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## NOTES

### JAMES C. FLYNN VS. LITTLE FALLS ELECTRIC & WATER CO.<sup>1</sup>

The very contract, which the Minnesota Supreme Court, in the case of James Flynn vs. Little Falls Electric & Water Co. declared void, was adjudged in an independent action in the Federal Court in the case of Little Falls Electric & Water Co. vs. City of Little Falls,<sup>2</sup> to be valid and binding upon the city of Little Falls. What is more, in spite of the maze of inconsistent reasoning found in the Flynn case, a diligent search among later cases in this state shows that there is a great reluctance to overrule the Minnesota Supreme Court's decision. In Reed vs. City of Anoka,<sup>3</sup> there is a poor attempt to distinguish the

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1. 74 Minn., 180.
  2. 102 Fed. (C. C.), 663.
  3. 85 Minn., 294.

earlier case, when in fact, a polite overruling is evident. In addition, since the decision in *Flynn vs. Little Falls Electric & Water Co.*, the Federal Courts have religiously declared valid, in independent proceedings concerning the impairment of contract rights, what the Minnesota State Courts, following the *Flynn* case, have declared void. It is evident, therefore, that *Flynn vs. Little Falls Electric & Water Co.* stands as Minnesota law on the question of the **TIME ELEMENT IN MUNICIPAL CONTRACTS**. This case, which cannot stand as satisfactory reasoning from a legal standpoint, is the subject of this note.

The facts which are essential for a consideration of the case are these:

In January, 1889, the city council of Little Falls passed an ordinance which granted to certain persons, their successors, or assigns, **FOR THIRTY YEARS**, the privilege of laying water pipes and mains in the streets of the city on the following, among other, terms and conditions: The grantees were to maintain the mains and waterworks ready for fire protection and operate the waterworks, after their completion, for a full term of thirty years. For the use of fire hydrants, which were 55 in number, the city was to pay \$80 per year for a full term of thirty years. The grantees assigned all their rights under the ordinance to the defendants, the Little Falls Electric & Water Co. The ordinance was accepted by the grantees and the waterworks were constructed and put in operation, and presumably, in absence of any allegation to the contrary, the water company has complied with all the terms and conditions of the ordinance.

The plaintiff, a resident and taxpayer of the city, brings this action, in behalf of himself and all other taxpayers, to enjoin the city and its officers from carrying out the provisions of the ordinance by paying the Water Company \$80 per year for each of the 55 hydrants, on the grounds that the needs of the city are not, and will not for years, require a greater number of hydrants than 35; that \$80 per year per hydrant is unreasonable and exorbitant, and at least \$40 per hydrant per year higher than the reasonable value thereof; and that the ordinance, at least in so far as it assumes to pay this price for all these hydrants **FOR THIRTY YEARS IS VOID**, because it is not within the scope of the power or authority of the city.

To this complaint, the Water Co. interposed a demurrer on the ground that the complaint did not state a cause of action.<sup>4</sup>

It is well settled that contracts by the authorities of a city, for

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4. Facts as in 74 Minn., 180.

water to be furnished the city, and its inhabitants, are not made in the exercise of governmental powers, but of its proprietary or business interests, and are governed by the rules applicable to contracts made by individuals or business corporations. Such contracts, WHEN FAIRLY MADE, WITHOUT FRAUD, OR BAD FAITH ON THE PART OF THE CITY OFFICERS, and which are NOT UNREASONABLE WHEN MADE, cannot be repudiated by the municipality after the private party has expended money in the building of the works in reliance thereon, and so long as such party complies with its provisions.<sup>5</sup> To put the proposition in a different way, a court may rule that such a contract is void, if IN ITS INCEPTION, IT SHOWED FRAUD, OR WAS UNREASONABLE WHEN MADE. This test is the only true way to determine the validity of municipal contracts.

Yet the fact remains, that long term contracts for a water supply have been attacked as granting monopolies, as unreasonable, as contracting away legislative powers, and what not. But today authority is almost unanimous in holding that if a contract is REASONABLE IN ITS INCEPTION, THE TIME ELEMENT, if not perpetual, has no effect in invalidating the contract. The following authorities sustain long term contracts of the same tenor and effect as those which we have under consideration; the time ranging from ten to fifty years: Reed vs. City;<sup>6</sup> Little Falls Electric & Water Co. vs. City;<sup>7</sup> New Orleans Water Co. vs. Rivers;<sup>8</sup> Vicksburg Water Co. vs. City;<sup>9</sup> Boerth vs. Detroit Gas Co.;<sup>10</sup> Ills. Sav. & Trust Co. vs. Arkansas City;<sup>11</sup> Creston Waterworks Co. vs. Creston;<sup>12</sup> Oconto vs. City;<sup>13</sup> Grant vs. City;<sup>14</sup> Western vs. City;<sup>15</sup> City vs. Memphis;<sup>16</sup> City vs. East St. Louis,<sup>17</sup> and Atlantic City vs. Atlantic.<sup>18</sup>

Thus it can be readily seen that when the validity of the kind of contract which we have under consideration is questioned, the only

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5. Little Falls Electric & Water Co. vs. City, 102 Fed., 663. For other cases on this topic see: Valparaiso v. Gardner, 97 Ind., 1; Ills. Tr. & Savings Co. vs. Arkansas City, 22 C. C. A., 171; Walla Walla v. City in 177 U. S., 558.

