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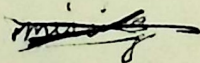
Supreme Court of Illinois

City of Chicago

vs.

Evans et al

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STATE OF ILLINOIS,

SUPREME COURT.

Third Grand Division.

No. 207.

Evans

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Cheney

Paper

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Scott & Co., PRINTERS, corner Clark and South Water Sts.

SUPREME COURT,
THIRD GRAND DIVISION.

APRIL TERM, 1860.

THE CITY OF CHICAGO,
vs.
JOHN EVANS ET AL.

} *Error to Cook.*

POINTS AND AUTHORITIES BY PLAINTIFF IN ERROR.

1. The court had no jurisdiction, and injunction illegally issued, because it was a legislative act on the part of the Common Council.

15 Barbour, 225-6-7-8.

Ibid. 236-9-40-42.

7 Barbour 57 B

2. The court only has jurisdiction when the Common Council attempts an act which amounts to a breach of trust. The bill in this case does not aver or charge any such act.

15 Barbour, 231.

3. There is no equity in the bill; for if the ordinance bears the construction contended for by it, it is a nullity, and equity never interferes to restrain a void act.

4. The defendants in error cannot, by such a bill, raise the question as to whether the North Chicago City Railway Company has violated, or is about to violate, its charter.

5. If the Common Council should confer authority upon a corporate body not capable of exercising it, it would be a nullity, but not ground for an injunction if the Common Council had jurisdiction of the subject matter.

Redfield on Railways, 162, note 6.

Ibid. 519.

Laws of Illinois, Private Acts of 1855, page 304

City Ordinance for Horse Railways, section 3.

Charter of Plaintiff in Error, sections 7 and 8.

21st of Illinois Rep. page 516.

8 June 289

207-17

See Memorandum
on abstract
as to law on
page 304 of
Private laws of 1855

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SUPREME COURT OF ILLINOIS.

Third Grand Division.

THE CITY OF CHICAGO,

Plaintiffs in Error.

V S.

JOHN EVANS, et. al.

Defendants in Error.

DEFENDANT'S POINTS.

I.

The Common Council had no right to grant the franchise contemplated by the ordinance.

"Corporations have only such rights and powers as are expressly granted to them, or as are necessary to carry into effect the rights and powers so granted."
New London vs. Brainard, 22 Conn. 552.

In *Trustees vs. McConnell*, 12 Ill. 140, the Court say "That a corporation which is a mere creature of the law can only exercise such powers as are conferred upon it by the act incorporating it, is a well settled doctrine."

In *Fitch, et. al. vs. Pinckard*, 4 Scam. 79, the Court say "The corporation must strictly pursue the law creating it or giving it power to act."

In the *People, &c. vs. County of Tazewell, et al.* 22 Ill. 152, the Court say

"Counties and cities are corporations created for public convenience and to trans-act the public business of the communities embraced within their limits; they are dependent upon the legislature for their very creation, and from it they derive all their authority."

The city charter gives the Common Council no power to grant the franchise, provided for in the ordinance. It gives them the power to *regulate* the use of locomotives and to direct and control the location of railroad tracks, &c. The power to *regulate* does not give the power to *grant a franchise*, but if the legislature grant the right to run a railroad through or into the city, then the exercise of such right can be regulated or prohibited by the city. This Court has held that the city has the fee simple title to the streets for the *public use*; it holds it in trust for the public, but that gives the city no right or power to give any person or corporation the exclusive use of them, or of any portion of them. The power to *regulate* the use of a thing is very different from granting the exclusive use to one person to the exclusion of the public.

It is not like the privilege granted to hacks and drays, or wagons, loaded with wood and hay, to stand in a particular part of the city. That is a public regulation and relates to all persons who choose to engage in that business. Nor is it like permitting any particular mode of transportation or travel through the streets, for there the privilege is common to all persons who choose to accept it, but when a particular person or corporation is permitted to construct and operate a railroad, then it is a grant of a privilege to that particular person or corporation, in other words, it is a franchise. A railroad is from necessity a monopoly. Now, if the Common Council have the power to grant a franchise of this character what is to prohibit them from multiplying and extending them until the whole use of the streets shall be granted to particular individuals or corporations, and the public excluded from the use of them.

The Common Council is not like a legislature; it has no power except such as is granted to it.

Melhan vs. Sharpe, 17 Barb. 435.

Mayor vs. New York, 1 Duer. 451.

State of New York vs. Mayor, &c. 3 Duer. 119.

Davis " " " 4 Kernan. 524-522-523-526

Sturdevant vs. People, 5 Selden. 263-273

The right to make this grant therefore depends upon the act of the legislature of 14th February, 1859.

