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MUNICIPAL CORPORATIONS: FRANCHISE TO ELECTRIC LIGHT COMPANY IN CITY OF THE FOURTH CLASS AS REQUIRING VOTE OF INHABITANTS.

7028-6815 RS Mo 1929

October 13, 1933.

Honorable William Hirth,
Editor, Missouri Farmer,
Columbia, Missouri.

Dear Sir:

Your letter of September 30th has been received containing a request for an opinion as follows:

> "While our State Advisory Board was listening to the plea of the city of Sullivan the other day for a municipal light and power plant, the city Attorney stated that the franchise under which the private utility company is now operating at that point had never been ratified by a vote of the people, and he therefore contended that these franchises are of no legal effect. I will appreciate it if you will have someone in your Department to advise me as to what the law is in a premise of this kind, that is whether ratification by the people is imperative."

I. NECESSITY OF RATIFICATION OF FRANCHISE BY VOTERS.

Revised Statutes of Missouri of 1929, Section 7028, provides as follows:

> "The board of aldermen may provide for and regulate the lighting of streets and the erection of lamp posts, poles and lights therefor, and shall have power to make contracts with any person, association or corporation, either private or municipal, for the lighting of the streets and other public places of the city with gas, electricity or otherwise: Provided, that no such contract shall be made for a longer time than ten years: and provided further, that no such contract shall have any legal force until the same shall have been ratified by a two-thirds majority of the
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qualified voters of said city voting at an election to be held for that purpose. The board of aldermen shall have the right, also, to erect, maintain and operate gas works, electric light works, or light works of any other kind or name, and to erect lamp posts, electric light poles, or any other apparatus or appliances necessary to light the streets, avenues, alleys or other public places, and to supply private lights for the use of the inhabitants of the city and its suburbs, and to regulate the same, and to prescribe and regulate the rates to be paid by the consumers thereof, and to acquire by purchase, donation or condemnation suitable grounds within or without the city upon which to erect such works, and the right of way to and from such works, and also the right of way for laying gas pipes, electric wires under or above the ground, and erecting posts and poles and such other apparatus and appliances, as may be necessary for the efficient operation of such works; Provided, that the board of (6)
alderman may, in its discretion, grant the right to any person, persons or corporation, to erect such works and lay the pipe, wires, and erect the posts, poles and other necessary apparatus and appliances therefor, upon such terms as may be prescribed by ordinance: Pro- (7)
vided, further, that such rights to any such person, persons or corporation shall not extend for a longer time than twenty years, and shall not be granted nor renewed, unless by consent of a majority of the qualified voters of the city, voting at an election held for such purpose; Provided still further, that nothing herein (8)
contained shall be construed as to prevent the board of aldermen from contracting with any person, persons or corporation for furnishing the city with gas or electric lights in cities where franchises have already been granted, and where gas or electric light plants already exist, without a vote of the people. (R.S. 1919, Sec. 8479."

This statute applies to cities of the fourth class. For the purpose of convenient reference to its various parts numbers have been set out above opposite various parts of this statute. It will be observed that parts 1, 2, 3 and 4 govern the regulation and lighting of public places, i. e. the light which the city as a municipal corporation requires for its own use, these parts making up one distinct unit of the statute, and that parts 5, 6 and 7 relate to the franchise to supply light not only to the city but to the inhabitants thereof as is evident from part 5 in the phrase "and to supply private lights for the use of the inhabitants * * * ". As we understand it your question relates to the franchise so it is with that section of the statute beginning with part 5 that this opinion will mainly deal. Part 7 expressly provides that a franchise "shall not be granted nore renewed, unless by consent of a majority of the qualified voters of the city, voting at an election held for such purposes:" The statute under discussion was enacted in 1895 (Laws of 1895, page 65, approved April 11, 1895) and has not since been amended.

No decisions have been discovered dealing with or construing the above Section 7028 but Section 6815 relating to cities of the third class is practically identical to Section 7028 except that in Section 6815 the last proviso of Section 7028 (part 8 above) is left out. Consequently decisions construing Section 6815 should be applicable to Section 7028.

In the case of City of Carthage v. Carthage Light Co., 97 Mo. App. 20, 70 S. W. 936 (1902) it was held that an ordinance enacted by a city of the third class at a time when what is now Section 6815 was in force, which ordinance granted a light franchise which was not voted upon by the inhabitants of the city was invalid because of the absence of such vote. The court said that the provisions required a vote of the people:

> "The second and fourth proviso above referred to render a doncession by the council, like that of Fitch, nugatory unless consented to by the qualified voters of the city. No such consent to the Fitch concession was ever obtained."
> * * * * * *
> "This ordinance not having been consented to by the qualified voters of the city, as required by the statute, which was the charter of plaintiff, was without legal validity in so far as it authorized the grantee therein to erect posts and wires in the streets of the city to light the same; " 97 Mo. App. 26.

and in Lawrence v. Hennessy, 165 Mo. 659, 65 S. W. 717 (1901) the same result was reached, and the court said:

> "The defendants' contention that ordinance 307 was void, because not authorized by a vote of the people as required by the Act of 1893, is well founded, for that act expressly prohibits the granting of a franchise of that character to any person, by any city of the third class, 'unless by consent of a majority of the qualified voters of the city, voting at an election held for such purpose.' " 165 Mo. 668.