6. 85 Minn., 294.

7. 102 Fed., 663.

8. 115 U. S., 674.

9. 185 U. S., 65.

10. 152 Mich., 65.

11. 22 C. C. A., 171.

12. 101 Iowa, 687.

13. 105 Wisc., 76.

14. 36 Iowa, 396.

15. 31 Pa., 175.

16. 5 Heisk, 495.

17. 98 Ill., 415.

18. 48 N. J. L., 378.

logical question is: WHAT WERE THE CONDITIONS UNDER WHICH THE COUNCIL INDUCED BUSINESS INTERESTS TO CONSTRUCT THE WORKS? If it be made to appear that, at the time the contract was entered into, it was fair and just, AND WAS PROMPTED BY THE NECESSITIES OF THE SITUATION, the TIME ELEMENT CANNOT INVALIDATE THE CONTRACT. On the other hand, if the contract was unreasonable in its inception, it was UNREASONABLE AB INITIO, and not because, in addition, it runs for thirty years. To come to the point, TIME ELEMENT HAS NOTHING TO DO WITH THE REASONABLENESS OR UNREASONABLENESS OF THE LONG TERM CONTRACT.

With these fundamental concepts, concerning MUNICIPAL CONTRACTS, in mind, it is well to consider the case at hand: Had the court in the case of Flynn vs. Little Falls Electric & Water Co. ruled that the contract in its inception was void (as the demurrer in this case evidenced) because it was unreasonable when made, there would be no quarrel with the decision. But the court, to use its express words, says "that the vice, in this contract, consists mainly, if not entirely, in the length of time for which it bound the city to pay annually this sum of \$4400 for fire hydrants. The hydrants, the price to be paid per hydrant, and the other provisions of the ordinance are chiefly important in so far as THEY BEAR UPON THE QUESTION OF THE POWER OF THE COUNCIL TO BIND THE CITY FOR SO LONG A PERIOD OF TIME." In other words, the court plainly states that the time element invalidated the contract.

Still, even though this ruling is out of line with the weight of authority, this decision would be looked upon as the minority view had the court used consistent argumentation. An examination of the successive steps of the opinion shows that the reasoning therein does not justify the conclusions obtained. In the beginning of the courts opinion we find this statement:

"Inasmuch as it might be impossible to induce any individual or corporation to expend the necessary capital to construct waterworks in a small city without the assurance of patronage by the municipality itself FOR A DEFINITE AMOUNT OF TIME, we have no doubt of the power of the city council to make a TIME CONTRACT with the company for supplying water to the city for fire protection, provided the time is reasonable. AND AS A SOMEWHAT LIBERAL CONTRACT in this regard might be necessary to induce men to put in waterworks at all, we would not be inclined to give any controlling

weight to the mere fact that the number of hydrants contracted for was beyond the present needs of the city, or that the price agreed to be paid was somewhat greater than the value of the use of the hydrants, **CONSIDERED ALONE.**"

Thus, the court considers the reasonableness of the contract **WHEN IT WAS MADE.** In a word, it affirms the policy that the city council, in inducing men to construct costly waterworks, has the power to **CONTRACT WITH A COMPANY FOR A PERIOD OF YEARS.**

"But the power of the municipal authorities," says the court in its next step in the argument, "to contract in relation to a given matter does not carry with it the power to make a contract which shall cede away, control, or embarrass the legislative or governmental powers. They have not unlimited and arbitrary discretion to make any kind of contract they see fit. If so, the council might make a contract running for 100, or even 500 years as well as 30 years. The provisions of this ordinance, providing that the city should pay this price for this number of hydrants for 30 years is **AS TO TIME**, unreasonable and void, as being beyond the scope of authority of municipal authorities."

In view of the previous statements that the validity of the contract depends upon the situation when the contract was made, and upon the necessity of inducing men to erect costly works, by promises of **LONG TERM CONTRACTS**, how can the court **CONSISTENTLY CONCLUDE THAT THE THIRTY-YEAR TIME ELEMENT** invalidates the contract? Why hasn't the council the right to contract for 100 years as well as 30 years, if that council follows out the very formula set forth by the court in its opinion, and, after exercising its sound discretion, it has been forced to contract for a long term of years because men could not be induced to construct expensive waterworks for a shorter period of time? The explanation is clearly this: The court has lost sight of the distinction between the governmental and business powers of the city. The rule that the members of the legislative body of the city may not so act or contract as to deprive their successors of the unimpaired exercise of legislative or governmental powers does not apply in this case; for the power to contract for waterworks, as **WE HAVE POINTED OUT IN A CONSIDERATION OF THE CONCEPTS OF MUNICIPAL CONTRACTS**, is a proprietary or business power. Accordingly, the city is governed by the same rules as a private corporation or individual, and may contract for terms longer than the duration of the terms of office. In fact, this objection, that the contract shows an attempt to barter away the legis-

lative powers of the city authorities has been considered in *Little Falls E. & W. Co. vs. City*, supra, wherein the very contract which we have under consideration was before the court, and was held to be untenable.

