THE LAWYERS REPORTS ANNOTATED

BOOK I
1888

ROBERT DESTY, EDITOR,
EDMUND H. SMITH, BURDETT A. RICH, ASSISTANTS.

EXTRA ANNOTATED EDITION OF 1913

ROCHESTER, N. Y.
THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY.
1913.

say that the town would in the long run be as well off to give away its old building. The question was one for the town to decide for itself, and its decision made in good faith is final.

The numerous cases cited in the defendant's brief fully support the conclusions here reached.

Judgment affirmed.

J. H. LUCIA, On Behalf of Himself and all Taxpayers of the Village of Montpelier,

v.

Village of MONTPELIER, the Board of Bailiffs, the Board of Water Commissioners, and F. L. Eaton, Treasurer.

1. **When power is delegated by the Legislature to an incorporated village, without limitation, to supply itself with water** for fire and domestic uses, such power rests in the discretion of the voters of the village in respect to the amount of money to be expended on aqueducts and the supply of water, if exercised in good faith and for a proper municipal purpose.

2. **And in such case when a village had constructed one water-main,** it was held to be a question of expediency, for the voters to decide, whether another should be built; and an injunction was refused restraining the expenditure of money voted for that purpose, although the water in the existing main was used, to some extent, in running motors, and afforded a fair supply of water if no accident befell it; and although some of the voters were influenced by a desire for an increase of motive power, but the concrete vote was given for the purpose of rendering the water supply more useful and certain.

(September 12, 1888.)

BILL in chancery. Heard on the pleadings and testimony, March Term, 1888, Rowell, *Chancellor*. The court *pro forma*, and without hearing, decreed that the defendants be perpetually enjoined from laying the water-main mentioned in the bill, and that the village treasurer be perpetually enjoined from hiring any money on the credit of the village for the purpose of paying the expenses of the same. *Reversed.*

The bill set forth, among other things:

That heretofore, to wit, in the year 1855, the Legislature of the State of Vermont incorporated the village of Montpelier by Act No. 89 of the Session Laws of 1855; that at the biennial session of the Legislature of the State of Vermont in 1872 said Act of incorporation was amended by Act No. 257.

That § 1 of this last-named Act is as follows:

"§ 1. The second section of the Act of incorporation of the village of Montpelier is hereby so amended as to authorize said corporation to purchase the right to take water from the outlet of Berlin Pond, or such other place as said corporation may desire, and convey said

