

Legal Status of the
Leavenworth Water Works,
Kansas, June 1, 1900.

AN EXAMINATION INTO THE LEGAL STATUS OF "THE LEAVEN-
WORTH CITY AND FORT LEAVENWORTH WATER COMPANY."

TOGETHER WITH A COPY OF THE ORDINANCE,
CHARTER, LAWS OF KANSAS, AND OTHER
DOCUMENTS RELATING TO THE
COMPANY AND ITS
PROPERTY.

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SECTION 1. INTRODUCTION.

Having been requested to make an examination into the legal status of "The Leavenworth City and Fort Leavenworth Water Company," the writer has concluded to put his opinion into print, and to incorporate into it the legislation of the State of Kansas, so that the soundness of the conclusions arrived at may be submitted, by any one interested, to the test of further examination.

The amount involved, the various questions arising, and the conflicting legislation, make the task difficult.

The preservation of the documents collated will make easier work in the future for any one desiring to re-examine the question.

SECTION 2. THE WATER COMPANY CHARTER.

The date of incorporation was March 16, 1881, and the charter, omitting the formal part, was as follows:

"*First.* The name of the corporation shall be 'The Leavenworth City and Fort Leavenworth Water Company.'

"*Second.* The purpose for which it is formed is to construct and maintain water works in or near the City of Leavenworth, and to supply said city and Fort Leavenworth, and the citizens thereof, with water to be used for domestic, manufacturing and fire purposes.

"To enable this corporation to carry out the above purposes, it shall have power to make all necessary contracts, to issue its bonds secured by the property of the corporation, to an amount not exceeding its capital stock, and generally to exercise all the powers, have all the rights and privileges necessary, or usually exercised and possessed by similar corporations.

"*Third.* The place where its business is to be transacted is Leavenworth City, Kansas.

"*Fourth.* The term for which it is to exist is fifty years.

"*Fifth.* The number of its directors shall be five, and the names and residences of those appointed for the first year are L. T. Smith, S. F. Neely, M. H. Insley, Levi Wilson, and D. M. Swan.

"Sixth. The amount of its capital stock is two hundred and fifty thousand dollars (\$250,000), and it is divided into twenty-five hundred shares of one hundred dollars each."

By an amendment dated January 28, 1882, the number of directors was increased to nine, instead of five.

On July 23, 1892, the capital stock was increased to seven hundred and fifty thousand dollars.

The records of the Secretary of State show that no further changes have been made.

SECTION 3. PRIMARY LEGISLATION.

The first law on the statute book of Kansas in regard to water works is found in the General Statutes of 1868, pp. 221-2, and is as follows:

"Any gas or water corporation shall have full power to manufacture and sell, and to furnish such quantities of gas or water as may be required by the city, town, or village where located, for public or private buildings, or for other purposes; and such corporations shall have power to lay pipes, main and conductors for conducting gas or water through the streets, lanes, alleys and squares in such city, town or village, with the consent of the municipal authorities thereof, and under such regulations as they may prescribe.

"The municipal authorities of any city, town or village in which any gaslight or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting, or supplying with water, the streets, lots, lanes, squares and public places, in any such city, town or village."

The foregoing was the primary law, and although later legislation was passed covering the subject, the above sections were carried forward in compilations adopted by the Legislature, until in 1897 the above was specifically repealed by the Public Utilities Act, hereinafter set forth in Appendix "C," page 27 hereof, (Laws 1897, p. 175.)

The next law was a law of 1872, authorizing cities to build their own water works and issue bonds therefor (Laws 1872, p. 412), but this act was afterward repealed by implication, as will be more fully shown hereinafter.

SECTION 4. THE LAW OF 1881.

In the law concerning cities of the first class, to which class Leavenworth then belonged, provision as follows was made for water works (Laws 1881, p. 95):

"Sec. 35. The council shall have the right to erect, maintain and operate water works within the limits of the city, and to regulate same, to prescribe the rates at which the water shall be supplied to the inhabitants of said city when taken from said works; and said city may acquire, by purchase, donation or condemnation, as herein provided, suitable grounds, within or without the city, upon which to erect water works, and the right of way to and from said works, and also the right of way for laying water pipes within the limits of said city, and from said water works to the city, all of which may be done in such manner as may be prescribed by ordinance: *Provided, That the mayor and council may grant the right to any person, or persons, company, or corporation, to erect water works and lay drain pipes for the use of said city and its inhabitants, upon such terms as may be prescribed by ordinance: Provided further, That such contract shall not extend for a longer period than twenty years, and shall not be re-granted or renewed unless by consent of a majority of the qualified voters of such city, to be ascertained at an election to be held for that purpose: And provided further, That in case the mayor and council shall grant to any person or persons, or to any corporation, the right to construct and maintain water works for the use and benefit of the city, the mayor and council shall have the power to levy, annually, on all the real, mixed and personal property of said city, taxable according to law, a tax in addition to other taxes, not to exceed two mills on the dollar in any one year, for the purpose and to pay said person or persons or corporation for the water furnished to said city.*"

The above became the law March 6, 1881.

The foregoing is the condition of the law as it stood when the Water Company above referred to was incorporated.

SECTION 5. RESUMÉ OF THE LAW.

The law stood when the Water Company was organized, March 16, 1881, as follows (we reprint the law parenthetically, as applied to water companies):

[Law of 1868.] "Any water corporation shall have full power to furnish such quantities of water, as may be required by the city where located, for public or private buildings, or for other purposes; and such corporations shall have power to lay pipes, main and conductors for conducting water through the streets, lanes, alleys and squares in such city, with the consent of the municipal authorities thereof, and under such regulations as they may prescribe. The municipal authorities of any city, in which any water corporation shall exist, are hereby authorized to contract with any such corporation for the supplying with water, the streets, lots, lanes, squares and public places, in any such city."

[Law of 1881.] "The mayor and council may grant the right to any corporation to erect water works and lay drain pipes for the use of said city and its inhabitants, upon such terms as may be prescribed by ordinance. Such contract shall not extend for a longer period than twenty years, and shall not be re-granted or renewed unless by consent of a majority of the qualified voters of such city, to be ascertained at an election to be held for that purpose."

Therefore, under the law the city had the power to make a contract with the Water Co. "upon such terms as may be prescribed by ordinance," but no contract to extend for longer than twenty years without a vote. *There was no limit except the limit of time.*

SECTION 6. RESTRICTIONS OF THE ORDINANCE.

The City passed, January 18th, 1882, an ordinance upon the subject of water works. A copy is hereinafter found, marked Appendix "A." The material portions now under consideration are as follows:

"ORDINANCE No. 1029.

"AN ORDINANCE. Authorizing the Leavenworth City and Fort Leavenworth Water Company to construct, operate and maintain water works in the City of Leavenworth, Kan.

"Be it Ordained by the Mayor and Councilmen of the City of Leavenworth:

"SECTION 1. That the Leavenworth City and Fort Leavenworth Water Company, a corporation duly organized under and in accordance with the laws of the State of Kansas, be, and is hereby authorized, subject to the limitations hereinafter, or by law provided, to construct, maintain and operate water works in, or adjacent to the City of Leavenworth, in Leavenworth county, Kansas," etc.

"SEC. 2. The rights and privileges herein granted to continue for a term or period of twenty years from and after the passage of this ordinance, *except as hereinafter provided.*"

[Here follow details of construction, and rates, etc.]

"SEC. 21. The city of Leavenworth reserves the right on or after the expiration of twenty years from the date of this ordinance to purchase the works of the company, together with the extensions, rights and franchises belonging to the same, upon giving said company six months' notice thereof in writing, the valuation to be determined by three hydraulic engineers not in the employ or interest of the city or company. The city choosing one, and the company one, and the third by these two; and the valuation of the work by these commissioners, or, if they fail to agree, a majority of them, shall define the sum to be paid to the company by the city; and in case no sale of the works to the city is effected at the expiration of twenty years or thereafter, as aforesaid, then the contract then existing between said parties shall continue during the period so passed over."

