CITY OF BRENHAM v. BRENHAM WATER CO.

(*Supreme Court of Texas.* March 25, 1887.)

1. MUNICIPAL CORPORATION—CONTRACTS—WATER COMPANY—EXCLUSIVE PRIVILEGE.
A city ordinance granted to a water company "the right and privilege, for the term of 25 years from the adoption of this ordinance, of supplying the city of B., and the inhabitants thereof, with water for domestic and other purposes, and for the extinguishment of fires." By the ordinance the city also agreed to pay the company a large sum per annum, during the term of 25 years, for the supply of hydrants. *Held*, this is a grant of an *exclusive* privilege to the water company for the period named.[1]

2. SAME.
The charter of the city provided that it "shall be capable of contracting and being contracted with," and gave it power to provide the city with water for the convenience of the inhabitants, and the extinguishment of fires; while the law under which the water company was organized provided that it should have full power to furnish water to any city where it was located, for public or private buildings, or for other purposes, and to lay pipes through the streets with the consent of the city. A general law also authorized any city in which a water company was organized to contract with it for supplying the city with water. *Held* that, while these several laws, taken together, undoubtedly authorized the city to make some contract for supplying itself with water, yet they did not confer on the city *express* power to make a contract granting the water company the exclusive right to supply the city and inhabitants with water for the period of 25 years, at a fixed rate *per annum;* and, as no such power was necessary or essential to the proper exercise of the powers expressly granted, it could not be implied, and this contract must be considered as unauthorized by the legislature, and invalid.[1]

3. SAME.
Power given to a municipal corporation to contract in relation to a given subject-matter does not carry, by implication, the power to contract, even with reference to that, so as to embarrass and interfere with its future control over the matter, as the public interests may require.

4. CONSTITUTIONAL LAW—MONOPOLY—GRANT OF—TEXAS CONSTITUTION.
A grant which gives to one or an association of persons an exclusive right to buy, sell, make, or use a given thing or commodity, or to pursue a given employment, creates a monopoly. The exclusive right need not continue indefinitely, so as to amount to a perpetuity. It is sufficient that it is an exclusive privilege for a period of time of the character forbidden. So, in this case, the ordinance granting the exclusive right to sell water to a community, for public and private uses, affects all the inhabitants in their common rights directly, and in their individual rights indirectly, and is in conflict with that clause of the Texas constitution which provides that perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed.[1]

Appeal from district court, Washington county.

Tarver & Bryan and *J. T. Swearingen*, for appellant. *Garrett, Searcy & Bryan* and *Bassett, Muse & Muse*, for appellee.

STAYTON, J. On August 18, 1884, the city of Brenham passed an ordinance, which provided that an association of persons, then unincorporated, known as "Brenham Water Company," should have the right to establish,

[1] The grant by a city council of the exclusive right of selling to the city all the water required by it for sewerage and fire purposes for the period of 20 years, at a minimum rate fixed in the contract, is a monopoly; and this, though the grant does not prevent other people from selling water to private citizens. Davenport v. Kleinschmidt, (Mont.) 13 Pac. Rep. 249. See, also, Omaha Horse Ry. Co. v. Cable Tramway Co., 30 Fed. Rep. 324; Saginaw G. L. Co. v. City of Saginaw, 28 Fed. Rep. 529; People v. Marx, (N. Y.) 2 N. E. Rep. 34, and note; City of Louisville v. Weible, (Ky.) 1 S. W. Rep. 605.
A city council has no authority to grant to any person a monopoly, even where no express prohibition is found in the charter or other acts of the legislature. Davenport v. Kleinschmidt, (Mont.) 13 Pac. Rep. 249, and note.

construct, and operate a system of water-works in or adjacent to the city, and for this purpose to use all the streets, alleys, lanes, public grounds, and all places under the control of the city, so far as might be necessary for the proper conduct of the business, "and for supplying said city, and the inhabitants thereof, with fresh water for domestic, manufacturing, fire, and other purposes." The length of mains and pipes to be first established was fixed at not less than four miles, to be located as might be agreed between the company and the city, which were required to be extended as the city might order to be done. The seventh section of the ordinance determined the capacity the water-works were required to have, and the eighth section gave the city the right to use water for public purposes other than the extinguishment of fires, which the city was to receive in full payment for all municipal taxes during the full term for which the contract was to run. The ninth section reserved to the city the right to purchase the water-works after the expiration of 10 years, at such price as might be agreed upon by persons to be selected as therein provided, whose appraisement was to be binding upon both parties. Section 1 was: "That there is hereby given and granted to Brenham Water Company the right and privilege, for the term of twenty-five years from the date of the adoption of this ordinance, of supplying the city of Brenham, and the inhabitants thereof, with water for domestic or other uses, and for the extinguishment of fires." The fifth section is as follows: "The said city of Brenham hereby agrees to rent, and does rent, of the said Brenham Water Company, 35 double-nozzle fire hydrants, located, by authority of said city, upon the mains and pipes within said city, for the extinguishment of fires, at a rental of $3,000 per annum, payable quarterly on the first day of January, April, July, and October in each year. The said rental shall commence when the city is notified that the said hydrants are ready for use, and shall continue during the full term specified in this ordinance; and for the purpose of providing for the payment of all hydrant rental becoming due, under the provisions of this contract, the city council shall levy, collect, and appropriate annually a sufficient sum of money to cover the amount becoming due on this contract." The sixth section provided that "the said Brenham Water Company shall make all extensions of mains and pipes whenever the said city council shall order the same to be made, and shall erect not less than at the rate of ten double-nozzle fire hydrants to the mile on such extensions, for which hydrants the said city of Brenham shall pay a rental of $60 each per annum, payable as provided in section 5." The thirteenth section fixed the water rate which might be charged to inhabitants in most of the matters and business that could be enumerated, but as to some enumerated, and those not enumerated, the charge was left to be fixed by contract to be made with the superintendent, and all rates were made payable quarterly in advance at the office of the corporation. The fourteenth section provides that "this ordinance shall be a contract by and between the city of Brenham and the Brenham Water Company, their successors and assigns, and shall be binding on both parties thereto, provided said company shall file with the city clerk its acceptance of the same in writing within five days after the passage of the same." The water company's acceptance was filed as required by the ordinance.