By that act the Chicago City Railway Company were incorporated for twenty-five years, with authority to build and operate such railways in the South and West Divisions of Chicago, as the Common Council should authorize. And the North Chicago City Railway Company was incorporated with like powers to be exercised in the North Division. Neither corporation has the power to build or operate a railroad beyond its territorial limits; neither can go into the territory of the other. Yet the Common Council attempted to exercise a power in direct conflict with this provision of the statute. The ordinance declares "That the North Chicago City Railway Company is hereby authorized to extent its road *across the Chicago river* at such points, and in such way as to make connections with the tracks of the Chicago City Railway Company, (by arrangement with said company,) at or near Randolph street, thereby making continuous lines of horse railroads between the different divisions of the city. And for this privilege the North Chicago City Railroad Company agree to pay annually \$100 for each bridge they may cross; provided that the cars shall not stand at any other place on South Clark street than on the east side of the public square."

The grant is made to the *North* Chicago City Railway Company and not the South Company. It permits the North Company to extent its road across the Chicago river. It authorizes them to make connections with the South Company at or near *Randolph street*. It authorizes them to have their cars stand on South Clark street at the east side of the public square.

It cannot be denied that the Common Council here attempt to grant to the North Chicago City Railway Company the right to exercise its franchise beyond its territorial limits. But it is claimed that by another clause in the ordinance it appears that it was not the intention of the Common Council to authorize the North Chicago City Railway Company to build the road on South Clark street; the clause referred to is as follows: "And for this purpose the last named company is authorized to lay such tracks and extensions as will furnish all proper facilities for a convenient and useful connection of said tracks." The intention here is manifest. It was that the North Company should build the road—no grant is made to the South Company; they cannot accept the grant, for they are not parties to it; the grant is to the North Company "*to extent its road across the Chicago river* so as to make connection at Randolph Street." The North Com-

(4)

pany are to operate it. This they can no more be permitted to do than to construct it; each company may build and *operate* a road within its own limits only.

II.

It is claimed that the Court has no jurisdiction. This question is settled by the following cases :

5 Selden, 270. 3 Story, Eq. sec. 925 and 928. 17 Barbour, 435. 15 Barbour, 193. 1 Duer, 457. 19 Ill. 406. 3 Page, ch. 254. 6 John. ch. 439. 4 Page, ch. 510. 4 Kernan, 526. 8 Simons, 193, 272. 3 Duer, 156. 1 Duer, 505, 7. 2 Mylne & Craig, 119.

The act of the Commou Council is not a legislative act, it is the making of a grant to particular persons. See authorities above cited—5 Selden, 273.

III.

It is no answer to say that the authority, attempted to be conferred, was a nullity. Courts may restrain the doing of an act that will produce irreparable injury, though the party injured may have a remedy in an action for damages. See authorities above cited.

VAN BURENS & GARY,

Attorneys for Defendants.

287
Supreme Court

City of Chicago

vs
John Evans et al

Gifts Points

Van Dusen & Gary
Gifts Atty's

Filed Apr. 18. 1860

L. Leland
Clerk

SUPREME COURT OF ILLINOIS.

Third Grand Division.

THE CITY OF CHICAGO,
Plaintiffs in Error.

VS.

JOHN EVANS, et. al.
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It cannot be denied that the Common Council here attempt to grant to the North Chicago City Railway Company the right to exercise its franchise beyond its territorial limits. But it is claimed that by another clause in the ordinance it appears that it was not the intention of the Common Council to authorize the North Chicago City Railway Company to build the road on South Clark street; the clause referred to is as follows: "And for this purpose the last named company is authorized to lay such tracks and extensions as will furnish all proper facilities for a convenient and useful connection of said tracks." The intention here is manifest. It was that the North Company should build the road—no grant is made to the South Company; they cannot accept the grant, for they are not parties to it; the grant is to the North Company "*to extent its road across the Chicago river* so as to make connection at Randolph Street." The North Com-

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VAN BURENS & GARY,

Attorneys for Defendants.

20th 17
Supreme Court

City of Chicago

vs
John Evans & Co

Defts Points

Wm Burns & Gary
Defts Atty

Filed Apr. 18. 1860

G. Leland
Clerk

State of Illinois } Third Grand
Supreme Court } Division

The City of Chicago }
vs

John Evans et al }

Now comes the said Plaintiff in Error
having that in the Record & proceedings in this
Cause in the Circuit Court of Cook County
Illinois, there is manifest error & prays that
the judgement & decree of the said Circuit
Court may be reversed, annulled & set aside
& assigns the following grounds for reversal,
1st That the Court below erred in overruling
said Pff's Motion to dissolve said Injun-
ction & dismiss said Defts' Bill.

2^d That the Court below erred in overruling said
Plaintiff's Demurrer to the Bill of complaint
of the said John Evans & others.

3^d That the Court below erred in making said
Injunction perpetual.

4^d That the judgement & decree in the Court below
should have been for the said Plaintiff in error &
not for the Defendants in error.