"SEC. 24. Said company agree to commence said works within thirty days after the passage of this ordinance, weather permitting, and prosecute the same to completion within twelve months of that date.

"SEC. 25. Within ten days of the passage of this ordinance the said company shall file with the city its acceptance of the same, which acceptance, duly acknowledged before some officer authorized to administer oaths, shall have the effect of a contract between the city and said company."

SECTION 7. THE ACCEPTANCE.

By section twenty-five of the ordinance an acceptance in ten days consummated the contract between the Water Company and the City; that is to say: By the terms of the ordinance, an acceptance in ten days *"should have the effect of a contract between the City and said company."*

The following acceptance was executed and filed with the City Clerk, January 27, 1882:

To the City of Leavenworth, Kansas, and the Mayor and Council of said City:

Notice is hereby given you, that the Leavenworth City and Fort Leavenworth Water Company has by its resolution duly passed, accepted, and *does hereby accept* the Ordinance Number 1029 of the said City of Leavenworth, with all of the propositions, stipulations, terms, grants, franchises and conditions thereof, passed by the Mayor and Council of said City, entitled "An Ordinance authorizing the Leavenworth City and Fort Leavenworth Water Company to construct, operate and maintain water works in the city of Leavenworth, Kansas," approved January 18th, 1882, and in consideration of the premises *does hereby agree* to keep and perform all of the stipulations, agreements and conditions of the said Ordinance to be kept and performed by the said Water Company.

In testimony whereof, the Leavenworth City and Fort Leavenworth Water Company has caused these presents to be executed by its President and Secretary, this 26th day of January, A. D. 1882.

[I. S.]

THE LEAVENWORTH CITY AND FORT LEAVENWORTH WATER CO.,
Attest: By M. H. INSLEY, President.

H. D. RUSH, Secretary.

[The foregoing was duly acknowledged before W. B. Fletcher, Notary Public, Leavenworth Co., Kansas.]

SECTION 8. OBSERVATIONS ON THE ORDINANCE.

After the passage of said ordinance and its acceptance, the Company started to build the water works. The Company had a year within which to complete them.

It will be noticed that the city reserved the right to purchase the works on or after the expiration of the twenty years limited in the ordinance, after which expressed reservation is the following clause:

"In case no sale of the works to the city is effected at the expiration of twenty years or thereafter as aforesaid, then the contract then existing between said parties shall continue during the period so passed over."

The city had no right to make the term of the contract extend beyond twenty years, and hence the extension and the reservation of a right to purchase were in excess of authority. Yet nevertheless the city and the Water Company did make both the extension and the reservation important parts of the contract.

SECTION 9. THE LAW OF 1883.

While the water works were being built and before they were received by the city, the Legislature of Kansas amended the law of 1881 by enacting on March 7, 1883, the following (p. 70):

"Sec. 35. The Mayor and Council shall have the right to erect, maintain and operate water works within the limits of the city, and to regulate the same, to prescribe the rates at which water shall be supplied to the inhabitants of such city, when taken from such works; and such city may acquire by purchase, donation or condemnation as herein provided, suitable grounds, within or without the city, upon which to erect water works, and also the right of way to and from said works, and also the right of way for laying water pipes within the limits of such city, and from such water works to the city, and to extend such right of way from time to time, all of which may be done in such manner as may be prescribed by ordinance: *Provided*, That the Mayor and Council may grant the right to any person or persons, company or corporation, to erect, maintain and operate water works, and lay water pipes and drain pipes for the use of such city and its inhabitants upon such terms as may be prescribed by ordinance; but such contract shall not extend for a longer period than twenty years, unless such contract shall be extended as hereinafter provided. Within six months next before the expiration of the twenty years for which any grant has heretofore been made, or may hereafter be made, as hereinbefore provided, the Mayor and Council of such city shall determine by a majority vote, whether, in their judgment, it will be for the interest of such city to purchase such water works, franchises and privileges, and if they determine that it would be for the interest of such city to purchase such water works, franchises and privileges, they shall

proceed to have the value thereof ascertained by a board of three competent and skilled hydraulic engineers not in the interest or employ of such city or Water Works Company, or having any interest in said works, the city choosing one, the Company one, and the third by these two. As soon as the valuation and terms are determined by said board, the Mayor and Council shall cause a special election to be held in said city to determine whether the said city shall purchase from the owners thereof such water works and machinery, franchises and privileges belonging to such owners, at the price and on such terms as have been fixed by the said board: if a majority of the voters of said city voting at such election shall vote in favor of the proposition, then such city shall purchase such water works, franchises and privileges, and the Mayor and Council shall forthwith proceed to contract with the owners of such water works, for such price to be paid by such city for such water works, machinery, franchises and privileges, and on such terms as were fixed by such board and voted upon by the voters at such election.

"If the majority of the votes cast at such special election shall be against the proposition to purchase said water works, or if the Mayor and Council shall neglect or refuse to call such special election, then the owners of said water works shall thereupon and thereafter have possession and enjoy all the rights, privileges and franchises theretofore granted to or acquired by them, necessary and proper to possess, maintain and operate their said water works, with all the rights, franchises and privileges theretofore held and granted, until said city shall by contract with such owner, purchase said water works, franchises and privileges; but no such contract of purchase shall be made by the Mayor and Council unless a majority of the voters of said city shall first vote in favor of such purchase, at an election called and held for that purpose in accordance with the provisions aforesaid, and no such election shall be called or held oftener than once in ten years. And in case the Mayor and Council shall grant, or shall have heretofore granted to any person, company or corporation, the right to construct and maintain water works for the use and benefit of the city, the Mayor and Council shall have the power to levy annually on all the property of the said city, taxable according to law, a tax in addition to other taxes, not to exceed two mills on the dollar in any one year, for the purpose and to pay said person, company or corporation for the water furnished to such city.

"All ordinances heretofore passed and contracts made by the Mayor and Council of any city of the first class since the passage of the act of which this act is amendatory, granting to any company or corporation the right to erect, maintain and operate water works in and for such city, provided that the same would be authorized by said section 35 as hereby amended, are hereby in all things legalized, confirmed and made valid, and all rights acquired under the said act of which this act is amendatory are hereby preserved, subject to the provisions of this act."

SECTION 10. OBSERVATIONS ON LAW OF 1883.

The law of 1883 amended the former law, and extended the duration of ordinances, as is seen by the clauses above cited:

"Such contract shall not extend for a longer period than twenty years, unless such contract shall be extended as hereinafter provided."

"All ordinances heretofore passed and contracts made by the mayor and council of any city of the first class since the passage of the act of which this act is amendatory, granting to any company or corporation the right to erect, maintain and operate water works in and for such city, provided that the same would be authorized by said section thirty-five as hereby amended, are hereby in all things legalized, confirmed and made valid, and all rights acquired under the said act of which this act is amendatory are hereby preserved, subject to the provisions of this act."

The question then arises, was the old contract one that the city might have made under the new law (of 1883)?

An examination of the law of 1883, above quoted, shows that it authorizes the city to have a public vote upon the question of buying a water-works plant then in operation. It adds:

"If the majority of the votes cast at such special election shall be against the proposition to purchase said water works, or if the mayor and council shall neglect or refuse to call such special election, then the owners of said water works shall thereupon and thereafter have possession and enjoy all the rights, privileges and franchises theretofore granted to or acquired by them, necessary and proper to possess, maintain and operate their said water works, with all the rights, franchises and privileges theretofore held and granted, until said city shall by contract with such owner, purchase said water works, franchises and privileges."

The act further provides that the elections shall not be oftener than once in ten years.