Before the first of June, 1885, the persons composing the Brenham Water Company incorporated under the same name, under the general incorporation act, and on that day the city was notified that the works were ready for use; but it was found that the water supply was not sufficient; wherefore the water company asked the acceptance of the works by the city, agreeing to give an additional supply of water equal to that they were then able to furnish, and to increase it as the consumption demanded it; to keep on hand such fuel as would enable it at all times to speedily put the pumps in motion in case of fire; to keep and maintain a telephone; to pump the stand-pipes full every day, and to bank the fires under the boilers; to allow the fire de-

partment to fill the fire cisterns from any of the hydrants; and "to adopt and enforce strict rules and regulations for the faithful carrying out of the purposes for which it is intended, and to use every diligence to give the city of Brenham good and efficient fire service." The city, on the same day, accepted the water-works under the terms of the agreements then tendered; and, in its ordinance so accepting, it provided "that no payment shall be made on said contract if the said company does not comply with its agreement hereinbefore recited, but, on compliance therewith, the payments shall be made, commencing on the first day of June, 1885." The ordinances did not give to the city the power to regulate and control the water-works, and to make them effective in case the water company failed to do so.

This action was brought to recover the price stipulated for the use of hydrants for the time intervening June 1, 1885, and January 1, 1886. The ordinance was made a part of the petition.

The city filed defenses, thus summarized, in the brief of its counsel, correctly:

"(1) A general demurrer.

"(2) That it appeared from the petition that the contract sued upon created a monopoly and perpetuity in plaintiff.

"(3) By special exception that no authority to make said contract was therein alleged.

"(4) That it appeared from said petition that the city council had rented the hydrants for a period of twenty-five years, at the yearly rental of three thousand dollars, and no authority was alleged in the council to bind the city for such a period of time.

"(5) A general denial.

"(6 and 7) That said contract was inoperative, against public policy, and void, because—*First*, the city of Brenham, having less than ten thousand inhabitants, was prohibited by the constitution and laws of the state from levying for city purposes more than twenty-five cents on the one hundred dollars valuation, on the property subject to taxation, and at the date of said contract the current expenses of the city, including salaries of officers and other reasonable and necessary expenses, annually incurred, exceeded the revenue derived from said tax; that there was no excess in any fund which could be appropriated to the payment of the rent of said hydrant, and the council, having no means to pay said rent, and having exhausted the limit of taxation allowed by law, were not authorized to contract said debt; that at the date of the contract the entire available current revenue of the city, out of which the expenses incurred by said contract could be paid, amounted to the sum of $8,763.31, an itemized statement of which is given, while the current expenses amounted to the sum of $12,942.14, an itemized statement of which is given; that these expenses, exceeding all the available revenues of the city, rendered the contract inoperative, illegal, and void.

"(8 and 9) That the contract was an attempt on the part of the council to surrender their legislative discretion, and barter away the power conferred upon it by law, and was contrary to public policy.

"(10) That the contract, under the pretense of obtaining water for the city, was in truth and in fact a donation.

"(11) That the price stipulated was so extortionate, unreasonable, and oppressive as to render said ordinance void.

"(12) That said contract exempted the property of plaintiff from the payment of city taxes during the term of twenty-five years, and was in violation of law which prohibits the council from appropriating the school tax and other special taxes to any fund other than that for which it was levied, and was therefore illegal.

"(13) The defendant specially denied that plaintiff complied with its undertakings, in consideration of which the promises of the defendant were made,

particularly in reference to the quantity or supply of water to be obtained, and quality of the pipes and mains furnished by the company.

"(14) That for these reasons, among others, the council, on the tenth day of July, 1885, adopted "an ordinance rescinding the contract with the Brenham Water Company, made August 18, 1884, and the supplemental contract made June 1, 1885, and repealing certain sections of the said ordinance entitled 'An ordinance to provide a system of water-works for the city of Brenham,' etc. The sections of said ordinance so repealed were all sections which required the water company to furnish water to the city for any purpose, or authorized the payment of plaintiff therefor in the amount claimed in the suit; that the sections in the ordinance excepted in said repealing ordinance were the sections which gave the plaintiff the right and privilege of supplying water, and the provisions therein for the enjoyment and protection thereof; that this ordinance of July 10th is a bar to plaintiff's action.

"(15) That, at the date of the contract, there was no such corporate body in existence as the Brenham Water Company; that the pretended existence of such a contract at the date of said contract was false and fraudulent.

