THE THEOREY AND THE LAW OF WATER WORKS SECURITIES.

The size of the contemporary newspaper is a subject of frequent criticism, but, in any event, there is this to be said in defence. Modern newspapers have to be large because there is such a variety of interests among their readers to gratify. If a man reads only the items which concern himself and his own affairs, as most men do, for him eight or ten pages shrink to a few columns.

Take the news about private water companies as an example. Who reads, or even notices it? Engineers, students of municipal problems, some lawyers, and people who have money invested in water works securities. But are they not entitled to the same consideration at the editor's hands as the class which turns first to the telegrams from South America, or to the mining news from Alaska? The editor, who ought to know, thinks so, and in a year's aggregate, news about private water companies occupies no little space. It is usually news of trouble and disaster.

Of the thousands of plants which are operating in all sections of the country, many are prosperous and successful. This, perhaps, makes them commonplace from the reporter's standpoint, and no tidings of their affairs come over the telegraph wires for publication with appropriate head-lines. The printed material is of another sort. Here are some specimens gathered from a few months' reading of one newspaper and another. After protracted litigation, the Duluth (Minn.) Gas and Water Company has sold its system
to the city at a price sufficient to pay only its first mortgage bonds. Its second mortgage bondholders and stockholders get nothing in return for their investment. The Supreme Court at Washington has decided that the city councils of three Illinois cities, Freeport, Danville, and Rogers Park, have the right, under the local water companies' charters, to fix the rates which they may charge for water. From Canandaigua, N. Y., comes this story: A private plant was installed in 1884 at a cost of $90,000, paid from the proceeds of bond sales. Its service was poor, and in 1884, the village built its own plant and took most of the consumers, some eight hundred in number. The private company is in the hands of a receiver, cannot earn operating charges, and ten cents on the dollar is offered for its bonds. The Supreme Court of Louisiana has decided that the charter of the New Orleans Water Company, a $4,000,000 corporation, is forfeited. At Topeka, Kansas, the city claims that the water company's franchise is terminated, and insists that it turn over, for $468,000, a plant which the company says is worth $700,000. For three successive summers there has been no hard rain in the water shed from which the Cherryvale (Kansas) Water Company draws its supply, and its engines have stopped because there is nothing to pump. The city has annulled its franchise and sued the company. Circuit Judge Caldwell and District Judge Phipps have rendered a decision in the famous case of the National Water Works Company against Kansas City, Mo. They hold that the city may purchase the Water Works Company's plant for $2,774,000. The amount of the company's bonded debt is over $4,000,000, and the bondholders thus realize a little more than sixty cents on the dollar. The city auditor of Sioux Falls, S. D., has officially notified the local water works company of the result of the recent election when the voters of Sioux Falls declared in favor of bonding the city for $210,000 for the purpose of constructing a municipal water works plant. The company is requested to make a proposition in writing for the sale of its plant. The Water Company has answered by beginning an action in the United States Court to enjoin the city from issuing its bonds. It alleges that, if the city builds its own plant, the water company's bonds, which amount to $300,000, will be made valueless. The president of the Helena (Montana) Water Works Company has served notice on the city council that if payment for water used for municipal purposes, at the rate of $18,000 a year, is not made, the supply will be shut off. The Hurley (Wis.) Water Company has sued the town
from which it got its franchise to recover several thousand dollars, claimed to be due for hydrant rental. The trial court has decided in the town’s favor on the ground that it had no power to grant the franchise. If the Appellate Court affirms the judgment of the trial court, the company’s bonds will have little value. St. Cloud, Minnesota, has been sued by the local water company for past due hydrant rental and the city has answered that the company has not earned the hydrant rental because its service has been inadequate. At Bismarck, N. D., a resolution has been introduced in the Common Council, rescinding the contract between the city and the water company under which $4,000 a year is paid. At Ottumwa, Iowa, the franchise of the water company has expired. If the company should shut off the water, the city would be without fire protection. But the city council refuses to call a special election to renew the franchise, or make a temporary contract. The city of Leavenworth, Kansas, has instituted proceedings for the acquisition of the water company’s properties, and a committee calls on the bondholders to unite for protection. The mayor of Davenport, Iowa, and a committee of aldermen have visited Milwaukee, Wis. They are examining water plants of various cities. In an interview they say that Davenport has a good water system, but it is under the control of a company which charges more than the people are willing to pay, and the city is considering the feasibility of installing its own plant. An epidemic of typhoid fever, as malignant as cholera, has developed at Ironwood, Michigan, and the water company’s reservoir has been found to be full of noxious slime, which proves fatal to mice. The superintendent of the company has fled to escape the vengeance of a vigilance committee. Some of these are contemporary items of news, and some, like the Ironwood episode, tales retold, because suggested by some contemporary incident. People who are not interested, do not notice them, but there they are and they contain a curious story—a story of complicated litigation, of popular dissatisfaction, and of disappointed investors.