---

NOTE.—*Power and authority of municipal corporations.* Corporate authorities of towns and cities have a large discretion in the exercise of their powers to establish waterworks, with which courts have no right to interfere except where it is clearly about to be abused. Warren v. Chicago, 8 West. 80, 118 Ill. 329. Municipal authorities of a city possess only such powers as are expressly granted by legislative enactment, and such others as are necessarily and fairly implied in, or incident to, the powers thus expressly granted, or essential to the declared objects and purposes of the corporation; and any act or attempted exercise of power in excess of the limits expressed or necessarily inferred is void. Dill. Mun. Corp. 3d ed. § 89; Whelen's Appeal, 1 Cent. Rep. 85, 108 Pa. 197; Le Couteulx v. Buffalo, 33 N. Y. 333; Meinzer v. Racine, 68 Wis. 245; Gilman v. Milwaukee, 61 Wis. 592; State v. Regents, 54 Wis. 150; Collins v. Hatch, 18 Ohio, 523, 51 Am. Dec. 465; Thompson v. Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385; Ravenna v. Pennsylvania Co. 10 West. Rep. 463; Brenham v. Brenham Water Co. 67 Tex. 542; Baltimore v. Hughes, 1 Gill & J. 480, 19 Am. Dec. 243; State v. Mansfield, 23 N. J. L. 510, 57 Am. Dec. 409; Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186; Logan City v. Buck, 4 Am. & Eng. Corp. Cas. 300; Fertilizing Co. v. Hyde Park, 97 U. S. 660 (24 L. ed. 1036); Atty-Gen. v. Great Eastern R. Co. 33 Moak, Eng. Rep. 768; Smith v. Newbern, 70 N. C. 14, 16 Am. Rep. 766; Cook County v. McCrea, 93 Ill. 236; McCann v. Otoe County, 9 Neb. 324; Sioux City & P. R. Co. v. Washington, 3 Neb. 30; Somerville v. Dickerman, 127 Mass. 272; Bryan v. Page, 51 Tex. 532; Francis v. Troy, 74 N. Y. 338; New London v. Brainard, 22 Conn. 552; Petersburg v. Metzker, 21 Ill. 206; Orphan Asylum v. Troy, 76 N. Y. 108; Memphis v. Memphis Water Co. 8 Baxt. 587; Greenough v. Wakefield, 127 Mass. 275; *Ex parte* Burnett, 30 Ala. 461; Vance v. Little Rock, 30 Ark. 435; Indianapolis v. Indianapolis Gaslight & C. Co. 66 Ind. 402; Bentley v. Chicago, 25 Minn. 259; Kansas v. Flanagan, 69 Mo. 22; Butler v. Nevin, 88 Ill. 575; Dore v. Milwaukee, 42 Wis. 108; Allen v. Galveston, 51 Tex. 302; Smith v. Newburgh, 77 N. Y. 130; Carron v. Martin, 26 N. J. L. 594; State v. Passaic, 41 N. J. L. 90; Ottawa v. Carey, 108 U. S. 110 (27 L. ed. 669). Where the Legislature grants discretionary powers to a municipal corporation, to be executed according to its judgment as to the necessity or expediency of a given measure, it thereby vests in the corporation a control and discretion as absolute as that originally possessed by the Legislature itself. Trigally v. Memphis, 6 Coldw. 389; Milne v. Davidson, 5 Mart. 409, 16 Am. Dec. 189, and note; State v. Williams, 11 S. C. 291; Respublica v. Duquet, 2 Yeates, 500; Markle v. Akron, 14 Ohio, 590; Brick Presby. Church v. New York, 5 Cow. 541; Howe v. Plainfield, 37 N. J. L. 146; State v. Noyes, 30 N. H. 279; Metcalf v. St. Louis, 11 Mo. 103; Taylor v. Carondelet, 22 Mo. 110; St. Paul v. Colter, 12 Minn. 46; State v. Dwyer, 21 Minn. 513; Heland v. Lowell, 3 Allen, 407; Portland v. Portland Water Co. 67 Me. 137; Mayor v. Morgan, 7 Mart. N. S. 5, 18 Am. Dec. 234; Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 24 Am. Rep. 756; Dill. Mun. Corp. 3d ed. § 308; *Ex parte* Burnett, 30 Ala. 469; Osborne v. Mobile, 44 Ala. 496; *Ex parte* Wall, 48 Cal. 321, 17 Am. Rep. 425; Covington v. East St. Louis, 78 Ill. 550; Indianapolis v. Indianapolis Gaslight Co. 66 Ind. 402; Perdue v. Ellis, 18 Ga. 591; Kniper v. Louisville, 7 Bush, 601. An express authority conferred, without restriction by the Legislature, upon a municipal corporation, carries with it by implication, and as a necessary incident, the right to determine the mode of its execution. Konrad v. Rogers, 36 N. W. Rep. 261; Ely v. Rochester, 26 Barb. 133; Pollion v. Brooklyn, 1 Cent. Rep. 808, 101 N. Y. 132; French v. Dunn County, 58 Wis. 403. And in such case the question as to whether the plan adopted in the execution of the authority is adapted to the municipal purposes for which the authority was conferred, or is measured by or limited to the municipal necessities or wants of the city, is one largely within the discretion of the municipal authorities; with which discretion the courts should not interfere except in a plain case of its abuse. Greeley v. People, 60 Ill. 20; Torrent v. Muskegon, 47 Mich. 115. Municipal authorities may, in the exercise or execution of the unrestricted authority conferred by the Legislature, make suitable provision, not only for the immediate, but also for the prospective, wants of the city, and may temporarily appropriate whatever is unnecessary for its immediate wants or necessities to other than municipal purposes, such as leasing for private purposes and the like. Spaulding v. Lowell, 23 Pick. 71; French v. Quincy, 3 Allen, 9; Camden v. Camden Village Co. 1 West. Rep. 286, 77 Me. 530; Worden v. New Bedford, 131 Mass. 23; The Maggie P. 25 Fed. Rep. 202; Atty-Gen. v. Eau Claire, 37 Wis. 400.