"(16) That the said company, through its agents, falsely represented to and assured the council, as an inducement to the contract, that the system of water-works would secure a general reduction in premiums paid for insurance, and that the amount saved in this way would be greater than the amount expended for water, and that, instead of such reduction, the rates had been increased.

"(17) That the supplementary contract of June 1st was made by the council while acting under a mistake of existing facts, and was obtained through the false representations of W. C. Conner, an agent of plaintiff; that the council was not afforded any opportunity of inspecting the mains and pipes then under ground, and inaccessible, and in the possession of plaintiff, and the defects were of such a character as to render it impossible to discover them by any means available to the council, and that Conner represented that they were sufficient in every respect for the purposes designated, and that the council was misled by the fraudulent defects in said mains and pipes; that, by reason of his false statements and misrepresentations, the alleged ordinance of acceptance was fraudulent."

The court sustained demurrers to so much of the answer as alleged that the contract created a debt in excess of the sum the city was authorized to raise by taxation, and to so much as set up the ordinance of July 10, 1885, rescinding the contract on which this action is based, and overruled the defendant's demurrers to plaintiff's pleadings. The evidence introduced under the thirteenth, sixteenth, and seventeenth paragraphs of the defendant's answer was conflicting. There was a verdict and judgment for the plaintiff.

The first assignment of error is that "the court erred in overruling defendant's demurrer alleging, as objections to plaintiff's original and supplemental petitions—*First*, that the contract sued upon created a monopoly and perpetuity; *second*, that no authority was shown in the city council making the contract to bind the city for a period of twenty-five years, and the attempt to do so was invalid, because the council could not to that extent surrender its legislative discretion and barter away the authority reposed in it by law; *third*, because the contract was an attempt upon the part of the council to limit the legislative authority of their successors, and embarrass them in the exercise of their exclusive discretion."

The city of Brenham was incorporated under a special law approved February 4, 1873, and the first section of its charter declares that it shall "be capable of contracting and being contracted with." Section 5 of article 24 of the charter gives the city power "to provide the city with water; to make, regulate, and establish wells, pumps, and cisterns, hydrants, and reservoirs, in the streets or elsewhere, within said city, or beyond the limits thereof, for the

extinguishment of fires, and the convenience of the inhabitants, and to prevent the unnecessary waste of water." These are the only parts of the charter which have any bearing on the questions raised by the assignments.

The law under which the Brenham Water Company was incorporated provides that "any gas or water corporation shall have full power to manufacture, and to sell and to furnish, such quantities of water or gas as may be required by the city, town, or village where located, for public or private buildings, or for other purposes; and such corporation shall have power to lay pipes, mains, and conductors for conducting gas or water through the streets, alleys, lanes, and squares in such city, town, or village, with the consent of the municipal authorities thereof, and under such regulations as they may prescribe." Rev. St. art. 629. "The municipal authorities of any city, town, or village, in which any gas-light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or supplying with water the streets, alleys, lots, squares, and public places in any such city, town, or village." Rev. St. art. 630. All these laws may be looked to in determining the power of the city to make the contract involved in this case, though, did it depend solely on the ordinance of August 18, 1884, and its acceptance, articles 629 and 630 of the Revised Statutes would not, in terms, be applicable.

Taking all the laws into consideration, we cannot doubt the power of the city to make some contract through which the city might be furnished with water. It becomes necessary, for the proper determination of this case, to ascertain the character of the contract on which the rights of the parties depend. The subject-matter of the contract is one over which the city had control solely under the power confided to it as a municipal government, to be exercised for the public good, and not under any private corporate right or proprietorship. The first section of the ordinance professes to give and to grant a right and a privilege to the water company to supply the city and its inhabitants with water for the period of 25 years. Was it intended to make this right and privilege exclusive for that period of time? This must be ascertained from the language of the ordinance, surroundings of the parties, and purpose sought to be accomplished. The ordinance, in terms, professes to give and to grant a right to do certain things, and therefore to receive certain benefits, for a quarter of a century; *i. e.*, to confer a claim to do certain things, and to receive a fixed compensation, which may be enforced for that period. It not only professes, in general terms, to confer such a right, but as if to emphasize it, and to fully illustrate the character of right intended to be granted, it terms it a "privilege." The word "privilege," as used in the ordinance, is evidently not used in the technical sense in which it is used in the civil law, or even under the common law, when used in the sense of "priority," but was intended to be given its ordinary signification,—meaning a right peculiar to the person on whom conferred, not to be exercised by another or others. This right is to supply the city and its inhabitants with water for their varied uses, for 25 years, at fixed prices in enumerated cases, and at such prices as the water company and inhabitants may agree upon in other cases. The word "supplying" must be considered in its connection, with a view to ascertain whether it was used in its primary sense, or in one more restricted; and, so considered, we can have no doubt that it was used in its primary sense, intending thereby to give the water company the right and privilege to furnish to the city and its inhabitants what water might be needed or necessary to be furnished through such a system. In the ordinance under consideration, it can mean no less than to furnish all the water the city and its inhabitants may need to have furnished under the power given to the city, through its charter, and this for the period of 25 years. It would do violence to the context to give to the word any other meaning.