Holmes Wick

Atty for Pff

In nullis et erratum }

Supreme Court

April Term, 1860

John Evans et al
vs
The City of Chicago
Plffs in Error

And hereafter afterwards to wit, in this
same Term the said John Evans, James H. Adair,
Henry Cooke, Thomas Whelan, George W. Cole,
Daniel Beinaud, Francis C. Sherman &
Leratio J. Loomis by Van Dusen & Gary
their Attorneys, duly comes here into
Court; and say, that there is no Error
either in the record & proceedings aforesaid
or in giving the judgment aforesaid. And
they pray, that the said Supreme Court
before the Justices thereof, now here, may
proceed to examine as well the record
& proceedings aforesaid, as the matters
aforesaid above assigned for Error, and
that the judgment aforesaid, in favor
aforesaid given, may be in all things
affirmed.

Van Dusen & Gary
Scts Attys

Supreme Court:

John Evans et al
Def in Error
ad for

The City of Chicago
Plt in Error

Joinder in Error

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the Third Monday, (being the Twentieth day) of February in the year of our Lord one thousand eight hundred and Sixty and of the Independence of the said United States the Eighty-fourth

Present, Honorable George Manierre Judge of the 7th Judicial Circuit of the State of Illinois.

Charles Haven States Attorney.

John Gray Sheriff of Cook County.

Attest, Wm L Church Clerk.

Be it remembered that heretofore, to wit, on the 30th day of January in the year aforesaid John Evans Etal, Complainants by Van Buren & Gary, their Solicitors, filed in the office of the Clerk of the Court aforesaid their certain Bill of Complaint against the City of Chicago, Defendant in the words & figures following, to wit,

Bill of Complaint

In the Circuit Court of Cook County. In Chancery

To the Honorable George Manierre, Judge of the Cook County Circuit Court, in Chancery sitting

Humbly Complaining show unto your Honor, your Orators John Evans, James M. Adair, Henry Cooke, Tolman Wheeler, George W. Dole, Horatio G. Loomis, Daniel Brainard & Francis C. Sherman, of the City of Chicago, in said County

2. That on the tenth day of January A. D. 1860 there was & for a long time before that time had been & still is a certain Street & public highway in said City, running North & South & crossing the Chicago River over a certain bridge there being called Clark Street, through which is constantly passing a large number of teams, carts, wagons, carriages & other vehicles going & passing upon & along said Street for the legitimate & ordinary purposes of business & travel. That South of the said River & the nearest to said River on the South side thereof of the Streets of said City are certain other Streets & public highways running East & West & crossing said Clark Street at right angles, called respectively South Water Street, Lake Street & Randolph Street, all of which are also constantly used & occupied by a large number of teams, carts, wagons, carriages & other vehicles going & passing upon & along said Streets for the legitimate & ordinary purposes of business & travel aforesaid. That said Clark Street from the crossing thereof by said Randolph Street as aforesaid, which is distant from the said River about nine hundred & seventy five feet to the said River & also the said bridge are main thoroughfares of said City and now are & for a long time past have been much thronged & crowded & the facilities of passing through & along the same much hindered & embarrassed by the great number of teams, carts, wagons, carriages & other vehicles constantly going & passing upon & along

3

the same as aforesaid. That the said River is a navigable river & during the seasons of the year when it is not frozen, is constantly used & occupied by large numbers of boats & vessels passing up & down the same for the usual & legitimate purposes of trade & travel. That the said bridge is not of a sufficient height above the water of said River to permit said boats and vessels to pass under the same but is so constructed as to turn upon its centre for the purpose of affording a passage for such boats & vessels in going up & down said River. That by reason of the frequent occasions & necessity for opening such passage by turning said bridge for the purpose aforesaid, the facilities for passing upon & along said Clark Street & over said bridge are further greatly hindered & embarrassed in so much that such teams, ^{cars,} wagons & carriages & other vehicles going & passing upon said Clark Street as aforesaid are often greatly delayed & compelled to stand still & wait for long spaces of time, so that said Clark Street often during such delays becomes filled & blocked up with the press & crowd of such teams, cars, wagons, carriages & other vehicles to the serious inconvenience not only of the persons having such teams, cars, wagons, carriages & other vehicles, but also of the owners & occupants of the houses, stores, offices & other tenements fronting upon & opening into said Clark Street.

That by an act of the Legislature of the State of Illinois entitled "An act to promote the construction of

4 Horse Railways in the City of Chicago" approved February 14th A. D. 1859 two Corporations were created, one called the Chicago City Railway Company, which was by such act authorized & empowered to construct, maintain and operate Railways in the South & West Division of said City; & the other called the North Chicago City Railway Company, which was by said act authorized & empowered to construct, maintain & operate Railways in the North Division of said City.

That all that part of Clark Street hereinbefore mentioned & so much of said bridge as is South of the centre of said River are in the South Division of said City.