Often when investments go wrong, posthumous explanation is easy. The receiver and his lawyer agree that any one but a fool might have seen that the scheme could not succeed. But the arguments by which the promoters of water works securities pressed their sale, had the merit of such plausibility that it is as difficult now as it was before disaster came to locate their fallacy. The first step in a water works project was to secure for the company
an "exclusive" franchise to supply the city with water for industrial and domestic purposes, and as a means of protection against fire. An "exclusive" franchise was the foundation and in a city of any considerable population or promise would clearly seem a valuable asset. In addition, the city was expected to contract for water for its public hydrants for a term of years, and to pay for this water annually a sum which it was calculated would at least equal the interest on the cost of construction. A bond issue supplied the money for this purpose, and perhaps something more than the amount strictly needed. The hydrant rental was assigned to the trustee under the mortgage as an assurance that interest coupons would be met as they matured. Why was this not a safe business proposition? The contracts with the city alone provided means for building the plant and an income for paying the interest on the bonded debt. The security holders had an opportunity impregnable position. Their bonds were practically a debt of the municipality, but they carried a higher rate of interest than municipal bonds, and, in the event of default, would be easier to collect, because there was specific tangible property behind them.

The promoters took the company's stock for their pains. Even it was an attractive investment. The commodity dealt in was water and every one had to buy water, and had to buy it from the company, because its franchise was "exclusive." The element of depreciation and the invention of improved devices, calling for the abandonment of old plants and for increased investments are serious factors in the careers of many public service corporations. Telephone systems and electric light plants often have to be rebuilt at great expense. But properly laid water mains last practically forever. The site of the submerged Pompeii was disclosed by a bubbling pipe, which through centuries had defied time's ravages, and while schemes for economy and efficiency of operation have been devised, the essential principles of water supply are nearly as simple as when Plancus was consul. Here then was an enterprise which would neither wear out nor need to be renewed, having an assured income from one source equal to its interest charges and supplying an indispensable commodity to a community without competition or the fear of it. The theory was quite perfect. No one who invested in the securities of private water companies had any reason to be ashamed of his judgment.

The enumeration of all the causes of the troubles which came, unheralded by prophets, would fill as many pages as the catalogue
of ships. Petty quarrels between the companies' managers and consumers, jealousy of the enterprise's success and prosperity, even local dishonesty and a wanton spirit of repudiation have, in different cases, contributed to the result. But the two most important agents in breeding first friction, and then bringing disaster, have been poor service and the demand for cheap water. Original defects in construction or unintelligent engineering were often to blame for the first. Sometimes a mistake was made in selecting for the source of supply a body of water which was either insufficient in quantity or contaminated by filth or disease. Had pressure never failed in time of fire, and had the water always run clear and bright in the pipes, the discontent which disclosed itself would perhaps not have appeared in any given case as quickly as it actually did. But, at best, there would probably have been only a postponement, and for this reason: In practical experience a fundamental and fatal weakness has been disclosed in the theory of private water companies, and curiously enough this weakness is the very thing which was regarded at the outset as their greatest strength. Every one has to have water and an adequate supply is essential to the preservation of property and the comfort and health of the community. But does it follow that people will submit to high or even reasonable charges for the service? Not at all. On the contrary, these considerations have induced a popular feeling that water cannot rightfully be used as a material for money making. Shall the poor man who cannot pay high rates be shut off and driven to the cistern or the well? This may mean an epidemic from which the whole city will suffer. Shall the man of moderate income have to measure carefully the quantity of water he consumes? Economy in this direction means added drudgery in the household, and the parching of many green spots which otherwise would make urban life brighter. There is some merit in these ideas, and in any event they have many adherents who regard water rates, not as the purchase price of an article of commerce, but as taxes. Every one expects all taxes to be low, and so water rates must be. When a private water company confronted such views, and the conclusion of municipal ownership to which they inevitably lead, its position was a serious one. In other departments of public service there was room for argument, but a private company cannot compete with a city in the price of water. A city can maintain a plant more cheaply than a private company, because it can borrow money at lower rates. A city has no taxes to pay and no dividends on stock,
which most frequently represents nothing more substantial than
good will, but is none the less ambitious for a return. And back of
all this, the city has its general powers of taxation, so that its water
department does not need to be even self sustaining. It is the
government's duty to see that water shall be so cheap that its use
will be general, and the public health be conserved. If the income
from water sales is not sufficient to maintain an efficient service,
for what purpose can a tax levy be more legitimately resorted to?
The non-resident property owner and the owner of unimproved
property are as much interested as the actual water consumer. No
property is worth much in a city without a plentiful supply of pure
water. The lighting problem concerns only a class, because the
poor can use kerosene, and neither gas nor electricity is necessary.
Street car transportation is paid for five cents at a time and for-
gotten in the intervals. But the universality of the use of water
and the system of periodic payments make the water question a per-
sistently vital one with all sorts of voters. The private company
is called on to reduce its rates below the point of a living return.
If it refuses, it soon has the choice between selling its plant to
the city at a loss or seeing it paralleled by a competitor with which
it cannot compete.

