4256.

FRANCHISE—RIGHT OF COMPANY HOLDING FRANCHISE TO RETAKE PIPES AT EXPIRATION OF FRANCHISE—MUNICIPALITY MAY ACQUIRE PIPES BY PURCHASE OR APPROPRIATION—LIABILITY OF CITY FOR DAMAGES FROM SUCH SEWERAGE SYSTEM.

SYLLABUS:

1. *Where a franchise, by which a private company was given the right to construct and maintain a sewerage system for hire in a city and to lay its pipes in the public streets, has expired, and said franchise is silent as to the disposition of said system upon its termination, title to such property located in said streets does not pass to the city but remains in the company, and the city would have no right to assume ownership thereof or to grant the right to another company to assume control thereof without due process of law.*

2. *In such case the city can acquire ownership of said property only by purchase or appropriation, unless it has been abandoned by the company.*

3. *Where in such case said sewerage system in the public streets becomes out of repair and obstructed causing the sewage to flow back into the cellars of certain property owners and damage directly results therefrom, the city would be liable therefor, provided it had actual or constructive notice of said condition.*

4. *The city, under its police power, would have the right to assume control of said sewer to the extent necessary to abate the nuisance, and keep it in repair and prevent the same from becoming dangerous to the public health.*

COLUMBUS, OHIO, April 19, 1932.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication which reads in part as follows:

> "At the request of the City Solicitor of Toronto, we are submitting herewith certain questions for your opinion, relative to the ownership of a sewerage system constructed with private capital under the terms of a twenty-five year franchise granted by the municipality, which franchise has expired, and as to where the liability should be placed for damages to property caused by lack of repairs and the failure to clean such sewerage system."

From the statement of facts submitted by the solicitor of the City of Toronto, the following appears:

In 1905 a sewerage company was granted a franchise by the council of said municipality for a period of twenty-five years, by which said company was given the right and privilege to lay and construct and maintain a sanitary sewerage system and place the same in the streets of said village. During said twenty-five year period the company has charged and collected sewer rentals from the owners of property connected with said system. Since the termination of said franchise, the company, which is said to be insolvent, has not removed its system from the streets and refuses to keep the same in repair. The system has become so obstructed as to cause the sewage to flow back into the cellars of certain property

owners creating a very disagreeable and unhealthy condition. The solicitor presents these questions:

1. Who is the owner of this system, the franchise having expired and the company refusing to repair the sewers and either to renew the franchise or to abandon its property?

2. Who would be liable for any damage resulting from said sewers being out of repair?

3. What would be the proper procedure to assume the control and ownership of said system?

4. Would it be possible for the city to take over the control of this system, it being a public matter, considering the fact that the company claims no liability, that it has no money or assets, and that a condition exists dangerous to the public health?

These questions will be discussed in the above order.

1. The franchise in question contains no provision that the property of the company in the city streets shall become the property of the city at its termination; in fact the franchise is silent as to the disposition of this property upon its termination.

The title to such property would not pass to the city but would remain in the company, and the city would have no right to take possession of it or to grant this right to another company without due process of law.

In the case of *East Ohio Gas Company* vs. *Akron,* 81 O. S. 33, it is held that:

> "The incorporated company may therefore voluntarily forfeit its right to exercise its privileges within the municipality and wholly withdraw therefrom; but in such case the municipality has no right to prevent the incorporated company from removing its property, nor to take possession of and make use of the same, nor to grant the right to use the same to another company, without due process of law."

In the case of *Cleveland Electric Railway Company* vs. *Cleveland,* 204 U. S. 116, 51 L. ed. 399, the following is held:

> "The title to the rails, poles, and other appliances for operating the Garden street branch of the Cleveland street railway system remaining in the various streets at the expiration of its franchise is in the railway company which has been operating the road.
>
> The right to take possession of the property of a street railway company remaining in the streets at the expiration of its franchise cannot, consistently with due process of law, be conferred by municipal ordinance upon another street railway company."

In the case of *Mt. Vernon* vs. *Berman & Reed,* 100 O. S. 1, in which it was held that the grantee of a franchise cannot remove its property from the city streets after said franchise has expired without restoring the streets to the condition in which it found them, the court said:

> "We think there is general concurrence in the view that when a franchise has expired, or has been revoked, the grantee corporation, in the absence of provisions in the contract to the contrary, may be compelled

to remove its structures, and, on the other hand, if it desires to remove them, cannot be prevented from doing so."

