

the master. Such being the situation, is it material to determine the exact status of the purchasers as to title or possession? In the peculiar condition of the case, they hold it certainly subject to the lien of the mortgage for the amount to be named in this new decree now to be entered. The defendant company claims that it has the right to have this property sold under a valid decree. Perhaps it has. Certainly no harm can accrue to these purchasers if the amount of the debt outstanding, and which they control, is as they state it, and the value of the property such as they contend. All this can be determined, however, and the rights of all parties protected, by the direction which will now be given to the case. There is but one practical course, and that is to provide, in the present decree, for the appointment of a commissioner and resale of the property. The rights of these purchasers, as to the amount heretofore paid into this court, in connection with this proceeding, are still in the entire control of the court, and can be fully protected to any extent that such rights may exist, by proper order, in distributing the funds arising from the sale. Let a decree be framed carrying into effect these views.

ILLINOIS TRUST & SAVINGS BANK v. ARKANSAS CITY WATER CO.
et al.

(Circuit Court, D. Kansas, Second Division. March 21, 1895.)

No. 314.

1. MUNICIPAL CORPORATIONS—WATER FRANCHISES—POWER OF COUNCIL.

A city of the second class, under the laws of Kansas, is without power to grant to a private corporation an exclusive right and franchise to furnish water for public and domestic use for a period of 21 years, for this is an attempt to create a monopoly,—a power which the city council does not possess unless it is delegated in clear and unmistakable terms.

2. SAME.

But, while the city would not be bound under such an ordinance to accept the service tendered by the water company for any definite period, it should yet be held to pay the stipulated price for water furnished for public purposes, so long as it accepts the service offered in pursuance of the ordinance.

3. SAME.

A proposed ordinance granting water franchises, which fails to receive the requisite number of votes, but which is nevertheless assumed to have been properly passed, both by the city and the water company, and is acted upon accordingly, is to be regarded as a contract binding the city to pay the stipulated price for water furnished for public use pursuant thereto, so long as it accepts the same.

4. SAME.

Where additions are made to the original plant of a water company upon mere informal application of its officers, without any ordinance or resolution prescribing terms and conditions, *held*, that the ordinance under which the original plant was constructed should be looked to for such terms and conditions.

This was a suit in equity by the Illinois Trust & Savings Bank against the Arkansas City Water Company and Arkansas City for the foreclosure of a trust deed, and an accounting as to certain

bonds secured thereby, which were issued by the defendant water company.

Rossington, Smith & Dallas, for complainant.

Ady, Peters & Nicholson and Eaton, Pollock & Love, for defendants.

WILLIAMS, District Judge. This is a suit in equity, brought for the purpose of accounting upon certain bonds and coupons issued by the defendant water company, and for the foreclosure of a certain deed of trust given to secure payment of the same. The facts, briefly stated, as gathered from the pleadings and evidence, are as follows:

The defendant the city of Arkansas City is a city of the second class, under the laws of the state of Kansas. The defendant the Arkansas City Water Company is a private corporation organized for the purpose of constructing and operating a system of waterworks in said city. On the 21st day of December, 1885, the defendant city undertook to confer a franchise upon the Interstate Gas Company, also a private corporation, whereby a system of waterworks was to be erected and maintained in said city for a period of 21 years; providing for the construction of a plant, laying of pipes, and the erection of certain fire hydrants thereon, and making of certain extensions from time to time thereon, requiring of the said Interstate Gas Company that all such fire hydrants should have a certain standard of efficiency for the purpose of fire protection. Thereafter the plant was constructed, upon which were located 50 fire hydrants, being the number provided at the time such franchise and privilege were granted. Thereafter the defendant the Arkansas City Water Company succeeded by purchase to all of the rights, franchises, property, and duties belonging to and devolving upon the Interstate Gas Company. At the time of the construction of the original plant of 50 fire hydrants, the Interstate Gas Company issued bonds to the amount of \$200,000, and executed a deed of trust upon the plant, property, and franchise and incomes of the system to secure payment of the same. And, after the transfer of the works to the defendant the Arkansas City Water Company, it executed its bonds in the sum of \$150,000, and the deed of trust upon all of the property, rights, and franchises of said company to secure payment of the same, the said \$150,000 of bonds and deed of trust being the same declared upon by the complainant in this suit. One hundred thousand dollars of such issue was used for the purpose of retiring the \$100,000 in bonds issued by the said Interstate Gas Company. The proceeds of the remaining \$50,000 in bonds was paid over to the defendant water company. Thereafter, from time to time, extensions were made to the original plant, and about 135 fire hydrants were added to the system, which extensions were made of four-inch mains. The said extensions were made upon application of the president of said water company, one J. B. Quigly, and were not made upon any formal resolution or ordinance of the defendant city. Afterwards, on the 16th day of September, 1891, the defendant the city of Arkansas City purchased from the Arkansas City Water Company said entire system of works, and all

