

FOSTER v. CITY OF JOLIET.<sup>1</sup>

(Circuit Court, N. D. Illinois. June 9, 1886.)

**1. MUNICIPAL CORPORATION—CONTRACT TO BUILD WATER-WORKS—RESCISSION.**

A contract by which one S. promises a municipality to construct and operate water-works, and which contains the provision that, "in case of failure of the party of the first part to construct or maintain said water-works as herein agreed, the rights and franchises hereby granted to him shall cease and determine," is not rescinded by *ex parte* action of the municipality, *e. g.*, by a resolution of its city council, without judicial proceedings.

**2. SAME—EXTENSION OF TIME FOR PERFORMANCE—INJUNCTION AGAINST MUNICIPALITY.**

Where one S. agrees with a municipality to construct and operate water-works to supply water to the public by a contract which contains the forfeiture clause set forth in the preceding head-note, and which does not make time the essence of the contract, and S. and his assignees construct and put in operation water-works not complying with the contract, and the non-performance of the contract is due largely to the acts of both parties, and in part to unsuccessful experiments authorized by the municipality, *held*, (1) that S. and his assignees are entitled, before they are liable to a forfeiture of their rights under the contract, to a reasonable time in which to perform it; (2) that an injunction lies to restrain the municipality from interference with the pipes laid, or to be laid, by S. and his assignees during the extension of time granted to them.

**3. CONTRACT—WHAT IS PERFORMANCE.**

Where one contracts to supply water from artesian wells, supplying water from other sources equally good or better is not compliance with his contract.

In Equity.

*James L. High*, for complainant.

*Benj. Olin and Dent, Black & Cratty Bros.*, for defendant.

**BLODGETT, J.** The bill in this case charges that on the fifteenth day of March, 1880, a contract was made between one Jesse W. Starr, Jr., of the first part, and the defendant city, of the other part, by which Starr agreed to construct and maintain, in the most substantial and workman-like manner, subject to the inspection and approval of the city council of defendant, an effective system of water-works, to supply the city and citizens of Joliet with water for domestic, manufacturing, sanitary, and fire purposes, and for that purpose to put down one or more artesian wells, or as many as should be required to furnish at least 500,000 gallons daily, and to put down, from time to time, new artesian wells, so as at all times to furnish the city and citizens an ample supply of water, and to a depth that would insure water of a good quality; that he would construct a reservoir with a capacity of at least 2,500,000 gallons, which should be entirely protected from surface water, into which the water from such artesian well should be conducted; that, if necessary, he would construct a stand-pipe of sufficient height into which the water should be pumped, and from

<sup>1</sup> Edited by Russell H. Curtis, Esq., of the Chicago bar.

which it should be distributed through the street mains; that he would furnish and lay down eight miles of street mains, of such diameter as the city counsel should approve, but not to exceed ten inches, nor be less than four inches, in diameter, with all needful valves and stop-gates, on which should be placed 50 two-way fire hydrants, to be located by the city; and that such water-works should be sufficient to throw, at one time, a one and one-fourth inch stream of water, at least 100 feet high, from any five hydrants; that he would furnish, and put into complete working order, pumping machinery, to consist of at least two sets of first-class engines, and two sets of first-class boilers, which should have a pumping capacity of at least 3,000,000 gallons in 24 hours; that he would supply private citizens along the line of the street mains with water at certain rates stipulated in the contract.

In consideration of this undertaking on the part of Starr the city agreed to give the water company exclusive rights in its streets for 30 years for water purposes, with the proviso that, in case of failure to construct or maintain such water-works, the rights and franchises granted should cease and determine; that the city would pay for the 50 fire hydrants provided by the contract to be located on the street mains an annual rental of \$7,000, payable in equal quarterly installments; that the city would pass all needful ordinances to preserve the purity of the water, and protect the machinery of the water-works from injury by malicious persons, and to prevent waste of water; that, in cases of change of grade of the streets, the city would pay the cost of relaying the water mains and pipes. It was further agreed that Starr should extend the mains beyond the stipulated eight miles as fast as he could obtain an assured income of at least \$1,500 per annum per mile, and to place five fire hydrants on each additional mile of main, if so requested by the city, for which the city was to pay an annual rental of \$40 for each hydrant. It was further agreed that Starr should commence work within 60 days from the date of the contract, and complete the same within one year after such 60 days.

By a supplemental agreement made June 7, 1880, it was agreed that there should be ten miles of street mains instead of eight, and that the number of fire hydrants located on such mains should be sixty instead of fifty; that the size of the street mains, within the limits of four and sixteen inches in diameter, should be designated on a map to be prepared by Starr, and by him presented to the chairman of the then committee on water-works of the city council, and the sizes indicated on such map should be subject to modification within the limits of four and sixteen inches, within five days after the presentation of such map to the chairman of such committee; and that the annual rental of the fire hydrants should be \$8,500, payable in equal quarterly installments; and by a further supplemental contract, dated October 9, 1880, it was provided that, in lieu of ar-

tesian wells provided for in the original contract, Starr might, at his election, supply the city with spring water from springs on and in the vicinity of the Brown farm, just east from the Rowell gravel pit, such springs of water to be thoroughly protected from surface-water drainage and surface impurities of all kinds, the stream from such springs to be banked so as to keep the surface water therefrom; but this change in the source of supply was not to dispense with the reservoir provided for by the original contract, nor in any way relieve Starr from any of the other covenants in his contract; and, if the springs should not supply the quantity of water required by the original contract, artesian wells were to be sunk, as required by the original contract.

Starr entered upon the performance of the contract; constructed the reservoir and stand-pipe; laid 10 miles of mains in the streets, and of the sizes designated upon the map duly presented to the water-works committee of the city council; and furnished and put in pumping machinery, engines, and boilers; and up to about the twelfth of December, 1881, was actively engaged in the construction of the works as provided for in the contract.

It is further charged that, in November or December of the year 1880, Starr caused a corporation to be organized by the corporate name of "The City of Joliet Water-works Company," and assigned to such corporation said contract with the city, and all his rights and privileges and interest therein, and sold and transferred to said company all the machinery, reservoirs, water-pipes, hydrants, real estate, water-rights, etc., then owned or possessed by him pertaining to such contract; that said water-works company, on the ninth of December, 1880, made and delivered to the Guaranty Trust & Safe Deposit Company of Philadelphia a mortgage upon all its lands, tenements, and water-works then owned, or thereafter to be acquired, with all its pipes, machinery, pumps, pumping engines, engine-houses, and equipments, for the purpose of securing the payment of 280 bonds of said company for the sum of \$500 each, bearing date on said ninth day of December, payable to the said Guaranty Trust & Safe Deposit Company on the first day of July, 1910, with interest at the rate of 6 per cent. per annum, payable on the first days of January and July of each year; that such bonds were placed upon the market, and sold to purchasers for value; that default was made in payment of interest on said bonds, and a bill filed in this court to foreclose the mortgage; and such proceedings had under such bill that a sale was made of the mortgaged property, and complainant Foster became the purchaser of said property for and on account of the owners and holders of said bonds, who joined with him as complainants in this case; and that said Foster had been put in possession of the property under said purchase by order and decree of this court, and has since August, 1883, had possession and control of said water-works, and of the property, engines, machinery, reservoirs, pumps, and pipes