MISSISSIPPI VALLEY POWER COMPANY *v.* BOARD OF IMPROVEMENT, WATER WORKS DISTRICT NO. 1.

Opinion delivered January 25, 1932.

1. ELECTRICITY—CONTRACT TO FURNISH POWER—EXTENSION.—Where a contract between a power company and a waterworks district fixed the rate of compensation for pumping water for a limited period and provided that at its expiration the district, on giving notice, might extend the contract, *held* the power company could not, by waiver of such notice or by continuing to furnish power, extend the contract so as to bind the district by its terms.
2. ELECTRICITY—DUTY TO FURNISH POWER.—A power company, being a public service corporation, could not, at expiration of a contract with a customer, refuse further service because the contract was not renewed, but was bound to furnish service at a reasonable rate as long as the customer desired it.
3. ELECTRICITY—EXPIRATION OF CONTRACT—RIGHTS OF CUSTOMER.—A customer could continue to take electric power at expired contract rates without an extension thereof and without being estopped to claim a reduction to reasonable rates, as provided by law.
4. WATERS AND WATER COURSES—WATERWORKS DISTRICT—CONTRACTS.—Under Acts 1929, No. 64, §§ 14, 15, a petition of a majority in value of the property owners in a waterworks district authorizing the district to borrow money is not required in a purchase of an engine where under the contract of purchase no money was to be borrowed, but the engine was to be paid for out of the district's income.
5. WATERS AND WATER COURSES—CONTRACT OF WATERWORKS DISTRICT.—Where a waterworks improvement district contracted to pay for an engine out of the income of the district without imposing any property taxes, the private interests of a taxpayer were not affected, and he could not restrain enforcement of the contract, even if it were invalid.

Appeal from Crawford Chancery Court; *Lee Seamster,* Special Chancellor; affirmed.

STATEMENT BY THE COURT.

This appeal is prosecuted from a decree dismissing appellant's complaint for want of equity.

The appellant company had a written contract with the appellee waterworks district of the city of Van Buren, to furnish electric current for a period of 5 years to the waterworks district to operate its pumps at a specified and designated schedule of rates, payment for the current to be made monthly. The contract contained the following clause for its extension:

"This contract shall remain in force for a period of five years, and the customer shall have the right to extend same for an additional period of five years by written notice to the company of its intention to do so, given at least three months before the expiration thereof."

When the term of the contract expired on October 5, 1928, the waterworks district did not give written notice or any other indication that it desired to or would exercise the option for another five-year term. Appellant power company continued to furnish current, and the district continued to pay for it, until appellee district determined to buy and install Deisel engines with which to pump the supply of water, which could be done at a much lower rate than it cost the district to operate with the electric current.

The appellee notified the power company of its intention to make the installation of the different machinery for operating, and invited appellant to the meeting for ascertainment of whether the waterworks could not be operated at a greater savings under their contemplated plan than under the contract that had obtained with appellant. Appellant did not claim or assert that its contract with appellee had been extended for another five-year period, even after receiving the invitation to the meeting, which its representatives attended, after having been informed: "It was necessary for us to meet with the board and to make an offer of a new rate or to attempt

to hold the business on our present rate schedule." Appellee had been paying the power company for current during the fiscal year ending December 31, 1930, at the rate of five and 2/10 cents per thousand gallons of water pumped, the average monthly bill being $592.59.

The representatives of Fairbanks-Morse & Company, from whom the waterworks district contemplated buying the Deisel engines for the operation of the plant, estimated the cost of pumping would be less than two cents per thousand gallons, less than one-half of what the district had been paying. The Fairbanks-Morse & Company offered to install the Deisel engines for a named sum, and to guarantee that the cost of pumping water with them would not exceed two cents per thousand gallons, and proposed that the engines should be paid for entirely out of the savings in seventy-two monthly installments of $327.32 each. This amount could be paid by the district to the Fairbanks-Morse & Company, leaving a net saving of $265.27 over the rate they had been paying. On this basis the district could save in the 72 months, and at the same time pay the purchase price of the engines, which it would then own, something over $4,000. In other words, comparing this to the cost of service for electricity, the net saving and gain to the waterworks district at the end of 6 years would be the value of the engines, $23,560 plus $4,000 in money, or a total of $27,560.

