vapor was conveyed in pipes laid through the streets. It was held that the pipes, being essential to the enterprise, with the license of easement under which they were laid, would pass under a sale of the property as an entirety. A lien was allowed upon the lot and plant for material and labor furnished in respect of the pipes. In *Badger Lumber Co.* v. *Marion Water Supply, etc., Co.*, 29 Pac. Rep. 476; on rehearing, 30 Pac. Rep. 117,—the supreme court of Kansas adjudged a mechanic's lien upon an electric power plant, and the premises upon which the plant was situated, for poles placed in the public streets, and upon which were stretched the wires connected with the electric light machinery. In *Brooks* v. *Railway Co.*, 101 U. S. 443, a lien for materials and labor upon one section of a railway was extended over the entire road. This is an instructive case. The company was organized to build a railroad from Burlington, Iowa, to some point on the Missouri river. From Burlington to Viele the company used the track of another company; from Viele to Bloomfield the company built and paid for its own track; from Bloomfield to Moulton the company used the track of another company; and from Moulton, Iowa, to Unionville, Mo., it built its own road. The materials and labor for which a lien was claimed were furnished and done upon this latter piece of road. It was urged in resistance of the claim that the road was built in sections, and that there was such a separation in space and time that they could not be considered as one improvement. The lien was, however, declared upon the road, right of way, stations, etc., of the company, from Viele junction to the south state line of Iowa; the court asserting that "the intersection of fourteen miles of another road between Bloomfield and Moulton does not destroy the identity of the improvement, nor convert it into two railroads."

The supreme court of Wisconsin, in considering the statute in question, has adopted a like liberal construction of the law, with a view to securing the benefit of a lien to those whose rights were sought to be protected. The statute accords a lien to one who furnishes labor or materials in or about the construction of the building or machinery, "constructed so as to become part of the freehold upon which it is to be situated." Notwithstanding this language, that court, in *Spruhen* v. *Stout*, 52 Wis. 517, 524, 9 N. W. Rep. 277, allowed a lien for a draft tube, procured and designed to be attached or permanently annexed to the mill, but which, in fact, had not been attached. The effect of this decision is that, if the principal structure be a part of the freehold, there exists a lien thereon for parts furnished with the intent to be affixed, but not in fact attached. With greater reason should a lien be allowed upon the principal structure for piping attached and constituting an essential and indispensable part of the plant. The case of *Eufaula Water Co.* v. *Addyston Pipe & Steel Co.*, 89 Ala. 552, 8 South. Rep. 25, stands opposed to the cases cited, and to the holding here. It is only necessary to observe, with respect to that case, that, as I think, it gives but narrow interpretation to the statute, and evidences adherence to the strictest letter of the

law, in despite of its manifest purpose. The decision is in sharp contrast with the holding in *Brooks* v. *Railway Co.*, and the liberal construction adopted by the supreme court of Wisconsin.

I am persuaded to the conclusion that the fact that the piping is laid within the streets presents no objection to charging its cost as a lien upon the plant and the parcel of ground upon which the pumping works and well are situated.

4. It is further insisted that the lien statute has reference only to property that may be sold on execution, and that the plant here, being such only as is essential to the use and enjoyment of the franchise, cannot be taken in execution, and is therefore exempted from the operation of the law. In support of this contention the court is referred to the following authorities: *Foster* v. *Fowler*, 60 Pa. St. 27; *Guest* v. *Water Co.*, 142 Pa. St. 610, 21 Atl. Rep. 1001; *Foundry Co.* v. *Bullock*, 38 Fed. Rep. 565; *Harrison & Howard Iron Co.* v. *Council Bluffs City Waterworks Co.*, 25 Fed. Rep. 170. The first is the leading case. *Guest* v. *Water Co.* is but an echo. *Foundry Co.* v. *Bullock* is rested solely upon grounds of public policy, citing in support *Foster* v. *Fowler*, and the decision of the supreme court of Wisconsin in *Wilkinson* v. *Hoffman;* not, however, distinguishing between a corporation municipal and one *quasi* public, nor referring to *Hill* v. *Railroad Co* , where the distinction is asserted. *Harrison & Howard Iron Co.* v. *Council Bluffs City Waterworks Co.* does not pass upon the question. In *Foster* v. *Fowler*, a water company incorporated for the purpose of introducing water into certain boroughs, for the use of the inhabitants of those boroughs, was sought to be subjected to the operation of the mechanic's lien law of Pennsylvania, with respect to its property essential to the operations of its franchise. The court declared against the lien, saying that corporations "for the building of bridges, turnpike roads, railroads, canals, and the like," are agencies of the public, "directly interested in the results to be produced by such corporations in the facilities afforded to travel and the movements of trade and commerce," and that the use of the franchise "is not to be disturbed by the seizure of any part of their property, essential to their active operations, by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking to accommodate the public." The court quotes approvingly the remarks of SERGEANT, J., in *Canal Co.* v. *Bonham*, 9 Watts & S. 27, that—