The next paragraph of the court's opinion is unusual: "Of course the council remains at liberty to contract for such a supply with the same company. If in the honest exercise of their legislative discretion, the city council concludes that the city requires 55 hydrants for fire protection, and that \$80 per hydrant is a reasonable price, they **WOULD HAVE THE RIGHT TO ENTER INTO A CONTRACT ON THESE TERMS WITH THE WATER COMPANY**, to run a reasonable length of time. \* \* \* Of course, it is not the purpose of this court **TO DECLARE EVERY CONTRACT FOR A THIRTY YEAR PERIOD**, as a matter of law, **UNREASONABLE.**"

Thus, by reasoning in a circle, so to speak, the court has returned to the same point from which it started. Does the court lose sight of the fact that the old council in 1889 exercised its sound discretion in the same manner as the contemporary council is now called upon to do? Suppose the court's advice is followed, and the contemporary council, in honest exercise of its legislative power, enters into a new contract for 100 years. Will such a contract be void? The only possible answer to our question is that sentence in the opinion which says that the contract must be for a **REASONABLE PERIOD OF TIME**. But the court **HAS NOT STATED WHAT A REASONABLE PERIOD OF TIME IS**. It cannot be contended that any period of time under 30 years is reasonable, for in a reargument of the case, the court stated that it was not its purpose to declare every contract for thirty years, as a matter of law, unreasonable. **WE ARE LEFT IN DOUBT AS TO WHAT A REASONABLE PERIOD OF TIME IS.**

The plain fact of the matter is that the company is at the mercy of the court. It has constructed costly works, and since its capital is already invested, it no longer has the necessary bargaining power to secure reasonable compensation for its services. The city, on the other hand, is not called upon again to induce capital to its borders; and so can dictate its own terms in a new contract. In commenting upon a similar situation, the court, in *Reed vs. City of Anoka*, supra, lays down this rule. "To overturn contracts heretofore made in good faith, upon which large investments of capital have been made, would place those who have invested their money at the mercy of public agitation and clamor." In fact, the whole law involved in this case is set forth in

the cases of Walla Walla Water Co. vs. City,<sup>19</sup> and Waterworks Co. vs. Rivers.<sup>20</sup> The first of these two cases is briefly this: "After a company has erected its works, and has invested its capital, a court may INQUIRE INTO THE CONTRACT WHEN IT WAS MADE, TO SEE IF FRAUD WAS PRESENT, OR IF THE CONTRACT WAS UNREASONABLE WHEN MADE, but the TIME ELEMENT CANNOT BE SAID TO INVALIDATE THE CONTRACT, for this would be taking away a vested right, and leaving the company at the mercy of a court to modify the contract whenever public sentiment called for such a modification.

As a fitting ending to a poor opinion, the court concludes: "The business of the water company is affected with public interest and thus it would not have the right to arbitrarily shut off the water because the time element of the ordinance is declared void."

Is it not astonishing to think that the court forgets that it is an elementary principle in the law of contracts, that if a contract is void as to one party, it is void as to the other. Is the company, to use the logic of the court, compelled to carry on its business at whatever price or terms the city determines? True, as long as a public service corporation chooses to do business under a franchise, it is affected with a public interest, and it must carry out its end of the agreement; but when that franchise is declared void, through no fault of the company, and the company decides to stop doing business, it is no longer charged with that public interest. THE COMPANY MAY SHUT OFF THE WATER IF THE CONTRACT IS DECLARED VOID.

In conclusion, it is sufficient to repeat what has already been said: If a company's contract with a city is void at all, it is void because IT WAS FRAUDULENTLY MADE, OR WAS UNREASONABLE IN ITS INCEPTION. On the other hand, the TIME ELEMENT CANNOT BE SAID TO INVALIDATE THE CONTRACT; for it can be seen that the term for which such a contract was made WAS THE VERY CONSIDERATION WHICH CAUSED CAPITAL TO ERECT ITS COSTLY PLANT. Yet in face of the court's own premise, that a city, in inducing capital, may contract for a LONG TERM OF YEARS, provided it exercises its sound discretion, the court inconsistently concludes that the time element was unreasonable, and the contract with the company, as set forth by the ordinance, was void. Without much hesitation, it can be safely concluded that this case, JAMES C. FLYNN vs. LITTLE FALLS ELECTRIC & WATER CO., can hardly stand as good logic, much less as an accepted minority view.

ERWIN E. STEINBERG.

19. 172 U. S., 1.

20. 115 U. S., 674.