The courts became the refuge of the companies when they were
assailed. They felt very confident of their position. They had
been careful to guard against all probable dangers. Their capacity
might be inadequate for the public needs. But the franchise had
prescribed what the capacity should be, and had provided that
before the works should be accepted, as complying with the fran-
chise, a test should be made to determine whether this had been
secured. This test usually consisted of throwing a certain number
of streams of water through nozzles of a stated size to a stated
height. Sometimes the plant was equal to the test, but frequently
it was so severe that no plant could have performed it. When a
company recognized its shortcoming in this direction, it would make
the performance of the initial test a holiday occasion. There would
be speeches, a lunch, a band and much excitement. The pumps
would be pushed to a point where the hose would be lifted out of
the firemen's hands, there would be loud cheering and the city
council would be called promptly into special session and a resolu-
tion, prepared in advance, would be passed with the utmost good
feeling, declaring that the test had been complied with, and that
everything was satisfactory. A year afterwards, if the fire streams
furnished were too feeble to reach a burning building, the company would produce this resolution and maintain that the matter was no longer open to debate. And it looked as though this were true. The company's service might be poor, but this also caused it no anxiety. Its franchise was by express terms made "exclusive," and consumers would have to be satisfied with what it had to give, or go without water. It regarded itself as safe from competition, either by the city or another company. When people complained that the charge for hydrant rental exacted more from the municipal treasury than it ought in fairness to be asked to pay, the company would refer to the contract between itself and the city as a conclusive answer.

When the companies got into litigation, the forum was more often a state than a federal court. The great fight against municipal repudiation of railroad aid bonds; which forms one of the most interesting stories in American legal history, was waged in the United States courts. The United States courts, too, interpreted and defined the permissible limits of railroad regulation by State legislatures. But private water companies were usually domestic corporations, and their controversies properly came for determination before State judges, elected by the people and holding office for a limited term. The era of judicial construction of the rights of private water companies begins about 1885. The questions were not new. They had been before courts in one shape or another for years, and an examination of the reports unearthed a long line of decisions and dicta which were so diverse in meaning as to give aid and comfort to both sides with reasonably equal force. But what was new were the facts. Private water companies were giving poor service at high rates, and claiming that there was no power lodged anywhere to furnish a remedy. The courts made short work of the contention and afforded one more illustration of what every lawyer's experience shows to be true, namely, that legal principles do not control and shape facts, but facts control and shape legal principles. Cities were entitled to good water at fair prices, and if the law had been so fixed by the courts that they could not get it, the courts would change the law.