It is plain, therefore, that the city could have made, under the law of 1883, a contract similar to the one it made in 1881.

SECTION 11. POWER.—RATIFICATION.

The franchise is a contract, the obligation of which may not be violated.

"A franchise granted by a municipal corporation and acted upon and lived up to by the party receiving it, should be, and is, in effect, a contract, and the privileges secured by such a franchise are property rights which, standing upon the same general basis as other

property rights, may not thereafter be withdrawn, impaired or violated by the municipality granting them."

W. U. Tel. Co. v. City, 53 N. Y. Sup. 690.

Citing—*Mayor v. Ry. Co.*, 32 N. Y. 261.

People v. O'Brien, 111 N. Y. 1; 18 N. E. 692.

City v. W. U. Tel. Co., 63 Fed. 68.

New Orleans Gas Co. v. La. Co., 115 U. S. 650.

The act of 1883 legalized, confirmed and made valid all contracts which had been made under the act of 1881 which might have been made under the act of 1883. The Legislature could ratify previously executed void contracts of the city.

Beach, Public Corporations, § 632.

Citing—*Bolles v. Brinfield*, 120 U. S. 759.

Grenada v. Kroger, 112 U. S. 261, and other cases.

The contract between the City and Water Company was for the benefit of each. If the water works were a success,—if they were carried through their experimental period,—if they were demonstrated to be practicable,—if the Missouri river water could be settled, filtered and used,—if the operation and product were satisfactory to consumers, and the works could be run without a loss, then the city wanted to buy. In addition to this, the city wanted the works to remain,—did not want the works removed if the city declined in population and other places furnished a more inviting field; and by having the right to buy, the city tied the plant to the spot.

Hence the contract was made. Neither party ever did any act up to date to change, alter or disavow the contract made in 1882. The works were built upon the faith of that contract ratified in 1883 by the Legislature.

It is rudimentary law that if a municipality enters into a contract which the Legislature would have power to enable the municipality to make, that the Legislature has power to confirm and ratify the contract. This branch of law has been so often shown and applied in the matter of the issue of municipal bonds that, in view of the millions so validated, it is idle to cite authorities upon the proposition.

Therefore we say that, on March 7, 1883, there was a legal, binding contract between the city and the Water Company, which had received the sanction of the Legislature and was thereafter binding upon both parties. That is to say: On the date when the law of 1883 went into force (March 7) the contract between the city and the Water Company became firm and effectual.

SECTION 12. ACCEPTANCE OF WORKS.—1883.

The contract between the city and the Water Works Company, made in 1882, having been ratified and confirmed by the Legislature on March 7, 1883, and being in binding force, the final act took place, which was the completion of the works and the acceptance of the same under the ordinance.

The official action of the city was as follows, as shown by the city records:

"Whereas, On the 18th day of January, A. D. 1882, the Mayor and Councilmen of the City of Leavenworth passed an ordinance, number 1029, authorizing the Leavenworth City and Fort Leavenworth Water Company to construct, maintain and operate water works in and adjacent to said city, granting to it the rights to lay and maintain pipes for the conveying and distribution of water in the streets and alleys, avenues, lanes and public grounds of said city, and the other rights, privileges, and immunities, *subject to the terms and conditions in said ordinance prescribed*, and the said company has constructed and completed such water works in the manner fixed and prescribed by the said ordinance: therefore, be it by the Mayor and Councilmen

"Resolved, That the water works of the Leavenworth City and Fort Leavenworth Water Company, constructed in and adjacent to the City of Leavenworth, be, and the same are, hereby accepted as fully constructed and completed pursuant to the provisions of the said ordinance, No. 1029, and that the rent of the fire hydrants now set for the use of the city, pursuant to said ordinance, shall commence on the first day of April, A. D. 1883, *payments to be made as provided in said ordinance*, and rents for any additional hydrants which may be hereafter set pursuant to said ordinance, and for which rents shall be payable thereunder, shall commence when each of such hydrants shall be set and ready for use.

"Approved March 31, A. D. 1883.

Attest:

O. C. BEELER, *City Clerk.*"

W. M. FORTESCUE,

Mayor of the City of Leavenworth.

SECTION 13. CLAIM OF THE WATER COMPANY.

The Water Company has a right to claim, that having built the works under a contract with the city, and the Legislature having validated said contract, and after said validation the works having been completed and accepted by the city, March 31, 1883, under the ordinance, that, therefore, the rights of all parties as they stood on March 31, 1883, shall remain unaffected by any future legislation not consented to by both parties.

What is that claim?

The claim of the Water Works Company is, in the words of the statute:

Possession and enjoyment of all rights, privileges and franchises theretofore granted and acquired, and the right to maintain and operate the water works, with all of such rights, privileges and franchises, until the city shall purchase them under the terms of the contract.

SECTION 14. THE OPPOSITE CONTENTION.

As against the claim of the Water Company there are several contentions:

First. That the city has the right by statute to fix water rates for the Company.

Second. That the rights of the Water Company were abrogated in whole or in part by the laws of 1891 and of 1897, hereinafter set forth.

Third. That the charter of the Company has been modified by the laws of 1891 and 1897.

Fourth. That the construction of law contended for by the Water Company would lead to perpetuities.

SECTION 15. RIGHT TO FIX RATES.

The law of 1881 contained the following provision:

"In case of the construction or operation of water works in any city of the first class by any person or corporation other than such city, the city shall retain and possess the right to regulate and fix the charges and rates for the use of water from such works by private persons or corporations, such charges to be reasonable at all times; and in case any such city shall fix an unreasonable rate, the same may be reviewed and determined by the district court of the county in which such city may be." (L. 1881, ch. 37, § 36.)

The foregoing gives the City Council the right to fix water rates, not for water furnished to the city, but to the private consumer. But having under said law fixed rates, by an ordinance, which was embodied in a contract ratified by the Legislature, the rates must remain as fixed until the contract is ended.

The water works in Leavenworth were built with reference to the contract. If the contract could be construed that the city should have the right at any time during the existence of the contract to fix rates, there would be no certainty of profit, and no inducement for capital to take the chances.

The ordinance concerning rates to private consumers was as follows:

"SEC. 20. The water rates to consumers during the continuance of this franchise shall be as follows, except that any rate may be modified or changed by the joint agreement of the city and company." [Here follows table of rates.]

By this contract, ratified by the Legislature, the rates were made permanent until the city bought the works.

As to the city, the agreement was as follows:

"SEC. 6. The city of Leavenworth hereby agrees to and does rent from said company, for the term of twenty years, *except as hereinafter provided*, seventy hydrants, to be located by the city and set by the company," etc.

The words, "*except as hereinafter provided*," have reference to the following, in Section 21 of the ordinance:

"In case no sale of the works to the city is effected at the expiration of twenty years *or thereafter*, as aforesaid, then the contract then existing between said parties shall continue during the period so passed over."

Therefore, there can be no new fixation of rates without the consent of the Water Company, until the city buys the works.

SECTION 16. OBLIGATION OF CONTRACTS.

A contract being in force between the city and the Water Company, the Legislature could not by any new law impair the obligation of the contract.

The laws of 1891 and 1897 are found in appendix hereto.

It will be further seen that the said laws did not intend to impair the obligations of any contract. They are prospective in their character.

AN EXAMINATION OF THE LAW OF 1891

Shows that it is *entirely prospective*. It says: "The Mayor and Council shall have the power to provide water works," etc.; and, "The Mayor and Council may grant any person, company or corporation the right to construct, maintain and operate water works," etc.; and, "The city shall have power to borrow money for the purchase or erection of water works," etc.