See the Extra Annotations at the end of this volume.

water in suitable aqueduct and pipes to said village, and then distribute the same through said village in aqueduct and pipes for the extinguishment of fires, and sanitary purposes, and for the use and convenience of the inhabitants of said village, and receive and collect such rents for the use of water as shall be agreed upon by the parties."

That § 6 of the Act last named is as follows:

"§ 6. Said village is hereby authorized to issue bonds to an amount not exceeding $50,000, on such terms as such village shall prescribe for carrying into effect the foregoing provisions."

That although said corporation is authorized by § 1 of its original charter to lay a tax on the polls and ratable estate of said village for the purpose mentioned in said charter, yet said corporation is not empowered to borrow money in any way except by said § 6, hereinbefore set forth.

That the village of Montpelier was duly organized, and has acted as a corporation for more than twenty years last past.

That in the year 1884 the village of Montpelier purchased the right to take water from the outlet of Berlin Pond, and either purchased or otherwise procured the right to construct a reservoir and aqueduct to convey the water to the village of Montpelier.

That the reservoir was constructed on the brook flowing out of Berlin Pond, about two miles distant from said village, and a large iron pipe laid to conduct the water from said reservoir to said village; and the water is conducted in iron pipes of different sizes through said village for the extinguishment of fires, sanitary purposes, and all the ordinary uses for which water is used.

That said aqueduct and reservoir are well and permanently built, and of ample size, so that sufficient water will flow through the same for the extinguishment of fires, and sanitary and domestic purposes at all times, and is in every way suitable for the wants of the inhabitants of said village, and large enough for the prospective needs of said village, and will afford sufficient water for all the purposes contemplated in said charter when said village shall contain six times its present number of inhabitants.

That the village of Montpelier issued its bonds and sold the same in the market in the sum of $50,000, as authorized by its charter, to aid in constructing said aqueduct (which bonds are now outstanding), and that sum not being sufficient to complete the same, raised by tax about the sum of $15,000, which has been expended in and about completing the same.

That at the time of the making of the plans, and of the construction of said aqueduct, it was not contemplated by those having the direction of construction and estimates that the water brought in said aqueduct could be used for power, and the estimates did not contemplate such use; but after its construction, there being a large surplus of water supplied by said aqueduct, not wanted for public use, or used for other purposes, it was found that by reason of the great height of the reservoir above the village such surplus water could be used in running motors; and a large number have been put in of various sizes by the inhabitants of said village, and such power has been rented for a sum much less than such power could be obtained in any other way.

That at the biennial session of the Legislature of the State of Vermont in the year 1884, an Act was passed amending the charter of the village, and said Act is numbered 212 of the Session Laws of 1884, and the same is referred to and made a part of this bill of complaint.

That, there being more persons living in the village of Montpelier who desire water for power at low rates, and others, wishing to induce people to engage in business in Montpelier, propose to furnish them power by laying another aqueduct or main from said reservoir to the village of Montpelier,—accordingly a meeting of the voters of said village was called on the 26th day of September, 1887, at which time certain votes were passed under article 1 in said warning, which were as follows:

"1. To see if the village will vote to lay another main water-pipe from the reservoir, so called, in Berlin, to some convenient point in said village, and to provide ways and means to defray the expenses of the same."

At the meeting aforesaid the following votes were passed, viz.:

"Moved, by A. J. Sibley, that the village shall vote to lay another main water-pipe from the reservoir in Berlin to some convenient point in said village; which motion was carried by a rising vote,—159 yeas, 12 nays."

On motion of C. H. Heath, the proper officers were directed to carry out the vote taken under article 1 of the warning.