If nothing more appeared than we have considered, to give character to the contract, and to illustrate the nature of the right intended to be secured

through it, it seems to us that there is no escape from the conclusion that the parties contracted, and intended to contract, that the right of the water company should be exclusive. The fifth and sixth sections of the ordinance, however, if there were doubt, it seems to us would remove it. The water company obligated itself to erect and maintain a given number of fire hydrants on the mains, which it absolutely agreed to put down, and for the use of these the city agreed to pay the sum of $3,000 per year for the period named. It further obligated itself to extend its mains, if requested to do so by the city, and upon each mile of such extension to erect not less than 10 fire hydrants, for each one of which the city promised to pay a rental of $60 per annum, as provided in the fifth section. Was the city, in this and in another part of the ordinance to which we have referred, agreeing to receive, and the company to furnish, the entire quantity of water to be used for fire and other enumerated public purposes during the 25 years? The contract, in terms, obligated the city to pay for this for the full period, whether it used the water or not, and thus made the only right valuable to the water company in so far exclusive.

If the city refused to take the water, and obtained it elsewhere, if the contract was valid, and the parties are to be supposed to have so considered it, then the city would but assume a double burden, which it cannot be conceived that the city ever contemplated. The language of the contract, the surroundings of the parties, and their evident purpose, forbid the belief that they either intended to make the right and privileges of the water company other than an exclusive right to furnish and be paid for all the water the city and its inhabitants might need to have furnished through a system of water-works for the full period of 25 years. Does the charter of the city of Brenham, or that of the water company, confer upon the city the power to make such a contract? Both charters may be considered together. The charter of the city doubtless gave it power to provide the city with water, and, under this, it may be held that it had the power to make a contract to receive and pay for water to be furnished by some other corporation or person. The charter of the water company expressly conferred upon it power to contract with the city to supply it with water for public purposes. Its charter, however, is under the general law, and the express power given to such corporations was evidently given to enable such of them as might be located in cities or towns having no such powers as had the city of Brenham to contract with them. The summary of powers which a municipal corporation has and may exercise, as given by Mr. Dillon, was recognized as correct in the case of *Williams* v. *Davidson*, 43 Tex. 33. "*A municipal corporation possesses and can exercise the following powers, and no others: First*, those granted in *express words; second*, those *necessarily* or *fairly implied* in or *incident* to the powers expressly granted; *third*, those essential to the declared objects and purposes of the corporation, —not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." Dill. Mun. Corp. 89.

No express power is conferred upon the city, through either or both of the charters, to make a contract through which the water company could become entitled to the use of the streets, and to have the exclusive right to furnish the city and its inhabitants with water at a fixed rate for 25 years; and we do not see that power to make such a contract was necessary or essential to the proper exercise of the power expressly given. Under charters containing grants of power less full and express than are contained in the charter of the city of Brenham, it has been held that power existed to erect and operate water-works under the control and ownership of the municipality when it deemed it necessary to the public good. The legislature had given power to the city of Brenham to erect, control, and regulate water-works, and this it may exercise, if it has or may have the pecuniary ability, unless constrained by the

contract under consideration. The legislature has also given power to every city within which one or more private corporations may have water-works to contract with one or all of them, and the further power to permit the use of its streets and other public grounds for the purposes of such works contemplated by the statute, by as many water companies as may desire to do so. Rev. St. arts. 629, 630, 3138.

It is now universally conceded that "powers are conferred on municipal corporations for public purposes; and, as their powers cannot be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." Dill. Mun. Corp. 97. Whether and how a municipal government will exercise a discretionary power conferred upon it must necessarily depend upon the determination of that question by it, in the exercise of whatever legislative power has been conferred upon it. To secure the means to carry out such legislative determination, the making of one or many contracts may become necessary. The validity of every contract a municipal corporation may assume to make must, at last, depend upon the validity of the law or municipal ordinance under which it is made. If the legislature had expressly authorized the making of the contract under consideration, it would doubtless be binding, unless there be some constitutional objection to such a law,—a matter which will be considered hereafter,—and the ordinance could not be held to operate, considered with its acceptance as a contract, as a surrender of any power the legislature intended the city government to exercise at all times. The question would then have been determined by a power superior to that of the municipality,—a power from which it derives all the power it has, and even its existence as a corporation.

The city having been given such power as we have stated, it must be understood that it was intended, not only that it might use it, but that it should use it, if deemed necessary, for the public welfare, so long as the power is possessed by it, *i. e.*, until taken away by the legislature. Will not the contract under consideration, if valid, have the effect, not only to embarrass the city government in the exercise of the power conferred upon it, but to withdraw from it the right to provide, in any other authorized way, water for public purposes and the use of its inhabitants, which was the sole purpose for which the power to erect, maintain, and regulate water-works was given to it? It seems so to us; for, as we have before said, the contract, in effect, assumes to give an exclusive right,—assumes to surrender to a private corporation, for the period of 25 years, the power which the legislature conferred on the municipal government. The power given to a municipal corporation to contract in relation to a given subject-matter does not carry the implication that it may contract, even with reference to that, so as to render it unable in the future so to control any municipal matter, over which it is given power to legislate, as may be deemed best. If the contract relied on is valid, neither the repeal of the charter of the city, nor any other act of the legislature, can abrogate it. If it is invalid, the city council had the right to declare it null, and to refuse to comply with it.

