

No. 12110 1/2

Supreme Court of Illinois

Moses.

vs.

Pittsburgh, Fort Wayne &
Chicago R. R. Co.

71641  7

SUPREME COURT,

April Term, 1856.

HIRAM P. MOSES, THOMAS KANE,

AND DENNIS LORDIN,

VS.

THE PITTSBURG, FORT WAYNE, &

CHICAGO RAILROAD COMPANY.

Appeal from Cook.

ABSTRACT.

This was a bill in Chancery filed by the appellants against the appellees on the 22d day of March, 1858, in the Circuit Court of Cook county, setting forth—

That heretofore, to wit, on the 18th day of June, A. D. 1855, there was, and before that time had been, a certain street or public highway called Beach street, commencing at or near the south line of block 73, in school section addition to Chicago, and running thence north to Harrison street, in said city, of the width of forty feet, including the spaces on each side for sidewalks, which said street was as above described, marked, and laid out upon the original recorded plat of said school section addition to Chicago, and then became a public street and highway of said city to be used as such, and ever since has with the additions and extensions made thereto, as hereinafter mentioned, continued to be one of the public streets and highways of said city, and for greater certainty your orators refer to the recorded plat thereof, platted and recorded in pursuance of the statute of this State, in the recorder's office of Cook county.

Your orators further show unto your honor, that on the day and year last aforesaid, your orator, Hiram P. Moses, was, and still is, the owner in fee of the n. $\frac{1}{2}$ of n. $\frac{1}{2}$ of block 73, in said school section addition to Chicago, lying and being contiguous to said Beach street, and fronting thereon about one hundred feet along said street, together with all and singular the appurtenances unto the said premises belonging. That your orator, Sherman Kane, about the time aforesaid, was, and still is, the owner in fee of lot forty-three, (43) in block sixty-five, (65) in said school section addition, lying and being contiguous to said Beach street, and fronting thereon for about the distance of one hundred and twenty feet, together with the appurtenances. That your orator, Dennis Lordin, was, and still is, the owner in fee of lot forty-two, (42) in block 65, in said school section addition, lying and being about feet in front along and contiguous to said street, together with all and singular the appurtenances unto the said premises belonging.

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Your orators further show unto your honor, that they have the right to use said Beach street in front of their said premises as a highway; and that no person or persons have any right to interfere with the free and unobstructed use by your orators of the said street for the purposes of a public highway along and in front of the said premises of your orators.

Your orators further show unto your honor, that in the early part of 1856, your orator, Hiram P. Moses, caused to be built upon his said premises a large machine shop for the manufacture of divers kinds of machinery, which said building extends about sixty-five feet in front along said street, and is erected one foot distant from the east line of said Beach street. That your orator, Thomas Kane, sometime in the month of August last, commenced to build, and has in process of erection, a building of the value of about \$40,000, for the purposes of stoves, grocery, stands, &c. And your orators show, that in order that said building so erected, and to be erected, may be of any service to your orator for the purposes for which they were built, and in order to carry on business therein, that it is necessary that there should be space in front of their said buildings for horses and carts, drays and wagons to back up and stand without the hindrance to load and unload from said machine shop, and also from said store buildings where the same are completed. Also, that there are two dwelling houses upon the premises of your orator, Dennis Lordin, used and occupied as such.

Your orators further show unto your honor, that by reason of the narrowness of said street, and its inadequacy to accommodate the public, or from some cause, that on or about the 18th day of June, A. D. 1855, the Common Council of the city of Chicago made and passed an order directing the city surveyor to proceed to survey, mark, and plat and record the land necessary to be taken to open and extend said Beach street sixty feet wide from its then terminus on the south side of block 73 aforesaid to Twelfth street in said city, by taking forty feet in width from the west side of blocks 74, 75, 76, and twenty feet in width from the east side of blocks 61, 62, and 63, in said school section addition. And also to widen said Beach street from the south line of block 73 aforesaid to Polk street, taking twenty feet in width from the east line of block 64 in said school section addition. And also on the day and year last aforesaid, ordered that after said survey should be made and returned, that the city clerk of said city should give ten days notice in the corporation newspaper of the intention of the Common Council of said city to take and appropriate so much land as should be necessary for the purposes aforesaid. With which orders the said city surveyor and city clerk afterwards complied.

