

NATIONAL FOUNDRY & PIPE WORKS, Limited, v. OCONTO WATER Co.  
*et al.*

(Circuit Court, E. D. Wisconsin. October 10, 1892.)

1. MUNICIPAL CORPORATIONS—CONTRACTS—FRANCHISES.

The charter of the city of Oconto conferred the powers belonging to municipal corporations at common law, and contained the "general welfare" clause usual in city charters, (Laws Wis. 1882, c. 56.) The general law conferring on cities the power to legislate upon the construction and operation of waterworks had not been adopted by the city, so as to derive any powers therefrom. *Held*, that the city had no power to confer a franchise for owning and operating waterworks, and for other things collateral thereto.

2. CORPORATIONS—BONDS—VALIDITY—WHEN "ISSUED."

A water company put forth bonds of the par value of \$125,000, depositing \$25,000 of them with a trust company under a deed of trust, and the other \$100,000 in trust as collateral for an advance of \$40,000. Thereafter advances of \$27,000 were contracted for, and in part made. *Held*, that the bonds, although pledged and not sold, were "issued," within the meaning of Rev. St. Wis. § 1753, which declares void any bonds issued by a corporation, except for money actually received, equal to 75 per cent. of their par value; and the same were not enforceable in the hands of the pledgee.

In Equity. Bill by the National Foundry & Pipe Works, Limited, against the Oconto Water Company, S. D. Andrews, W. H. Whitcomb, and others. On motion for receiver and injunction. Granted.

*W. D. Van Dyke* and *Geo. H. Noyes*, for complainant.

*W. H. Webster*, for defendants.

JENKINS, District Judge. The conceded facts upon which the present application for a receiver and for an injunction are based, so far as now necessary to state them, are these: The complainant on the 2d day of January, 1892, recovered judgment in this court in an action at law against the Oconto Water Company for \$24,250.04 damages and costs, and, upon return of execution *nulla bona*, filed this bill against the judgment debtor and others to subject its property to the payment of the judgment. The Oconto Water Company was incorporated under the Revised Statutes of Wisconsin, on the 8th day of July, 1890, for the purpose of constructing and operating a system of waterworks within the city of Oconto, and of supplying the city and its inhabitants water for protection against fires, and for domestic, manufacturing, and other purposes. On the 9th day of July, 1890, the city of Oconto adopted an ordinance whereby it was ordained "that the Oconto Water Company, its successors and assigns, be and are hereby authorized, subject to the limitations herein or by law provided, to construct, own, maintain, and operate waterworks in the city of Oconto; to lay pipes for the carrying and distributing of water in any of the streets, avenues, alleys, lanes, bridges, or public grounds of the city, as now or may hereafter be laid out; to acquire and hold, as by law authorized, any and all real estate, easement, and water rights necessary to that end and purpose, with all necessary and proper buildings, wells, conduits, or other means of obtaining water supply, with all necessary machinery and attachments thereto, to supply the city and the inhabitants thereof with good and

wholesome water, suitable for fire and domestic purposes; and for this purpose may enter upon any street, avenue, alley, lane, stream, bridge, or public ground under control of the city, to take up any pavement or sidewalk thereon, and make such excavations as may be necessary for the laying of such pipe and attachments." The ordinance further purports to grant continuance of the rights and privileges for a period of 30 years, and contracts for the use of hydrants and a supply of water for a like period at a specified annual rental. The city further undertakes, upon request of the water company, to adopt and maintain an ordinance protecting the company "in the safe and unmolested enjoyment of the franchise hereby granted, from waste of water by consumers," and "to carry into effect the provisions of this ordinance, and the contract thereunder entered into," and grants to the water company, "its successors and assigns,"—so runs the ordinance,—“the power to make, adopt, and enforce regulations not inconsistent with the law, for the convenience and security of said grantee, its successors or assigns, as well as that of the public, in the operation of said mains, and may enforce such regulations by cutting off the supply of water, or otherwise, and shall have the right at all seasonable hours of the day to have access to the water pipes and meters of any water takers, to protect themselves against abuse or fraud, and repair, observe, or remove the same, and may require all water takers to sign a contract to observe all reasonable regulations, as a consideration for furnishing water." The ordinance undertakes also to regulate the maximum charges to consumers, "collectible quarterly in advance, except sprinkling rates, which shall be paid in advance for the season," and provides that the company shall have the right, at will, to supply consumers at the meter rate instead of at the schedule rates, and that connections between the mains and the consumer shall be made at the expense of the consumer.

