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. 40*a*) 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. § 925*d*.) 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 930*a*.) 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

of an act of the legislature taking effect only upon the assent of the people expressed at the polls, which is now generally held to be valid, upon the ground that the law derives its potency from legislative will, and not from the assent of the poll. So, here, the right to use the streets was conferred upon the Oconto Water Company by the law of its incorporation, subject to the contingency of the assent of the city. The franchise emanates from the legislature, not from the municipality. The ordinance is not an exercise of legislative power, but of the right to contract. *Indianapolis* v. *Gaslight Co.*, 66 Ind. 396.

The case of *State* v. *Madison St. Ry. Co.*, 72 Wis. 612, 40 N. W. Rep. 487, is not in conflict. The ruling there was to the effect only that, considering the terms of Rev. St. Wis. § 1862, the provisions of the ordinance there under review, by force of the statute, became part of the law of the incorporation of the railway company, and for violation of such provision an action could be maintained by the attorney general to vacate the charter or annul the existence of the railway company, under the provisions of Rev. St. Wis. § 3241. Applying the doctrine of that case to the one in hand, the most that can be said is that the conditions of the assent of the city to the use of its streets inhere in and are part of the law of incorporation of the defendant water company. None the less, however, are its franchises derived from the legislature, and not from the municipality. It is also to be noticed that there is a marked difference in the statute under consideration in that case and those in question here. Section 1862, there considered, provides that "any municipal corporation * * * may grant to any such corporation"—a street railway corpotion—"such use, and upon such terms as the proper authorities shall determine, of any streets or bridges. * * * Every such road shall be subject to such reasonable rules and regulations * * * as the proper municipal authorities may by ordinance from time to time determine." There the legislation does not directly grant to the railway corporation any power to use the streets, but delegates to the municipality the right to grant the power. Here the power is in terms conferred by the legislature upon the water company, subject to the assent of the municipality. There the street railway is subject to constant municipal control. Here the water company is independent of municipal direction except in the use of its streets. It is, I think, clear that the power possessed by the city of Oconto was only to yield its assent to a legislative grant of the use of its streets, and to contract for a supply of water. The franchises of the water company were conferred by the legislature of the state, and not by the ordinance of the city.

The question then recurs, what rights passed to Andrews & Whitcomb under the instruments of transfer and their foreclosure? By their terms they convey or assign only such rights and privileges as were granted to the water company by the ordinance of the city. No other franchise or rights are attempted to be conveyed. If the right to the use of the streets may be said to have proceeded from the municipality, it was, standing alone, a mere easement. The transfer of such naked right could not carry with it the ownership of the mains, nor the title to the plant as an

entirety, nor the franchise to operate the plant, nor to the land upon which the plant was situated. So that if it be true, as is here claimed, that a naked franchise is transmissible; that the franchise is the main and the plant the incident; and that a transfer of the former carries with it the title to the tangible property essential to its use and beneficial enjoyment,—it still remains that here there was no transfer of the franchise to operate the plant, and consequently no transfer of tangible property. It therefore results that the claim of Andrews & Whitcomb to the plant is unfounded in law, and its possession by them wrongful as against the complainant.

2. The water company, in fulfillment of its agreement, issued to Andrews & Whitcomb $100,000 of its bonds as collateral to loans made and to be made, to the amount of $40,000. These bonds had not previously been issued. The law of Wisconsin provides (Rev. St. Wis. § 1753) that "no corporation shall issue * * * any bonds * * * except for money * * * actually received by it, equal to seventy-five per cent. of the par value thereof, and all * * * bonds issued contrary to the provisions of this section * * * shall be void." These bonds were issued in defiance of the statute. That they were pledged, not sold, cannot avail to give them validity in the hands of the pledgee. The term "issue" is here used in the sense of "deliver" or "put forth." They were delivered and put forth, by the act of pledging, as binding obligations of the company. If the pledge were valid,—if bonds not issued may be used as collateral for a debt less than 75 per cent. of their par value,—the pledgee could, upon default of the company in payment of the loan, lawfully dispose of them for any price obtainable, and they would become, in the hands of a *bona fide* holder for value, lawful obligations of the company for the full amount expressed, thus defeating the statute, which forbids their issue at less than 75 per cent. of their par value. The statute is its own interpreter. These bonds are void. They are of no binding force for any purpose in the hands of Andrews & Whitcomb. Whether a *bona fide* purchaser for value from Andrews & Whitcomb could assert the bonds against the company need not be considered. It is the province of a court of equity to prevent such a contingency.