That at a meeting of the Common Council of the City of Chicago on the 10th day of January A. D. 1860 at said City, a Special Committee of said Common Council to whom had been referred a Petition of the North Chicago City Railway Company asking the passage of an ordinance granting the privilege of extending their tracks so as to form suitable connections with the City Railway Company's tracks of the South & West Division of said City, reported & submitted to the said Common Council & asked the said Common Council to pass an ordinance as follows—

An Ordinance authorizing the connection of the tracks of the North Chicago City Railway Company & the Chicago City Railway Company—

Section 1. Be it ordained by the Common Council

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of the City of Chicago - That the North Chicago City Railway Company is hereby authorized to extend its road across the Chicago River at such points and in such way as that they shall make connections with the tracks of the Chicago City Railway Company (by arrangement with said Company) at or near Randolph Street, thereby making continuous lines of Horse Railroads between the different divisions of the City, and for this purpose the last named Company is authorized to lay such tracks and extensions as will furnish all proper facilities for a convenient and useful connection of said tracks.

The said North Chicago Railway Company, in consideration of the privileges hereby granted, agree to pay, annually into the City Treasury the sum of one hundred dollars for each bridge they may cross, for the purpose of keeping such bridge or bridges in repair, provided further that nothing herein contained shall authorize the cars of said Companies to stand on South Clark Street at any other place than along the East side of the public square as near the curb stone as possible without interfering with the sidewalk.

Section 2. The Construction and operation of any road or roads that may be built under this ordinance shall be subject to all the rules, limitations and restrictions that are prescribed in the ordinance heretofore passed by the City Council.

Which said proposed ordinance was then & there by the said Common Council laid over & ordered

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to be published.

8 That the said North Chicago City Railway Company have no power or authority by their charter or otherwise to construct, maintain or operate any railroad or railway in the South Division of said City, nor has the said Common Council or said City of Chicago any power or authority to grant or permit to said North Chicago City Railway Company any such power and authority to construct, maintain or operate any railroad or railway in said South Division,

That the said Chicago City Railway Company have now in operation a railway track along Randolph Street aforesaid at the said crossing of Clark Street & the said North Chicago City Railway Company has also now in operation in the North Division of said City & in & upon the continuation of said Clark Street on the North side of said River a railroad track which approaches to within a short distance of said River & that the said North Chicago City Railway Company has no other track approaching the said ~~North~~^{South} Division of said City & which can be made to connect with the tracks of the said Chicago City Railway Company, than their said track on Clark Street on the North side of said River.

And your Orators further show unto your Honor that the purpose & intention of the said Common Council or of a majority thereof, as your Orators are informed & believe is to pass the said Ordinance in due form of law for the purpose & object of authorizing & permitting the said North Chicago City Railway Company to

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extend its road across the said bridge at Clark Street aforesaid & along said Clark Street from the said River to or beyond Randolph Street aforesaid & that if said Ordinance is so passed the said North Chicago City Railway Company will immediately thereafter proceed to construct, maintain & operate said last mentioned road across said bridge & along said Clark Street from the said River to or beyond Randolph Street aforesaid, under color of the pretended authority of such an ordinance.

That your Orators are the owners, in severally of different lots, pieces & parcels of land & of houses, stores, offices & other tenements fronting upon & opening into that portion of said Clark Street between Randolph Street aforesaid & the said River of great value amounting in the aggregate to upwards of Four hundred thousand dollars; & are either by themselves or by their respective tenants holding under them respectively in possession & enjoying the use & benefit thereof.

That your Orators sue not only on behalf of themselves but also of all others similarly situated & who choose to become parties to this suit & contribute to the expenses thereof.

And your Orators further show unto your Honor that they are informed & believe that the said North Chicago City Railway Company only are the parties applying to the said Common Council for the passage of said ordinance & that the Chicago City Railway Company have no interest in the passage of said ordinance & have made no application for the same & that all arrangements contemplated by said ordinance between

said Companies are for the exclusive benefit & advantage of said North Chicago City Railway Company & to enable them to construct, maintain & operate in said North Division a railway in violation of their charter.

That your Orators are informed & believe & so charge the fact to be that if the said North Chicago City Railway Company are permitted to extend their railroad across said bridge & along said Clark Street to said Randolph Street it will be of no benefit to the public as the frequent detentions of said Company's cars by the necessary opening of said bridge for the passage of vessels & boats as aforesaid & the consequent blocking up of said Street with the cars so detained will more than counterbalance all advantages thereby gained & that if said North Chicago City Railway Company is permitted to construct, maintain & operate across said bridge & along said Clark Street South of said River, a railroad track it will cause such an obstruction to said Street as will constitute a public nuisance and your Orators will be continually, irreparably & permanently injured in the use, benefit & enjoyment of their said property fronting upon and opening into Clark Street as aforesaid for which damages which might be recovered at law would afford no adequate compensation & they & their tenants will be greatly injured & inconvenienced in the conducting of their necessary affairs & business & be deprived of the use of said Clark Street between Randolph Street & said River, or a portion thereof, by the passing & repassing of cars upon such railroad track

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by the great additional hindrance & embarrassment which will be occasioned to the passing of teams, carts, wagons, carriages & other vehicles in & along said Clark Street by which said Street already so thronged & crowded as aforesaid will be rendered oftentimes impassable.