"On motion of F. L. Eaton, the treasurer was authorized to borrow a sum not exceeding $30,000 to defray expense of laying the pipe as provided in article 1 of the warning."

That the sole purpose of putting in said second main from the reservoir to the village of Montpelier is to provide power for individuals or corporations—and the water to be conveyed in the same is not needed for public use or purposes; that the village of Montpelier has no means of paying the proposed expense of the additional water-main except by taxation.

The prayer was for a temporary injunction restraining the defendants "from entering into any contract with any person or persons for pipe to lay the main water-pipe, mentioned in the foregoing bill of complaint, and from incurring any expense on behalf of the village of Montpelier toward constructing a main water-pipe from the reservoir to the village of Montpelier, as provided in the vote of said village on the 26th day of September, 1887; and that the said F. L. Eaton, treasurer of the village of Montpelier, be restrained from borrowing any money on the credit of said village for the purpose set forth in said vote of September 26, 1887, until the further order of the court; and that, on hearing, said injunction be made perpetual."

Messrs. **Senter & Kemp** and **Pitkin & Huse**, for defendants:

The village of Montpelier, under its charter, § 2, has a right to provide a water supply for its inhabitants (33 Vt. 277); although it could not, without authority granted by the Legislature, exercise the right of eminent domain.

For the effect of this case as a precedent in later decisions

Rome v. *Cabot*, 28 Ga. 50; *Livingston* v. *Pippin*, 31 Ala. 542; Dill. Mun. Corp. § 371.

The village, in its vote of September 26, 1887, to lay another main water-pipe from the reservoir in Berlin to some convenient point in the village, was in the exercise of a proper municipal function of which it was the proper and sole judge.

The record of that vote is the only proper proof of what it was.

Cabot v. *Britt*, 36 Vt. 349.

The vote of September 26, 1887, was a legislative act on the part of the village.

New York & H. R. Co. v. *New York*, 1 Hilt. 562, 588.

And as to the legislative acts and discretion of the higher legislative bodies, the motives and the intent of individual legislators are not subject-matter for judicial inquiry. The acts of a State are subject to still less inquiry, either as to the act itself or as to the reason for it.

Doyle v. *Continental Ins. Co.* 94 U. S. 535, 541 (24 L. ed. 148); *Kountze* v. *Omaha*, 5 Dill. 448; *Wright* v. *Defrees*, 8 Ind. 298, 302; *Goddin* v. *Crump*, 8 Leigh, 120, 156; *Sunbury & N. R. Co.* v. *Cooper*, 33 Pa. 278; *Johnson* v. *Higgins*, 3 Met. (Ky.) 576; *People* v. *Draper*, 15 N. Y. 555; Cooley, Const. Lim. 222; 2 Dill. Mun. Corp. § 601.

And as to municipal action and discretion, the same rule prevails, and such action is conclusive when the subject-matter is within the delegated legislative powers.

1 Dill. Mun. Corp. § 94; *Livingston* v. *Pippin*, 31 Ala. 542; *Spaulding* v. *Lowell*, 23 Pick. 71–80; *Hovey* v. *Mayo*, 43 Me. 322, 334; *New York & H. R. Co.* v. *New York*, 1 Hilt. 562, 588; *Des Moines Gas Co.* v. *Des Moines*, 44 Iowa, 505; *Methodist Protestant Church* v. *Baltimore*, 6 Gill, 391, 400; *Williams* v. *Newfane School Dist.* 33 Vt. 271; *Eddy* v. *Wilson*, 43 Vt. 362.

It is not for the court to dictate to the village how it shall spend its money, unless the authority of the representatives of the citizens has been exceeded.

Torrent v. *Muskegon*, 47 Mich. 115.

No principle of law is more solidly established than that when, in the honest and legitimate pursuit of a lawful object, a municipality obtains a water supply, it need not let the excess thereof run to waste, but may put it to profitable use.

State v. *Eau Claire*, 40 Wis. 533; *Green Bay & M. C. Co.* v. *Kaukanna Water Power Co.* (Wis.) 35 N. W. Rep. 529, 534, cited in *Bell* v. *Plattville*, 36 N. W. Rep. 831.