The debt of the complainant, for which it recovered its judgment, was for iron pipes furnished, to be used, and which were used, in the construction of the waterworks plant, under a contract therefor dated August 28, 1890. The pipe was delivered during the months of September, October, and November of that year, and laid in the streets of the city. On the 13th day of September the defendants Andrews & Whitcomb entered into an agreement with the water company, by which Andrews & Whitcomb agreed to loan to the company a sum not exceeding \$40,000, upon interest, to be furnished between that date and January 1, 1891. The Oconto Water Company, in consideration of the premises, agreed to make immediate transfer in trust to Andrews & Whitcomb "of the Oconto waterworks franchise as issued to said Oconto Water Company," together with the entire issue of stock of the company, amounting to \$100,000, and further agreed to issue immediately \$100,000 in the first mortgage bonds of the company, to be secured on the entire Oconto waterworks franchise, and all the rights and privileges of said company; the deed of trust to be made to some trust company thereafter to be agreed upon by the parties. The stock and bonds were to be delivered to Andrews & Whitcomb as collateral security for the money to

be advanced, and upon payment of the loan, with 7 per cent. interest, and the further sum of \$5,000, were to be returned to the company. Afterwards, and about October 1, 1890, in fulfillment of that agreement, an assignment of what is denominated in the answer "the rights and franchises acquired by said company under and in virtue of said city ordinance No. 153 of said city of Oconto" was executed by the water company, and delivered to Andrews & Whitcomb. This document was antedated to September 13, 1890, and by its terms sells, assigns, transfers, and sets over to Andrews & Whitcomb "all the rights, privileges, immunities, franchises, and powers, of whatsoever name and nature, which were granted unto the said Oconto Water Company in and by that certain ordinance passed by the common council of said city of Oconto, and approved by the mayor of said city on the 9th day of July, 1890, said ordinance being entitled 'An ordinance providing for a supply of water to the city of Oconto, Wis., and its inhabitants, and authorizing the Oconto Water Company, its successors and assigns, to construct, operate, and maintain waterworks therein.'" This contract was as security for the repayment of the loan contemplated by the agreement of September 13, 1890. Certificates for the entire issue of the stock of the company were delivered to Andrews & Whitcomb, except as to three shares made out by their direction in the names of others. The entire issue of stock was held by them as collateral security, as provided in the agreement of September 13, 1890.

At a meeting of the directors held October 29, 1890, action was had, authorizing the issue of first mortgage gold bonds of the company, to the amount of \$125,000, in sums of \$1,000 each, numbered consecutively from 1 to 125, both inclusive, payable in 25 years, with interest coupons attached; 100 of such bonds to be negotiated and sold, to provide funds for the completion of the system; the remaining bonds to be negotiated and sold, to provide funds for the extension of the system as may thereafter be deemed advisable; such bonds to be secured by trust deed to the Minneapolis Trust Company upon the franchises and rights of the company. The action of this meeting of the board of directors was confirmed at a meeting of the stockholders held subsequently on the same day. The bonds and the trust deed were prepared and executed, and bore date November 1, 1890. The trust deed was recorded in Oconto county, November 13, 1890, in volume 52 of Deeds, p. 394. On the 18th day of November, 1890, the officers of the company delivered to Andrews & Whitcomb 100 of such bonds as security, in accordance with the agreement of September 13, 1890; the other 25 bonds being lodged with the trust company. The sum of \$40,000 mentioned in the agreement of September 13, 1890, was actually loaned to the company by Andrews & Whitcomb on or prior to December 23, 1890, the last sum of \$5,000 being advanced on that day, and they received the notes of the company for the total loan pursuant to the terms of the agreement. On March 13, 1891, the company contracted with Andrews & Whitcomb for a further loan of an amount not to exceed \$12,000, to complete the work; they to hold the security then held by them as col-