The motion for a receiver and injunction is allowed; the injunction to provide for the deposit of the bonds with the clerk of this court for safe keeping pending this suit, or until further order of the court.

## BRUSH SWAN ELECTRIC LIGHT CO. OF NEW ENGLAND *v.* BRUSH ELECTRIC CO.

(*Circuit Court of Appeals, Second Circuit.* Oct. 4, 1892.)

1. CONTRACT—MODIFICATION—EVIDENCE.
   Defendant corporation, engaged in manufacturing certain patented machines, constituted plaintiff corporation its exclusive "agent" for a certain territory, the latter to receive a specified commission, and to pay for each machine ordered by it in 75 days. Thereafter plaintiff became insolvent, and, being in default for payments, an interview was had between the presidents of the two companies, which resulted, as claimed by plaintiff, in an oral agreement that it should not be required to pay until it had received payment from its customers. Plaintiff's bookkeeper testified that this was the agreement as reported to him by the two presidents at the time. Defendant claimed that the agreement was only for a modification of the regular terms in special cases, each to be determined as it arose; and it appeared that defendant continued, by letter, to urge payment according to the original contract. Afterwards another meeting was had between the presidents, and in a letter from defendant to plaintiff the result was stated in substance to be that when any variation from the old contract was necessary in order to make a sale the terms thereof should be reported to defendant with the order, and defendant would then promptly determine whether it would accept the same. The letter also urged payment of existing debts. To this plaintiff replied that the matter as thus expressed was "quite satisfactory." *Held*, that there was never any modification of the contract, except as last stated.
2. SAME—SPECIFIC PERFORMANCE.
   The original contract provided that if at any time plaintiff's pecuniary responsibility became impaired so as to render it unsafe for defendant to transact its business through plaintiff, defendant might abrogate the contract, the question of financial responsibility being first determined by arbitration. Afterwards plaintiff became insolvent, and, being largely in arrears to defendant, the latter refused to fill further orders unless security was given in each case. The demand for security not being complied with, defendant requested an arbitration, but no answer was made thereto, and later it declared the contract abrogated, and refused to fill further orders. *Held*, that as plaintiff had itself violated the modified contract in the matter of payments, and was apparently unable to comply therewith in the future, it was not entitled to specific performance of defendant's agreement to furnish machines.
3. Same—ARBITRATION.
   Plaintiff not being in a position to demand specific performance, it was immaterial, in a suit therefor, that defendant had based its request for an arbitration on the ground that plaintiff had refused to furnish security, whereas the contract did not require any security.

In Equity. Bill by the Brush Swan Electric Light Company of New England against the Brush Electric Company for specific performance of a contract. This relief was denied by the circuit court on the ground that the contracts were of such a nature as to render specific performance impracticable, but the bill was retained for the purposes of injunction and an accounting, which were accordingly decreed. 41 Fed. Rep. 163. A rehearing was subsequently denied. 43 Fed. Rep. 225. Afterwards leave was given to file a cross bill, (Id. 701,) and, a hearing having been had thereon, it was held that the same could not be maintained, and that the original decree should not be disturbed. 49 Fed. Rep. 8. Defendant appealed. Reversed.

*Albert Stickney* and *Gilbert H. Crawford*, for appellant.

*James C. Carter* and *Wm. G. Wilson*, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from a final decree rendered by the circuit court for the southern district of New York, which