Mr. **S. C. Shurtleff**, for orators:

It is for the court to determine, upon the evidence, whether any given enterprise is a public or private undertaking, so as to authorize a corporation to engage in it by taxing its citizens.

Tyler v. *Beacher*, 44 Vt. 648.

This is not the exercise of that honest discretion in doing what the village had a right to do, as is mentioned by the court in *Greenbanks* v. *Boutwell*, 43 Vt. 207, but it comes clearly within what the court says in that case would be a pretext of a lawful purpose to do what it had no legal right to do.

Villages and towns have no right to incur debts or levy taxes to aid or encourage private or corporation enterprises for manufacturing or mining. The leading case on this subject is *Citizens Sav. & L. Asso.* v. *Topeka*, 87 U. S. 20 Wall. 655 (22 L. ed. 455).

This question has twice been before the Supreme Court of the United States, and the same principle reaffirmed.

Parkersburg v. *Brown*, 106 U. S. 500 (27 L. ed. 244); *Cole* v. *La Grange*, 113 U. S. 6 (28 L. ed. 897); *Tyler* v. *Beacher*, *supra*.

Powers, J., delivered the opinion of the court:

This is a bill in equity brought by sundry taxpayers in the village of Montpelier to arrest the expenditure of municipal funds for a proposed extension of the water supply of said village. The facts established by the evidence are, briefly stated, as follows:

Prior to September 26, 1887, the village of Montpelier had, at great expense and by virtue of its chartered authority, secured the right to take water from Berlin Pond to supply the wants of its inhabitants for domestic and public purposes. The supply thus secured largely exceeded the present wants of the village, and the excess owned by the village was running to waste.

The main pipe conducting the water to the village crosses the Winooski River, and is exposed to damage, if not breakage, by the breaking up of the ice and floating of floodwood in the spring of the year. The water has been used to some extent as a power in running motors in the village, from which use a considerable revenue has been earned. The village is very compactly built, and a large fire threatens more damage to property than it would were the buildings more isolated or scattered. The water supply, however, is sufficient for ordinary fire exposure.

The voters of the village, at a legal meeting held on the 26th day of September, 1887, voted, by a large majority, to lay another water-main from the village reservoir in Berlin to the village, and authorized a loan of $30,000 to defray the expense. The bill in this case seeks to restrain this expenditure, the orators insisting that the additional main is not wanted for any proper municipal purpose within the chartered power of the village, but primarily to supply additional power to run machinery; and the defendants insisting that the primary purpose is to render the supply of water more secure in case of injury to the original main, and more ample in case of an extraordinary fire. The defendants furthermore insist that inasmuch as the village owns an excess of water beyond the capacity of its reservoir, it has the right to use the same for manufacturing purposes, even if it subserves no proper municipal end beyond the earning of income for the village. In support of the last proposition, the defendants cite the cases of *State* v. *Eau Claire*, 40 Wis. 533; *Green Bay & M. C. Co.* v. *Kaukanna Water Power Co.* 35 N. W. Rep. 529; and *Bell* v. *Plattville*, 36 N. W. Rep. 831.

We have no occasion to consider the soundness of this last claim of the defendants, as we are all agreed that the evidence warrants the expenditure on grounds clearly within the chartered power of the village.

The Legislature delegated to the village the

See the Extra Annotations at the end of this volume.

power to supply itself with water for fire and domestic uses. It left the exercise of this power to the discretion of the voters. It fixed no limits to the expenditure and set no bounds to the supply. It presented no system and devised no plan for adoption. It left the entire legislative function involved to the judgment of the village. The village, for aught that appears, in good faith, in the exercise of its power, adjudged that its fire exposure demands a water supply that is beyond all danger, so far as possible, of failure, both under ordinary and extraordinary contingencies; and that its supply for ordinary domestic uses shall not be cut off by any failure in the original main.

