

Court of Appeals of Kentucky.  
 DYER  
 v.  
 CITY OF NEWPORT et al.  
 June 12, 1906.

Appeal from Circuit Court, Campbell County.

“To be officially reported.”

Action by W. H. Dyer against the city of Newport and another. From a judgment in favor of defendants, plaintiff appeals. Reversed and remanded.

West Headnotes

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#### 268 Municipal Corporations

##### 268IX Public Improvements

268IX(A) Power to Make Improvements or Grant Aid Therefor

268k271 k. Water Supply. **Most Cited Cases**

A city authorized by its charter to enact by-laws and ordinances for the general welfare of the municipality may, in the exercise of its police power, provide for the public health and the public safety against fire by contracting for a supply of water to be furnished, either by the municipality, or another under contract with it.

### Municipal Corporations 268 277

#### 268 Municipal Corporations

##### 268IX Public Improvements

268IX(A) Power to Make Improvements or Grant Aid Therefor

268k277 k. Improvements and Works Beyond Boundaries of Municipality. **Most Cited Cases**

A city has no power to contract to extend its waterworks system to an adjoining city though it may sell any excess of its product to outsiders.

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#### 268 Municipal Corporations

##### 268XIV Taxpayers' Suits and Other Remedies

268k991 Restraining Action by Municipality or Officers

##### 268k993 Unauthorized or Illegal Acts

268k993(2) k. Making and Performance of Unauthorized or Illegal Contracts. **Most Cited Cases**

A suit to enjoin the execution of a contract by a city for water supply, on the ground that it is ultra vires, is maintainable by an individual taxpayer.

\*25 Lucius Desha, for appellant. James T. Thornton, Aubrey Barbour, and C. L. Raison Jr., for appellees.

O'REAR, J.

Newport is a city of the second class. As such it has the power to provide its citizens with water, and in pursuance of that power had installed and is operating a municipally owned waterworks plant. It was of course provided by taxation upon its citizens. Clifton is a municipality lying outside, but alongside, the city of Newport. It was created by an act of the Legislature prior to the adoption of the present Constitution. Its legal autonomy has not since been changed. *City of Covington v. District of Highlands*, 113 Ky. 612, 68 S. W. 669. Clifton is authorized by provision of its charter to enact by-laws and ordinances for the general welfare of the municipality and its inhabitants not inconsistent with the Constitution and laws of the United States and of this state. Under that provision, and in the exercise of its police power, it has the right to provide for the public health, and the public safety against fires, by contracting for a supply of water to be furnished either by the municipality or by another under contract with it. 1 Dillon's Mun. Corp. 147. In pursuance of that power, Clifton passed an ordinance to sell the franchise for 20 years of laying pipes and mains in its streets, alleys, and highways, and to contract with the purchaser to furnish

water to the municipality through fire hydrants to be provided by the other contracting party, and of water to such of its citizens or residents as applied therefor through mains and pipes to be provided by such contractor at rates to be set \*26 out in the agreement to be entered into between such successful bidder and the municipality of Clifton. Bids were advertised for in pursuance to the ordinance. The city of Newport was the successful bidder. Its bid being accepted, it was entered into a contract with Clifton in pursuance to its bid.

This suit by appellant, a citizen and taxpayer of Newport, is to enjoin the execution of the contract on the ground that it is ultra vires. The action is maintainable by an individual taxpayer. *Mooney v. Clark*, 69 Conn. 241, 37 Atl. 506, 1080; Smith's Modern Law of Municipal Corporations, § 1647a. It is admitted that the waterworks plant owned by the city of Newport is adequate to supply all its citizens their present needs in respect to water, and in addition to comply with the contract with Clifton. The question is, nevertheless, whether it is permitted to enter into such an obligation as it has done in this instance. Cities and towns are chartered as corporations in aid of government. They have now in this state no other corporate character. Many of their powers are delegated governmental functions which the state itself might have performed through other agencies or directly. Regarding such the municipal corporation is deemed an arm of the state government, and partakes of its qualities of sovereignty. For its acts or nonaction, it is not civilly or criminally responsible, on the same ground that the state is immune from prosecution or suit for the same act. See *Twyman's Adm'r v. City of Frankfort*, 117 Ky. 518, 78 S. W. 446, 64 L. R. A. 572; *City of Lexington v. Batson's Adm'r*, 81 S. W. 264, 26 Ky. Law Rep. 363; *Georgetown v. Commonwealth of Kentucky*, 115 Ky. 382, 73 S. W. 1011. But such municipalities may own property in what is termed their private as distinguished from their public capacity. Concerning such and its contracts relating thereto, it may sue or be sued in the same way and for the same causes that a private corporation or an

individual may be. Included in such property are waterworks, and electric and gas plants for furnishing light and water to its inhabitants. It is not possible for a city to acquire property for any other purpose, or to engage in any kind of business, not incidental to its municipal capacity as an agency of government. For whether it is treated in its public or private capacity, it is always required to act alone with respect to matters legitimately pertaining to the government of its inhabitants. It is not within the power of the city of Newport to embark in even governmental enterprises beyond its territorial jurisdiction. It is not authorized to undertake by contract or otherwise to discharge a governmental duty to localities other than its own territory, for the reasons (1) that a municipality has only such power as is expressly delegated to it by the Legislature, and such as is incidentally included therein; and (2) that to execute any power of government presupposes the power to levy and collect taxes from its inhabitants and property within its jurisdiction to defray the expenses incurred in its execution. There is no express and no implied grant of power to Newport to engage in such enterprise beyond its corporate limits; nor has it the right, therefore, to levy and collect taxes for such purpose.

The contract in this suit if valid would impose the obligation on the city to put in all necessary water mains, and fire hydrants in Clifton at the expense of the city of Newport. To raise the money to do this, it would have to impose a tax on the people and property liable to city taxes, or appropriate money out of the city treasury put there by taxation. In either event, it is equivalent to the imposition of a tax on the people and property of Newport to install and maintain water facilities in the municipality of Clifton. And, if the contract with Clifton should prove unprofitable to Newport, and the latter should lose money in the enterprise, the loss would have to be made up by the latter by collecting funds to defray it by taxes levied on the property in Newport. Nor could Newport acquire a franchise by purchase, or otherwise, in the absence of express legislative authority, to operate a waterworks system in and for

the benefit of another municipality. We conclude that the contract in suit was void. It was beyond the power of the city of Newport to enter into it.

In [Henderson v. Young](#), 83 S. W. 583, 26 Ky. Law Rep. 1152, and [Rogers v. City of Wickliffe](#) (decided last week) 94 S. W. 24, 29 Ky. Law Rep. - , we held that where a municipality owns and operates its own electric light plant, or its own waterworks, it may legally sell any excess of its product to outsiders. We adhere to that opinion. But in each of these cases the outside purchasers took the product from the plant as constructed and operated by the city, and the latter was not bound or permitted to extend its facilities beyond the corporate limits in order to accommodate such purchasers. If Clifton had constructed, or a private concern had constructed a plant of mains, pipes, etc., in Clifton to supply its citizens with water, Newport might lawfully sell them any of its surplus water from its plant.

The judgment of the circuit court dismissing appellant's petition is reversed, and cause remanded for a judgment in conformity herewith.

Ky.App. 1906.  
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29 Ky.L.Rptr. 656, 123 Ky. 203, 94 S.W. 25

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