The only repealing clause of the law of 1891 is the one repealing the law of 1883, hereinbefore quoted. Again, the law of 1891 was repealed in 1897 by implication, because the Public Utilities Law of 1897, found in Appendix "C" hereto, covered the whole subject, or

at least attempted to. If the Public Utilities Law of 1897 is unconstitutional and void, then the law of 1891 is in force; but in that case, the law of 1891, being wholly prospective, it does not injure the Water Company, nor did it intend to impair the obligation of any contract, as is readily seen from a reading of the act itself.

AN EXAMINATION OF THE LAW OF 1897

Shows that it does not affect contracts already made. The act provides:

"SECTION 1. That all private corporations which may now or hereafter . . . furnish . . . water . . . to any city . . . shall be permitted so to do and to make *renewal or original* contracts for so doing, and to lay pipe . . . only upon the conditions hereinafter imposed. . . ."

"SEC. 2. The municipal authorities of any city . . . in which such private corporation now exists . . . is hereby authorized to contract with any such corporation . . . for supplying water . . . for all purposes necessary in any such city, and to fix all charges therefor upon the conditions imposed by this act."

"SEC. 3. As a condition precedent to procure a *renewal or original* grant, lease or contract, from any city . . . to furnish water, . . . such private corporation . . . shall furnish a detailed and accurate statement of all items . . . of material and the then present value used in constructing . . . its plant [and other items], . . . which statement shall be sworn to . . . and filed with the clerk of said city. . . ."

"SEC. 4. No *renewal or original* grant, lease or contract shall be made with any such private corporation by any city . . . without reserving rents and providing for the collection of the annual rental value for the use of its streets, . . . which shall be done . . . by allowing, first, legitimate expenses of conducting such corporation's plant, including all necessary repairs, and, second, by allowing interest at the rate of not more than six per cent. per annum on the capital invested; . . . and such municipality shall . . . collect the net balance of said earnings as rentals for the use of the streets, . . . and as the city's income on the franchise leased by said municipality to any such corporation."

"SEC. 5. Every such private corporation . . . shall make out a statement and an itemized account, which . . . shall be filed with the city clerk, . . . which shall set forth every item of income received by said corporation, . . . also all items paid out . . . : *Provided*, That the expenses and per centum taken on capital invested . . . and the rental taken by the city . . . shall be readjusted on the first day of July of each year. . . ."

The provision for taking rental for the streets, etc., applies only in the case of a renewal or in the case of a grant of a new franchise.

It is true that section 1 provides that corporations shall be permitted to furnish water to cities only under the conditions imposed by the act; but no conditions are imposed by the act, except in the case of the *renewal* or *original grant* of a franchise. The act would not, therefore, affect existing franchises.

Therefore it appears that although the acts of 1891 and 1897 would be unconstitutional if they attempted to impair the obligations of the contract, nevertheless an examination of the said laws does not disclose any attempt on the part of the Legislature to make said laws retroactive, or to make them apply to contracts theretofore in force.

SECTION 17. MODIFICATION OF CHARTER.

In the Constitution of the State of Kansas are the following words: "*Corporations may be created under general laws, but all such laws may be amended or repealed.*"

It is claimed that the law of 1897 so amends the general law of Corporations that by implication it takes away some of the rights and privileges of the Water Company, and throws upon it additional burdens. The writer does not know to what extent this is now claimed or will be claimed by the City of Leavenworth. It makes little difference how much or how little is claimed,—all such claims are without legal force.

In examining the question, we first define the rights which are to be preserved.

A water-works corporation has two sets of franchises: one is received from the State, and may be called the granted or primary franchises; the other set of franchises are the acquired or secondary franchises. It is necessary to keep this distinction in view.

The primary franchises are the grant of a portion of the sovereignty of the State. The secondary franchises are mere property, which can be mortgaged or sold.

The *primary franchises* are the right to be a corporation, to have a body of directors, to do business through its officers, to have a seal, and to have capital stock with limited liability attached to the ownership thereof. In other words, in brief, the primary franchise is the right to be a "person" within contemplation of law, and do business for a limited period as such.

The *secondary franchises* are, in case of water works, when obtained, to lay pipes in the street, and to have the right to dig into

the street and make repairs; the right to force water through the pipes, and to sell it to whomever will buy.

The constitutional right to amend or repeal corporation laws pertains only to the primary franchises, or to such as are granted by the State. The constitutional right of amendment and repeal does not pertain to the secondary franchises, because the secondary franchises are property, and besides, were not obtained from the State.

A corporation cannot mortgage or sell its primary franchises, but it can mortgage and sell its secondary franchises. The city has no power to change or alter the character of the primary franchise.

In section 2 of this opinion the writer has set forth a copy of the charter of the Water Company, and now asks where in any sense the subsequent law of the State of Kansas amends or repeals the rights granted in the charter?

The law of 1897 did not alter or repeal any of the charter of the Water Company, nor was the law intended so to do.

SECTION 18. ILLEGALITY OF THE CLAIM OF THE CITY.

It is claimed that if the city be adjudged to have no right to bring the profits of the company down to a 6-per-cent. basis, that yet, nevertheless, the city has a right to demand that the company make to the City Clerk the reports prescribed in the law of 1897.

The State has a right to prescribe a law by which reports shall be made, and in the Kansas Corporation Law of 1898 has prescribed what reports corporations shall make to the Secretary of State.

The requirements as to reports in the law of 1897 are a part of the 6-per-cent. law, and if a corporation does not come under the 6-per-cent. clauses of the law, the requirements as to reports are not applicable to such corporation. If all of the principal features of a law are inapplicable, a mere detail in the law is inapplicable. If the purpose of a law is illegal, any mere detail by which it is to be carried out is illegal. If the objects and purposes of an act fail, then the whole act fails.

A corporation organized and doing business in the State of its creation is a "person" under the meaning of the 14th amendment to the Constitution of the United States. A State cannot withdraw a corporation from the guarantees of the Federal Constitution. Under the reserved power to amend or repeal a corporation, the State cannot exercise any control over the property of a corporation "except such as may be exercised through control of its franchise and over

like property of natural persons engaged in similar business." (*Santa Clara v. S. P. Ry. Co.*, 18 Fed. 385.)

The State of Kansas may pass a prospective law (not a retrospective one), and may in that prospective law exercise a control over public utilities or over businesses clothed with a public purpose, but such law must be reasonable, just and equal. The 14th amendment reads:

"Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

As the law of 1897 prescribes a different rule for one person (a Kansas corporation) than for another (a private individual), and restricts one person of a class from making over 6 per cent., but allows another in the same business to make all he can, it would seem that the law was unreasonable, unjust, and, above all, unequal, under the decision of Judge FIELD, above quoted.

Such a discrimination cannot be justified as an exercise of police power; there is no question of the health, morals or safety of the public, or of any person. It is merely a discrimination against corporations. It has no reference to the operation or management of the water works. If the water works were sold to an individual, then the purchaser would be exempt from the operation of the law, and the public would gain nothing. Therefore, the whole object of the law is to find out which corporations are making money; if some of the corporations are serving the public at a loss, then such corporations can be let alone; but if any of them have passed the experimental stage and have become dividend-payers, then the companies should furnish the necessary data for their prompt and easy confiscation.

The classification in the law of 1897 is wholly unequal; and in a celebrated Missouri case (1893), a similar law was fully gone into, and the decision was approved by the U. S. Supreme Court in *Gulf v. Ellis* (165 U. S. 150). The Missouri law in the case cited made it a misdemeanor for those engaged in mining or manufacturing to pay for labor with store orders. The restriction did not run to those employing labor in other business. It was held to be class legislation. (*State v. Loomis*, 115 Mo. 307, 314.) See also *Braceville v. People*, 147 Ill. 66.

In these days of intense competition, no business could stand the oppression of being compelled to make the disclosures required by the law of 1897, and since the passage of the law no corporations have gone into business in Kansas under the said law.

It therefore appears that —

First. The law of 1897 was not intended, by its very terms, to apply to contracts of corporations theretofore existing.