lateral to the loan under the agreement of September 13, 1890, as further security for all additional loans theretofore made by them, amounting to \$4,439.79, and for the loan of \$12,000 so contracted to be made. This latter sum was advanced to the company on the 13th day of March, and was used in the purchase of material for the plant and for carrying on the work of construction. It was thereafter ascertained that further funds were essential, and on the 16th day of May, 1891, the parties contracted for another loan by Andrews & Whitcomb, not to exceed \$15,000, upon like terms to those of the contract of March 13, 1891; under which agreement Andrews & Whitcomb advanced \$8,763.33, which was used in completion of the plant.

On the 17th day of June, 1891, the loans remaining unpaid, Andrews & Whitcomb instituted suit against the Oconto Water Company in the circuit court of Oconto county, and on the 13th day of August, 1891, upon default of appearance to the suit, a decree was rendered that they recover of the Oconto Water Company the sum of \$63,887.23, the amount of the loans, with interest, and the costs of the action, which amount was declared to be a lien upon "all the rights, privileges, immunities, franchises, and powers, of whatsoever name or nature, which were granted the said defendant in and by a certain ordinance passed by the common council of the city of Oconto, Wis., and approved by the mayor of said city, July 9, 1890, said ordinance being ordinance No. 153 of said city, and being entitled 'An ordinance providing for a supply of water to the city of Oconto and its inhabitants, and authorizing the Oconto Water Company, its successors and assigns, to construct, operate, and maintain waterworks therein,' and upon \$100,000 in the capital stock of the defendant, now held in pledge by the plaintiffs, and upon \$100,000 in the first mortgage bonds of the said defendant, now also held in pledge by the plaintiffs." The decree provided for a sale of the property upon which a lien was declared, which was had, Andrews & Whitcomb becoming the purchasers. The sale was confirmed by the court on the 29th September, 1891, and an instrument was executed by the referee, conveying to Andrews & Whitcomb the property mentioned, and in the language of the decree, under which they took actual possession of the waterworks system, and have since retained possession, claiming to own the same, upon the ground that by the sale they acquired title to the franchises of the Oconto Water Company, and that the title to all tangible property essential to the use and enjoyment of the franchise passed to them therewith.

At the threshold of the inquiry, the court is confronted with the question as to what rights Andrews & Whitcomb acquired under the agreement of September 13, 1890, the instruments executed pursuant thereto, and the foreclosure of the rights thereby acquired. The grant to them was of "all the rights, privileges, immunities, and powers, of whatever name or nature, which were granted unto the said Oconto Water Company" by the ordinance of the city of Oconto. What rights could the city lawfully grant, and what were granted? The solution of the questions depends upon the powers conferred upon that municipality. The

city by its charter is vested "with the general powers possessed by municipal corporations at common law," and with certain governmental powers specifically defined in its charter, and with authority to enact and enforce ordinances under the "general welfare" clause usual in charters of municipal corporations, and specific power is vested touching various matters of municipal concern. Laws Wis. 1882, c. 56. The general power is conferred upon cities to borrow money, and to issue negotiable bonds for the purchase or erection of waterworks. Rev. St. § 942. By chapter 125, Laws 1879, (Sanb. & B. St. § 930a,) the common council of every city is authorized to permit, subject to such rules and regulations as may be imposed, the laying of pipes in the streets of the city, and their maintenance and use for the purpose of conveying water or steam under the surface of the streets. By the general statute entitled "Of Cities,"—Laws 1889, c. 326, (Sanb. & B. St. c. 40a,)—cities are authorized to own and operate waterworks, and to legislate on all matters with reference to their construction, operation, management, and protection,—section 925*n*. In the chapter entitled "Organization of Corporations," (Rev. St. Wis. c. 86,) under which the Oconto Water Company confessedly had being, it is enacted that "any corporation formed for the purpose of constructing and operating waterworks in any city or village of this state may make and enter into any contract with such city or village to supply such city or village with water for fire and other purposes upon such terms and conditions as may be agreed upon, and may, by the consent of, and in the manner agreed upon with, the proper authorities of such city or village, use any street, alley, lane, park, or public grounds for laying water pipes therein; \* \* \* and any such city or village may, by contract duly executed by the proper authorities, acquire the right to use the water supplied by such corporation, or such portion thereof as it may desire, upon such terms and conditions as may be agreed upon by such corporation and the authorities of such city or village." Section 1780, as amended. These are all the statutory provisions which I have been able to find, touching the question of municipal authority and corporate franchise here presented.

