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.

The court therefore holds that the terms of said contract, and the erection and extension of said original system of waterworks under the same, constitute a contract on the part of the city with the owners of said waterworks, and that the city shall continue to pay for the use of said 50 hydrants, at the rate of $60 a year, so long as said city continues to use the same for fire protection, and that the water company, its successors and assigns, are entitled to the use of the streets, alleys, and public grounds of the city for the purposes of maintaining and operating said system of works. But the obligation of this contract, like that of all others, is mutual, and, to entitle a recovery for hydrant rental, the standard of efficiency must fairly comply with the terms of the contract, and that standard is as follows:

"That the works erected by the Interstate Gas Company, its successors and assigns under this ordinance, are able to throw simultaneously, four (4) streams of water from any four (4) hydrants to be designated by the mayor and city council through one hundred feet of two and a half inch rubber hose, and one inch ring nozzle, at least sixty-five (65) feet high from stand pipe alone and eighty-five feet high by direct pressure from pumps."

The right of the water company, its successors and assigns, to recover from the defendant the said hydrant rentals for the 135 additional fire hydrants shown by the evidence to have been placed upon extensions for the completion of the original system, is the only remaining question. This is a question, I think, important to the parties to this suit, but its determination is necessary from the fact that, in the deed of trust sought to be foreclosed by complainant, such hydrant rentals are assigned as a part of the security for the prompt payment of the bonds and interest thereon; and as the complainant asks a decree of foreclosure and sale of all the property, rights, and franchises and income of the water company, it is important to know what the purchaser at such sale shall acquire by his purchase; and for the further reason, that it appears from the evidence that no hydrant rental has been paid by defendant city since the year 1891, and the complainant prays for an accounting with defendant city as to the amount of hydrant rentals now due, and a decree for the same. Upon this branch of the suit a large number of witnesses were orally examined before the court, and many of the depositions on file bear upon this question. If this claim for hydrant rentals for fire hydrants located upon extensions to the original plant is upheld, it fixes a charge of about $8,000 annually upon the defendant city. So great a charge upon the revenues of the city must rest upon some well-authenticated enactment of the common council of said city, or upon a binding and subsisting contract, in which the rights, duties, and liabilities of the respective parties are clearly defined and set forth; and even then—such a contract, if found to exist, being in its nature purely executory—the demanding party takes upon himself the burden of proving a substantial compliance with the terms and conditions of such contract before any recovery will be decreed therefor. A careful review of the evidence upon this proposition clearly shows that there is no ordinance or resolution of defendant city authorizing such extensions to be made. The evidence does show such

extensions to have been made upon informal applications of the officers of defendant water company, without any apparent regard to the rights or necessities of the inhabitants of defendant city. In these informal orders for such extensions there is nothing prescribing the efficiency of the service, or the terms and conditions upon which it is to be rendered, and the length of time during which such service shall continue is not specified. Therefore, a test of such efficiency having been once agreed upon between the parties, we must look to the original contract to find what the terms and conditions are upon which such additional service is to be tendered and received. Applying the test fixed in the original contract, I do not hesitate to say that not one of the fire hydrants located upon extensions to the original plant come up to the requirements of such standard of efficiency. The parties to this suit were at great pains to make ample tests of these fire hydrants under the supervision of competent engineers and experts, who have testified to the results. This evidence satisfies my mind that the hydrants located upon such extensions do not afford protection to the portion of the city in which the same are located, and are of no practical utility to the defendant city. It follows that this claim for hydrant rentals must be denied, and is denied. The decree heretofore entered in this suit having been set aside because the same was not in accord with the opinion of the court, a decree will now be entered in conformity with this opinion.

BOARD OF COM'RS OF GRAND COUNTY v. KING.

(Circuit Court of Appeals, Eighth Circuit. February 18, 1895.)

No. 452.

1. POWER TO TAX—LEGISLATIVE FUNCTION.
The power to tax is a legislative function exclusively, and cannot be exercised except in pursuance of legislative authority. A court has no taxing powers, and can impart none to the county authorities. It has no jurisdiction to coerce the levy of a tax, except where the law has made it the clear and absolute duty of the proper authorities of the county to levy such tax.

2. COUNTY WARRANTS.
When a county is authorized to levy a given rate of tax for general county purposes, no holder of county warrants or of a judgment rendered thereon has a right to demand that a special tax shall be carved out of this general rate and levied for the exclusive purpose of paying his warrants or judgment, unless the statute requires it and leaves the county levying board no discretion.

3. MANDAMUS—COMPELLING LEVY OF TAX.
It is not within the power of a court to compel, by mandamus, the levy of a tax to pay a judgment against a county, where no statute expressly makes it obligatory on such county to levy a tax for the purpose, and it does not appear that the judgment was based on a bond or other security, issued under a statute making it obligatory to levy a tax to pay it.

4. SAME—COLORADO STATUTE.
One K., the holder of a judgment against G. county, in the state of Colorado, applied to the United States circuit court for a mandamus to compel the county to levy a tax to pay such judgment. The cause of action on which the judgment was rendered did not appear. The statute of Colorado in force when the judgment was rendered (Gen. St. Colo. c. 28, § 7) provided