In tender consideration whereof & inasmuch as your Petitioners are without remedy in the ordinary course of proceedings at law & can only have relief in a Court of equity where matters of this nature are properly cognizable & relievable.

To the end therefore that the City of Chicago whom your Petitioners pray may be made defendant to this bill may true, direct & perfect answer make to all & singular the matters & things herein stated & that as fully as if the same were here again repeated.

And that the said defendant may be enjoined & restrained from passing any ordinance or giving any power, privilege or authority whereby the said North Chicago City Railway Company shall or may directly or indirectly or by arrangement with any other Company, Corporation or person, construct, maintain or operate or cause to be constructed, maintained or operated any railroad or railway across the said bridge or on said Clark Street between said Randolph Street & said River & particularly that the said defendant may be enjoined & restrained from passing the said proposed ordinance herein before copied or any other ordinance with similar powers or provisions

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And that your Orators may have such further or such other relief in the premises as the nature of their case shall require & as shall be agreeable to equity & good conscience.

May it please your Honor to grant unto your Orators the People's writ of Injunction issuing out of & under the seal of this honorable Court, to be directed to the said City of Chicago & to their Counsellors, Attorneys, Solicitors, trustees & agents therein & thereby commanding & strictly enjoining the said defendant & the persons before mentioned in manner aforesaid

And may it also please your Honor to grant unto your Orators the People's writ of subpoena issuing out of & under the seal of this honorable Court, to be directed to the said City of Chicago therein & thereby commanding the said defendant on a certain day & under a certain penalty to be therein inserted, to be & appear before this honorable Court then & there to answer the premises & to stand to, abide by & perform such order & decree therein as to this Court shall seem proper & as shall be agreeable to equity & good conscience.

Van Buren & Gary
Compls. Sols. }

John Evans
J. M. Adsit
Tolman Wheeler
Geo. W. Dole

State of Illinois }
County of Cook } ss.

John Evans, James M. Adsit,
Tolman Wheeler and George W. Dole, being severally

N duly sworn each for himself, says that he is one of the Complainants in the foregoing bill of Complaint. That he has heard the same read & knows the contents thereof. That the same is true of his own knowledge except as to the matters & things therein stated to be on information or belief & as to those matters & things he believes it to be true.

Sworn to & subscribed
 before me this 28th day
 of January A. D. 1866

L. C. Paine Freer

Master in Chancery

Cook Co.

Jno. Evans

J. M. Adair

Tolman Wheeler

Geo. W. Dole

Let the writ of Injunction issue in conformity with
 the prayer in the above and foregoing Bill of Complaint.
 To the Clerk of the } George Manierre
 Circuit Court Cook Co. } Judge of 7th Judicial
 Circuit Ills.

Endorsed

"Filed Jany. 30th 1866. W^m L. Church Clerk."

And thereupon on the same day & year aforesaid
 to wit, January 30. 1866 there were issued out of the
 office of the Clerk of the Court aforesaid and under
 the seal of said Court, the People's certain writs of
 Summons and Injunction directed to the Sheriff
 of Cook County to execute & clothed in the words &
 figures following, to wit,

Summons

State of Illinois }
County of Cook } ss.

12

The People of the State of Illinois, to the Sheriff of said County, Greeting:

We command you that you summon the City of Chicago if they shall be found in your county, personally to be and appear before the Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House, in Chicago, in said County of Cook on the third Monday of February next, to answer unto John Evans, James M. Addis, Henry Cooke, Tolman Wheeler, George W. Doh, Daniel Beainard & Francis C. Sherman in their certain Bill of Complaint filed in the said Court, on the Chancery side thereof.

And have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same.



Witness William L. Church Clerk of our said Court, and the seal thereof, at Chicago aforesaid, this thirtieth day of January A. D. 1860
W^m L. Church Clerk

Injunction

State of Illinois }
County of Cook } ss.