It may be difficult to enumerate the common-law powers of a municipal corporation. It is certain, however, that the conferring of franchises upon other corporations is not one of them. Under its charter, by a well-known principle of law, it can exercise no power not expressly granted, or fairly to be implied. It may be that, by virtue of its duty to care for the public health and safety, a city has the power to contract for a supply of water; but it cannot, without express legislative authority, construct, maintain, or operate waterworks. Dill. Mun. Corp. (4th Ed.) § 27. Without like authority it cannot grant exclusive right to use the streets, and a distributing plant located in the streets is essentially a monopoly. The right to use the public highways for gas pipes or water mains rests in legislative authority directly granted or delegated to municipalities. So, likewise, the right to operate waterworks is of legislative origin, and can only be conferred by a municipal corporation

when expressly authorized by the supreme legislative power of the state. It cannot be doubted that the common council of the city of Oconto, in the enactment of the ordinance in question, entertained a broad and generous view of its own powers. It was pleased to confer, or attempt to confer, upon this water company, the power to "construct, own, maintain, and operate waterworks in the city of Oconto, \* \* \* to acquire and hold, as by law authorized, all real estate, easements, and water rights necessary to that end and purpose, with all necessary and proper buildings, with conduits or other means of obtaining water supply, with all machinery and attachments thereto," in addition to the right to use the streets and public grounds of the city for its water mains and pipes, and undertook to regulate contracts and dealings between the water company and the inhabitants of the city, using water, and to bestow upon the company the right of access to the homes of consumers of water, and to regulate its exercise. If the right to confer these great privileges and franchises, and to exercise inquisitorial powers, can be pointed out, the ordinance is effective to the end designed. No ordinance, however, can enlarge, vary, or diminish the powers of a municipality.

Whence came that power? I find no legislative warrant for it. The charter of the city does not confer it. No general law applicable to the city of Oconto grants it. The chapter entitled "Of Cities" (Sanb. & B. St. c. 40a) was enacted in 1889, (Laws 1889, c. 326.) It provides that no city then incorporated shall be affected by the provisions of the act, unless it shall adopt the same for its government in the manner provided. (Sanb. & B. St. § 925d.) The present charter of the city of Oconto was enacted in 1882. (Laws 1882, c. 56.) There is no suggestion in the record that the city of Oconto has ever adopted the provisions of the general law, and we are not at liberty to assume that it has. Failing such adoption, the city is not affected by, and derives no powers from, that general law, assuming that the chapter has relation to waterworks owned and operated by a corporation other than the municipality, which may be doubtful. The city is therefore only authorized to permit the laying of pipes in the streets, and their maintenance and use. (Section 930a.) That is not a grant of power to bestow a franchise, but permission to suffer an easement. The law of its incorporation confers upon the Oconto Water Company its franchise (1) to own and operate the waterworks; and (2) to use the streets of the city. Sanb. & B. St. § 1780. The former power is without condition; the latter is subject to the assent of the municipality. The practical efficacy of the franchise may depend upon the discretionary act of the city. The franchise is not, however, derived from that discretion, but from the will of the legislature. The law authorizes the city to assent to the exercise of a power granted by the statute. The grant of power to the water company—as to the use of the streets—becomes operative only upon the happening of that contingency of municipal assent. That is not a grant of power to a city to confer a franchise. *Sims v. Railway Co.*, 37 Ohio St. 556. The matter is somewhat analogous to the case