In the case of *Gas-Light Co.* v. *Middletown*, 59 N. Y. 231, the town authorities were empowered to cause the streets to be lighted with gas; and were required, when they deemed it necessary to do so, to contract with the gas company to furnish and lay down gas-pipes, erect lamp-posts, and other necessary things, and to furnish gas. Under these facts the authorities contracted with the gas company to furnish gas and light certain streets for the term of five years. Subsequently the law which conferred authority on the town to make the contract was repealed, and an action was brought to recover for gas furnished after the repeal, and it was held that the contract was in-

valid on the ground that such a contract could not deprive the legislature of its power to repeal a law affecting a municipal corporation. It was said: "If the board of town auditors could deprive the legislature of this power for five years, by entering into a contract with plaintiff for that time, it might for 100 years, by contracting for that period. I think it entirely clear that no such power was conferred by the act on the town auditors."

A contract made with a municipal corporation is no more beyond its control, if its effect be to withdraw from or embarrass the municipality in the exercise of any legislative power conferred upon it, than is such a contract beyond the reach of the legislature that created the municipal corporation. It is solely the want of power to make the contract which authorizes either body to disregard it.

In the case of *State* v. *Gas-Light Co.*, 18 Ohio St. 291, it appeared that the gas company had a charter which empowered it, within the city of Cincinnati, to do all the acts which gas companies, incorporated under the general laws of this state, are authorized to do, including the right to sell gas to the city and its inhabitants. The city of Cincinnati was also authorized, by its charter, to contract with gas companies for lighting its streets, and to levy taxes to meet the expenses. So standing the charters, with the consent of the city, the gas company acquired all the rights which the city had contracted to permit an individual to enjoy. That contract embraced substantially the same rights and privileges as the contract before us professes to give to the plaintiff, and these were to be enjoyed for 25 years. The contract was held to be invalid. Waiving a consideration whether the legislature of the state might have granted such rights and privileges, the court said: "Assuming that such a power may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority. But we have referred to these authorities as our justification for saying that when a franchise so far in restraint of trade, and so pregnant with public mischief and private hardship, is drawn in question, and it is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. It must be found on the statute book in express terms, or arise from the terms of the statute by implication so direct and necessary as to render it equally clear."

In the case of *Garrison* v. *City of Chicago*, 7 Biss. 486, it appeared that a gas company, having corporate powers as broad as any the plaintiff can claim under its charter, contracted with the city of Chicago to supply it with gas for the period of 10 years. The power of the city to buy gas, under its charter, was as full as is the power of the city of Brenham to contract for a water supply, and it was held that the city had no power to contract for so long a time. In disposing of the case it was said: "The officers of the city—the members of the council—are trustees of the public. There can be no doubt that the right to regulate the lighting of the streets, and to furnish means for the same by taxation, is in its nature legislative power. It concerns the whole public of the city. The effect of the contract in question by the city authorities in October, 1869, if valid, was to bind their successors for 10 years as to these matters of legislation. If it be conceded that the power existed, as claimed, then it practically follows that, at the end of the term, in 1879, a contract may be made by their successors without limit, and which may bind the public indefinitely. I am unwilling to sanction a principle which, in a case like this, would lead to such results. The safer rule is to hold the officers of a municipality to a rigid accountability in the discharge of their trust. In all cases of contract to run for years, the authority to make them should be clear; because they involve pecuniary liability, and it is a tax upon future property owners of the city."

The principles asserted in the case of *Canal Co.* v. *St. Louis*, 2 Dill. 84, lead to the same result.

In some of these cases there seems to have been no power given to the municipal corporations to do, through works to be created and controlled by themselves, the things for which they contracted with others. If so, the more potent is their illustration of the principle involved. The city of Brenham was not in that situation.

In the case of *City of Indianapolis* v. *Gas-Light Co.*, 66 Ind. 400, it appeared that the gas company, by its charter, was empowered to manufacture gas to be used for the express purpose of lighting the city of Indianapolis. One section of its charter declared that "said company shall have the privilege of supplying the city of Indianapolis and its inhabitants with gas, for the purpose of affording light, for the term of twenty years." Another, "that nothing in this act shall be so construed as to grant to said Gas-Light & Coke Company the exclusive privilege of furnishing said city with gas, for the purposes within named." It was further provided that "the said city of Indianapolis, in its corporate capacity, shall have power to contract with said company to furnish gas for the purpose of lighting the streets, engine-houses, market-houses, or any public places or buildings." The gas company contracted to furnish the city with gas for the period of five years from a given date, and the city refused to pay for some received during the time embraced in the contract, and to recover the price of that the action was brought. It was held that the city was liable for gas furnished after it had elected to treat the contract as a nullity, and had given notice that it would not pay for gas furnished, and for lighting, cleaning, and repairing lamps on and after a day named. The provision in the charter that the act should not be construed to give an exclusive privilege to the gas company was evidently not intended as a legislative declaration that the city might not by contract grant an exclusive privilege, but simply to avoid a misconstruction of the charter itself, and to leave the city free to make such contracts as it deemed proper, within the powers granted. The privilege given to supply the city and its inhabitants with gas for the period of 20 years, coupled with an express power to the city to contract, might well evidence an intention on the part of the legislature to permit it to contract for a longer period than was embraced in the contract made. If the legislature so willed, and there was no constitutional objection to such legislation, such a contract would be valid. From the report of the case, it is doubtful, however, whether the legislation to which we have referred controlled the decision. The gas company was chartered in 1851; the contract sued on was made July 22, 1876; and at some time after the incorporation of the gas company, whether before or after the contract was made not appearing from the opinion, the city was incorporated under a general law, one section of which gave the city power "to construct and establish gas-works, or to regulate the establishment thereof by individuals or companies, or to regulate the lighting of streets, public grounds and buildings, and to provide, by ordinance, what part, if any, of the expenses of lighting any street or alley shall be paid by the owners of lots fronting thereon." The inference from the opinion is that the power of the city to make the contract was based on the power given to regulate the lighting of the streets. If so, then the decision does hold that the city had power to make the contract, extending over several years, under a grant of power of the most general kind.

