HISTORY OF MISSOURI SEWER LAWS

The present scheme of sewer laws in Missouri had its origin in a special act applicable to the City of St. Louis in 1849, since developed and extended generally. It has been a native growth, not borrowed from, nor having any parallel in, the legislation of any other state.

It will be convenient to trace this interesting growth in two parts: (1) the statutes; (2) the decisions.

STATUTES.

Glancing rapidly over legislation prior to the present scheme, so as to be sure of our proper starting point, we find that sewers were not mentioned in the territorial act concerning incorporated towns in 1808 (Ch. 53, p. 184), which only gave power to remove nuisances. But in 1822 authority was added for St. Louis to "open and keep in repair . . . sewers and keep the same clean" (Laws, p. 967). But again no express reference was made to sewers in the act incorporating the City of St. Louis in 1839.

The first complete act on the subject, which has been followed as a rudimentary model for the later enactments, was "An Act to provide a General System of sewerage in the City of St. Louis," approved March 12, 1849 (Laws, p. 519). Its first section reads: "The Mayor and City Council of St. Louis shall cause, by ordinance, the city to be laid off into districts to be drained by *principal* and *lateral* or tributary sewers, having reference to a *general plan of drainage* by sewers for the whole City, and number and record the same." (Italics mine.)

This act further provided for payment of such sewers by an ad valorem realty tax of one-half of one percent per annum in each district, predicated upon which the City might make separate issues of bonds—somewhat after the present manner of street improvement bond issues in Ohio, Arkansas, Oklahoma and elsewhere.

Here will be noticed a first rough distinction between "principal" and "lateral," or "tributary" sewers, as a backbone and ribs; the then main or principal sewer being the backbone, and the lateral, tributary sewers being the ribs, but all similarly paid for at that time. This was fitted to the topography of the City along the bank of the Mississippi river; and soon main sewers were run west along the main streets, with lateral ribs draining into these, but all being then within sep-

arate districts, to be locally paid for—both main and laterals being parts of a district sewer.

The first ordinance thereunder was No. 2485, approved July 27, 1850, making every east and west street with its abutting property a separate district, and authorizing district bond issues therefor, except that the *"large sewers* on Poplar, Seventh and Ninth streets shall be constructed whenever the General Assembly . . . shall authorize the City of St. Louis to borrow money for that purpose"; as a debt of the whole City. At this time, before the Constitution of 1876 limited municipal indebtedness, Counties and Cities were making most improvements by borrowing money therefor.

This ordinance was amended August 29, 1850, by ordinance No. 2514, declaring the Poplar, Seventh, Ninth and also Biddle street sewers to be *"public* sewers, as contra-distinguished from *district* or common sewers, and are to be constructed at public expense as soon as requisite authority to borrow the money is obtained from the Legislature." A "Common Sewer Fund account" was established into which the avails of special taxes were paid, and bond issues predicated thereon—which completes the procedure under this first legislation of 1849.

This scheme was created and thought of only in connection with the City of St. Louis. No part of it is included in acts to incorporate St. Joseph, Hannibal and Carondelet in 1851, and Kansas City in 1853; these were merely granted power to "establish, erect and keep in repair, bridges, culverts, drains and sewers, and regulate the use of the same"—the language generally followed in incorporating towns down until 1877.

Now recalling that the ordinances Nos. 2485 and 2514, *supra,* by which the Biddle street and other main sewers might be constructed, were to await legislative authority to borrow money generally, we find this granted in 1853 (Laws, p. 247), by section 10 of an amendatory act, which reads: "The City of St. Louis shall have power to direct to be built at the expense of the City any *main sewer* necessary to carry out the *general system* of sewers adopted; and to borrow money for the purpose of making any public improvement that may be deemed necessary for the city, . . . and may . . . issue bonds of the City having not more than thirty years to run."

Here we see first in legislation that distinction, which remains to this day, that the larger *main* (public) sewers are to be at the charge

of the whole city, as distinguished from district sewers, with their smaller mains, chargeable to the benefit districts.