From the above remarks and quotations it is clear that (1) the statute which has been in force since 1895 requires a vote of a majority of the qualified voters voting at an election held for that purpose to grant a franchise for lighting a city and (2) unless such vote is taken no franchise can be valid.

In your request for an opinion you did not state when the present private light and power plant received its franchise and began supplying the city of Sullivan with electricity. If such plant began its operation before 1895 it likewise would not have a valid franchise from the city for a city of the fourth class in 1895 could not have granted such a franchise. Before the enactment in 1895 of what is now Section 7028 no statute existed authorizing cities of the fourth class to grant franchises to electric light companies, and in the absence of express statutory authority to such a city to grant such a franchise no power would exist to do so. See City of St. Louis v. Kaime Real Estate Company, 180 Mo. 309, 79 S. W. 140 (1904) wherein the court at page 322 said:

> "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words: (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation - not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

At first glance it might seem that the last proviso of Section 7028 (part 8 above) might contradict the conclusion of the preceding paragraph of this opinion, but a careful analysis of the language of

such proviso shows that it relates solely to contracts to supply the city with light for municipal purposes and not to a general franchise, and the Supreme Court of Missouri by Ragland, P. J. has pointed out the difference between these two functions in construing Section 6815 in the case of State ex inf. Chaney v. West Mo. Power Co., 313 Mo. 283, 281 S. W. 709 (1926) in the following language:

> "In this connection it should be noted that what we have designated as specification '(3)' of the statute merely authorized the making of a contract for city lighting for a period not exceeding twenty years and had nothing to do with the duration of the franchise contemplated." 313 Mo. 298.

II. ESTOPEL

It has been demonstrated above that the franchise of the present utility company could not be valid if the people have not voted for it but it is possible that although the franchise is not valid the city would not be in a position to attack its validity because of acquiescence under which the company has spent a considerable sum of money relying on the failure of the city to object to its existence and operation. In City of Mountain View v. Farmers' Telephone Exchange Co., 294 Mo. 623, 243 S. W. 153 (1922) a telephone company had been operating for approximately ten years in the city of Mountain View and had expended considerable sums on its plant, lines and equipment. The only municipal authority fr such existence and operations was the written permission of the chairman of the board of trustees of the town whereas under the statute applicable the company could not exist and operate without the sanction of the entire board of trustees, so that for the purpose of analogy to the case under consideration the telephone company was operating as the utility company in the instant case without having secured the authorization which was by statute a condition precedent to such existence and operation. In that case it was held that the city was estopped from setting up the absence of the statutory authority and the judgment of ouster which had been rendered by the lower court was reversed by the Supreme Court. In that case the court said:

> "Plaintiff city is proceeding on the theory that since the defendant company had no legal right in the first instance to enter the town, it has no more rights now than it had then, and that it, the city, can enjoin the defendant now, as well as the town might have done ten years ago. But this threory proceeds on another theory, that the plea of estoppel under the facts here is not available or will not lie against the city." 294 Mo. 631, 632. * * * *

> "We do not deem it necessary to discuss further the point under consideration. It is certain that the principle of equitable estoppel may, in certain cases, be invoked in this State against municipal corporations in matter pertaining to governmental functions. And we are equally certain that the facts in the case at bar make it one of the exceptional cases where this principle should be applied. To say that the plaintiff city can restrain the defendant company from reconstructing or readjusting its lines in the city in order to avoid the trouble caused by the light plant, and in order to give service, would be equivalent to ousting defendant from the city. No community would indefinitely patronize a telephone system that failed to give substantial service. Defendant could not give substantial service without in some way eliminating the trouble caused by the lighting system. We are not ruling that plaintiff city cannot regulate the manner in which defendant shall construct its telephone system. This right the city has, and defendant does not contend otherwise. Ofcourse, regulate means what the word ordinarily implies, and does not mean to oust or destroy." 294 M o. 633, 634.

Neither City of Carthage v. Carthage Light Company nor Lawrence v. Hennessy both cited and discussed above are in conflict with City of Mountain View v. Farmers' Telephon Exchange Company because in the Carthage case the court pointed out that it could not consider the estoppel element because it had not been pleaded, and in Lawrence v. Hennessy the suit was between two private companies so that the estoppel of the city, which was not a party, could not have been in question. It is entirely possbile, therefore, that the city of Sullivan would be estopped to deny the validity of the franchise in question. Whether or not such estoppel would be held would be entirely within the judgent of the tribunal before which any litigation attacking such franchise would be heard because estoppel depends entirely upon the circumstances of each particular case, and since these circumstances are not set out in detail in your letter requesting this opinion it would be impossible to give an answer on this point. It might be mentioned, however, that the element of time is usually an important element in estoppel and in the Mountain View case it was held that approximately ten years was sufficient time.

In conclusion, it is our opinion that the law of Missouri requires a franchise to an electric light company to operate in a city of the fourth class to be granted by a vote of the people, and that a purported franchise without such vote would be void but that the city might by acquiescence to such purported franchise, especially if under it any considerable sums of money were expended, forfeit its rights to attack or question the right of such company to operate, and that whether or not such city would be so estopped is a matter which would depend upon the judgment of the tribunal before which such attack would be made.

Very truly yours,

EDWARD H. MILLER
ASSISTANT ATTORNEY GENERAL

APPROVED:

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ATTORNEY GENERAL