The district accepted the offer, and a contract embodying its terms was prepared and executed. Under the contract all expenses of operation was first required paid from the income, and the monthly installments due on the engines "shall be paid only from the savings which the Waterworks Improvement District No. 1, aforesaid, will effect in the cost of pumping water, which cost, prior to the installation of this equipment, has been estimated, determined and agreed to be the sum of 5.2 cents per one thousand gallons, being the cost for the fiscal year ending December 31, 1930." The contract also recites the agreement to pay the sum mentioned from

"the savings in the cost of pumping water as above defined does not now create, and shall never be held to create, any liability or general obligation upon the said district, and no taxes, general or special, shall ever be levied upon the real estate or other property in said district, or hereafter within the limits of said district, to pay all or any part of said sum of $23,560 or any interest thereon, nor shall any part of said sum ever be paid from any other funds of said district except from funds in hand representing the savings in the cost of pumping water as hereinbefore provided; and it is expressly agreed by the parties hereto that this contract does not in any manner pledge the credit of the said district to the payment of the installments provided for herein otherwise than as in this contract provided." The savings were to be kept in a separate fund, "the pumping station savings fund," by the commissioners, "which fund will be pledged to meet the installments provided for in this contract, and will be used for no other purpose whatsoever." If the month's savings was not sufficient to meet the monthly installment payment as provided, the payment was to be reduced proportionately, and, if thereafter an increase in the amount of savings resulted, the payment to the Fairbanks-Morse & Company was to be proportionately increased so that the intention of the contract could be carried out. The installment payments were to be evidences in writing delivered as of the date of the completion of the installation of the engines or improvement and to bear interest at the rate of 6 per cent. per annum, and "shall recite on their face that they are to be paid only from the savings as defined in this contract." These evidences of installments were to be executed in the following form:

"$327.22 Van Buren, Arkansas,....., 1931.

"....months after date, for value received, the board of commissioners of Water Improvement District No. 1, of Van Buren, Arkansas, promise to pay Fairbanks-Morse & Company, or order, at St. Louis, Missouri, $327.22, with interest from maturity at the rate of six per cent. (6%) per annum.

"This instrument is one of a series of 72 instruments of even date and same import.

"This is not a general obligation of Water Improvement District No. 1 of Van Buren, Arkansas, but a special obligation, payable only from that part of the income of the waterworks plant of the said district set aside by the terms of the contract between the waterworks district No. 1 of Van Buren, Arkansas, and Fairbanks-Morse & Company, as applicable to payment hereof, and, by reference to said contract, the terms thereof are, so far as regards payment hereof, incorporated herein.

"....

"Chairman."

The appellant's complaint sought to restrain the district from violation of the terms of the contract, which it claimed had been renewed, in effect requiring appellee to fulfill the terms thereof for another five-year period, and to enjoin the district perpetually from purchasing the new equipment from Fairbanks-Morse & Company, and making any payments thereon, and for all general relief.

Hill, Fitzhugh & Brizzolara, for appellant.

Jones, Hocker, Sullivan & Angert and *Partain & Agee* and *Coleman & Riddick,* for appellee.