The points involved in early water works litigation were very important and had to do with the very foundations on which the popularity of waterworks securities rested. They did not, like early railway litigation, concern the right of regulation. They concerned the existence of the companies. The "exclusive" fran-
chise and the municipal contract for fire service were the main points of attack. The enemies of the enterprise argued that it was not in the power of a city council, or even of a State legislature, to grant a corporation the exclusive right to supply a community with water, and that a contract by a city to take water for public hydrants at an agreed price for a long term of years was void. The law, as it stood, did not settle these questions. The decided cases which discussed them at all, were few and obscure. On the first, the Supreme Court of the United States had held that, in the absence of a prohibition in the State constitution, a State legislature could grant a corporation or individual an exclusive right to make and sell gas to a city, and if the beneficiary of the grant accepted and acted on it, a contract was created, which could not be impaired or abridged by subsequent legislative action. The Supreme Court of Wisconsin had made a similar holding also in reference to gas. The Supreme Court of Tennessee had held that a city could grant to a company an exclusive privilege to operate water works in its limits, and this, too, in spite of a constitutional inhibition against perpetuities and monopolies. The Supreme Court of Kentucky had said practical the same thing, as had the Supreme Court of Connecticut. On the other hand, many courts had held that a municipal corporation, unless in express terms empowered to do so by the State legislature, acting within its constitutional powers, could grant no exclusive rights to any corporation or individual. It is interesting to note that this view of the law had been most often advanced by the Federal Courts. Thus, as early as 1859, Mr. Justice Nelson, speaking for the Supreme Court of the United States, had pointed out that clear legislative permission was an essential prerequisite to a city's exercising any such function. In 1879 the same court, speaking through Chief Justice Waite, again advanced the same doctrine. In 1886 Judge Brown, now of the United States Supreme Court, decided in a case before the United States Circuit Court of the sixth circuit that legislative authority, granted a city to cause its streets to be lighted and to make reasonable regulations with reference thereto, did not empower the city government to grant to one company the exclusive right to furnish gas for thirty years. The Supreme Court of Iowa had decided in 1876 that a city could not grant an exclusive franchise to run passenger omnibuses on its streets, although subsequently, in 1887, with interesting versatility, it held that it could give exclusive privileges to a street railway company. But these and other cases were usually concerned
with disputes between competing companies, not between a company and the municipality. They also turned on the construction of special city charters, which limited their possible applicability. None of them went further than to hold that while a city, simply because it was a city, could not confer an exclusive right in its streets, none the less it could do so if the State legislature empowered it to, and that the legislature itself could directly grant the right, unless the constitution forbade.

And really it did not much concern private water companies, whether their franchises were exclusive or not. Their main reliance was on the integrity of the contracts by which the cities, in which they operated, agreed to take and pay for water for public purposes for a term of years. If these were valid, they furnished a safeguard which made the franchises practically secure, irrespective of their legal value. No city bound to take water from one private company for its hydrants, at a heavy rental, for twenty or thirty years, could find another company willing to construct a competing plant, nor would any such city be in a position to install a plant of its own. But were such contracts good? The early cases on this question also were few, and not very helpful. The New York Court of Appeals had said that they were not. If a municipality could thus bind itself for five years, it argued, it could bind itself for nine hundred and ninety-nine years. But such reasoning is not over-profound, and if applied in the other direction would serve to vitiate a contract made for a day or for even half an hour. Other courts had found this trouble: When a city agreed to pay a fixed sum per annum for a public service over a term of years, it thereby incurred a debt for the aggregate amount payable under the agreement. If this aggregate exceeded the debt limit permissible under its charter, the contract was void. The Supreme Court of the United States has called these authorities "respectable," but this is only evidence of the Supreme Court's politeness, not of the decisions' merit. In such cases there is obviously no debt until the periodic service has been rendered. Other courts had questioned the validity of the contracts on a still different ground. They regarded them as made in the exercise of the city's legislative functions, and they expressed a doubt as to the power of a local legislative body to bind the municipality beyond its own term of office, and so as to tie the hands of future local legislative bodies. This view is an interesting illustration of the influence which cant phrases or aphorisms have on judicial thought,
even when misapplied. But it is so subtle and elusive that it is surprising it did not carry greater weight among lawyers. Many years went by before its fallacy was clearly demonstrated by an appellate court. But in spite of all these decisions the opinion prevailed at the bar during this early period that where an individual or a corporation had, in good faith, invested money in the construction of a water works plant, relying on a contract with the city for a term of years, the courts would protect the contract against repudiation by the municipality.