Second. The Constitution of the State gave the Legislature no power to interfere with existing property rights.

Third. Such interference by the law of 1897 would impair the obligation of contracts.

Fourth. Under the law of 1897 the Water Company was not given "the equal protection of the laws," if the act applied to the Water Company.

Fifth. The law of 1897 does not touch the Water Company at any point.

SECTION 19. THE QUESTION OF PERPETUITY.

Upon asserting that the Water Company can keep on furnishing water and enjoying its franchises after the expiration of the twenty years, the question is asked if the Water Company claims a perpetuity? Upon this subject it seems that there should be no trouble. A corporation organized in Kansas has the same right to buy land in Kansas to hold "forever" that an individual born in Kansas has. The Water Company is chartered for fifty years. This is no perpetuity. Many a man has bought land "forever," and yet sold it the next day. A corporation can own and hold property and franchises as long as the Legislature permits it to live.

There are two ways by which the duration of the Leavenworth franchise may be cut off. One method is by the purchase of the property by the city; the second, by the repeal of its charter by the Legislature. The Legislature can kill the corporation (by repealing its charter) any minute. As long as these two remedies are in the hands of the public there can be no perpetuity, and no wrong.

SECTION 20. FINAL CONCLUSION.

The Legislature and the City of Leavenworth can say that hereafter all corporations can waste and lose all the money they may in investing in Kansas (as millions have been lost), but if the corporation after years of experiment is at last a paying concern, it shall not receive after that more than 6 per cent. This sort of legislation can be enacted *for the future*; then investors can leave Kansas alone or not. Foreign capital has not invested in Public Utilities in Kansas since 1897, and will not until the unwise legislation is changed.

But, as to the past, these laws do not apply, and the Leavenworth Water Company has a contract good for the fifty years of its existence unless the city buys the works under the terms of the original contract, or unless the Legislature repeals the charter. What would happen in the latter event it is not now necessary to consider, for the time has passed in Kansas when such legislation is probable.

Therefore, the stockholders and bondholders of the Leavenworth Water Company can go ahead giving the citizens good service, and making necessary extensions, and reaping the benefit of their foresight and investment, in having put their money into a good town.

E. F. WARE.

GLEED, WARE & GLEED, Attorneys.
TOPEKA, KANSAS, June 1, 1900.

APPENDIX "A."

ORDINANCE No. 1039.

AN ORDINANCE. Authorizing the Leavenworth City and Fort Leavenworth Water Company to construct, operate and maintain water works in the city of Leavenworth, Kan.

Be it Ordained by the Mayor and Councilmen of the City of Leavenworth :

SECTION 1. That the Leavenworth City and Fort Leavenworth Water Company, a corporation duly organized under and in accordance with the laws of the State of Kansas, be, and is hereby authorized, subject to the limitations hereinafter, or by law provided, to construct, maintain and operate water works in, or adjacent to the City of Leavenworth, in Leavenworth county, Kansas, to lay pipes for the carrying or distribution of water in any of the streets, avenues, lanes, alleys or public grounds of the city, with all necessary and proper buildings, machinery, and attachments required to supply the city and inhabitants thereof with water; and for this purpose may enter upon any street, avenue, lane, alley, bridge or public ground under the control of the city, to take up any pavement or sidewalk thereon, and make such excavations as may be necessary for the laying of such pipes and attachments, provided that such use of such grounds be made with the least practicable inconvenience to the inhabitants of said city, and that such pavements, sidewalks or excavations be replaced by, and at the expense of the Water Company, in as good condition as before, and with the least practical delay.

Sec. 2. The rights and privileges herein granted to continue for a term or period of twenty years from and after the passage of this ordinance, except as hereinafter provided.

Sec. 3. Said water works shall be constructed on the gravitation system, a reservoir of the capacity of not less than three millions of gallons being built on the highest available locality on the range of hills known as Pilot Knob, south of Ohio avenue, to which the water shall be pumped from the source of supply, the Missouri river, where settling basins of not less than four million gallons capacity shall be provided; it being understood and agreed that the water shall be unobscured, and in good and proper condition for use, before leaving the pumping stations, and the company are required at all times to keep the water as pure as practicable, and to this end shall increase the size of the settling basins, or add to them from time to time, as may be necessary to secure this result.

Sec. 4. The size of main pipes, of which not less than seven miles shall be laid within the limits of the city, shall be as follows: From

the pumping stations to the city and from the city to the upper reservoir, eighteen inches (18) interior diameter; where the mains branch for city distribution, each of two mains shall be fourteen inches, each of three mains twelve inches, or other mains so placed or joined that the aggregate flow in either direction shall be equal to the eighteen-inch pipe; and no main over six hundred feet long, on which the city agree to rent one or more hydrants, shall be less than six inches in diameter, unless the same has a full water supply from both ends. In locating mains the company shall locate mains on Second street, Fifth street, and Broadway, extending each as far north and south as is consistent with proper connections by lateral lines east and west, joining them, so as to have full water flow within the aforesaid first seven miles of mains.

Sec. 5. It is understood and agreed that the ability of the mains to furnish water for the extinguishment of fires is limited by the sizes hereinbefore specified, these being considered sufficient to throw at one time, from as many different hydrants, twelve one-inch streams with one hundred feet of hose each, or eight one and one-fourth inch streams with fifty feet of hose each, to heights as follows: On ground fifty feet above the river, one hundred and twenty feet high; on ground one hundred feet above the river, one hundred feet high; on ground one hundred and fifty feet above the river, eighty feet high.

Sec. 6. The City of Leavenworth hereby agrees to, and does rent from said company, for the term of twenty years, except as herein-after provided, seventy hydrants, to be located by the city, and set by the company, on the aforesaid seven miles of water mains, said measurements not to include the branches extending from said mains to the hydrants; each of said hydrants to have two openings for the attachment of hose, and to be set by the Water Company, in connection with their pipe-laying, so as to be ready for use when the works are first in operation; and if more hydrants than seventy are required by the city on the first seven miles of pipe as aforesaid, the city shall pay the company the cost of erecting such additional hydrants, but shall pay no rent therefor, but shall pay to the company from time to time any actual or necessary cost of repairs to such extra hydrants, nor shall the penalties hereinafter stated apply to these extra hydrants.

Sec. 7. The rental for the aforesaid seventy hydrants, and inclusive of any further number that the city shall elect to place on the aforesaid first seven miles of water mains, shall be the sum of fifty-two hundred and fifty dollars annually, to be paid in quarterly installments.

Sec. 8. The seven miles of mains aforesaid shall be deemed the original pipe system, and shall consist of water mains of from eighteen inches to six inches in interior diameter, measuring the largest first, till seven miles are laid.

Sec. 9. All water mains laid subsequent to these seven miles shall be considered as additional lines; for any additional hydrants which the city shall elect to locate on these lines, there shall be paid by the

city to the company an annual rental of seventy-five dollars each, until the whole number of hydrants in the city becomes two hundred and fifty; any hydrant in excess of two hundred and fifty shall be at an annual rental of sixty dollars each.

Sec. 10. The city shall have the power to order mains extended, whenever a revenue of one hundred and twenty-five dollars is assured for each block of such extensions, whether by the city or residents, or jointly. The rent of hydrants on ordered lines shall commence when they are set ready for use.

Sec. 11. In case of the company laying more than seven miles of mains, or laying pipes for distribution without the order of the Council, it shall be optional with the city whether they will rent hydrants on the same, and no liability as to guarantee of revenue on the part of the city shall exist as to such mains, and the city shall have the further right to locate hydrants on such mains at any time after they are laid, without payment of the extra cost of connecting with the water mains after being so laid.

Sec. 12. All water rates, both public and private, shall be payable quarterly, on the first days of January, April, July and October of each year, except as the company may otherwise agree with individual consumers.