In 1859, "An act amendatory of and supplemental to the several acts incorporating the City of St. Louis" (Laws, p. 165), enacts almost *verbatim* the provision which now runs through five articles of the Chapter on Cities. It defines the several classes in accordance with St. Louis conditions, and is the consummation of the tentative step of ten years before. Section 14 reads:

"The Board of Common Council shall have power, by ordinance, to cause a *General Sewer System* to be established, which shall be divided into three classes of sewers, namely, *public, district* and *private* sewers. Public sewers shall be established *along the principal courses of drainage, at such times and to such extent,* and of such dimensions, and under such regulations, as may be provided by ordinance; and there (*sic.* these?) may be extensions or branches of sewers already constructed, or entirely new throughout, as each case may require. The Board of Common Council shall levy a tax on all property made taxable for State purposes, over the whole city, to pay the cost of constructing, reconstructing and repairing such works; which tax shall be called a 'Special Public Sewer Tax,' and shall be of such amount as shall be required for the sewers provided by ordinance to be built; and the fund arising from said tax shall be appropriated solely to the building, rebuilding and repairing of said sewers. District sewers," etc.—the act proceeding to define them, about as they are now defined in sections 8766, 9075, 9241, 9385, 9614, 9614, R. S. 1909, the last amended laws, 1917, p. 388, all in similar terms for our several classes of cities, all providing in the same section for a district tax or special assessment in payment.

Eight years later this provision found its way into an amended charter of Kansas City (Laws, 1867, p. 18), re-enacted in 1870 (Laws, p. 327, Art. X, Sec. 1).

In that year also, we find for the first time a seemingly slight difference between the language used of the large established system in St. Louis, and the newer one in Kansas City, the latter now being found in the provisions for other cities. This new St. Louis provision reads: "A sewer system *is hereby established,*" retrospectively, as distinguished from the former prospective language, "The Council shall have power to cause to be established." (Laws, 1870, p. 458, Art. VIII, Sec. 10, "An act to revise the Charter of the City of St. Louis,

and to extend the limits thereof.") This declared the public sewers to be those along the principal courses of drainage, thus it would seem giving a subsequent legislative declaration that the Poplar, Seventh, Ninth and Biddle street sewers fell properly within the definition of what was intended to be and was now declared to be a public sewer. The act gave the city power to issue bonds to pay for them, as public sewers.

This in a general way summarizes the history of this legislation down to the adoption of the Constitution of 1876. In 1877, Senator Phelan (a member of the Senate Committee to revise rules in accordance with the new constitution, and presumably rather familiar with its structure), introduced three bills carrying this provision into the charters of first, second and third class cities; in first class cities, a sewer system was "hereby established"; in the others the Council was granted power to establish. (Compare R. S. 1879, Secs. 4530, 4790 and 4897.)

The same distinction was made in R. S. 1899 between Sec. 5395, governing first class cities, and copied in the then charters of St. Louis, Kansas City and St. Joseph, and Secs. 5685, 5847, 5969 and 6282 (now 9074, 9240, 9384 and 9613, R. S. 1909), governing respectively cities of the second, third and fourth classes, and those under special charters. The reason for this persistent difference, looking on one system as established, and all others as merely authorized, the Legislature in 1909 had forgotten, or overlooked, which in nowise robs of any of its force the legislative construction given in 1870, as shown above. In that year (Sec. 232, Laws 1909, p. 138) the language as to first class cities again became prospective—Sec. 8765, R. S. 1909, conferring power to first class cities to establish sewer systems. Acting with the greater freedom perhaps contemplated by this language, the City of St. Louis in 1914 in its new charter, Art. XXII, Sec. 14, has attempted to define anew and differently what shall hereafter be a public sewer in that city—which raises questions which we shall notice below. Indeed, St. Louis had departed from the statutory definitions in 1901.

Before completing our historical sketch by discussing this departure, it is necessary to observe that a fourth class, "joint district sewer" was first created by the citizens of Kansas City, and not by the Legislature. Pursuant to the act of 1887, page 42, permitting cities of more than 100,000 inhabitants to frame their own charters, an elec-

tion was held in Kansas City in 1889, by which was adopted a new charter in lieu of that found in Laws 1875, page 196. By Article IX, Section 8 of this charter written by a board of freeholders and adopted by the citizens of Kansas City, the general sewer system was to be divided into four classes, to-wit: public, district, joint district and private sewers.

