holder. We quote from the case:

In the case at bar, there was a clear legal duty on the defendants, as members of the board of public instruction of Dade County, to proceed in a particular way with respect to the issuance of evidences of indebtedness for the purchase of school sites. This clear legal duty to proceed in a particular way to comply with the statutes implied an equally clear legal duty not to proceed in any other way, and not to issue evidences of indebtedness, apparently valid on their face and having the seal of the board of public instructions attached thereto, unless the conditions warranting such issuance, had been ascertained by them beforehand to exist.

The duty to comply with the indispensable legal formalities required to be observed in the issuance of public securities and evidences of indebtedness, in order to make them valid and bind the corporate body or board so issuing them, is ministerial and non-discretionary in character. A neglect of that duty by proceeding in a manner in disregard of the law and to the special damage of another not a contributor to the default therefore renders the participants in such illegal conduct liable in damages to the person specially injured by such omission or neglect. * * *

If the facts as represented to the plaintiff bond purchaser were not correct, and the bonds therefore declared void, then either the purchaser or the city will suffer a loss. Those causing such loss, we submit, should, where it is caused by their negligence, be compelled to make the damaged person whole.

There is no evidence in the record to support the trial court's finding that there was neither negligence nor misrepresentation on the part of the several individual defendants who were officers of the defendant Spring City at the time of the disputed issue. The bonds themselves as well as the preliminary proceedings authorizing their issue disclose a representation which, if these bonds are held invalid, was false and prejudicial to the plaintiff. In the *First National Bank* case above cited, there arose a duty upon those individuals to ascertain the facts they represented and a presumption that if the facts as represented were false, there was a liability in tort to the holder. There is nothing in the record

which would overcome that presumption if in fact these bonds are declared to be void.

We especially take exception to the court's finding (R. p. 42), that the *defendants* were entitled to rely upon the opinion of the Attorney General of the State of Utah. The Attorney General stood in somewhat of an adversary position, not as counsel for any of the defendants. Neither were the defendants protected in their reliance upon their bond brokers or his attorney. Those defendants procured their counsel and if it was incompetent, they, not their adversary, must suffer adversely from an unfortunate choice.

We further except to the court's finding that the plaintiff knew or should have known the financial condition of defendant Spring City (R. p. 41, para's 1 and 2). We can find no authority for the proposition that one department of the state is charged with constructive notice of the acts, conditions, records and affairs of another department. It would be an onerous burden to charge each department of government with the acts and records of every other department.

CONCLUSION

Plaintiff and Appellant respectfully contends in summary and conclusion, that the bonds subject of this litigation are constitutional, valid, and collectible. That there has been no violation of the provisions of the Constitution or of the enabling laws of the State of Utah.

The bonds are not invalid, we contend, for reason of exceeding the provision for maximum debt of Article

XIV, Section 3. That at the time of their issuance, they were within the potential and expected revenues of the defendant Spring City for the year in which they were issued. That being valid when issued, they remained valid and subsisting general obligations of the municipality, although payable in years other than the one in which the obligation was incurred. They were not, nor could they be, invalidated by subsequent appropriations, expenditures, or disbursements of the municipality during the year in which they were issued.

We respectfully contend that the bonds were issued pursuant to an express statutory authority, which additionally empowered the municipality to collect revenues for the satisfaction of the debt.

Plaintiff and Appellant further submits that for money had and received, the Defendant Spring City ought to be required to repay the full amount paid for the disputed bonds, including interest and premium; that the restoration sought may be properly ordered upon sound principles of the law of restitution, allowing a damaged party to be compensated for amounts by which another has been unjustly enriched by money had and received.

It is respectfully urged and contended that, if the bonds be held invalid, then the Plaintiff and Appellant ought to be entitled to recover the amount of their damage from the individual defendants herein, who were, at the time of the issuance of those bonds, officers of the defendant Spring City, for reason of their negligent misrepresentations and recitals as the same were con-

tained in the proceedings preliminary to the issuance of, and as contained in, the bonds, and for reason of their failure to so manage the affairs of the city so as to retain as valid and subsisting obligations, the securities in which they had recited and covenanted that the evidences of debt were lawfully and constitutionally issued, and within current revenues.

Respectfully submitted,

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