The People of the State of Illinois
To the City of Chicago, and to your Attorneys, Solicitors

Agents and Servants, and to each and every of them, Greeting:

13

Whereas it hath been represented to the Honorable George Manierre, Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in said Circuit, and State aforesaid, on the part of John Evans, James M. Adair, Henry Cooke, Tolman Wheeler, George W. Dole, Daniel Brainard & Francis C. Sherman, Complainants in their certain bill of complaint exhibited before said Judge, and filed in said Court, against you the said The City of Chicago, to be relieved touching the matters therein complained of. In which said bill it is stated among other things, that you are combining and confederating with others to injure the complainant, touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience. And the said Judge, having under his hand endorsed upon said bill an order that a Writ of Injunction issue out of said Court according to the prayer of said bill. We, therefore in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the said the City of Chicago and the persons before mentioned, and each and every of you, that you do absolutely desist and refrain from passing any ordinance or giving any power, privilege or authority whereby the North Chicago City Railway Company shall or may directly or indirectly or by arrangement with any other Company, Corporation or person, construct, maintain

14

or operate, or cause to be constructed, maintained or operated any railroad or railway across the bridge over the Chicago River at Clark Street or on Clark Street between Randolph Street & said River & particularly from passing the proposed ordinance copied in the said Bill of Complaint or any other ordinance with similar powers or provisions until this Honorable Court, in Chancery sitting, shall make other order to the contrary. Hereof fail not under the penalty of what the law directs.

To the Sheriff of said County to execute, and return in due form of law.

Witness William L. Church, Clerk of said Circuit Court, and the seal thereof, at Chicago, in said County, this thirtieth day of January A.D. 1860



W^m L. Church Clerk

And afterwards, to wit, on the 23rd day of February in the year last aforesaid, said writs were returned into the Court aforesaid, by said Sheriff endorsed as follows, on each, to wit,

Endorsement

"Served this writ on the within named City of Chicago by reading & delivering a true copy of the same to John C. Haines, Mayor of said City, the 30th day of January 1860 - Fees: Service 50 - Copy 50 - Mile 5 - return 10 = 1.15. John Gray Sheriff by J. Lombard Deputy."

Endorsed

"Filed Feby, 23rd 1860 W^m L. Church Clerk.

And heretofore, to wit, on the 3^d day of February in the year aforesaid, the said defendant by Hosmer & Peck its Solicitor filed in the Court aforesaid its certain Motion in writing in the words and figures following, to wit,

15

Motion to dissolve

Cook County Circuit Court

City of Chicago
vs
Jno. Evans et al } Injunction

And now comes the said Def. by Hosmer & Peck its Atty. and moves the Court to dissolve the Injunction issued herein for the following, among other reasons.

1st Because there is no equity in said Bill.

2^d Because the Injunction improperly issued herein, there being no sufficient reason assigned in ~~sa~~ Bill for an Injunction.

3^d Because the Complainants are attempting illegally to interfere with said Def. in a matter peculiarly within the authority & discretion of its Com. Council.

4th Because the said Bill shows no cause whatever for an Injunction, it neither shows fraud, nor that its Com. Council was attempting to do anything contrary to law, or what it had a right to do.

5th Because said Injunction illegally issued.

Hosmer & Peck

Def's. Atty.

Endorsed. Filed Feby. 3^d 1860. - W^m L. Church, Clerk

And afterwards, to wit, at the February Term of said Court to wit, on the 20th day of February in the year aforesaid, the following proceedings, among others, were had and entered of record in said cause, to wit,

16

John Evans, James M. Adsit,
Henry Cooke, Tolman Wheeler,
George W. Dole, Horatio G. Loomis,
Daniel Brainard, & Francis C. Sherman

Bill

18966

vs.

The City of Chicago

This day comes the said defendant, by its Solicitor and moves the Court to dissolve the Injunction heretofore granted in said Cause, and to dismiss the Complainant's Bill of Complaint filed therein, out of this Court for want of Equity.

And afterwards, to wit, at the same term of said Court last aforesaid, to wit, on the 27th day of February in the year aforesaid, the following further proceedings were had and entered of record, to wit,

John Evans, James M. Adsit,
Henry Cooke, Tolman Wheeler,
George W. Dole, Horatio G. Loomis,
Daniel Brainard, & Francis C. Sherman

Bill

vs.

The City of Chicago

This Cause coming on this day to be heard upon the Motion of the defendant

heretofore entered, to dissolve the Injunction heretofore granted in said Cause and dismiss the Bill of Complaint filed therein for want of Equity; and Counsel having been heard, as well in support of said Motion as in opposition thereto, and the Court having duly considered the premises and being now fully advised therein, doth order that said Motion be overruled and the same hereby is overruled accordingly.

And thereupon on the same day and year last aforesaid, said defendant by its Solicitors, filed in said cause its certain demurrer to the Complainants said Bill of Complaint in the words & figures following, to wit,

State of Illinois	}	ss.	Cook Circuit Court
Cook County			
City of Chicago	}	ads.	February Term A.D. 1860

In Chancery
Bill for Injunction

This defendant, the City of Chicago, by protestation not confessing all or any of the matters & things in the said Complainants' bill contained, to be true, in such manner & form, as the same are therein set forth & alleged, does demur to the said bill, and for cause of demurrer show that the said Complainants have not, by their said Bill, made such a case as entitles them, in a Court of Equity to any discovery from or relief against this defendant, as to the matters contained in the said Bill, or any of such matters, and that said Complainants are not entitled to any relief in this Court

18

touching any of the matters complained of in said Bill. Wherefore and for divers other good causes of demurrer appearing in the said Bill, this defendant doth demur thereto, and it prays the judgment of this Honorable Court whether it shall be compelled to make any further & other answer to the said Bill, and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained

Hosmer & Peck
(Defts. Attys.)