That afterwards, to wit, on the 10th day of September, A. D. 1855, another order was passed by said Common Council to proceed to the election of three reputable, discreet, and disinterested freeholders of said city, whose duty it should be to ascertain the damages and recompense due the owners respectively of such real estate as should be taken and appropriated for the purposes aforesaid; and at the same time to assess the amount of such damages, together with the cost of the proceedings

upon the real estate deemed benefitted by the improvement in proportion as nearly as might be to the benefit resulting to each parcel of ground respectively. That in pursuance of such order and resolution of said Common Council, three persons of the description aforesaid were then and there elected by ballot, who afterwards performed their duty in the matters aforesaid as directed by said last mentioned order of said Common Council; that afterwards, and about the 25th day of February, 1856, said Beach street, by reasons of the proceedings had in that behalf, became and was extended and widened in the manner and to the extent indicated by the order or direction to the said city surveyor herein before mentioned. And thereupon, or soon thereafter became a public highway of the city of Chicago, extending from Twelfth street to Harrison street aforesaid, and being of the width of sixty feet from Twelfth street to Polk street, and remaining and being of its original width of forty feet from Polk street to Harrison street.

Your orators further show unto your honor, that their respective parcels of land aforesaid were largely assessed by the said freeholders or commissioners for the purpose appointed as aforesaid, as being real estate deemed benefitted by the improvement aforesaid. That the said commissioners in making the said assessments upon the real estate of your orators, acted in pursuance of the order and direction of the Common Council of said city, and that your orators paid the several assessments aforesaid. And that the said assessments or moneys paid by your orators in that behalf, were appropriated to the payment of the damages resulting to persons to whom damages or recompense were by said commissioners ascertained to be due, in pursuance of the order of said Common Council before mentioned. And your orators aver that no damages were awarded to them, or either of them for or on account of the said improvement made as aforesaid.

Your orators further show unto your honor, that said street was extended and widened as aforesaid for the use and benefit of the public and your orators as a public highway, and was widened as aforesaid because it was found necessary to do so in order that the public highway, or Beach street, at the place where the same was widened, might be of a width sufficient to accommodate all persons using the said street as a public highway, and that said street is in no part thereof of a greater width than the use of said street as a public highway actually requires.

Your orators further show unto your honor, that by reason of the narrowness of said Beach street, through which is constantly passing a large number of teams, carts, wagons, and other vehicles standing and passing upon and along said street for the legitimate, reasonable, and ordinary purposes of business and travel, that a railroad track upon, and along said street, opposite and in front of your orators said premises, on which locomotives and railroad cars might, &c., run, would greatly obstruct said street for public use, and seriously obstruct and damage your orators business carried on as aforesaid, and would greatly injure and damage their said property assessed for the benefits therewith resulting by reason of the improvement, or widening said street as aforesaid, which said assessments were fully paid by your orators.

Your orators further show unto your honor, that by an act of the legislature of the State of Illinois, approved February 5, 1853, entitled "An act to incorporate the Fort Wayne and Chicago Railroad Company," the Pittsburg, Fort Wayne, and Chicago Railroad Company became incorporated under the name and style of the Fort Wayne and Chicago Railroad Company, to which said act of incorporation for the powers, privileges, franchises and duties thereby conferred upon and pertaining to the said railroad company, and for the provisions of said act, your orators, for more certainty, beg leave to refer. That afterwards, by an act of the legislature of the State of Illinois, entitled "An act to amend an act entitled an act to incorporate the Fort Wayne and Chicago Railroad Company," approved February 5, 1853, and approved February 22, 1854, the said railroad company were authorized and empowered in all cases where they might not be able to acquire the right of way through any lands or premises where necessary for the purposes of said railroad by purchase or donation, to obtain the same in the mode provided by an act entitled "An act to amend the law concerning the right of way for purposes of internal improvement," approved June 22, 1852. And it was thereby enacted that said company should be entitled to all the beneficial provisions thereof, or of any subsequent general law on the same subject, to which said several acts of the legislature, and all other acts of the legislature relating to said company, your orators beg leave to refer for the provisions thereof in respect to the rights, powers, privileges and duties of the said railroad company, and the same are made a part of your orators bill herein.

Your orators further show, that afterwards the corporate name of said railroad company became changed from the style of Fort Wayne and Chicago Railroad Company to the name and style of the Pittsburg, Fort Wayne, and Chicago Railroad Company, by which the said company is now known and designated.

Your orators further show unto your honor, that said railroad company has not, as they are informed and believe, under all and any of the acts of incorporation thereof by the legislature of this State, any right, power, or privilege conferred upon the said company of building or constructing any railroad track, or maintaining the same, or of running their line of railroad within the corporate limits of the city of Chicago, or of procuring the right of way for the purpose of constructing or laying down any railroad track within the corporate limits of said city. And your orators aver that said railroad company is in no manner empowered by law to take or use the streets or public highways of said city for the purpose of laying down a railroad track thereon.