When the decisions actually came on both these specific questions, they were very disappointing. Here are some examples: In 1887 the Supreme Court of Montana said that the grant by a city council of the exclusive right to sell to the city all the water it might require for sewerage and fire purposes for a period of twenty years was a monopoly, which the city council had no authority to grant, even in the absence of an express prohibition in the city's charter, or other acts of the legislature. In the same year the Supreme Court of Texas said that an exclusive franchise and a contract to take water for twenty-five years were both void, because they ran counter to that clause of the Texas constitution which provides that perpetuities and monopolies are contrary to the genius of a free government, and shall not be allowed. In 1892, the Supreme Court of Minnesota said that even when a city had granted an exclusive franchise under express legislative authority, it had not thereby disabled itself from installing water works and a system of supply of its own. Later the same court said that a contract between a village and a water company by which the village agreed to pay a fixed price for a specified number of hydrants during a term of thirty years was void, but that, on the other hand, inasmuch as the business of the water company was “affected with a public interest,” it had no right to summarily and arbitrarily shut off the supply of water, in spite of the invalidity of its contract. In 1892 the Supreme Court of Kansas said that while such contracts should be upheld for a reasonable time, and until it was made to appear that the city might obtain better facilities upon more reasonable terms, when, in fact, improved methods were offered which would give the city better facilities in the way of water, light and travel, or in any other manner give its inhabitants increased safety and protection, the governing power should be free to act. The reasonable inference from these and a dozen similar decisions of other courts is this: Even if a private
water company has a franchise and a contract from the municipality, and there is no ground for criticism of the service it renders, none the less it is at the best only a tenant at sufferance, liable to be ousted if another tenant wants the stand at a higher figure, or if the city decides to go into the business itself. Not much comfort here for the man with a hundred thousand dollars invested in pipe ten feet below the ground, and which is worthless except as the property of a going concern.

But if such is the position of a company which gives good service, what is the fate of a company which furnishes poor water at an inadequate pressure? The well-known Galesburg Water Company case answered this question. It was, perhaps, unfortunate for the water companies that this controversy should have come before Judge Gresham. Abstract legal principles and the quibbles of schoolmen seem to have had little interest for him. A keen sense of justice and an appreciation of the substance of things were the conspicuous features of his mentality. The city of Galesburg, Illinois, had granted one Shelton a thirty years franchise of the standard pattern, and in it had rented fire hydrants for the franchise's term. He had assigned the franchise to the Galesburg Water Company, which had built the works, and mortgaged them to the Farmers Loan and Trust Company of New York for $121,000. When the plant was completed, it was subjected to the tests called for by the ordinance. These were satisfactorily made and the works formally accepted by the council. Afterwards the water furnished proved poor in quality and inadequate in quantity. As the court puts it, "the water company trifled with the health and the lives of the people." The city was patient, but finally began suit in the State court to annul the company's franchise. The bondholders intervened, removed the case to the United States court, and there contended that the city was estopped by its resolution accepting the works from claiming that they did not comply with the franchise. It was admitted that the bondholders had purchased the bonds in good faith, and had relied in part at least on the resolution of acceptance. Judge Gresham did not tarry to write an opinion. He decided orally that all this made no difference, that the rights acquired by the bondholders were subject to the terms of the ordinance, that they stood in no better position than the company itself, that the duty to furnish good water and plenty of it was a continuing one, and that, having failed in this duty, the company's rights were ended and the bondholders' security forfeited.
On appeal, the Supreme Court of the United States held that he was right. At this stage little was thus left of the promoters’ theory, so plausible in itself and so plausibly presented. An exclusive franchise was no franchise. A contract for a period of years was terminable, whenever it was to the advantage of the city to terminate it. The initial acceptance of the plant did not preclude the city from subsequently rejecting it when its defects were disclosed. And poor service carried ruin to the bondholders who had no power to prevent it, as well as to the company, to whose negligence it was due. It is not surprising that water works securities lost much of their popularity at this time.

The law of the Galesburg Water Company case is the law of the land to-day as surely as it was fifteen years ago. The integrity of a water company’s franchise is still dependent on its rendering good service, and the health and safety of the community at large are superior, in the consideration of the courts, to the property interests of any class of investors, whether they own stocks or bonds. But on the more technical points of water works jurisprudence, a saner view prevails than is reflected in the opinion of the western and southern courts, which have been referred to. Two recent decisions are responsible for this in as far as it is true; they form the last chapter in this story, are important in themselves and serve somewhat to relieve the gloom of the general picture. In the first the two old questions were involved.