Section 11 of Article IX, of this charter, as amended February 27, 1892, provides: "Joint district sewers may be constructed by the city as follows: Whenever the city deems it necessary that a sewer should be constructed in any part of the city containing two or more sewer districts it may, by ordinance, unite such sewer districts into a joint sewer district and cause a sewer to be constructed therein in a like manner in all respects as is provided in Section 10 of this article in cases of district sewers, except in cases of joint district sewers the city may, if deemed proper, provide in the ordinance creating such joint district sewer, that the city shall pay a certain sum to be specified in said ordinance toward the payment of the cost of such joint district sewer, and should the Common Council by ordinance unite two or more sewer districts into a joint sewer district for the purpose of constructing a joint district sewer therein, the action of the Common Council shall be conclusive for all purposes, and no special tax bills shall be held invalid or be affected on account of the included drainage area thereof, or the size, character or purpose of such sewer; provided, however, that no sewer district shall be included in such joint district which is not contained *in the natural drainage area* of the valley or water-course in which the joint district sewer is proposed to be constructed. The contract for the construction of such sewer shall specify that the city shall be liable for the sum so specified to be paid by the city, and that the remainder of such cost thereof shall be paid in special tax bills, to be issued in any manner that is or may be provided for the issuing of tax bills for the construction of sewers."

As will be observed, the distinctions between a public and a joint district sewer, and between the latter and a district sewer, were somewhat hazy from an engineering standpoint.

This Kansas City special charter does not define public or district sewers—though using words which had a fixed legislative meaning in this state, so that the definitions of the statutes were obviously part and parcel of the terms, and would be implied.

In the second charter of Kansas City, adopted by the people in

1908, there is little change in these provisions, except that there is a further attempt to make the action of the city conclusive in respect to classification of sewers, and to deprive the courts of the State of Missouri of any power of review. Article VIII, Section 5, reads: "The general sewer system of the city shall be divided into four classes, to-wit: public, district, joint district and private sewers. The city may, by ordinance, find and determine the class to which any sewer belongs, and the finding and determination of the city in that respect shall be final and conclusive." Then Article VIII, Section 8, with respect to joint district sewers, is the same as the old charter quoted above, except for inserting the words "or reconstruct" in the first sentence providing that joint district sewers may be constructed or reconstructed by the city, etc.

The term "joint district sewers" was first defined in an amendment of the charter of St. Louis in 1901, Article VI, Section 20, but the definition there given, by the citizens of St. Louis, has not been accepted by the Legislature in the acts passed by it.

This fourth class of sewers has been recognized in legislation, by Laws 1907, page 99, with respect to third class cities—Section 9242 R. S. 1909; Laws 1909, page 304, with respect to fourth class cities—Section 9390 R. S.; Laws 1909, page 329, with respect to cities under special charters—Section 9628 R. S.; and Section 165, Laws 1913, page 420, a new article for second class cities. The language in all is substantially the same, no definition being attempted, but all following the language of the Kansas City charter of 1889. This new classification was made necessary by two things: (1) the difficulty of paying for public sewers out of general revenues, which include the so-called special public sewer tax, held unconstitutional in practice in *Union Trust Co. v. Pagenstcher,* 221 Mo. 121, it being included within the limitation on general revenues, and (2) the impracticability of borrowing money for that purpose under the restrictions of the constitution of 1876, in most cities.

Provisions for sewer bonds in some charters, such as Section 9593 R. S. 1909, in cities under special charters, and within general improvements authorized elsewhere, are of lesser practical importance, because sewers usually follow electric light, water works, city halls, judgments and streets in the development of a community, and the expense of a sewer system is so great that it will too nearly exhaust

any margin of borrowing power which an ordinary city may likely have remaining after laying out the preceding improvements.

So a temptation arises to call public sewers by other names, so as to get them built. Yet any impracticability of construction under the rather rigid scheme laid out by the statute, does not authorize a city to improve that scheme of the legislature, nor justify calling a public sewer something else so as to build it with the proceeds of tax bills issued against a district or joint district.

There is another difference, since the constitution of 1876, between the provisions applying to third and fourth class cities, and those for all the rest. In the past, municipal assemblies had been authorized to establish public sewers "at such times, to such extent," etc. That remains for the large cities; but for these two classes of smaller cities, the words "at such times," have been struck out. From this it may be matter of doubt whether the legislature intended that the public sewer system, in cities of the third and fourth classes, must be laid out, established, and built at once, exhausting further power perhaps in the assembly. This doubt, though more apparent than real, adds another temptation to call subsequently built public sewers by a more feasible name. The fact that by the statutes as to each class of cities, it is also provided that district boundaries cannot be changed after the construction of a district sewer therein, at least looks to the wisdom of laying out a comprehensive plan at the outset. This is a further temptation thereafter to employ a convenient name for the sake of getting results, and to call a new drain a joint district sewer because of practical difficulties concerning the building of a public sewer in a third or fourth class city, or the issue of new district sewer bills in any city—indeed, a temptation to resort to ingenuity and equivocation to extricate the city from a plight in which it finds itself because of a shortsightedness which failed to lay out a proper scheme at the start. However, in any particular case, the courts will be found inclining to uphold a reasonable latitude of discretion in city councils dealing with physical facts before them.