Your orators further show unto your honor, that afterwards, to wit, on the 17th day of November, 1856, the Common Council of the city of Chicago, in due form of law, passed an ordinance approved on the day and year last aforesaid by the mayor of said city, whereby the said Common Council pretended to authorize and empower the said Pittsburg, Fort Wayne, and Chicago Railroad Company. Amongst other things, to lay down, maintain, and operate a railroad track or tracks, with necessary switches, turn-outs, and side tracks in the street in the city of Chicago, running north and south on the centre line of section 21, t. 39, n.

r. 14, e. of 3d principal meridian from the south line of North street to the north line of Twelfth street; and then on Beach street aforesaid to Harrison street, upon the terms, conditions, and provisions in said ordinance specified, which said ordinance the said railroad company afterwards, and on or about the 20th November, 1856, accepted, to which said ordinance acceptance thereof, and other proceedings, your orators beg leave to refer, and for more certainty, have attached to this bill of complaint a copy of said ordinance and proceedings marked exhibit "A," which they pray may be taken as a part of this bill of complaint.

Your orators further show unto your honor, that at the time when said Common Council passed the foregoing ordinance, that the said Council had no legal right or power under, or by virtue of the charter of the city of Chicago, or of the laws of this State, as your orators are advised and believe, to permit or authorize said railroad company to occupy said Beach street in manner, or upon the terms or conditions set forth in said pretended ordinance passed as aforesaid. And your orators insist that said ordinance, so far as the same relates to Beach street, or authorized said railroad company to use said street in manner in said ordinance specified, was at the time of its passage, and still is, utterly null and void, and without any legal authority whatsoever; and that said ordinance gave said company no right or authority to use said street in manner therein provided. And your orators, for greater certainty, refer to the various charters and corporate powers and authority conferred by the legislature upon the city of Chicago, and pray that the same may be made a part of your orators bill of complaint herein as fully as if specifically set forth.

Your orators further shew unto your honor, that the said Pittsburg, Fort Wayne and Chicago Railroad Company are now proceeding under color of the said ordinance, but, as your orators are advised and believe, without legal rights or authority to lay down, maintain and operate a single railroad track upon and along the whole length of Beach street aforesaid, and are already laying down maintaining and operating said track upon and along said Beach street, under the pretended color and authority of the acts incorporating said railroad company the chartered and corporate powers of the city of Chicago and the ordinances of said city passed in pursuance thereof as aforesaid, and without the consent of your orators or any of them ever had or obtained in that behalf, and have already placed a portion of their said railroad track in front of the premises of your orators, and are proceeding to operate the same without the consent, and contrary to the express wishes of your orators, by means whereof the said railroad company are greatly obstructing the said Beach street, are hindering and interfering with the travel thereon, and have as to so much of said street as is by said company occupied and used, as aforesaid actually diverted and changed the same from the purposes for which the same was widened and opened as aforesaid, that is to say, from the purposes of a public highway, so far as laying down a single track in the center of said street, and transporting thereon in the cars of said company passengers and freight through, to and from the city of Chicago, in the regular course of business. And your orators insist that the Common Council of said city has not the power to allow, permit or

authorize any person or corporation to encroach upon or injure the said Beach street in manner aforesaid, or in any other way or manner, or to divert or change, or to authorize any person or corporation to divert or change the said Beach street or any part thereof from the use or purpose for which the same was dedicated, widened and extended as aforesaid, and to direct or permit the same or any part thereof to be used for any other or different purpose whatsoever.

Your orators further shew unto your honor that if the said railroad company is permitted to lay down, maintain and operate their said railroad track with or without necessary switches or turn outs and side tracks in, along and upon said Beach street, that they, your orators, will be continually and permanently injured in their said business by the danger of the approach of trains of cars, and be deprived of the use of said street, or a portion thereof, for the purposes of a public highway along and in front of their said premises at the time of the passing of the trains of said company; that said company are already using and contemplate using locomotives driven by steam in operating their said track upon and along Beach street, and in front of the premises aforesaid by your orators, in conducting railroad cars over and along said track, and that the sparks and cinders therefrom will greatly endanger the safety of the buildings of your orators upon the said premises; by means whereof the enjoyment of your orators' property will be rendered precarious upon and along said street. Your orators further shew that they cannot use and occupy the said street as a public highway in front of their said premises as otherwise, without great fear and apprehension for their personal safety from running cars upon and along said street.

And your orators well hoped that said Pittsburg, Fort Wayne and Chicago Railroad Company, and all other persons or corporations, would have desisted from laying down, maintaining or operating a railroad track or tracks, with necessary switches, turn outs and side tracks, and that said company, and all persons or corporations acting at its instance, or request, or otherwise, would have desisted from running their cars upon and along said Beach street as aforesaid, in compliance with the frequent requests of your orators in that behalf.