"Has a city power to grant an exclusive franchise without express legislative authority?" Judge Walter Sanborn, speaking for the court, answers:

"For the purposes of this decision, we shall concede that the city had no power to make the privilege of the company to use its streets exclusive, because such a grant tends to create a monopoly. But the company has constructed the works. It has executed the contract on its part, as far as it has been possible for it to be executed. The exclusiveness of its right to the use of the streets of the city was granted for its sole benefit. If it does not receive this benefit, the city suffers no loss. The only effect upon the city is that it gets the water works for a less price than it agreed to pay for them. The grant of this exclusive right was neither immoral nor illegal. It was merely ultra vires. When a part of a divisible contract is ultra vires, but neither immoral nor illegal, the remainder of it may be enforced. The result is this: The fact that the city undertook to grant to
the company an exclusive right to conduct water in pipes through streets, does not avoid the entire contract.”

The exclusive features of the grant are invalid, but the grant is good, except for the exclusive features.

"Is a city’s promise to pay hydrant rental for a term of twenty-one years void?" “Why should it be?” asks Judge Sanborn. “Is it because the members of the city council, as trustees for the public, are exercising legislative powers, and can conclude no contract which will bind the city beyond the terms of their offices, and so circumscribe the legislative powers of their successors, and deprive them of the right to their unrestricted exercise as the exigencies of the times may demand?” This was the familiar argument urged by lawyers and approved by some courts for fifteen years. Has it any merit, and if it has not, where lies its fallacy? Right here, answers Judge Sanborn:

“It ignores the settled distinction between the governmental, or public, and the proprietary or business powers of a municipality, and erroneously seeks to apply to the exercise of the latter a rule which is only applicable to the exercise of the former. A city has two classes of powers—the one, legislative, public, governmental, in the exercise of which it is a sovereignty, and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself, as a legal personality. In the exercise of the powers of the former class, it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules, which govern a private individual or corporation. In contracting for water works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers."

The test, therefore, by which to determine the validity of its contract covering a term of years, is this: Would the contract be good if made by a private corporation, having the charter powers of the city? If it would be, it is good when made by the city.

There was nothing especially novel about these ideas. For example, the Supreme Court of Indiana, as early as 1879, had
pointed out the distinction between the governmental and the business functions of a municipality. Their significance lay in the strength and clearness of their expression, and in the authority they carried, when coming from the court which advanced them, and from a jurist of Judge Sanborn's reputation and influence. The Eighth Circuit embraces the States of the north and middle-west, which, for years, has been the storm center of water works litigation. The decision of its highest court commanded attention, especially when it so phrased the thought that other tribunals, groping in the fog, might appreciate its value. For the United States courts, it has, for the present, settled two propositions: (1) An exclusive franchise, conferred by a city in excess of its powers, is not altogether void, but void only as to its exclusive features, and (2) a contract by a city to take water for a term of years is not illegal because it ties the hands of the city as against the future, but is to be measured and weighed by the same standards which would be applied to a similar contract made by an individual or a private corporation.

So much for the substantive laws of the United States courts. There is thus adequate protection for a private water company, giving good service, if it can have its cause heard, where these views obtain. But as has been before noted, a private water company is likely to be a domestic corporation, organized under the laws of the State where it operates. When it sues a city, or is sued by a city, both litigants are citizens of the same State, and there is no diversity to oust the State courts of jurisdiction, and give it to the federal courts. If the city formally repudiates its contract, can the company, even though it be a domestic corporation, take the controversy into the federal courts and get the benefit of the principles they have advanced, or is it relegated to the State tribunals, which may refuse to follow them? This was the question involved in the second of the recent cases which have been referred to. The constitution of the United States says that no State shall pass any law impairing the obligation of contracts and that the judicial power of the federal courts shall extend to all cases arising under the constitution. If a State legislature should grant a franchise and thereafter enact a law, alleged to impair it, a case would arise under the constitution of the United States, and the federal courts would have jurisdiction, without regard to the citizenship of the parties on either side. Is the ordinance or resolution of a common council purporting to annul a contract which the city
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has made with a water company also a "law" within the meaning of the constitution?

In 1896 the United States Circuit Court of Appeals held in substance that it was not. The city of Fergus Falls, Minnesota, by ordinance, in 1883, rented from the assignor of the Fergus Falls Water Company fifty hydrants for thirty years at eighty dollars each. Ten years later the city's common council passed a resolution declaring the previous ordinance null and void, and refused to make any further payments under it. The water company was a Minnesota corporation and so, of course, was the city. But, none the less, the company in 1895 brought suit for the hydrant rental in the United States Circuit Court and recovered. The following year the Circuit Court of Appeals reversed the judgment and ordered the case dismissed, because the federal courts had no jurisdiction.