It is very clear, upon the authorities, that a purpose to forefend against possible dangers to its water supply is both a dictate of prudence and of duty. The question whether it be wise to incur the expense proposed does not address itself to the court. We have only to consider the question of power. The Legislature left the question of expediency to the village, not to us. The power existing, the manner and extent of its exercise, as determined by its custodian, must be held legal until it is seen that it is perverted to wrongful ends or diverted to wrongful uses. The fact that, while a proper municipal purpose is answered by laying an additional main, an incidental improper purpose is subserved, does not invalidate the action of the village, provided, in good faith, the primary purpose of the expenditure is to perfect its water supply generally, and the additional motive power gained is a mere sequence of its action.

Suppose the village had deemed it wise at the outset to lay two mains instead of one, in order to secure an uninterrupted flow of water in case either failed, would it be seriously claimed that it had exceeded its chartered power? If such action were warrantable then, it is warrantable now. The power was not exhausted in the first attempt at its exercise. The power given the village was to take water from Berlin Pond for municipal uses. If by the growth of the village the first draft upon the supply becomes inadequate for its legitimate wants, may it not be enlarged? If the first method of supply, though ample, is exposed to hazards that threaten its continuance, it is quite clear that it may be perfected by any means that will secure the end for which the power was given.

That the original main afforded a fair supply, if no accident befell it, we can easily see; and that some individual voters desired quite as much, at the meeting of September 26, to obtain an increase of motive power, or a more certain water supply for ordinary municipal purposes, we can well believe; still we are satisfied, from the facts shown, that the concrete vote of that meeting had its foundation in a purpose and desire to make the water supply of the village, for all uses to which it might be subjected under the charter, more ample, more useful, and more certain.

This being so, it is a question of judgment upon a proposed municipal expense for a legitimate purpose which, under the law, addresses itself to the voters of the village, and not to the courts. 1 Dill. Mun. Corp. § 94; *Spaulding* v. *Lowell*, 23 Pick. 71; *New York & H. R. Co.* v. *New York*, 1 Hilt. 562; *Bates* v. *Bassett* [*ante*, p. 166].

The decree is reversed, and the cause remanded to the Court of Chancery, with a mandate to dismiss the bill, with costs.

KENTUCKY COURT OF APPEALS.

LAWRENCE
v.
SIMMONS *et al.*

1. **Where the Legislature grants a lottery franchise** and authorizes its sale, the purchaser may, for a valuable consideration, permit others to enjoy a part of the profits, but cannot assign the franchise so as to enable each assignee to conduct a separate lottery.
2. **In a suit for a share in the profits of a lottery,** the petition, alleging that defendants acquired the right to run the lottery, and that certain sales by which both plaintiff and defendants obtained their rights therein were made by the original grantee under legislative authority, sufficiently alleges that defendants were operating the lottery in accordance with the grant.
3. **Equity may stop the running of a lottery** until an accounting is accorded one denied his rightful share of the profits, but will not appoint a receiver to take charge of it, because of the consequences to public morals.

(September 13, 1888.)

APPEAL by plaintiff from a judgment of the Louisville Law and Equity Court sustaining a demurrer to a petition for an accounting, etc. *Reversed.*

The facts alleged and the questions presented are stated in the opinion.

Messrs. **Simrall & Bodley** and **F. W. Morancey** for appellant.

Messrs. **D. W. Sanders** and **O'Neal, Jackson, & Phelps** for appellees.

Pryor, J., delivered the opinion of the court:

If the facts alleged in the petition filed by the appellant are true,—and they must be so regarded on the demurrer,—we perceive no reason why he is not entitled to relief. The lottery franchise was sold or transferred under and by virtue of a legislative enactment by the city of Frankfort to E. S. Stewart, who became the sole owner; and Stewart afterwards transferred two one-hundredths interest to Reamer, who transferred the same through Stewart to Lawrence, the appellant. It is further alleged that, after this sale to Reamer, the lottery privilege and franchise were assigned to Edward Mensley in trust for the benefit of Stewart, Solomon, Reamer, and others; that after this transfer in trust all the parties in interest except Reamer sold and assigned all their title and interest to Simmons & Dickinson, the defendants, who had notice of Ream-

1 L. R. A.

For the effect of this case as a precedent in later decisions