"The privileges granted to corporations to construct turnpike roads, etc., are conferred with a view to the public use and accommodation, and they cannot voluntarily deprive themselves of the lands and real estate and franchises which are necessary for that purpose; nor can they be taken from them by execution, and sold by a creditor, because to permit it would defeat the whole object of the charter, by taking the improvements out of the hands of the corporation, and destroying their use and benefit."

The court further observed:

"We think the remark of LOWRIE, J., in *Williams* v. *Controllers*, 18 Pa. St. 275, is in point here, 'that, where there can be no execution, there can be no action,' and that is as true in this case, if we are right in the character we have assigned to this corporation, as it was in that."

In the case referred to, a mechanic's lien was denied for materials furnished in the construction of a public schoolhouse; the quoted remark of Judge LOWRIE being used in this connection:

"Where there can be no execution, there can be no action, and as a *levari facias* is the only execution proper on a judgment on a mechanic's lien, and as that sort of execution is not allowed against a county, it follows that this form of action cannot be sustained, if these defendants come within the meaning of the word 'county.'"

Judge LOWRIE then proceeded to show that the statute exempts from execution all public corporations.

I have quoted at length from the opinion in *Foster* v. *Fowler* because it becomes important to ascertain the precise reasons upon which that decision is grounded, with a view to ascertain whether the principles declared can be applied to conditions prevailing within the state of Wisconsin. The supreme court of Pennsylvania, it will be perceived, bases its holding upon two grounds: *First*, because of the public character of the enterprise; that therefore, as the corporation itself cannot voluntarily deprive itself of its property essential to the purpose of its organization, so it cannot be taken by creditors; and, *second*, and quite incidentally, that, "where there can be no execution, there can be no action."

With respect to the first ground, if I have correctly interpreted the decisions of the supreme court of Wisconsin, the public character of the enterprise is not allowed to defeat the application of the general laws of the state to a private corporation. The policies of the two states in this regard would seem to be widely divergent, and the decision of the one cannot be allowed to control the policy of the other. It would also appear from the observation of Judge SERGEANT that in Pennsylvania a *quasi* public corporation cannot voluntarily deprive itself of its property essential to the exercise of its franchise, and that the right of the creditor to take corresponds with the right of the debtor to alienate. It is not so in Wisconsin. Here the corporation may "take and hold property, both real and personal, * * * and sell, convey, or otherwise dispose of the same;" may "mortgage its franchises, tolls, revenues, and property, both real and personal, to secure the payment of its debts, or to borrow money for the purposes of the corporation," (Rev. St. Wis. § 1748, subds. 6, 7,) and may lease, sell, convey, or assign its franchises and privileges conferred by law to any corporation, where such rights would be in direct aid of the business of the purchasing corporation, (Id. § 1775*a*, as amended by chapter 127, Laws 1891.) In the exercise of these powers of alienation, the corporation stands upon like footing with an individual, and subject to like liability to involuntary alienation. In the absence of express legal exemption, "it is an inseparable incident to property that it should be liable to the debts of the owner, as it is to his alienation." *Hough* v. *Cress*, 4 Jones, Eq. 295, 297. No such exemption is expressed upon the statute book. To the contrary, it is most manifest that the legislature designed that the property of all private corporations, purely private or *quasi* public, should be subject to sale for the payment of debts. In the case of the latter

class, to avoid arrest of the enterprise, and public inconvenience resulting from alienation, voluntary or involuntary, the law enacts that the purchasers of the franchise of any corporation, by purchase at sale under mortgage, in bankruptcy, or under judgment, order, decree, or proceedings in any court, may organize anew, and shall be vested with the rights, privileges, and franchises of the old corporation. Rev. St. Wis. § 1788. I conclude, therefore, that the ruling in *Foster* v. *Fowler*, as to the first ground upon which it is based, is not applicable here.