the property, rights, and franchise of the defendant the Arkansas City Water Company, taking therefor a deed of general warranty as evidence of said transfer of said property. The deed of trust hereinbefore mentioned was excepted from the covenant against incumbrances in said deed. No hydrant rental has been paid by the defendant city to the complainant or any one else for water furnished through said fire hydrants located upon said system since the 1st day of October, 1891. Upon the purchase of said system of waterworks, the defendant city, by ordinance duly passed and published, repealed the said former so-called ordinance of said city,—No. 27. The complainant on the 18th day of October, 1892, the interest on said bonds being in default at said date, brought this suit for an accounting of the amount due on said bonds and coupons in default, for the purpose of foreclosing said deed of trust, and for the accounting with the defendant city, and also alleging in its bill of complaint that the transfer of said property to the defendant city was fraudulent, and was for the purpose of defeating the security of the complainant for the payment of said bonds and interest thereon, and praying a decree of this court that the defendant the city of Arkansas City, in the purchase of said works, had assumed all the debts, liabilities, and obligations of its grantor, the Arkansas City Water Company, and also asking the appointment of a receiver. The defendant the Arkansas City Water Company was not served with subpoena, and has entered no appearance in this action. The defendant city answered the complainant's bill, alleging that the contract claimed to exist between the city and the Arkansas City Water Company by reason of said Ordinance No. 27 is void, for the reason that it did not have, upon its passage, the number of votes required by law; that the several extensions of the waterworks, and the addition of 135 fire hydrants, and the rental therefor, did not constitute a binding obligation upon the defendant city; that the additional fire hydrants were erected upon a plant originally designed for but 50 fire hydrants; that such extensions were made of small pipe, in long lines, and that the hydrants placed thereon were inefficient for the purpose designed by said contract, and could not be made to comply with the requirements for such fire hydrants; that said extensions were unnecessary; that fire hydrants were located so closely together as to render a large number of them unnecessary for fire protection, or any of the public purposes mentioned in said Ordinance No. 27; that said contract was illegal, unreasonable, and extortionate. The defendant city also denied that it had in any way assumed or become liable for the principal and interest upon the bonds, as alleged in the plaintiff's bill of complaint, or for the interest thereon, or that it had in any way assumed or agreed to pay the indebtedness of the Arkansas City Water Company provided thereby, and prays that the alleged contract between the defendant city and the Arkansas City Water Company provided for by said Ordinance No. 27 be declared null and void, and that the city be relieved from the payment of all hydrant rentals for the extra hydrants placed upon the extensions to said works. The complainant thereafter, by amendment to its bill, avers that, notwithstanding the failure to enact said Ordi-

nance No. 27 as required by law, the defendant city had long used and recognized the same as an existing contract between it and the Arkansas City Water Company; that by reason thereof it became and was a binding contract, notwithstanding the failure of said city to enact the same as required by its charter and the laws of the state,—and also made due replication to the answer of the city. Upon issues so joined, evidence was taken, and the cause heard by the court.

The court having heretofore heard this cause, and decreed that the said city should pay hydrant rental for the original 50 fire hydrants located upon the works, as originally constructed, and should not be required to pay hydrant rental for said additional hydrants as were added thereto, thereupon one George E. Hopper, receiver in charge of said works under order of this court, applied to the court for additional hydrant rental, averring that the said hydrants on said extensions were efficient, and in all respects complied with the conditions and requirements of the provisions of said Ordinance No. 27; and thereon testimony was taken, and submitted to the court, regarding such efficiency. Thereafter, for good cause shown, the decree, as heretofore placed of record in this cause, was set aside, and the case reopened for further consideration and argument, and is now before the court upon the printed briefs of solicitors for complainant and the receiver in charge, and counsel for defendant city.