This case was cited as an authority to sustain a contract for a supply of water for a city embracing a period of 20 years. *City of Valparaiso* v. *Gardner*, 7 Amer. & Eng. Corp. Cas. 629. The city of East St. Louis was given power to contract and be contracted with; to provide for lighting the streets and erection of lamp-posts; and to make such ordinances as might be necessary to carry into effect those and other powers granted. The East St. Louis Gas Company was given power by its charter to contract and be contracted

with; power to manufacture and sell gas for the purpose of lighting the town of East St. Louis and territory contiguous, the town and city of that name being the same. The gas company was also given the exclusive privilege of supplying the town and contiguous territory with gas for 30 years, charges not to exceed rates of another company, and 10 per cent. added. The city contracted for gas for the period of 30 years, and, after it had received gas for some time under the contract, it declined to receive more, holding the contract invalid for want of power to make it; whereupon an action was brought to recover the sum due under the contract for the period the city had received and not paid for gas furnished. Under this state of facts, the supreme court of Illinois held that the city was liable for gas furnished before it disaffirmed the contract. The ground on which the contract was claimed to be invalid was the want of power to make a contract to bind the city for so long a period. The court did not pass on the validity of the contract, nor is there any intimation in the opinion of either of the judges that the court would have declared the contract binding on the city; while in an elaborate opinion by one of the judges it was held that the contract was void, and that it was beyond the power of the legislature to authorize it.

In *Water-Works Co.* v. *Atlantic City*, 6 Atl. Rep. 24, it was held that a contract made by a city having power, under its charter, to provide a supply of water for the city, by which it agreed to receive water from a water company so long as the company complied with its obligation, was valid. From the report of the case, we cannot ascertain fully what the charter powers of either corporation were; but, to the objection that the city had no power to bind itself for an indefinite period, the court replied that the contract provided a means by which the city could terminate it at any time.

These are the leading cases bearing on the question before us, and we are of the opinion that the better reason is with those that hold that a municipal corporation has no power, under such laws as operate on the contract before us, to make such a contract. Municipal officers hold but for short terms, those of the city of Brenham for but one year, and the very purpose for which short terms of office and frequent elections are required is to leave the control of municipal affairs as near as may be in the hands of the people; to make the municipal administration reflect, as near as may be, the will of the public. The reasons but emphasize the necessity for denying to a city council, or other governing body, the power, by contract or otherwise, to disable or hinder from time to time the full and free exercise of any power, legislative in its character, which the legislature has deemed proper to confer upon such corporations. Cases will arise in which it becomes necessary to make investments for permanent improvements, and as to such things the acts of the governing body then acting must necessarily be given effect. The improvement in such cases becomes the property of the city, and its power over it continues, through which it may use, change, or so deal with it as may be deemed best.

We do not wish to be understood to hold that a municipal corporation has no power, in any event, to contract for such things as are consumed in their daily use, for a period longer than the official term of the officers who make the contract; but we do intend to be understood to hold that such corporations have no power to make contracts continuous in character, in reference to such things or any others, by which they will be, in effect, precluded from exercising from time to time any power, legislative in character, conferred upon them by law.

There is, however, another question involved in this case, which will be examined, reaching further than the one we have considered, and involving, not only the power of the municipal corporation to make the contract sued on, under the terms of the charters of both corporations, but involving the question of the power of the legislature, directly or indirectly, to confer upon the water company such rights and privileges as it claims under the contract

It is claimed that the contract creates a monopoly, and that this is in violation of the constitution, which declares that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." If such is the effect of the contract, it is forbidden by the constitution, and no legislation can give validity to it. A grant which gives to one or an association of persons an exclusive right to buy, sell, make, or use a given thing or commodity, or to pursue a given employment, creates a monopoly. There are, however, certain classes of exclusive privileges which do not amount to monopolies, and a consideration of these, and the grounds on which they stand, is not now necessary.

The right to exercise the exclusive privilege need not extend to all places; it is enough that it is to operate in and to the hurt of one community. It need not continue indefinitely, so as to amount to a perpetuity; it is enough that it be an exclusive privilege, for a period of time, of the character forbidden. The more general is its application as to places and persons, and the longer it is to continue, the more hurtful it becomes. In the case before us, the contract, as we have seen, gives the exclusive right to sell to a community for public purposes for the period of 25 years, thus affecting all the inhabitants in their common right directly, and in their individual rights at least indirectly. This right to sell for public purposes carries with it, through the contract, the obligation to buy for public uses. It gives the exclusive right to sell to the inhabitants of the city for the same period, for all the private uses for which they may need water, in such ways, and to be so applied, as it can be only by a system of water-works; which is a denial, in effect, to the inhabitants of the right to buy for these private purposes from any other water company. Such an exclusive right prevents competition, and tends to high prices; all matters affecting which the contract before us surrenders the right further to regulate for a quarter of a century. It has been said, in cases to which we will hereafter refer, that there can be no monopoly in the use of a street to lay down gas or water mains or pipes, because it is not a matter of common right to use streets for such purpose. This may be admitted without affecting the question before us. When such use, however, is but a means to the exercise of an exclusive right to sell water, and to compel a city or its inhabitants to buy it, it will be found difficult to separate the means from the end intended to be accomplished. A system of water or gas works may be operated in a town or city as well by one individual as by a private corporation, if he have the ability. No corporate franchise is necessary to that purpose. It is an occupation in which any person may engage if he has the means, which may, and ordinarily will, involve the right to use streets and other public grounds.