With respect to the second ground upon which the decision of that case is placed, that, "where there can be no execution, there can be no action," it has been seen that the phrase occurs in Judge LOWRIE's opinion, holding that a mechanic's lien cannot be enforced against a municipality. Not content to rest his judgment, as it might well have been rested, upon the broad ground of public policy, he prefers to base his conclusion on the more technical objection that by the statute of the state a mechanic's lien could only be enforced by *levari facias*,—a writ peculiar to the state of Pennsylvania,—and such a writ could not by law issue against a public body. Such ground of decision is wholly inapplicable in the state of Wisconsin, where the lien is foreclosed in equity, and the sale is under decree, and property of corporations may be sold under decree to enforce payment of debts. Upon this phrase, so employed, rests the whole contention that the lien laws apply only to property that can be sold under a writ of execution. It must be borne in mind that in Pennsylvania there exists no separate equity jurisdiction, as here. All judgments there are enforced by some sort of writ of execution, and are not, so to speak, self-executing, as is a decree in equity here. The phrase must be interpreted in the light of that fact. The term "execution" is there employed, as I think, in a broad sense, comprehending all means by which the judgments or decrees of courts are enforced. In such sense, the phrase is well enough as a test, whether an asserted right is given by statute, although modern legislation, permitting actions against federal and state governments without power of enforcement by the courts, presents an exception to the rule. In general the right to judgment or decree necessarily carries with it the right of enforcement of satisfaction, and where, by reason of public policy, the right cannot obtain, it is held the statute does not embrace the particular right asserted. Property exempt from sale under any judicial proceeding, upon grounds of public necessity, is not within the operation of the lien laws, and for the like reason, unless the law so expressly declares. In other words, the exemption goes to the character of the use of the property, and not to the form of the writ or proceeding by which the right is enforced.

Judge Dillon correctly apprehends the rule when he says, speaking of the exemption from the operation of the lien laws of municipal property held for public use: "It is only such property as can be sold under judicial process that is subject to such liens. Laws creating liens in favor of mechanics are enacted with reference to that class of property." Dill. Mun. Corp. (4th Ed.) § 577. In *Badger Lumber Co.* v. *Marion*

Water Supply, etc., Co., (Kan.) 30 Pac. Rep. 117, the rule is thus stated: "The general rule is that property of a corporation which may be sold under a mortgage or specific lien given by the owner may be subjected to a mechanic's lien." In whatever variety of language the rule may be formulated, the right to the lien corresponds with the right of the debtor to alienate, subject only to limitation founded upon grounds of public policy. In most states the lien is enforced by writ of execution; here by foreclosure, as in case of a mortgage. All other lienholders for construction may join as plaintiffs, or, refusing, be made defendants. All subsequent lienholders or purchasers are to be made parties, and foreclosed of their interests. The sale is by decree, and absolute, without redemption, as in the case of a sale under execution. Rev. St. Wis. §§ 3321, 3324, 3326. If there can be no action where there can be no common-law writ of execution, the lien law of Wisconsin would be wholly inoperative, and inefficient for any purpose. The contention cannot be upheld. The lien law of Wisconsin applies to all property which is the subject of alienation by the debtor, and of sale under whatever form of judicial writ or proceeding. It does not apply to the property of municipal corporations held for public use, because such property is not the subject of judicial sale while so held. But the property of all corporations, private or *quasi* public, is so subject under some form of judicial proceeding. I discover in the statutes no exemption. Actions against them may be brought as against natural persons, (section 3204;) and, after judgment at law and return of execution *nulla bona*, the court may sequestrate the stock, property, and effects, and appoint a receiver, (section 3216,) and distribute its property among the creditors, (section 3217.) In the case of toll-taking corporations, the franchise and the property may be sold upon execution in the manner prescribed. (Sections 3229, 3235.) A *quasi* public corporation being, then, not exempt by reason of any public policy, and expressly subjected to the laws for the enforced payment of debts, the case of *Foster* v. *Fowler* cannot be applied here. The lien of the statute obtains unless the objection next to be considered avails to defeat the right.

5. It is lastly urged that the plant is essential to the use and enjoyment of the franchise, and inseparable from it, and that therefore the lien of the statute cannot be enforced. It was said by Mr. Justice CASSODAY in *Improvement Co.* v. *Wood*, 81 Wis. ——, 51 N. W. Rep. 1004:

"The rights, franchises, and plant essential to the continued business and purposes of such corporations are not to be severed, broken up, or destroyed, without express legislative authority, but, on the contrary, are to be preserved in their entirety."