The last stage in the development of this system (although it amounts to a departure except in terms) is that adopted by the citizens of St. Louis under their special charters of 1901 and 1914. As has been indicated above, the distinction first made between the different classes of sewers, and the only distinction recognized by the Legislature has been an engineering one, *i. e.*, a description of the character

of the drainage area and the character of the sewer, and making the classification dependent upon its conformity to one or the other description. This was intelligible, definite and certain except in border line cases where there was difficulty in determining whether as a matter of fact the drainage area was "a principal course of drainage" or merely a lateral or tributary course. In 1901, due no doubt to the embarrassment noticed above, the citizens of St. Louis by their charter adopted on October 22nd of that year, attempted to abandon the engineering standards. Section 20 of Article VI of that charter provides that "a sewer system is hereby established, which shall be divided into four classes, viz.: public, district, joint district, and private sewers; the class in any case being determined by the authority of its construction, and the definitions hereinafter specified, *irrespective of the area drained, the size, character or purpose of the sewer.*" Public sewers were defined to be those "paid for wholly out of general revenue"; district sewers were defined to be those "constructed or acquired under authority of ordinances, within the limits of an established sewer district, and paid for by special tax assessed upon the property in the district"; and joint district sewers were defined to be those "constructed or acquired under the authority of ordinances uniting one or more districts or unorganized territory, for the purpose of providing main, outlet, or intercepting sewers, for the joint benefit of such districts or territory, and paid for by special taxes assessed upon all the property in such joint sewer district."

If there was any doubt that the citizens intended to make the former criterion (the engineering character) a mere incident, and the former incident (the method of payment) the criterion, this doubt was entirely removed by their charter of 1914, in which Article XXII, Section 14, provides: "There shall be four classes of sewers, public, district, joint district and private sewers, as hereinafter defined, but otherwise without regard to the area drained, the size, character or purpose of the sewer. Public sewers are those which have been or may be constructed or acquired and paid for wholly out of general revenue. District sewers are those which have been or may be constructed or acquired, under authority of ordinance, within the limits of an established sewer district, and paid for by special assessments upon the property in the district. Joint district sewers are those which have been or may be constructed or acquired under the authority of ordinances uniting one or more districts and unorganized territory,

or uniting districts or unorganized territory, into a joint sewer district, for the purpose of providing main, outlet, or intercepting sewers, for the benefit of such joint sewer district, and paid for by special assessment upon the property in such joint sewer district. Private sewers are those paid for by private parties constructing the same."

Thus it will be seen, that while there are some limitations, in terms, to the effect that district sewers shall be within the districts and joint district sewers shall be mains, outlets, or intercepting sewers within the joint district, the real test becomes the fiat of the municipal officers as to how they deem it "expedient" to have any particular sewer paid for. Whether this is such a roving commission, that it amounts to no definition whatever, will doubtless be threshed out in the Mill Creek sewer litigation—though it is clear that from the former engineering standpoint, which may have been unwittingly incorporated into the charter, at least in part, by its employment of terms having a fixed legislative meaning, the Mill Creek sewer has all the characteristics of what is known as a public sewer, and is certainly a main sewer to a greater degree than those originally recognized by the Legislature on Biddle, Seventh, Ninth and Poplar streets. It is not the purpose of this article to argue that case, but merely to notice that pending litigation in completing the historical development of the scheme.

This scheme, thus fully developed, was given a new application in 1917. All the legislation heretofore has been with reference to cities of different classes. But the new act (Laws 1917, p. 213), provides for the construction of sewers by counties, or jointly by action of the county and municipalities when the area affected is so extensive as to be within and without the limits of one or more cities. While it was passed for the special benefit of St. Louis County with its large number of small suburban municipalities, it can be so easily amended to apply to such counties as Jasper, that if found to be feasible, it will doubtless open up a new field of importance to several counties in the State. This act provides that the County Court or a commission acting for said Court or a commission acting for said Court and cities affected, may establish district sewer districts or joint sewer districts, construct sewers therein, condemn property and issue special tax bills in payment. It is quite an elaborate piece of legislation, consisting of twenty-three sections of considerable length, many of its details, however, being adopted from provisions which have already been tested and become familiar.