Thus, means to accomplish the purpose can ordinarily be acquired only through provision given directly or indirectly by the state, but cases may arise in which no such consent would be necessary. Such a franchise, when granted, is one of the fullest character, and, from its nature, subject at all times to control.

Some conflict of authority exists as to whether such contracts as that under consideration create monopolies. The question has arisen in several cases in which gas and water companies asserted exclusive right to use streets for laying down mains and pipes, under charters granted, which, in terms, gave exclusive right. The question has most frequently arisen in cases between rival companies seeking to use streets, and in which no further right was directly involved.

In *Norwich Gas-Light Co.* v. *Norwich City Gas Co.*, 25 Conn. 19, it appeared that a gas company, holding a charter which in terms gave it the exclusive right to use streets for the purpose of laying down pipes, renting gas-posts, burners, and other things necessary to lighting the streets, alleys, lanes, public grounds, and other places, sought to restrain a rival gas company from using the streets for a like purpose; and it was held that the char-

ter created a monopoly which the court would not sustain, even in the absence of a constitutional provision forbidding monopolies. Such a claim asserted by a gas company holding under a contract with a municipal corporation, which assumed to give the company the exclusive right to use the streets for the purposes of its business, in another case was held to be a monopoly, and on that ground the claim held to be invalid. *State* v. *Cincinnati Gas-Light Co.*, 18 Ohio St. 293.

The case of *City of Memphis* v. *Memphis Water Co.*, 5 Heisk. 525, was very similar in its facts to the Connecticut case above noticed, and it was held that the exclusive right to use the streets of the city, given to the water company by its charter, did not create a monopoly. As this case fairly presents the theory on which such exclusive grants to use streets for gas and water purposes are maintained, we will quote a part of the opinion. The court said: "The question, then, is narrowed down to the inquiry, did the individuals composing the Memphis Water Company have the right, before their incorporation, in common with all others, to erect water-works in Memphis, to take up pavements, occupy the streets, and do such things as were necessary and proper in completing their water-works? It is clear that none had the right to do those things except the city of Memphis, by virtue of its corporate powers, and this right on the part of the city was exclusive until it was taken away by the legislature, and transferred to the Memphis Water Company. It is no more a monopoly, when conferred on the water company, than when it belonged to the city of Memphis. It was an exclusive privilege when exercised by the city. It is an exclusive privilege in the Memphis Water Company, but not a monopoly."

In *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252, it appeared that the plaintiff had a charter which gave it the exclusive right, for the period of 50 years, of making and supplying gas-light to the city of New Orleans by means of pipes or conduits laid in the streets, to such persons as might voluntarily choose to contract for it. The defendant was subsequently chartered under a general law authorizing the formation of corporations for certain purposes, among which was the construction and maintenance of works for supplying cities or towns with gas, and it had obtained provision from the common council of New Orleans to use its streets and other public ways and places to lay mains, pipes, and conduits. This it was proceeding to do when a suit was brought to restrain it, and it was held that the exclusive grant, in connection with the facts shown, constituted a contract which state legislation could not impair. In disposing of the case, it was said: "Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business, open as of common right to all, upon terms of equality; for the right to dig up the streets and other public places of New Orleans, and place their pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the state, or by the municipal government of that city, acting under legislative authority. * * *"

To the same effect is the decision of the supreme court of Louisiana in *Crescent City Gas-Light Co.* v. *New Orleans Gas-Light Co.*, 27 La. Ann. 138, 147, in which it was said: "The right to operate gas-works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets, and lay down gas-pipes, and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the state, and in the exercise of the police power, the state could carry on the business itself, or select one of several agents to do so."

Subsequently to the granting of the charter through which the plaintiff claimed, the constitution of the state of Louisiana was so changed, while

preserving rights, claims, and contracts then existing, as to provide that "the monopoly features in the charter of any corporation now existing in this state, save such as may be contained in the charter of railroad companies, are fully abrogated," and it was claimed that this could operate to divest the plaintiff's privilege. As to this the court, however, said: "The monopoly clause only evidences a purpose to reserve the policy, previously pursued, of granting to private corporations franchises accompanied by exclusive privileges as a means of accomplishing public objects. That change of policy, although manifested by constitutional enactments, cannot affect contracts which, when entered into, were within the power of the state to make." The inference from the language used is that, had the constitutional provision in regard to monopoly features in charters been in force when the plaintiff's charter was granted, its exclusive privilege, franchise, or whatever it may be termed, would have been inoperative.