It was also asserted by Mr. Justice PINNEY in *Fond du Lac Water Co.* v. *City of Fond du Lac*, 82 Wis. ——, 52 N. W. Rep. 439, 441:

"In virtue of the intimate and necessary relation of the lots and the mains, pipes, and hydrants, which extend to most parts of the city, with the franchises and privileges of the plaintiff, it would seem that, as a subject of taxation, as well as of sale under judicial process, they are to be regarded as an entirety; and, as the plaintiff is a *quasi* public corporation, a dismember-

ment,—a separation of the entire plant,—under such proceedings, cannot be allowed."

I fully concur with the declarations of these able jurists. I assume that the term "franchise," as there employed, refers to the privilege to maintain and operate the plant, and not to the franchise to exist as a corporation; the former being the subject of transfer, the latter not transmissible. *Memphis, etc., R. Co.* v. *Commissioners*, 112 U. S. 609, 619, 5 Sup. Ct. Rep. 299. When then results? The incorporation of the material for which a lien is here claimed into a plant operated under a franchise was the act of the defendant. The plant and franchise may not be severed by judicial sale, because of the peculiar public use to which the plant is devoted. The law gives a specific lien upon the plant for the material incorporated into it. Does the inseparable character of franchise and plant present an insuperable obstacle to the enforcement of a right given by the law? I think not. The defendant operates its plant "and uses its franchise subject to the obligation to pay the claim of the lienor." *Purtell* v. *Bolt Co.*, 74 Wis. 132, 135, 42 N. W. Rep. 265. Since, then, the act of union was by the procurement of the defendant, and by severance of franchise and plant, the latter would become of little worth, and the paramount public welfare forbids their separation, in the interest of both creditor and debtor, in the interest of the public, and as a matter of common equity, plant and franchise should be decreed to be sold as an entirety. I think it within the inherent powers of a court of equity to so decree; not that the lien embraces the franchise, but because plant and franchise have, by act of the defendant, been rendered inseparable. The plant has been applied to a public use. The public welfare requires that use to be uninterrupted. A court of equity may therefore well require that the right to the use shall follow the tangible property devoted to that use, and dependent upon it. It may well be required that, upon subjection of the plant to sale in satisfaction of the lien granted by the law, the franchise to maintain and operate it for the public use shall be sold with it, as an essential incident to it; treating plant and franchise as an entirety. Otherwise, a judicial sale would work destruction to both plant and franchise. The course suggested is conformable to equity. It conserves the public welfare. It preserves this property to public use, giving to the purchaser the estate as the defendant has it. It renders to the complainant a right given it by the law. It operates not unjustly upon the defendant, since thereby its property, subjected by the law to sale, is preserved from sacrifice necessarily resulting from separation of franchise and plant. It is demanded by the exigency of the occasion that equity should supplement and effectuate the law. Indeed, if, as a matter of strict legal right, the franchise to operate does not inhere in the tangible property necessary to its use, as an essential incident to it, I think that in a court of equity the defendant may well be deemed, by his act of devoting this plant to public use under its franchise, thereby rendering it inseparable therefrom, to have assented that upon its sale, voluntary or involuntary, the franchise to operate should pass with it.

The case is peculiar and somewhat novel. I believe the course proposed to be grounded on acknowledged principles of equity. I think, also, that it has the support of high authority. It is recognized in the statute which authorizes reorganization of purchasers of the franchise at sale in bankruptcy or under judicial decree. Rev. St. Wis. § 1788. In *Drawbridge Co.* v. *Shepherd*, 21 How. 112, upon bill filed to enforce payment of a judgment at law against a bridge company, the court held that it was within the province of a court of equity, without statutory sanction, to cause possession to be taken of the bridge, to appoint a receiver to collect tolls, and to cause them to be applied in discharge of the judgment. In *Gue* v. *Canal Co.*, 24 How. 257, 264, Mr. Chief Justice TANEY, without ruling upon it, suggests the precise remedy here asserted. In *Railroad Co.* v. *James*, 6 Wall. 750, on appeal from this court, complainant had obtained judgment at law against the La Crosse & Milwaukee Railroad Company, and filed his bill to declare the lien of his judgment and for a sale of the road. The court entered a decree declaring the lien, and directing a sale. The report of the case upon appeal does not disclose the terms of the decree, but, as appears from the records of this court, it directed a sale of—

"All and singular, the railroad property known as the 'La Crosse & Milwaukee Railroad,' from Milwaukee to Portage City, its depots, station houses, and buildings, together with all its rolling stock, *franchises*, and appurtenances now in possession of or claimed by the Milwaukee and Minnesota R. R. Co."