The company claimed that the resolution of the city's common council which declared the ordinance null and void was a legislative act, impairing the obligation of a contract, and that for this reason, the controversy was one arising under the constitution of the United States. One of the appellate judges agreed with this contention, but the majority of the court held that no federal question was involved, that the suit was simply one on a contract of the same nature as a suit which the company might bring against a private consumer for water supplied him, and that the resolution of the city's council refusing to pay differed in no respect from a similar refusal which might be made by a private consumer. The point in the case, it said, was whether the city had authority, under the laws of Minnesota, to enter into the contract. If it had, the repudiating resolution was a nullity. If it had not, the repudiating resolution was simply a declaration of what was true without it.

The Supreme Court of the United States was not asked to review this decision, but in 1898, the same question came before it on an appeal from the Circuit Court of Washington. Here the issue was squarely presented and squarely decided. The same arguments which had availed with the Circuit Court of Appeals two years before were urged anew in this higher tribunal: When a city makes a contract in the exercise of its business functions, and thereafter refuses to perform its part, no matter if the expression of its refusal be in the form of an ordinance or resolution of its legislative body, there is presented simply a question of an ordinary breach of a contract, not of a "law" impairing the obligation of a contract. The problem was a puzzling one. If a city makes a
contract to pave a street, and thereafter passes an ordinance annulling
the contract, is the federal court a proper forum for the ensuing
litigation, even though both parties live in the same State? The
repository of ultimate infallibility at the national capital appears
to have been somewhat bothered. Its attention was probably not
called to the Fergus Falls case, and in any event, it does not refer
to it. But in the end it rises to the responsibility, decides that
the United States courts have jurisdiction, and contents itself with
this statement:

"We know of no case in which it has been held that an ordinance
alleged to impair a prior contract with a gas or water company
did not create a case under the constitution and laws of the United
States. * * * The cases wherein the charter of a gas or water
company have been treated as falling within the constitutional
provision are altogether too numerous to be now questioned, or
even to justify citation."

The defeated party, when he cursed the court at the tavern
according to tradition, may have said with some force that the
court was not justified in citing authorities, because there were no
authorities to cite, and that the basis of the opinion was the doctrine
of ipse dixit instead of the doctrine of stare decisis.

But the decision was an important one, fully as important as
Judge Sanborn's decision in the Arkansas City case, of which it is
the complement. Together they settle the law for the present in
this fashion: If a city undertakes, by ordinance or resolution, to
repudiate a contract with a private water company, the ordinance
or resolution is a legislative act, and, if alleged to impair the obliga-
tions of the contract, the controversy is one for the federal courts,
and in the federal courts the exclusive features of a franchise do
not make it void, and an agreement to take water for a term of
years is not necessarily beyond the city's powers, because in its
making the city exercises its business and not its governmental
functions.

Under the application of the exactest thought, there is some
inconsistency between the holding of the Arkansas City case and the
holding of the Walla Walla case. But as they stand, these cases
promise a happier outcome in future for private water companies
which meet the requirements of their franchises in the character
of the service they render.  

Ambrose Tighe.

St. Paul, Minnesota.
APPENDIX.

2State v. Milwaukee Gas Light Co., 29 Wis. 454.
3Memphis v. Memphis Water Co., 5 Heisk (Tenn.) 405.
4Newport v. Newport Light Company, 84 Ky. 166.
6Minturn v. Larue, 23 Howard 435.
8Saginaw Gas Light Co. v. City of Saginaw et al., 28 Federal Reporter 529.
9Logan v. Pyne, 43 Iowa 524.
11Richmond County Gas Light Company v. Middletown, 59 N. Y. 228.
13Garrison v. City of Chicago, 7 Bissel 486.
14Illinois Trust & Savings Bank v. City of Arkansas City, infra.
17Long v. City of Duluth et al., 49 Minn. 280.
18Flynn v. Little Falls Electric & Water Co., 74 Minn. 180.
19Columbus Water Co. v. Mayor of Columbus, 48 Kansas 99.
22City of Indianapolis v. Indianapolis Gas, Light, and Coke Company, 66 Ind. 396.
24City of Fergus Falls v. Fergus Falls Water Co., 72 Federal Reporter 873.