Sec. 13. In case of the failure or refusal on the part of the city to pay hydrant rents, for the period of thirty days after any installment falls due, it shall be the privilege of the company to withhold all public supply till such arrearages are paid.

Sec. 14. The city shall have the right to cause the hydrants to be inspected from time to time, and in case any hydrant is found not in working order, the company shall be notified thereof, and if they fail to repair the same within twenty-four hours, ten days' rental of such hydrant shall be deducted for each day it remains out of order until such reduction amounts to the annual rental of the hydrant, it being the duty of the company to report to the city when the hydrant is again ready for use: such notification on either part shall be in writing, and signed by the proper officers. The above penalties shall not be exacted for hydrants disabled by the carelessness or willful injury of persons not in the employ of the Water Company, nor to hydrants temporarily disabled by repairs or extensions of mains.

Sec. 15. The city shall have water free of charge for the use of the offices occupied for city purposes, for public schools, for flushing sewers and washing gutters on curbed and paved streets, when deemed necessary by the city authorities, for which latter purpose the use shall not exceed six one-inch streams at one time nor more than three hours per day. The city shall also have water free of charge for not exceeding six drinking fountains and two public fountains, the aggregate use of water for the same not to exceed ten thousand gallons of water per day for six months in each year. This section shall not be construed as requiring the Water Company to lay any service pipes from their mains to these localities.

SEC. 16. In constructing and operating the works the company shall be liable for any damages arising from injury to the property or persons, the city or citizens, and shall save the city harmless from any damages therefrom.

SEC. 17. If any person shall carelessly or maliciously destroy or injure any portion of the works, or waste water unnecessarily by opening hydrants or otherwise, the same shall be liable to the Water Company for any damages arising therefrom.

SEC. 18. The fire hydrants rented by the city shall be used for no other purpose than hereinbefore provided, and to insure this, it shall be a misdemeanor for any person not authorized by the city to open them.

SEC. 19. The City of Leavenworth agrees to pass and enforce such ordinances as may be necessary to protect the Water Company in their property and rights within the city, from the acts of evil-disposed persons during the continuance of this franchise.

SEC. 20. The water rates to consumers during the continuance of this franchise shall be as follows, except that any rate may be modified or changed by the joint agreement of the city and company:

[Here follows schedule of rates.]

Other uses, special or meter rates. No connections made with mains to give an annual rental of less than \$6.00. Whenever the company have reason to believe that water is being wasted they shall have the right to place meters and collect the amount indicated by them; and any person deeming themselves aggrieved by rates charged shall have the privilege of setting a meter and paying the amount indicated, in like manner.

SEC. 21. The City of Leavenworth reserves the right on or after the expiration of twenty years from the date of this ordinance to purchase the works of the company, together with the extensions, rights and franchises belonging to the same, upon giving said company six months' notice thereof in writing, the valuation to be determined by three hydraulic engineers not in the employ or interest of the city or company. The city choosing one, and the company one, and the third by these two, and the valuation of the work by these commissioners, or if they fail to agree, a majority of them, shall decide the sum to be paid to the company by the city; and in case no sale of the works to the city is effected at the expiration of twenty years or thereafter, as aforesaid, then the contract then existing between said parties shall continue during the period so passed over.

SEC. 22. Whenever from any cause the company shall be temporarily unable to supply water to either the city or consumers, or in case the hydrants shall be closed for non-payment of rental, all rents for the use of water shall cease to such parties during such period, and if it be the fault of the company the rebate from rental shall be for double the time the works are disabled; but this shall not apply to private service pipes if it can be shown that the main giving such supply is in operation.

SEC. 23. Said Water Company agree to keep their works always in operation, and supply in ample quantity the city and inhabitants thereof with well-settled and wholesome water.

SEC. 24. Said company agree to commence said works within thirty days after the passage of this ordinance, weather permitting, and prosecute the same to completion within twelve months of that date.

SEC. 25. Within ten days of the passage of this ordinance the said company shall file with the city its acceptance of the same, which acceptance, duly acknowledged before some officer authorized to administer oaths, shall have the effect of a contract between the city and said company.

SEC. 26. This ordinance shall take effect and be in force from and after its publication.

Approved this 18th day of January, A. D. 1882.

W. M. FORTESCUE, Mayor.

Attest: O. C. BEELER, City Clerk.

APPENDIX "B."

[The Law of 1891.]

CITIES OF THE FIRST CLASS.

AN ACT relating to cities of the first class, and repealing certain sections of former laws relating to such cities.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. [This section does not apply to water works.]

SEC. 2. The mayor and council shall have the power to provide water works for the purpose of supplying such city and its inhabitants with water, and may maintain, operate and regulate the same, and prescribe the rates at which water shall be furnished, and may make such provision, either by constructing water works or by the purchase of such works already constructed; and such city may acquire suitable grounds, either within or without the city, by purchase, or may obtain the same by appropriate proceedings in condemnation upon which to erect such works, or upon which to lay water pipes and mains for the purpose of conveying water to the consumers within the city; and such city shall have jurisdiction over any such grounds outside the city upon which such works, pipes and mains may be located, the same as if such grounds were within the city, as far as may be necessary in order to protect, maintain and operate such works.

SEC. 3. The mayor and council of such city may grant any person, company or corporation the right to construct, maintain and operate water works, and lay pipes within such city for the conveyance of water for the use of such city and its inhabitants, as well as to contract with any person, company or corporation to furnish water for such purposes, and may contract with or grant to any person, company or corporation the right to lay and maintain water mains under, along, upon and across the streets and alleys and other public grounds of such city for the purpose of conveying water to any city in this State or any other State. And in case the mayor and council shall grant or shall have heretofore granted to any person, company or corporation the right to construct and maintain water works for the use and benefit of the city, shall contract or have heretofore contracted with any person, company or corporation to furnish water for such purposes, the mayor and council shall have the power to levy annually on all the property of said city, taxable according to law, a tax in addition to other taxes, not to exceed two mills on the dollar in any one year for the purpose, and to pay said person, company or corporation in full for such year for water furnished to such city.

SEC. 4. No grant or contract provided for in the preceding section shall continue for a longer period than twenty years; and any such

grant or contract may be terminated at any time after the expiration of ten years from the making of the same, or such less time as may be fixed at the time of making such grant or contract; and the city may acquire title to the water-works property, and all the rights, privileges and franchises thereto pertaining, in the manner following: The city may, at any time after the expiration of ten years from the making of such grant or contract, or after the expiration of such less time as may be stipulated in the franchise or contract, file a petition in the district court of the county in which such city is situated, against the owner or owners of such water works and all others interested therein, which petition shall contain a general description of the water-works property, praying that the city be permitted to acquire title thereto in the manner provided for in this act. Thirty days' notice shall be given to all persons interested in said property of the time for the hearing of such application, by publication in three successive issues of some weekly paper printed in such city, having general circulation therein, the first of which shall be not less than thirty days prior to the time of the hearing; and also by delivering a copy of such notice to the manager of such works, if such manager can be found within the county. In such proceedings, petition and notices it shall not be necessary to state the names of any of the parties interested as defendants, except that of the reputed owner or owners. At the time set for the hearing of such petition, the court shall appoint three disinterested commissioners, non-residents, one of whom shall be named by the city, one by the court, and one by the owner or owners of such water works; but if such owner or owners fail to make such selection, the third shall also be selected by the court. The commissioners so appointed, after having taken and subscribed an oath faithfully and impartially to discharge their duties as such commissioners, shall forthwith proceed to determine the value of the water-works property, which value shall be the fair value of said property. The commissioners so appointed shall have power to administer oaths, to subpoena and compel the attendance of witnesses, and the production of papers. Within thirty days after their appointment, unless for good cause shown the time be extended by the court, or the judge thereof, the commissioners shall file their report with the clerk of said court. If any commissioner so appointed shall fail to act, or his place become vacant for any other reason, the court shall fill such vacancy. The action of a majority of such commissioners shall be deemed to be the action of the commissioners. Within ten days after the filing of such report, any person interested may file exceptions thereto, and thereupon the court or the judge thereof shall appoint a time not more than twenty days from the filing of such report, for the hearing of such exceptions, which exceptions shall be heard, and in a summary manner without pleadings; and upon such hearing the court may confirm said report, or it may set the same aside, as shall be just, and appoint new commissioners. In the event such report