Enclosed

"Filed Feby. 27. 1866 - W^m L. Church Clerk"

And afterwards, to wit, at the same term of said Court aforesaid, to wit, on the 29th day of February in the year aforesaid, the following further proceedings were had and entered of record in said cause, to wit.

State of Illinois } Cook County } ss.	Circuit Court of Cook County of the February Term A.D. 1860
John Evans, James M. Adair, Henry Cooke, Tolman Wheeler, George W. Dole, Horatio G. Loomis, Daniel Brainard & Francis C. Sherman	In Chancery Bill of Injunction
vs. City of Chicago	

This day come the parties by their Solicitors, and thereupon this cause came on to be heard upon Bill and Demurrer thereto, and the Court being fully advised in the premises doth overrule said

Demurrer to said Bill, and the said Defendant thereupon elect-
 ing to abide by its Demurrer it is therefore ordered, adjudged and
 decreed that the default of said defendant be entered and the
 said Bill be taken as confessed. And thereupon this cause com-
 ing on to be heard upon, it is ordered, adjudged and decreed that
 the Injunction issued herein enjoining and restraining the said
 Defendant from passing any ordinance, or giving any power,
 privilege or authority whereby the North Chicago City Railway
 Company shall or may directly or indirectly or by arrangement
 with any other Company, Corporation or person, construct,
 maintain or operate, or cause to be constructed, maintained
 or operated any railroad or railway across the Clark Street
 bridge mentioned in said Bill, or on said Clark Street
 between said Randolph Street & said River as described
 in said Bill, and enjoining & restraining the said De-
 fendant from passing the said proposed ordinance set
 out in said Bill or any other ordinance with similar
 powers & provisions, be and the same is hereby made per-
 petual. It is further ordered, adjudged & decreed that the
 said Defendant pay to the said Complainants their costs in
 this behalf expended & that they have execution therefor.

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of the original writs, pleadings & proceedings had and entered of record in a certain cause late, pending in said Court on the Exchequer — side thereof, wherein John Evans et al were complainants — and the City of Chicago was — Defendant.

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court at Chicago, this Twenty Sixth day of March — A. D. 1860.

Wm L. Church Clerk.

Rec'd 6⁰⁰

J. 207
John Evans Esq
atty
City of Chicago

Record

Filed April 17, 1860

L. Lamm
Clerk

E. Peck
att'y.
June 16th

Supreme Court
The City of Chicago
vs. Pltff in Error
John Evans et al
Def't in Error

Points submitted in answer to
argument of Mr Deekwith.

The Common Council had no authority
to make the grant contemplated by the
ordinance. 1st Because, the Common
Council had no authority except such
as is delegated to it by the Legislature.
See Authorities cited on printed points.

The City Charter gives them power to
regulate the streets, but not to grant to any
one the privilege to establish a rail way.

In Davis vs The Mayor of New York,
Over page 505, the Court say, "Municipal
Corporations possess only such powers as are
specially granted by the act of Incorporation
and as are necessary to carry into effect
the powers expressly granted."

In New York the City Charter gives
the same power to regulate streets &c as in
Chicago.

In State of New York vs The Mayor

De 3 Our page 145. In speaking of the right of the Common Council to give the privilege to build a rail road the Court say "Neither of the City Charters, nor any Statute of the state confers any such power in express terms.

Again "If no such power is conferred by the express terms of its charter, or by the express terms of a Statute of the State, or by necessary implication, the assertion of such a right is the usurpation of a franchise."

Again on page 152, the Court say, "we think it (the grant) void, First, that it grants a franchise which the Common Council has no authority to grant."

In *Davis vs the Mayor &c of N York & Kernon* on page 517. the Court of Appeals after fully discussing the question say, "I have examined with respectful attention the several cases in which the power which I have been examining is claimed to have been expressly or impliedly affirmed. They are without exception cases in which the right to establish the rail road at the places where it was proposed to be constructed, had been granted, immediately or immediately by the Legislature

On page 522 they say, "The foregoing
 " considerations have led me to the conclusion
 " that the resolution of the Common Council
 " granting the defendant Sharp and others
 " the right to lay a rail road in Broadway
 " was without the scope of the powers of
 " the Corporation and was wholly unauthorized
 " and illegal."

The powers claimed by the
 defendants for the Common Council is a
 dangerous one. If they may usurp
 powers not granted to them & not necessary
 to carry out the powers expressly granted,
 then all property holders in a City are
 the mercy of an irresponsible & sometimes
 venal body of men. It is to the Courts
 only that they can look for protection.

