

13162

To. _____

Supreme Court of Illinois

Wheeler

vs.

City of Chicago

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

1860
No. 91.
1860

Wheeler
vs
Chicago

13162

Wheeler

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Sheriff of the County of Cook

Greeting :

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Superior Court of Chicago Cook County, before the Judge thereof, between William Wheeler

plaintiff, and The City of Chicago

defendant, it is said that manifest error hath intervened, to the injury of the said plaintiff

as we are informed by his complaint, _____ the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

City of Chicago

City of Chicago
that said be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if said City of Chicago shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said City of Chicago

notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 32 day of March in the Year of Our Lord One Thousand Eight Hundred and Fifty Six

L. Leland
Clerk of the Supreme Court.

by Geo. B. Rice Deputy

William Wheeler

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The City of Chicago

Scire facias

Filed March 18. 1860

L. Leland

of the City of Chicago
by leaving a copy
with S. D. Ward

Comptroller of said
City the mayor not
found in this County
the 14th day of March
1860

John Gray Sheriff
By McHeim

Services 50
Copies 50
Mileage 10
Return 10
Deputy
Per day
Petty City
\$120

ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT, of Chicago
Court for the County of Cook Greeting:

Because, In the record and proceedings, as also in the rendition of
the judgment of a plea which was in the Superior
Court of Chicago, Cook County, before the Judge thereof, between
William Wheeler

plaintiff, and The City of Chicago

defendant, it is said mani-
fest error hath intervened, to the injury of the aforesaid plaintiff

as we are informed
by his complaint and we being willing that error should be
corrected, if any there be, in due form and manner, and that justice be done
to the parties aforesaid, command you that if judgment thereof be given,
you distinctly and openly, without delay, send to our Justices of the Su-
preme Court the record and proceedings of the plaint aforesaid, with
all things touching the same, under your seal, so that we may have the
same before our Justices aforesaid at Ottawa, in the County of La
Salle, on the first Tuesday after the third Monday in April next, that
the record and proceedings, being inspected, we may cause to be done therein,
to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief
Justice of our said Court, and the Seal
thereof, at Ottawa, this 3^d day of
March in the Year of Our Lord
one thousand eight hundred and fifty-six.
L. Leland

Clerk of the Supreme Court.
L. B. Rice

William Wheeler
The City of Chicago

Went of Error

~~Filed March 3 1860~~

~~L. Leland~~

~~Black~~

Filed March 7th 1860

Wheeler

Filed March 19. 1860

L. Leland

Black

Supreme Court
William Wheeler

vs
The City of Chicago

action of Inassess on the case upon
promises in the Superior County
Chicago brought by said William
Wheeler as Plaintiff against said
City of Chicago as Defendant. Judgment
was rendered against the Plaintiff
in favor of the Defendant with
costs on the 23rd day of February
A.D. 1860

The Clerk of the Supreme Court of
the 3rd Grand Division will
please issue Writ of Error and
Scire facias to hear Errors in that
Cause ~~and make the~~ to Cook County
returnable to next Term of that
Court to oblige

Feb. 27 1860

James H.

Darnell & Smith

attest for Meff

Please mail these writs to us at Chicago

Darnell & Smith

Supreme Court

William Wheeler

vs

The City of Chicago
Plaintiff

Filed March 3^d 1869

L. Leland
Clerk

Dorwell & Smith
Plffs atty

No 91—

Printed by Beach & Barnard, 14 South Clark Street.

SUPREME COURT OF ILLINOIS.

Third Grand Division, }
APRIL TERM, A. D. 1860. }

WILLIAM WHEELER,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO,
Defendant in Error.

POINTS OF DEFENDANT IN ERROR.

This is an action of *assumpsit*.

The declaration alleged, at length, the proceedings of the defendant, under chap. 6 of the City Charter, for the condemnation of plaintiff's land for the purpose of opening a street, the confirmation by the Common Council of the assessment, the duty of the defendants to collect money by means provided by their charter, to pay the assessment to the plaintiff, the promise of the defendants to perform said duty, and the breach thereof.

To this declaration the defendant demurred, and the demurrer was sustained. The defendant in error, in support of the ruling of the Court below, submits the following

POINTS:

I.

The action of *assumpsit* is based upon a contract, either express or implied, and there must also exist a *privity* of contract between the parties, plaintiff and defendant.

In the present case, there exists *no contract* between the parties, there is no priority of relation between them; the action proceeds upon the statute, which simply confers upon the Common Council power to open streets, condemn property for that purpose, determine what persons will be benefitted by such improvement, and assess the damages and expenses thereof on the real estate of persons benefitted, in proportion as nearly as may be to the benefits resulting to each. It is out of this *particular fund*, and from this particular assessment, that the party claiming compensation must be paid. The statute does not either in express terms or by implication, charge this compensation upon the city corporation, it simply imposes upon it the duty of making, apportioning and collecting this assessment.