2. Coming now to the question of liability, the company, being the owner of the property, would undoubtedly be primarily liable for any damages directly caused by its refusal to repair the same resulting in the creation of a nuisance. As to the city's liability, there would be no question if this sewer were owned by the city; for in such a case it has been held in the case of *Portsmouth* vs. *Mitchell Manufacturing Company,* 113 O. S. 250, that a city is liable if it had actual or constructive notice of the condition complained of.

Where the sewer is not owned by the city, the following is held in the case of *Mansfield* vs. *Bristor,* 76 O. S. 270:

> "Where a drain laid by property owners in a public street, under permission from the city, empties into a natural stream, and thereafter, without express license from the city, is used as a sewer to discharge sewage into the stream to the injury of a lower riparian owner, the drain is a nuisance, and the city is liable for negligence in not abating it."
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> The court says in the opinion on page 277:
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> "The care, supervision and control of public streets is given to the city and it is made its duty to cause them to be kept open and in repair and free from nuisance, and the city is liable for damages resulting from its negligence in the discharge of this duty. *City of Zanesville* vs. *Fannan,* 53 Ohio St., 605. The construction of a public sewer in the streets is an authorized use of the streets *(City of Cincinnati* vs. *Penny,* 21 Ohio St., 499), and, under the power given it over its streets, a city may grant permission to a lot owner to lay a private sewer in a public street, but neither at common law nor under the statute could it authorize a nuisance, and at common law as well as under the statute it would be liable for damages resulting from its negligence in not abating a nuisance on land in its possession and under its control."

In the case of *Thompson* vs. *Winona, et al.,* 96 Miss. 591, the city was sued for damages for the pollution of a stream and the flooding of adjacent land by the discharge from a sewer constructed and maintained by a private corporation for hire. The city claimed it was not liable in that it did not own the sewerage system and received nothing therefrom in the way of fees or rentals, and that the sewerage company was a private corporation conducting its business for hire and operating under a franchise granted by the city. The court held the city was liable and that the fact that such private corporation was also liable was immaterial. The court in this case stressed the fact that the city by ordinance had required the property owners to connect with the sewer, but in view of what is said in the case of *Mansfield* vs. *Bristor, supra,* I do not believe that circumstance would make any difference.

I am of the opinion that in the event damages result directly from said sewer being out of repair, the city would be liable therefor.

3. Since the authorities hold that the sewerage system remains the property of the company, the only way in which the city could assume the control and ownership of said property would be either by purchase or appropriation. The franchise having expired, the company has no right to keep its property in the public streets. The city therefore could order the company to remove the same, and upon its failure or refusal to do so, the city itself could remove it and put in its own sewers, and if the company were collectible, the city could compel it to

pay the necessary expense of such removal. However, the city would have no right to assume ownership of said property without due process of law, unless said property has been abandoned by the company.

While mere nonuse ordinarily is not, of itself, sufficient to constitute an abandonment, I am of the opinion that if the company were notified to remove its property within a certain specified time and they failed to do so, such failure would be evidence of an abandonment. If, after opportunity had been given the company to remove its property from the city streets where it no longer has any right to be, such company has failed or refused to remove the same, it would hardly be in a position to deny that it has abandoned it.

4. Since the condition caused by the sewer being out of repair is undoubtedly a nuisance which is a menace to the public health, the city, under its police power, would have the right to take the necessary steps to abate the nuisance and to assume control of said sewer to the extent necessary to keep it in repair and prevent the same from becoming dangerous to the public health.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4257.

APPROVAL, SUPPLEMENTAL RESOLUTION FOR ROAD IMPROVEMENT IN LORAIN COUNTY, OHIO.

COLUMBUS, OHIO, April 20, 1932.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

4258.

APPROVAL, LEASE TO LAND IN SYLVANIA TOWNSHIP, LUCAS COUNTY, OHIO, FOR GAME REFUGE PURPOSES.

COLUMBUS, OHIO, April 20, 1932.

HON. WILLIAM H. REINHART, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination State Game Refuge Lease No. 2150 made to the State of Ohio by the Sisters of St. Francis of Sylvania, Ohio, for a tract of land situated in Sylvania Township, Lucas County, Ohio, and a State Game Refuge Order designed to operate upon said land. Finding the same to be executed in proper legal form, I have attached my signature thereto in approval.

Respectfully,

GILBERT BETTMAN,

Attorney General.