DECISIONS.

The distinctions between the several classes of sewers have come before the courts. In one case where counsel failed to bring to the Supreme Court's attention the history of the scheme, the court attempted definitions with the aid of a dictionary only, which were reframed to conform to the topographical facts before the Legislature, when these were properly presented. We refer to the definition, to which we shall return below, of a public sewer as draining the whole city, by analogy with a public road for all the people; overlooking the fact that the Legislature first used that term with respect to the Poplar, Seventh, Ninth and Biddle street sewers in St. Louis, which do not drain a whole city, but which merely follow, as the Legislature requires, the "natural course of drainage" in a topographical drainage area. Whereas, if "public sewer following the natural course of drainage" meant one in the water course draining the whole city, the Mississippi river alone would have fallen within the term—which the Legislature never intended; nor did the language used force this absurd construction.

As the pertinent decisions are not numerous, noticing a few of lesser importance will not lengthen this review as much as omission might weaken it. So we shall take them in their order.

In *Eyerman v. Blaksley*, 78 Mo., *l. c.* 151 (1883), the question was whether a district sewer could be built to connect only with another district sewer. The court say, "It might be questioned whether the assembly can authorize the construction of a district sewer of greater capacity than necessary to drain the district in which it is constructed, at the expense of the property-holders. They might object and *resist payment* of the extra cost of such a sewer, or by timely proceeding, *restrain* the municipal authorities from its construction; but having been completed with capacity to drain an adjacent district, the property-holders *in the latter* have no ground to object to the connection of their sewer with it."

In *Heman v. Payne*, 27 App., *l. c.* 486 (1887), Judge Rombauer considers the Eyerman case, *supra*, and says it means that "the charter provision which requires a district sewer to connect with a public sewer on some natural course of drainage . . . is satisfied if the district sewer connects with another district sewer already constructed, which, in its turn, connects with a public sewer—that is, that the connection need not be direct and immediate. . . . But can it be said

that the mandate of the charter is satisfied *if the intermediate connection consists of a private sewer?* Certain not." The court holds further that a private sewer cannot become a public sewer by user.

In *Heman v. Handlan,* 59 App., *l. c.* 492 (1895), Judge Rombauer, in holding void tax bills for the construction of the Vandeventer sewer, made the test topographical, and thus historically sound, *i. e.,* as to whether the area affected was such as to benefit the public at large, saying:

> "The proposition is certainly untenable, that a municipality can charge property within a certain district for the construction of a sewer therein without regard as to whether the primary object of such sewer is one to benefit the public at large, or to benefit a particular district. To concede such a power would render the provision in the charter, that 'the cost of public sewers shall be paid out of the general revenue,' wholly nugatory. That the power is vested in the courts to declare an ordinance unreasonable which seeks to charge on private property an improvement constructed in the main for the public benefit, has been decided in Corrigan v. Gage, 68 Mo. 541."

Hill v. Swingley, 159 Mo., *l. c.* 49, 50 (1900), turns on failure to prove a good allegation of the answer. The court say:

> "It is for the municipal assembly, acting in the manner prescribed by the charter, to say when and where sewers are to be constructed and the kind, whether public or district. But it *can not by ordinance or otherwise authorize the construction of a public sewer to be paid for by special assessments, nor can it authorize a district sewer to be paid for out of the city treasury.* And the difference between a public and a district sewer is not a mere difference in name, but *is a physical fact,* so that the municipal assembly can not by ordinance *or otherwise* authorize the construction of what is in fact a public sewer and by merely denominating it a district sewer tax the cost of its construction on the lots in a district named. *Such an act would be a fraud,* and the special tax bill issued in pursuance of it invalid. The defendant set up that defense by his answer in this case and complains that the trial court cut him off in his proof of the fact. The proof which defendant offered on this point tended only to show the dimensions of the sewer and materials of which it was constructed and then to compare it in those particulars with other

sewers in the city constructed in the past forty years and thus show that it was larger than some of the so-called public sewers. But the dimensions of a sewer and the materials entering into its construction do not alone distinguish its character as public or district, and as defendant's offer of proof went no further than that, the court did not err in excluding it."