shall be set aside, further proceedings shall be had in all respects as in the case of the original appointment of commissioners, until the award of commissioners shall be confirmed by the court. No appeal shall lie from the action of the court upon the hearing of exceptions to any award of commissioners. At any time within four months after the confirmation of such award by the district court, the city may deposit the amount of the award with the treasurer of the county for the use of the owners or others interested in said works; and if for any cause such commissioners so appointed shall fail or refuse to make and file its report within the time limited therefor, the court by attachment may compel such filing, or may discharge such commissioners and appoint new ones from time to time until commissioners shall be appointed, two of whom shall agree upon a report. From the time of the making of such deposit with the county treasurer, the city shall be the absolute owner of the entire water-works property, and all rights, franchises and privileges thereto pertaining, free and clear of the claims of all persons theretofore interested therein. Upon application of the city, writs of assistance shall be granted by said district court, directing the sheriff of the county to put such city in possession of the same. The court shall determine as to the proper disposition of the sum so awarded, and any person aggrieved by such determination may review the same by petition in error in the supreme court. No grant or contract made under the provisions of this act shall in any manner inure to the benefit of any incumbrancer holding any lien or incumbrance of the water-works property at the time of making such grant or contract, who shall fail to assent thereto, and all subsequent incumbrances shall be subject to the provisions of this act the same as if they had expressly assented, and all who have assented as herein provided shall be subject in all respects to the provisions of this act.

SEC. 5. The city shall have power to borrow money for the purchase or erection of water works, or for the payment of the amount of the award of such commissioners, or the purpose of purchase or construction of electrical or other works for the purpose of lighting the streets of said city or furnishing light to the inhabitants thereof, and may issue bonds therefor; but no such money shall be borrowed or such bonds be issued until the mayor and council shall be instructed to do so by a majority of the legal voters of such city at a special election called and held for that purpose. The bonds issued under this section shall be payable in not less than twenty nor more than thirty years from their date, and shall bear interest at a rate not to exceed six per cent. per annum, payable annually or semi-annually, and shall not be sold for less than their face value, and no commission shall be allowed for their sale.

[By a final section the foregoing law of 1891 repeals all that part of the law of 1883, heretofore cited, being all of the law of 1883 concerning water works, and being the same law cited in Section 9, hereinbefore, as found in this opinion.]

APPENDIX "C."

[The Public Utilities Law of 1897, p. 167.]

EMPOWERING CITIES TO PROCURE LIGHT, HEAT, AND POWER.

AN ACT authorizing and empowering cities of the first, second and third classes to obtain gas lights, electric lights, electric power, water or heat by contracting with private corporations to furnish any such city and its citizens with such light, power, water or heat under the conditions in this act imposed, or to obtain such gas lights, electric lights, electric power, water or heat by purchasing or constructing, owning and operating gas plants, electric-light plants, electric-power plants, water works or heating plants by such cities; and for the purpose of owning and operating any such plants, to purchase or lease gas or other lands, and to repeal paragraphs 1401 and 1402 of the statutes of Kansas, 1890, and all other acts and parts of acts in conflict with this act.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That all private corporations which may now or hereafter manufacture, sell and furnish . . . water to any city in this State of the first . . . class as may be required by such city for public or private buildings, or for other purposes, shall be permitted so to do, and to make renewal or original contracts for so doing, and to lay pipes and conductors for conducting . . . water . . . through the streets . . . and into buildings and other places in the city, with the consent of, and under contract with, the municipal authorities thereof, only upon the conditions hereinafter imposed in this act, *supplemented by such regulations as the municipality may prescribe* in accordance with this act.

SEC. 2. The municipal authorities of any city of the first . . . class in this State in which any such private corporation now exists, and which may now or hereafter manufacture, sell or furnish . . . water . . . to such city and its citizens is hereby authorized to contract with any such corporation . . . for supplying . . . water . . . to public or private buildings and other places, and for all purposes necessary in any such city, and to fix all charges therefor, upon the conditions imposed in this act.

SEC. 3. As a condition precedent to procure a renewal or original grant, lease or contract from any city of the first . . . class in this State to furnish the municipality or its citizens with . . . water, . . . such private corporation, by its resident president and secretary, or resident manager or other officers, shall furnish a detailed and accurate statement of all items and kinds of items of material, and the then present value of material, used in constructing or to be used in constructing its plant, where used, or to be used, as well as a description and statement of the then present value of the real estate necessarily owned and used, or to be acquired by said

corporation, in operating its plant, which detailed statement shall give date of purchase of each item, from whom purchased, price paid or to be paid, and the then actual present value thereof, and also a particular statement of the items paid out for labor, to whom paid, or estimated amount to be paid, in the construction of said plant, as accurately as can be done; which statement or estimate must be sworn to by said officers or manager, and filed with the clerk of such city for inspection of any citizen thereof, and after public notice of such filing and the purpose thereof, in some newspaper of general circulation in such city, giving the date when such grant or lease will be applied for, at least forty days before any renewal grant, lease or contract, or original grant, lease or contract, is made with any such corporation by such city, permitting the corporation to use the streets, alleys, roadways or squares of such city.

SEC. 4. No renewal or original grant, lease or contract shall be made with any such private corporation by any city of this State without reserving rents and providing for the collection of the annual rental value for the use of its streets, alleys, roadways or squares, which shall be done and ascertained by allowing, first, legitimate expenses of conducting such corporation's plant, including all necessary repairs, and second, by allowing interest at the rate of not more than six per cent. per annum on the capital invested as ascertained under the provisions of the preceding section, unless the council and mayor are petitioned to allow a greater rate than six per cent., by at least three-fifths of the *bona fide* taxpayers of such city based on the last assessment rolls, which expenses and per cent. of the capital invested being deducted from the gross earnings of said corporation, such municipality shall, through its proper officers, collect the net balance of said earnings as rentals for the use of the streets and alleys, roadways and squares of such city, and as the city's income on the franchise leased by said municipality to any such corporation; and as such rentals, said net proceeds shall be paid into the treasury of such city on the first day of January and July of each year, after the making of such grant, lease or contract for the operation of such plant.

SEC. 5. Every such private corporation now existing, or which may hereafter be organized in such city in this State shall, beginning with the first day of July, 1897, and on the first day of January and July of each year thereafter, and after the beginning of the operation of its plant, through its manager, secretary or president, make out a statement and an itemized account, which shall be sworn to by the officer making out said account, and filed with the city clerk of such city, there to remain on file for the inspection of every citizen of such city, which statement of account shall set forth *every item of income* received by said corporation, giving the date received, of whom received, on what account received, and the amount received; also all *items paid out*, including the date when paid, to whom paid, on what account paid, and amount paid, thus showing item by item the disposition or outgo of the entire income of said corporation, which

statement of account shall also be accompanied by a statement of names, places of residence of each stockholder and the number of shares held by each stockholder set forth in writing: *Provided*, That the expenses and per centum, taken on capital invested, allowed to any corporation and the rental taken by the city provided for in section 4 of this act, shall be readjusted on the first day of July of any year during the life of the contract or lease: *And provided further*, That two-fifths of the taxpayers of such city, as shown by the last preceding tax-roll, shall have petitioned the mayor and council for readjustment, by petition filed with the city clerk thirty days before July first of the year in which such readjustment is sought, if the readjustment is sought on the ground of fraud perpetrated, or mistake made by such corporation, its officers or agents.