But now so it is, may it please your honor that the said Pittsburg, Fort Wayne and Chicago Railroad Company, combining and confederating with divers other persons and corporations, at present to your orators not fully known, but whose names, when discovered, your orators pray may be herein inserted, and they made parties defendants hereto with apt and proper words to charge them, and contriving how to injure and defraud your orators in the premises, refuse to comply with the reasonable requests of your orators made as aforesaid, but pretend that they have the right and are legally authorized to lay down, maintain and operate a railroad track or tracks, with necessary switches, turn outs and side tracks, in, upon and along said Beach street, in manner aforesaid; whereas your orators charge the contrary, and aver that said railroad company has not the right, and is not legally authorized or empowered to lay down, maintain and operate a railroad track or tracks, with necessary or any switches, turnouts or side tracks or otherwise, upon and along said Beach street.

All which actings, doings and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises. In tender consideration whereof, and forasmuch as your orators are remediless at and by the strict rules of common law, and cannot have adequate relief save in a court of equity.

To the end, therefore, that the said Pittsburg, Fort Wayne and Chicago Railroad Company, and the rest of the confederates, when discovered, may without oath, their oath being hereby waived pursuant to the statute, full, true and direct and perfect answer make to all and singular the matters aforesaid, as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated, and that not only as to the best of their respective knowledge, but also as to the best of their respective hearsay, information and belief.

And that the said Pittsburg, Fort Wayne and Chicago Railroad Company, its privies, agents, employees and servants, and all others confederating therewith, be perpetually enjoined, restrained and prohibited from laying down, continuing, maintaining, or operating further any railroad or railroad tracks, with or without switches, turn outs or side tracks, or in any way supporting the same hereafter in, upon or along Beach street aforesaid, and in the mean time, and until the final decree that said defendants be or may be enjoined as aforesaid until the further order of this court, and that your orators may have such other or further relief as the nature of this case may require, and as may be agreeable to equity and good conscience.

May it please your honor to grant unto your orators the peoples' writ of injunction issuing out of and under the seal of this court, according to the course and practice thereof, enjoining said Pittsburg, Fort Wayne and Chicago Railroad Company in manner aforesaid; as well as the peoples' writ of summons issuing out of and under the seal of this Court, to be directed to the said railroad company, commanding the said company by a certain day to be and appear before this court, and to stand to and abide by such order and decree in the premises as to your honor shall seem agreeable to equity and good conscience.

HIRAM P. MOSES,
THOMAS KANE,
DENNIS LORDEN, by

F. H. KALES, one of their Solicitors.

SHERMAN & KALES, Complainant's Solicitors.

STATE OF ILLINOIS, }
COOK COUNTY, } ss:

Hiram P. Moses, of said county, being duly sworn, says that he has heard read the foregoing bill of complaint, that he is one of the complainants therein mentioned, that he knows the contents thereof, and that the same is true of his own knowledge, except as to the matters

therein stated to be upon information and belief, and as to these matters he believes it to be true.

H. P. MOSES.

Subscribed and sworn to before me this 22d day of March, A. D. 1858.
WILLIAM L. CHURCH, Clerk.

The defendants filed a general demurrer for want of equity, which was *pro forma* sustained by the court, and the bill dismissed. From which decree the complainants appealed, and bring the case to this court.

The errors assigned are—

The sustaining of said demurrer and the rendition of said decree.

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~~154~~

Hiram P. Moses Exors

vs

The Pittsburg, Fort
Wayne & Chicago R.R. Co.

Record

Filed May 14th 1858

L. Belmont
Clerk

12110²

... of the ...

H. P. MOSES

... to be ...

WILLIAM J. CHURCH, Clerk

... of the ...

Chicago July 23 1858

Wm. J. O'Catow,

Dear Sir:

Your favor

making inquiry as to the case of
Hoses et al vs Ft Wayne RR Co is rec'd O:
Mr Beckwith is of counsel with us; and
Mr. Judd is of counsel for the
RR Co - depts -

Mr Beckwith says he & Mr Judd
agreed that the abstract as printed
should be the Record in the case
without any certificate of Clerk,
and that such agreement is written
& signed by himself & Mr Judd upon one
or more of the Abstracts submitted to the
Court. The record was so short, and the
question upon it, arising upon demurrer
it was thought best for the whole record
to be printed (except the formal matters) as
an abstract &c.

Mr Beckwith says he understood

that if ~~the case was~~ printed argu-
ments were furnished to the Court
that ~~we~~ should be sufficiently
early by furnishing them by Sept.
I will however see Mr Judd
and also Mr P. immediately in
relation to the matter, and we
shall have the arguments sub-
mitted as soon as possible.

Very truly yours

Sherman & Hayes