Prior v. Construction Co., 170 Mo. 439 (1902), arises under the St. Louis Charter of 1901, which as shown by the history above, provided, Sec. 20, Art. 6, that the class of a sewer should be "determined by the authority of its construction, irrespective of the area drained, the size, character, *or the purpose of the sewer.*" While the court says that assessments either by the front foot or area rule are no longer open to question, they did not have presented to them the question whether the charter provisions abandoned all topographical rules and substituted therefor the mere caprice of the assembly. The improvement is discussed by the court from an engineering standpoint. Then the court points out at page 449, "The evidence in this case is not sufficient to show whether a sewer on Arsenal street from Illinois street to Ninth street, would or would not have been a public sewer under the old charter; that is, it is not sufficient to show whether such a sewer constructed between such termini would be along one of the principal courses of drainage or not." It is held to be a joint district sewer under the charter, but the assessment is upheld on the theory of special benefit, *l. c.* 451: "There can be no two minds upon the question of a direct special benefit being conferred upon plaintiff's lots by the construction of the joint district sewer, under the evidence in this case." This utterance, of course, is from the old standpoint of topography and the case is not authority as to whether topography may be ignored under the charter's loose language. If special benefits exist, that which would have been a public may now be a joint district sewer in St. Louis, it would seem.

South Highland Land & Imp. Co. v. Kansas City, 172 Mo. 523 (1902), is the case we criticised above as reaching absurd conclusions with the aid of a dictionary, in the absence of knowledge of any other intendment by the Legislature. The court shows this criticism to be just, by its own cautious statement, *l. c.* 534, as follows:

"The terms 'public,' 'district' and 'joint district' applied to sewers are used in the charter of Kansas City without definition, and are

therefore to be construed in their natural or common meaning, *there being no suggestion that there is any different technical meaning.*

"The learned counsel for appellant in their brief say: 'As the charter does not define what is a public sewer, the court must do so'."

The court then proceeds to discuss public roads, by analogy, arriving at the conclusion that a public sewer (*l. c.* 534) "is a sewer open and available to the whole city and not limited to any particular part."

In this connection, it may be permissible to recall a most trenchant analysis, by Mr. Justice Holmes, of how courts may err because of failure of counsel, in just such a case, to present matters properly for consideration. He says for the Supreme Court of the United States:

"There are many things that courts would notice if brought before them, that beforehand they do not know. It rests with counsel to take the proper steps; and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account. Laws frequently are enforced which the court recognizes are possibly or probably invalid." *Quong Wing v. Kirkendall,* 223 U. S. 59; 56 Law Ed. *l. c.* 352.

In this Kansas City case, *l. c.* 531, 532, the court, however, observe, "The duty of the city in respect of its sewers is not performed until it has given them an outlet." And again, *l. c.* 533: *"If it is in fact a public sewer, the Common Council could not, by merely giving it a name, change the fact."* Again, the engineering standard.

But more important, on the point that the terms *public* and *district* sewer had a fixed legislative meaning, the court say, *l. c.* 533: "When lawmakers use a word, they have a right to say, in the same act, what they mean by it, and in construing the act that definition is to be taken as the correct meaning as there used, although it may be a purely arbitrary definition."

So we have been attempting in this article to show, by presenting the surrounding facts and the history of the legislation, what the Legislature did mean, and the matters to which the terms used were applicable. Counsel having failed to present those matters, it was not surprising that the court reached strange conclusions in this South Highland case considered only under the Kansas City charter.

In *Barton v. Kansas City*, 110 App. 31 (1904), after reviewing the testimony at length, the court hold void and cancel certain district sewer tax bills, saying:

"The sewer here involved, as it has been constructed, is not the sanitary sewer known to the charter and the sewer system of Kansas City, nor is it the combined sewer for sanitary and drainage purposes, known to that system. If anything, it was a drainage sewer only; and, indeed, it is undisputed, that it was not intended for house connection or use. As constructed it was, therefore, not the sewer authorized by the ordinance and there is no base upon which the tax bills can stand, and we adopt the conclusion of the trial court that they are void."