SEC. 6. Any officer or manager of such corporation who shall fail or refuse or neglect to comply with the provisions of this act, requiring a statement, or who shall make a false showing in any statement required of him by this act, shall be fined in the sum of not less than five hundred dollars nor more than one thousand dollars for each offense, and the corporation shall forfeit its right to collect its charges for light, power, water or heat furnished to the municipality or the citizens thereof.

SEC. 7. Any one or more citizens, taxpayers, may file objections with the city clerk to any statement required herein and made by such corporation, and be heard as to what expenses, repairs, and rate per cent. on capital shall be allowed to such corporation, and may have the employees, officers and stockholders of any such corporation or other witnesses examined under oath before the mayor and council of any such city to show the inaccuracy or falsity of such statement, or the over-valuation of any property itemized in such statement; and if such statement is found to be inaccurate or false, or any property over-valued, the mayor and council may act on the evidence before them and fix and determine what expenses, repairs and the rate per cent. on capital such corporation is to be allowed under this act, and the rentals the city is to receive, or may require additional statements filed from time to time as may be necessary to enable them to act intelligently in the performance of their duties under this act; and such mayor and council shall have power to compel the production of books and papers and the attendance of witnesses necessary to such investigation; and the city clerk is hereby authorized to administer oaths to all witnesses and to issue subpoenas and attachments to compel the production of books and papers and the attendance of witnesses.

SEC. 8. That all cities of the first . . . class of the State of Kansas are hereby granted full power and authority on behalf of such cities to purchase, procure, provide and contract for the construction of, and to construct and operate . . . water works, and to secure, by lease or purchase, . . . lands for the purpose of supplying such cities and the citizens thereof with water . . . for domestic

ness and all other purposes: *Provided*, That nothing in this act shall prevent any such city from constructing any such plant at any time after the act takes effect.

Sec. 9. That for any and all indebtedness created for any of the purposes mentioned in section eight of this act, any city of the first . . . class is hereby granted full power and authority to issue the bonds of the city to an amount equal to said indebtedness; the said power to create said indebtedness and to issue bonds being independent of and in addition to like and other powers heretofore granted such cities; but such bonds shall not be issued in amount to exceed twenty per cent. of the assessed value of such city as shown by the last preceding assessment. Said bonds shall not be issued in denominations of less than ten dollars nor more than two hundred dollars, and shall run for a period of not to exceed twenty years, and shall bear interest at a rate not to exceed six per cent. per annum, and may be used in payment in the purchase or construction of the plant or plants to such persons as will receive them and to whom such city may become indebted in the construction or purchase of any such plant or plants, at not less than their face value, and as directed by the mayor and council of said city; and said bonds shall be receivable in the payment of city taxes in an amount not to exceed ten per cent. of said taxes in any one year.

Sec. 10. On presentation of a petition signed by two-fifths of the resident taxpayers of any such city as shown by the last assessment roll, the acting mayor of such city shall issue a proclamation for a city election to be held, giving at least thirty days' notice thereof in a newspaper published and of general circulation in said city, for the purpose of submitting to the electors of such city a proposition to issue bonds of such city for any and all purposes mentioned in the last two preceding sections, and section twelve of this act.

Sec. 11. If, upon a canvass of the returns of said election, it shall appear that a majority of the electors voting at such election are in favor of issuing said bonds, the corporate authority of the city shall issue the same for the purpose and in the manner and to the amount specified in this act.

Sec. 12. No renewal or original grant, lease, or contract provided for in this act shall continue for a longer period than twenty years, and any such grant, lease or contract may be terminated at any time after the expiration of ten years from the making of the same, or such less time as may be fixed at the time of making such grant, lease or contract; and the city may acquire title to any . . . water works . . . of any private corporation upon the expiration of any existing grant, lease or contract now in force with any such corporation, or upon the termination of any future grant, lease or contract made in accordance with this act, and all the rights, privileges and property thereto pertaining, in the following manner, to wit: The city may, upon the termination of any grant, lease or contract now in force with any such corporation, or at

any time after the expiration of ten years from the making of such grant, lease or contract under this act, or after the expiration of such less time as may be stipulated in the grant, lease or contract, file a petition in the district court of the county in which said city is situated, against the owner or owners of any such plant and others interested therein, which petition shall contain a general description of the plant or property, setting forth the interests or property rights of said corporation or others therein as near as may be done, and praying that the city may be permitted to acquire a title thereto in the manner provided in this act. Thirty days' notice shall be given to all persons interested in said property at the time for the hearing of the said application, by publication in three successive issues of some weekly newspaper printed in such city, having general circulation therein, the first of which shall not be less than thirty days prior to the time of the hearing, and also by delivering a copy of such notice to the manager of such plant, if such manager can be found within the county. In such proceedings, petition, and notices interested as defendants, except those of the reputed owner or owners. At the time set for the hearing of such petition, the court shall appoint three disinterested commissioners, non-residents of the city, one of whom shall be named by the court and the other two by the county commissioners of said county. The commissioners so appointed, after having taken and subscribed an oath to faithfully and impartially discharge their duties as such commissioners, shall forthwith proceed to determine the then present value of any such plant, exclusive of the city's franchise or property element therein, which value shall be a fair value thereof. The commissioners so appointed shall have power to administer oaths, to subpoena and compel the attendance of witnesses, and the production of books and papers, and any citizen taxpayer or officer of the city may appear before them and be heard as to the city's interest. Within thirty days after their appointment, unless, for good cause shown, the time be extended by the court or the judge thereof, the commissioners shall file their report with the clerk of said district court. If any commissioner, so appointed, shall fail to act, or his place become vacant for any other reason, the court shall fill such vacancy. The action of a majority of such commissioners shall be deemed to be the action of the commissioners. Within ten days after the filing of such report, any citizen of such city, or other person interested, may file exceptions thereto, and thereupon the court or the judge thereof shall appoint a time not more than thirty days from the filing of such report, for the hearing of such exceptions, which exceptions shall be heard in a summary manner without pleading, and upon such hearing the court may confirm the said report or may set the same aside as shall be just, and appoint new commissioners. In the event such report shall be set aside, further proceedings shall be had in all respects as in the case of the original appointment of com-

missioners until the award of the commissioners shall be confirmed by the court. No appeal shall lie from the action of the court upon the hearing of exceptions to any award of the commissioners. Said commissioners shall be allowed three dollars per day for services rendered, to be paid out of the city treasury. At any time within four months after the confirmation of such award by the district court, the city may deposit the amount of the award with the treasurer of the county for the use of the owners or others interested in such plant; and if for any cause such commissioners so appointed shall fail or refuse to make and file their report within the time limited therefor, the court, by attachment, may compel such filing, or may discharge such commissioners and appoint new ones from time to time until commissioners shall be appointed, two of whom shall agree upon a report. From the time of making such deposit with the county treasurer, the city shall be absolute owner of any and all privileges, property, and property rights of any such corporation, and all others in any way interested in any such plant, free and clear of the claims of all persons theretofore interested therein. Upon application of the city, writs of assistance shall be granted by said district court directing the sheriff of the county to put such city into possession of such plant. The court shall determine as to the proper disposition of the sum so awarded, including the rights of incumbrancers, owners and all others interested therein, and any such person aggrieved by such determination may review the same by petition in error in the supreme or appellate court.

SEC. 13. That paragraphs 1401 and 1402 of the General Statutes of Kansas, 1889, and all other acts and parts of acts in conflict with this act, be and the same are hereby repealed.

SEC. 14. This act shall take effect and be in force from and after its publication in the official State paper.

Approved March 13, 1897.

Published in official State paper March 26, 1897.