Not an Authority has been cited &
 none can be found to sustain the doctrine
 claimed by the defendants except the single
 case in Kentucky, which was referred to
 in the case of 4th Kennon. No doubt but this
 mode of travel is an improvement, but it
 should not be encouraged in violation of
 the rights & interests of property holders,
 & there is no body who need the restraints
 which Courts of justice alone can impose,
 than Municipal Corporations. It is a
 fact not to be overlooked that the

rage for horse rail roads has become a mania, and whole streets are so occupied by double track rails as to drive Carriages from them, & thus almost destroy the value of the property adjoining.

It was said in the argument that every rail road in the City of New York has been built without Legislative Authority. To this I answer if that is so, then they are all illegal, & are built and operated in violation of the laws of that state, for in every instance in which they have come before the Court the Courts have distinctly decided that the Common Council has no power to grant the privilege. The fact however is, that they were enjoined from running on Broadway & other streets, then were built on streets to which there was no objection, & the past winter, obtained Legislative enactments confirming them.

A distinction was attempted to be made between what the Council called a contract, & a license to build and operate the road. This doctrine was attempted to be made in the cases above referred to and in every instance was overruled, and the Court held that a grant thus made without reserving

5
in the ordinance the right to revoke,
was irrevocable. Besides, there is no
good sense in the distinction, the
ground upon which the act is illegal
is, that instead of regulating the streets
for the benefit of the public, it grants
the use itself to a particular person
or persons, to the exclusion of the public.
now, it is no matter, whether this is
done for a limited, or an indefinite
time. It is illegal & without authority
for any time.

The case of Prosser vs Fort Wayne
road, was referred to, but it has no application.
the Court then held, that inasmuch as the
authority was given both by the Legislature
& the Common Council. It was illegal.
besides it was put upon the ground
that it was taking private property
without compensation. & no other point
was discussed or decided.

I have thus endeavored to
answer the argument of the defendants
Council upon the abstract propositions.
But I submit that the question is
not necessarily involved in this case.
This grant was attempted to be
made under the Authority of the act
of the Legislature. It is to "extend

6
their road", what-road?, why, the
road they had built under the Authority
given them by the Common Council by
virtue of the power, given them by the
Legislation. They was incorporated as
a Company for 25-years, under that,
they build a road & that road is
sought to be extended, the only question
in this case is, whether the Common
Council can under the Legislation of
1859 authorize the North Chicago Rail
Road Company to build a branch
a road in the South Division,

and it is not a

III

It was claimed that the Bill could not be sustained because it was depriving the Common Council from doing a Legislative act. my answer to this is, it is not a Legislative act. It is the making of a grant. a Legislative act is one that affects the public. again, whether Legislative or not; makes no difference, if they are about to exceed their power, they may be restrained. This question too was discussed in the cases above referred to. I refer the Court to 1 Den page 494 - 495; 3 Selden 273.

III

It was also claimed that the Bill could not be maintained by depriving property holders. This objection is not new. It has been raised almost every time. That any individuals have invoked the aid of the Courts to protect them against the unlawful acts and usurpations of municipal corporations and have always been overruled by the Courts. The distinction is this, that where the act complained of affects the public only. Then the people

8
must be a party, but where the act
injuriously affects individuals, or
individuals & the public, then the
individuals injured may commence
the suit. In the Case of Davis vs Mayor
&c. 4 Remon 506. It was found that
the Complainants owned no property on
the street through which the road was
to run, & the Court held that they
could not maintain the suit, but
distinctly affirmed the position we claimed.
By looking at the Bill, the Court will
see that the facts alleged, not only
show an irreparable injury to property
holders, but makes it a misused

IV

It was claimed that the act
of the Legislature of 1855 authorized
the Common Council to connect the roads,
to that we answer, that that act was
not intended to have any reference to
horse rail roads.

2^d. The authority granted by the
Common Council in this case, was granted
under the Authority of the act of the Legislature
of 1859 & the validity of the ordinance is
to be judged by that act, & if that act.

9
did not authorize the Common Council
to grant a Franchise to the North
Company extending its road into the
South Division of the City - thus the
ordinance was without authority

The appellants insist, that
no franchise was asked or received,
the franchise under the legislatures
grant was complete, the intention
of the ordinance was to grant a
license to lay the track - nothing
further. The whole ordinance
shows, that each corporation was
to lay tracks, within ~~the~~ ^{their} appropriate
legal divisions - the construction
of the ordinance attempted by the
appellants is unfair, and unreasonable
and the Court will not presume
that a wrong was intended, where
none was intended, or that a false
interpretation or use of the ordinance
is designed

for appellants
Hosmer & Beck

207
Superior Court

The City of Chicago
Plff in Error

vs

John Evans et al
Defts in Error

Points in Answer to
Argument of Petp Council