The statement of facts is too long to set forth here. The sewer under consideration was not one for ordinary sanitary purposes, but rather a tunnel or outlet for general drainage. An important feature of the case is that it determines the question of validity with reference to the uses of the sewer as of the date of construction, expressly refusing to consider subsequent, or speculative uses, saying *l. c.* 39, 40: "It appears that while the acts of the park board referred to were taken after the construction of the sewer, yet such acts were before the tax bills were issued." (The reference is to subsequent drainage connections.) "That, of course, is of no consequence. When the contractor finished the work, and the only work provided for by the ordinance and contract, he was, or was not, entitled to the tax bills. His right was then made up, not to be added to or subtracted from, by subsequent matters over which he had no control." (This case also discusses *St. Joseph v. Owen*, 110 Mo. 445, which we have omitted as not important.)

State ex rel. Joplin v. Wilder, 217 Mo. 261, returns, perhaps unconsciously, to first principles in defining public sewers. Judges Valliant and Burgess follow the case of South Highland Land Company v. Kansas City, 172 Mo., *supra*, that it must be one available to the whole city; but Judges Fox, Lamm, Graves, Woodson and Gantt dissent, and in a separate opinion by Judge Woodson hold certain sewers in Joplin, described in the opinion, to be public sewers; and also describe certain public sewers in St. Joseph by way of illustration, concluding that it would be "against all reason and common sense to say the City of St. Louis has no power to construct a public sewer in South St. Louis because it would be a physical impossibility for it to

drain the entire city, including North St. Louis, which is perhaps twenty miles away." And at the first part of Judge Woodson's opinion he instances a city "built upon sites, which from the contour and physical conditions of the earth's surface, have different water sheds draining the waters from one portion of the city in one direction to the natural course of drainage, and another which drains the waters of another portion in another and different direction, yet to the same course of drainage."

The description of the sewers in Joplin and St. Joseph which the majority of the court holds to be public sewers, accords exactly with what the legislature had in mind in first using the term with respect to Poplar, Seventh, Ninth and Biddle street sewers in St. Louis with its then narrow riparian area; and the majority opinion, therefore, returns to the first definitions.

Southworth v. Mayor of Glasgow, 232 Mo. 108, is the last case in the Supreme Court, all the judges in banc concurring, except Burgess, absent. The court follow *State ex rel. v. Wilder, supra,* and expressly refuse to follow the South Highland case. The sewer under consideration in that case is not sufficiently described to serve for comparison, except that it was one which would not be available to a whole city.

Schwabe v. Moore, 172 S. W. 1157, 187 Mo. App. 74, is the last case on the subject in the Courts of Appeals, following *State ex rel. v. Wilder, supra,* holding that a sewer constructed by Hamilton-Brown Shoe Co., in Columbia, at a cost of $3,300.00, and three thousand five hundred and forty feet in length, and constructed as a private sewer with all necessary manholes, lampholes, flush tank, and other appurtenances, beginning and emptying into the manholes in the main trunk sewer at a certain street without connections with private property, constituted a public sewer which the city could buy as such.

The result of this historical inquiry is that we can construe the statutes with some confidence. The term *public sewer* has been defined for years as one following a natural course of drainage, and is still generally so defined. So the creation of the new class of joint district sewer did not invade the field of public sewers, when so created. The earlier district sewer districts remain rigid and unalterable. A joint district sewer, therefore, is one—not a public sewer—draining two or more sewer districts, but not following a natural course of drainage, unless it confer special benefits therein apart from the general benefit

to the city. The language of the present St. Louis charter, obviously was intended to depart from these classifications. Yet the use of the phrase "as hereinafter defined" coupled with the later recognition of some topographical standards, may perhaps be held to assimilate the old definition in part at least. And no matter what the language, the old constitutional test will run through it all, that a special tax can only be assessed upon the theory of special benefits, with some latitude in the local assembly while they act reasonably and in good faith, *Heman v. Allen,* 156 Mo. 544; *Heman v. Schulte,* 166 Mo. 409. A public sewer therefore remains, throughout the state, one of such character and location in a natural course of drainage as to be necessary to the community at large; this raises questions of relativity, so that doubtless what was a public sewer along Biddle street in 1853 in a small riparian settlement might be so unimportant to the present metropolis and the drainage area might be now so small that it could not be said to lie today in a "principal course" of drainage; a district sewer is one peculiarly benefiting and draining a limited and probably a topographically unique area within the city limits; and a joint district sewer is neither of these, but a hybrid partaking more of the character of the latter, draining several tributary districts. And in each case the lines of demarkation may be sufficiently hazy, in applying the tests to the area, to make a fruitful field for litigation.

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