Upon appeal the decree was affirmed; the court observing, after declaring the lien of the judgment:

"We do not doubt that a sale under a decree in chancery, and conveyance in pursuance thereof, confirmed by the court, passed the whole interest of the company existing at the term of its rendition to the purchaser."

There would seem to be no escape from the binding authority of this case. The lien of a judgment and that arising under the mechanic's lien laws are at least of equal dignity, both being the creatures of statute, and there is no distinction in principle between the creation of lien by mortgage or by statute. *Hill* v. *Railroad Co.*, 11 Wis. 223, 233. If, in the enforcement of the lien of a judgment upon the real estate of a corporation *quasi* public, its franchises to operate the property for public use may be sold with the property, I fail to understand why similar action may not be taken by a court of equity with respect to the enforcement of a mechanic's lien. In *Railroad Co.* v. *Delamore*, 114 U. S. 501, 5 Sup. Ct. Rep. 1009, it was ruled that the franchises of a railroad company, which can be parted with by mortgage, will pass to the assignee in bankruptcy, and may be sold under decree. The court declares, (page 510:)

"It follows that, if the franchises of a railroad corporation can by law be mortgaged to secure its debts, the surrender of its property upon the bankruptcy of the company carries the franchises, and they may be sold and passed to the purchaser at the bankruptcy sale."

And there, as here, the surrender or subjection of the property to the creditor was involuntary, and by compulsion of law. In the case of

Hammock v. *Trust Co.*, 105 U. S. 77, 89, the court held that state laws authorizing redemption from sales of real estate could not be applied to the real estate of a corporation operating its property under a franchise and for public use. The court decreed an absolute sale, because "a sale of the real estate, franchise, and personal property separately might in every case prove disastrous to all concerned, and defeat the ends for which the corporation was created." In *Steger* v. *Refrigerator Co.*, *supra*, the supreme court of Tennessee declared "that the pipes, and the license or easement under which they are laid, would certainly pass under a sale of the property as an entirety, and for operating purposes, no reservation being made." So, also, in the case of *Railroad Co.* v. *Parker*, 9 Ga. 377, where judgment creditors were proceeding to sell separate portions of the railroad, a court of equity arrested the executions, and decreed a sale of the road, "with all the rights, franchises, and property connected therewith," and distributed the proceeds among creditors according to their respective rights. The eminent Judge LUMPKIN, reviewing this decree, observes:

"The chancellor, then, in taking this matter in hand, and directing a sale of the entire interest for the benefit of all concerned, was but invoking the powers of equity to aid the defects of law, and applying analogous principles to the existing emergency; and, so far from transcending his authority, he is entitled to the thanks of the parties and the country for the correct and enlightened policy which he adopted. Had he faltered, or shunned the responsibility thus cast upon him, he would have shown himself unworthy of the high office which he filled. As it is, this precedent will stand in bold relief as a landmark for future adjudications."

I follow these landmarks, guiding me, as I think, to a correct conclusion.

Let there be a decree for complainant, declaring a lien for its debt upon the waterworks plant and upon the interest of the defendant in the premises in question; directing a sale of the plant, and such interest in the lands, and of the franchise of maintaining and operating the plant for the uses to which it is devoted by the law of the defendant's incorporation, as an entirety, and that the proceeds of sale be brought into the registry of the court, for distribution among all who may show right thereto.

SAN DIEGO COUNTY *v.* CALIFORNIA NAT. BANK *et al.*

(Circuit Court, S. D. California. October 3, 1892.)

1. BANKS AND BANKING—DEPOSITS—COUNTY FUNDS.
Where the treasurer and tax collector of a county, without authority of law, deposit county moneys in a bank, and receive certificates of deposit marked "Special," the title to the moneys does not pass, although there is no agreement that the identical bills shall be returned, and they are mixed with the bank's general funds, and the county is entitled to recover an equal amount from a receiver of the bank prior to the payment of the general depositors.

2. SAME—EQUITABLE REMEDIES.
The county's rights in such case are enforceable only by a bill in equity, for there is no privity of contract between it and the bank. *National Bank* v. *Insurance Co.*, 104 U. S. 54, followed.