The only breach which the plaintiff alledges, is that the defendant neglected to collect it. The defendant then has been guilty of a neglect of duty, according to the plaintiffs own showing, to-wit: of *not collecting* the assessment. The damages which the plaintiff may have sustained, do not arise from the violation of a contract, either express or implied, that the *city* shall pay for the land condemned, but result from, and are consequent upon, the neglect to collect the assessment from those particular individuals upon whom it has been imposed, and who are bound by the statute to pay it.

The liability of *the city* to the defendant in an action of assumpsit for the value of the property condemned, arises only when the assessment has been collected and is in their hands. And should the city fail to collect the assessment, the remedy against them would properly be by *mandamus*, to compel them to do so.

II.

Under the charter, the expenses of opening streets are not made a charge upon the whole city, but only upon the owner's and occupant's of the houses and lots to be benefitted by the improvement. The corporation is the agent or instrument of the land holders having an interest in the matter, to ascertain how much one man ought to pay and another to receive, to collect the money from those who are benefitted, and see that it is properly applied to the particular object.

Lake vs. Trustees of Williamsburg, 4 Denio. 523.

McCullough vs. Mayor of Brooklyn, 23 Wend. 458—12 ed. 165—6 Hill, 244, 2 Denio. 110—2 Hill, 466—4 ed. 88, 76, 92.

The corporation of the city in matters of this description, are acting not simply as an individual acts in respect to his private interests, nor as a private corporation acts in relation to its property or concerns. They act as a public corporation in discharge of duties, and the exercise of powers which they hold as trusts for the benefit not of the corporation as such, but for the citizens at large, and for the public. Not only so, they are *trustees and agents* in another sense. The exercise of their powers in such matters as the present, proceeds upon the assumption of benefit to contiguous land owners, to be secured *through the agency of the corporation, not at their own cost, but at the land owner's expense.* And that agency involves further the creation of a lien upon the lands, and the enforcement of the rights of the land owner's bound to contribute as between themselves. So that the defendants, as a private corporation, may be said to have no interest in the subject, but to act throughout *as trustees and agents of the public and the land owners;* and to be clothed with the requisite powers only for the benefit of such owners and the public.

By the very terms of the statute upon which this action is based, no obligation whatever *is imposed upon the city corporation to pay the damages sustained by individuals whose property has been condemned.* *There exists no legal duty so to do.* And since it is not made a charge upon the city, and no *legal duty* to that effect is imposed upon them, there exists no express contract to pay such damages. An implied contract to pay those damages could only arise from a legal duty or obligation to do so, *and since no such legal duty or obligation exists,* no such implication can arise. *The duty or obligation to pay* is charged upon the *particular individuals* benefitted, and upon them alone.

Brady agst. The Mayor of New York, &c., 16 How. Pr. R. 444.

III.

The plaintiff in error in his third point assumes, that it was the duty of the defendant to pay the plaintiff "*A liquidated sum in cash.*" No such duty, as we have already seen, existed either by statute or by implication, and could not exist until after the amount of the assessment had been collected.

The cases cited by the plaintiff in error, it will be found on examination, are essentially different from the one at bar.

1. *Higgins vs. The City of Chicago*, 18 Ill. 276, is an action of mandamus. Now if that case was decided correctly no action to recover the amount or suit in damages whatever will lie, because a mandamus is never allowed where there is any other remedy.

2. *Hawkins vs. Trustees of Rochester*, 1 Wend. 53, was a case brought expressly upon the statute pertaining to Rochester, which was passed in 1826, and which provided that "if the Board of Trustees *neglect*, on demand, to pay the sum assessed as damages to any individual, caused by laying out or widening any street, the party thus entitled to the sum assessed *may sue the Board of Trustees* and recover the same in an *action of debt on mutatus* with interest and costs." Such a remedy is expressly given by the statute. See *Cuyler vs. Trustees of the village of Rochester*, 12 Wend. 167.

3. *People vs. Trustees of Brooklyn*, 1 Wend. 318, was an application for mandamus, and which was to compel payment of a sum of money for opening a street and which depended upon the provisions of the charter of that city, and which provides that the party who is damaged shall be paid by the city, and the city assumes the payment.

4. The matter of Anthony street in the City of New York, 20 Wend. 618, arose upon a petition for leave to discontinue the proceedings which had been commenced upon the part of the corporation.

5. *Buell vs. Trustees of Lockport*, 11 Barb. 602, was an action of debt brought under the 46th section of the charter of the village of Lockport, which proves "that in case of non-payment, on demand, with interest, or in case where the parties shall be known and named in the precept of the said Board of Trustees shall refuse to pay the sum or sums so assessed, with interest from the time of judgment rendered upon said assessment, to the said parties or owners or either of them entitled to the same, said owner or parties may sue for and recover the same from said Board of Trustees together with interest, and the proceedings under the precept, and proceedings antecedent thereto, shall be presumptive evidence against the defendants."