KIRBY, J., (after stating the facts). Appellant contends that the conduct of the parties, the power company continuing to furnish power to the district and charge and receive for the service the same rates or compensation as paid under the contract, amounted to an extension of the terms of the contract for another five-year period, without regard to whether any notice of such desired extension was given in accordance with the terms of the contract. That the provisions about the written notice were for its benefit and could be waived by it. The undisputed testimony shows that no such written notice of desire to extend the contract for an additional period of five years was given, or attempted to be given, in accordance with the terms of the contract before its expiration; nor did the appellant company make any claim or insist-

ance that such conduct and so-called waiver of notice amounted to an extension before the meeting of the parties to discuss the contemplated action of the waterworks district for purchasing the Deisel engines from Fairbanks-Morse & Company, which would necessarily dispense with the use of the power furnished by appellant company. The district could have complied with the terms of the contract by giving the written notice required for its extension, but certainly the power company could not, by any waiver of such notice, express or otherwise, extend the provisions thereof; and the continuation of the service at the same rates, as under the terms of the old contract, could not have had effect to extend it for another term. Appellant argues otherwise, saying that, without such notice, the company on the 5th day of October, 1928, was at perfect liberty to cut off the current, and refuse further service, but such is not the case, as the company is a public service corporation, and as such was bound to furnish to appellee district, so long as it desired it to be done, current for its use at a reasonable rate, and, by an attempted waiver of such notice of the extension of the terms of the contract charging the old rates provided therein, it could not acquire any other rights under the law than to furnish the desired power at reasonable rates. *Clear Creek Oil & Gas Co.* v. *Ft. Smith Spelter Company,* 161 Ark. 12, 255 S. W. 903. The appellee district could continue taking the power furnished by appellant company at the rates provided in the old contract without an extension of same, and without being bound or estopped in any way to claim a reduction to reasonable rates in accordance with the law providing therefor.

Appellee did not hold over any property of appellant company after the expiration of the lease as contended by appellant. It is presumed, of course, that appellant was fully compensated for the extra service and expenses for service in furnishing the power by the rates allowed to be charged and collected under the terms of the contract. All of the parties appeared to have

understood their rights as disclosed by the meeting held for determination of whether the district could not save much expense by the installation of its own power plant, instead of the continued use of power furnished by appellant, the appellant at such meeting agreeing to reduce its rates 25 per cent. if power were used according to the "off peak" schedule. The appellant company had no contract with the waterworks district for furnishing power for any particular term or time, when it sought to enjoin the district from installing a power plant of its own, with which it could supply water to the district at a saving of about 3 cents per thousand gallons, and from such savings pay for the installation of the new power plant in a period of seven years, leaving in the savings fund more than $4,000, and no error was committed in dismissing the appellant's complaint for want of equity.

Neither does appellant company have any standing as a taxpayer to resist or prevent the purchase of the new power plant by the appellee district. Sections 14 and 15 of act 64 of 1929 provided for the creation of improvement districts for installing waterworks, electric light plants, and sewers, and making repairs, improvements or extensions thereon, "when they are in funds"; and, when such district has to borrow money for such purposes, the exercise of the power is conditioned on a petition of the majority in value of the property owners of the district, the adoption of an ordinance by the council authorizing the commissioners to proceed with the work, the assessment of benefits and the levying of a tax to raise funds to repay the money borrowed. The appellant contends that the district is not authorized to purchase the Deisel engines for the new power plant except by procuring the money in the manner provided for borrowing in said statute. This contention is not warranted, however, since the contract expressly provides that the purchase price of the engines is to be paid for only out of the savings in the cost of pumping water, and the agreement provides: "shall never be held to create any liability or general obligation upon the district, and no taxes, general

or special, shall ever be levied upon the real estate or other property in the district, or hereafter within the limits of the district, to pay all or any part of the said sum of $23,560, or interest thereon." It also provides that no part of the purchase price shall ever be paid from other funds of the district, except funds on hand representing the savings in the cost of pumping water, and that the credit of the district is in no manner pledged for payment of the monthly installments evidenced by writing, providing it is not a general obligation of the improvement district, but a special obligation, "payable only from that part of the income of the waterworks plant of the said district set aside by the terms of the contract between the waterworks district No. 1 of Van Buren, Arkansas, and Fairbanks-Morse & Company, as applicable to payment hereof, and, by reference to said contract, the terms thereof are, so far as regards payment hereof, incorporated herein." The district is in funds, of course, if there is money enough in the "savings fund" available to make the payments as they become due, but it necessarily would be in funds to discharge such obligations, because under the contract there is no obligation unless the fund for its discharge is on hand, and, when there are no such funds, there is no obligation that can be made a charge or levied as a benefit or assessment against the property of the district, as said in a Massachusetts case:

"It is, in effect, a cash transaction, where the payments are to be made *pari passu* with the accumulation of the fund, and the only fund, out of which they are to come." *Smith* v. *Town of Dedham,* 144 Mass. 177, 10 N. E. 782. Appellant insists, however, that, notwithstanding the notes or instruments are payable out of the "savings fund," they are none the less a debt, bearing interest, and are purchase-money notes for machinery, of which title is retained until their payment. The courts have held, however, that contracts of this character did not create debts within the purview of constitutional or statutory prohibitions against incurring debts as the only

recourse in the contract which the selling company has in the case of the failure to pay the purchase price is to retake the machinery. It is a contingent liability only, for which a general tax cannot be levied, and does not constitute a lien upon the power plant, nor its revenues. It can be paid only on the contingency that the district derives enough net revenues from the consumers of water and lights furnished by the plant to pay such notes after payment of all expenses of operation, and, as said in *Bell* v. *Fayette,* 325 Mo. 75, 28 S. W. (2d) 356: "There is no aspect to that situation which could make the agreement to pay in the manner provided a debt of the city. It is a contingent purchase, the property to be paid for only out of the net earnings which it produces; the seller takes a chance on that contingency." See also *Lang* v. *Cavalier,* 59 N. D. 75, 228 N. W. 828; *Barnes* v. *Lehi City,* 74 Utah 71, 279 Pac. 878; *Johnson* v. *Stuart,* Iowa 226 N. W. 164. Other authorities sustaining the principle are *State* v. *Neosho,* 203 Mo. 40, 101 S. W. 99; *Shields* v. *Loveland,* 74 Col. 27, 218 Pac. 913; *Franklin Trust Co.* v. *Loveland,* 3 Fed. (2d) 114; *Twichell* v. *Seattle,* 106 Wash. 32, 179 Pac. 127; *Bowling Green* v. *Kirby,* 220 Ky. 829, 295 S. W. 1004; *Searle* v. *Haxton,* 84 Col. 494, 271 Pac. 629; *Carr* v. *Fernstermacher,* 119 Neb. 172, 225 N. W. 114; *Butler* v. *Ashland,* 113 Ore. 174, 232 Pac. 655; and *Ward* v. *Chicago,* 342 Ill. 167, 173 N. E. 810.

Appellant attempted to make a showing in the meeting, held for the consideration of the purchase by the district of the machinery for the power plant, that the waterworks district could use electricity furnished by the appellant company in pumping its water as cheaply as it could be done with the plant contemplated being purchased, and some of the estimates made by the power company's experts tended to sustain the contention; the other estimates introduced by experts showing overwhelmingly to the contrary, and that in six years the district would be able to supply its own water with the plant proposed to be purchased, paying the entire purchase

price of the engines and have remaining over some $5,500 in money; and also that the life of the engines was more than 20 years. The proposed purchase and contract was not an improvident one, could not be, and the contract was within the power of the district to make, not being prohibited by said §§ 14 and 15 of act 64 of 1929. The contract being valid, and the agreement or obligation to pay being such that it did not constitute a debt against the district, nor impose general liability thereon, no tax could be levied to raise funds for the payment thereof, the credit of the district not being pledged for the payment of the installments, nor the funds of the district, except the "savings fund," the contract of purchase could not affect the taxpayer's private interests, and he has no case of equitable interposition nor right to an injunction to prevent its consummation, even though the contract were invalid and it may be challenged by the State. *Jones* v. *Mayor,* 25 Ark. 301; *Henry* v. *Steel,* 28 Ark. 465.

The court did not err therefore in dismissing appellant's complaint for want of equity, and the decree must be affirmed. It is so ordered.