In *New Orleans Water-Works Co.* v. *Rivers*, 115 U. S. 674,[1] a suit was brought by the company to restrain Rivers from laying pipes, mains, and conduits from the Mississippi river to the St. Charles Hotel; and the claim was based on the fact that the plaintiff had a charter which gave it the exclusive right to supply the city of New Orleans and its inhabitants with water from the Mississippi river, or other stream, by mains or conduits, with such right to lay them in the streets, public places, and lands of the city, which had been granted in consideration that it would furnish water to the city free of charge. The claim of the plaintiff was sustained, and the charter held to be a contract that could not be impaired by the constitutional provision afterwards adopted, to which reference is made in the preceding case. The same inferences may, however, be drawn from the opinion, as to what would have been the effect of the provision of the constitution repealing "the monopoly features in the charter of any corporation," had it been operative at the time the plaintiff's charter was granted.

In the case of *State* v. *Milwaukee Gas Co.*, 29 Wis. 460, it was conceded that the grant of an exclusive right to lay pipes, for the purpose of conducting gas, in the streets, avenues, and other public places of a city, coupled with the exclusive right to manufacture and sell gas to its inhabitants for 15 years, created a monopoly.

In the *Slaughter-House Cases*, 16 Wall. 61, 65, 102, 121, 128, it was conceded that the exclusive privilege in question, in these cases, was a monopoly; but in these, as in the case last above cited, it was held that, in the absence of some constitutional provision forbidding monopolies, the grant of these exclusive privileges was not invalid. Under an exclusive grant of privileges, similar to those in question in the *Slaughter-House Cases*, it was held in the case of *City of Chicago* v. *Rumpff*, 45 Ill. 97, that a monopoly was created. The court said: "Such action is oppressive, and creates a monopoly that never could have been contemplated by the general assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary, business."

In the case of *State* v. *Gas Co.*, 34 Ohio St. 581, it was held that such an exclusive right as the contract in this case gives, created a monopoly.

It will not do to say that an exclusive right in a municipal corporation to operate water or gas works stands upon the same ground as does such exclusive right held by a private corporation or an individual. In the one case the right is, in effect, exercised by the people who are to be affected by it, and not for profit, but for the welfare and convenience of the public and the inhabitants of the corporation. The correction of abuses in its management, whereby oppression may be avoided, is in the hands of the people; while, on the other hand, such works are operated for private gain, with every incentive to op-

[1] 6 Sup. Ct. Rep. 273.

pression, without power, in those to be affected, to relieve themselves from it. In the one case the exclusive right may create a monopoly, and in the other not.

The exclusive rights given by the contract before us lead to the same results as a monopoly in any other matter; and whether a monopoly or not is best ascertained by the results which are brought about by a contract or law, and the exercise of rights the one or the other may profess to confer, we are of the opinion that the exercise of the exclusive rights conferred on the water company produce the same results as would the exercise of an exclusive right which would fall within the most exacting definition of a monopoly, and that the allowance or creation of such exclusive rights is contrary to the spirit of the constitution of this state.

There are many other questions in this case which, in view of the controlling character of those already considered, need not be examined.

If the appellee furnished water between the time the works were put in operation, under the ordinance passed June 1, 1885, and the tenth July of that year, when the city declined further to regard the contract as binding, for that the city ought to be held liable; but this is the extent of the right of the appellee to recover for water furnished the city.

The judgment will be reversed, and the cause remanded.

GULF, C. & S. F. RY. Co. *v.* MORRIS and others.

(*Supreme Court of Texas.* March 25, 1887.)

1. RAILROAD COMPANIES—DISSOLUTION—SALE OF ROAD.
   Some of the stockholders of the G., C. & S. F. Ry. Co. bought up all of the stock and bonds of the C. & M. R. Co., and destroyed them. They did not, however, buy the road itself, but, taking themselves to be owners of the road from the purchase of the stock and bonds, they sold it to the G., C. & S. F. Ry. Co. A creditor of the C. & M. R. Co. having obtained judgment against the road, *held*, that he had the right to levy execution on the road and franchise; the purchase and destruction of the stock and bonds, and subsequent sale to the G., C. & S. F. R. Co., not constituting a dissolution of the C. & M. R. Co., so as to relieve it, as a corporation, from all its debts and obligations.
2. SAME—POWER TO PURCHASE.
   Corporations organized for public purposes cannot, by contract of sale, lease, or otherwise, render themselves incapable of performing their duties to the public, or in any way absolve themselves from the obligation which forms the main consideration for giving them a corporate existence, unless this be done by consent of the state, given through the charter, or in some other manner.
3. SAME.
   Under the general incorporation law of Texas, one railroad company has no power to buy another railroad, nor does that law authorize a railroad company to sell its road to another company, or to another person.
4. SAME—CHARTER—AMENDMENT.
   Under Rev. St. Tex. art. 4113, regulating the general right to amend railroad charters, and providing that any railroad corporation may, by amendment to its charter, project and provide for the locating, constructing, owning, maintaining, and operating of a branch line to its original main line, while the right to construct, operate, and maintain is conferred, it does not confer the right to buy another railroad.

Appeal from district court, Montgomery county.

Ballinger, Mott & Terry, for appellant. *Hutcheson & Carrington* and *J. E. & W. P. McComb*, for appellees.

STAYTON, J. On April 14, 1882, the charter of the appellant was amended under the general law, and by that it was provided, in addition to powers otherwise given, that it should have power "also to construct, own, operate, equip, and maintain a branch of said railway, to be called the 'Eastern Branch' thereof, commencing at a point on its main line in Burleson county,