Upon the trial of this cause it was not seriously contended by counsel for complainant that the defendant city had assumed the payment of, or was in any way personally liable for, the bonds in suit, and there is no evidence to warrant such finding. The evidence also fails to disclose that there was any fraudulent intent or wrongful purpose on the part of the defendant city in the purchase of the works. It does, however, clearly appear from the evidence that the bonds in suit and the trust deed were duly made and executed by the defendant water company, and constitute a valid first lien upon all the property, rights, and franchises of the Arkansas City Water Company, defendant, in said city; that the interest upon said bonds had been defaulted prior to the bringing of this suit, by reason whereof the whole amount of said bonds had become due and payable, and the complainant entitled to a decree of foreclosure thereon.

The serious controversy in this suit arises upon the following propositions: First. Does a city of the second class, under the laws of the state of Kansas, have the power to grant an exclusive right and franchise to a corporation to furnish water for public and domestic use within said city for a period of 21 years? Second. Was the so-called ordinance of defendant city, No. 27, legally enacted; and, if not, what rights, if any, were acquired under the same? Third. Should the defendant city be required to pay a stated hydrant rental upon any or all of the additional fire hydrants placed upon extensions to the original plant? A decision of the foregoing propositions is necessary, to fully determine the matters in controversy in this suit.

Recurring to the first proposition, I cannot give my assent to the doctrine so ably contended for by counsel for complainant in their ex-

haustive brief, that the defendant city had the power to grant an exclusive franchise, and for the period of time as set forth in said Ordinance No. 27 of the defendant city. The right to furnish water for public and domestic use within a city is a public service, and of such high consequence to the public that it should at all times remain open to the control of the city council for the benefit of the public. The contract here insisted upon would place the matter beyond control of the council for a long period of time. This is in the nature of an attempt to create a monopoly,—a power which the city council never possesses, unless it is delegated in clear, unmistakable terms. This view is fully sustained by the following authority: Jackson County Horse R. Co. v. Interstate Rapid Transit Ry. Co., 24 Fed. 306; Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. 324; Saginaw Gas-Light Co. v. City of Saginaw, 28 Fed. 529, 540; Gas-Light Co. v. Middletown, 59 N. Y. 228; Chicago v. Kumpff, 45 Ill. 90; Gale v. Kalamazoo, 23 Mich. 344; State v. Cincinnati Gas Light & Coke Co., 18 Ohio St. 262; Logan v. Pyne, 43 Iowa, 524; Long v. City of Duluth, 49 Minn. 280, 51 N. W. 913. As supporting the same doctrine, also: Minturn v. Larue, 23 How. 435; Wright v. Nagle, 101 U. S. 791. It does not, however, follow, in my judgment, that the attempt to grant such exclusive privilege for a fixed period of time would render the entire ordinance illegal. On the contrary, all that this court now decides is that the city is not bound to accept the service tendered by the water company for any definite and fixed period of time, but, under contract made in pursuance of an ordinance legally adopted, the city should be held to pay the stipulated price, so long as it accepts the service offered in pursuance of the contract.

Whether Ordinance No. 27 was legally adopted, in the opinion of the court, is practically disposed of by the statute and the undisputed evidence in this suit. Section 765, Gen. St. 1889, reads as follows:

"All ordinances of the city shall be read and considered by sections at a public meeting of the council, and a vote on their final passage shall be taken by yeas and nays, which shall be entered on the journal by the clerk, and no ordinance shall be valid, unless a majority of all the members elected, vote in favor thereof; provided, however, that when the council are all present and voting and there shall be a tie, the mayor shall have the power to give the casting vote on the passage of any ordinance."

The evidence shows that, at the time of the consideration of said Ordinance No. 27, the said council of defendant city was composed of eight members, seven of whom were present; four voting in the affirmative, and three in the negative,—the mayor not voting. This being true, the ordinance was thereby rejected. But it appears that the officers of defendant city and the Interstate Gas Company all proceeded upon the idea that said Ordinance No. 27 was duly adopted, and had become a legal ordinance of said city; that the original system of waterworks provided for in said alleged ordinance was put in by the Interstate Gas Company, and accepted by the city, in pursuance of said ordinance, and that there were attached thereto, for public use, 50 public fire hydrants, the efficiency of which was duly accepted by the mayor and council of said city, in pursuance of the terms of said ordinance; and that the city has ever since said time continued to use said 50 fire hydrants for fire protection.