Here it will be observed the liability for the sum assessed, and the right of action to recover it, are expressly created by the statute.

“The nature and extent of the duty and obligation devolved upon the city in the opening of streets,” is, it is urged by the plaintiff in error, “precisely the same as in the case of improving and repairing.” No greater mistake could well be made. The duties and obligations of the city in the *opening* of streets are especially defined and conferred by the statute; but the duty and obligation of a municipal corporation to keep its streets and highways in repair is a *common law obligation*, and results from its general duty to the public so to protect streets and highways that the right of passage over them may be safely engaged.

Whatever remedy, therefore, the statute may confer, for a breach of this duty to keep streets in repair, is cumulative. Actions against municipal corporations for damages, resulting to individuals from defects in the highways, are uniformly based upon the general common law obligations, already stated, and are always in case. *Browning vs. The City of Springfield*, 17 Ill. 143, and *The City of Chicago vs. Mayor*, 18 Ill. 349, cited by the plaintiff in error, are both actions on the case. The injury complained of in those cases resulted from the neglect to discharge the common law obligation, to which we have already alluded. In the present case no such obligation exists, and the duty to collect the assessments imposed upon those particular individuals whose property is to be benefited by the opening of streets is one imposed by the *statute alone*, and if any other remedy can be had for its non performance than mandamus, it must be by action on the case.

Ran vs. Green, Cowper's Reports, 474, was an action brought upon a statute which expressly provided for the payment, of the amount to recover which the action was brought to the plaintiff.

The Town of Pawlet vs. The Town of Langate, 19 Vt. 621, was an action brought upon the following statute :

“If such stranger, so ordered to remove, be sick or disabled and cannot be removed without endangering life, the overseer shall provide for his maintenance or cure at the charge of such town, and after the recovery of such stranger shall cause him to be removed under such order; and the town, in which he was last legally settled, shall repay all charges occasioned by the sickness, maintenance or cure of such stranger and for his removal, and shall also repay all charges and expenses incurred, if he shall die before removed; and, if the town, in which such stranger was last legally settled, shall not pay and satisfy all the charges and expenses as aforesaid, within fifteen days after notice shall be given in writing, the same may

be recovered from such town in an action to be brought in the name of the town making the disbursements."

The plaintiff in error has also misquoted the language of the Court in this case. The Court say : "the *general rule is* that for money accruing due under the provisions of a statute the action of assumpsit may be supported, unless another remedy is expressly given."

It will be observed, in this case, that an express liability to pay the charges, to recover, for which the action was brought, was by the very words of the statute imposed upon the defendants, and a right of action given against them to recover it. And this is the meaning of the language : "*money accruing due under the provisions of a statute,*" that is, that the statute by direct terms imposes upon the defendant the duty and obligation to pay to the plaintiff the money which he seeks to recover. In the present case the statute imposes no such obligation upon the defendant ; and, therefore, the cases are essentially different, and as no duty to pay is created, no promise to pay can be implied.

Neither is *The Bank of Columbia vs. Patterson's Administrator*, 7 Cranch. 299, a case in point. That was an action brought against the Bank for work and labor done and rendered for it, and for extra work in building its banking house ; the only question decided by that case was, that inasmuch as the extra work was done for their benefit and at the request of its authorized agents, the law raised an implied promise to pay therefor, and that it was a duty imposed upon them by law. Before this class of cases can be made at all applicable to the present, it must first be made to appear, *that it was the duty of the city of Chicago to pay to the plaintiff the value of the land condemned, and that that duty was imposed by law*. The only law, as we have had occasion to remark, by which the existence of such a duty can be determined, is the statute itself, and that so far from imposing that duty upon the defendant in error, imposes it upon the particular individuals to be benefitted by the improvement.

The other cases cited by plaintiff in error, all proceed, upon the peculiar language of the statute, and in all those cases, the duty for the breach of which the plaintiff complains, was expressly imposed upon the defendant.

IV.

The action of assumpsit, against a person, or a corporation acting in a particular character, for a breach of duty, can be sustained only in that class of cases, where the duty is of common law origin.

1 Saund. Pl. and Ev. page 166.

In support of the proposition that an action of assumpsit is not the proper form of remedy in the present case, we submit the following authorities :

“ Where commissioners, under a local act, have power to appoint officers at a salary to be paid out of the rates raised, the appointment does not create a contract on the part of the commissioners to pay the salary. Therefore, an *indebitatus* action will not lie against them for salary ; but a mandamus, or an action on the case, is the proper remedy.”

Bogg vs. Pearse, 3 Eng. Law and Eq. 538.

“ Assumpsit will not lie against a collector of taxes for a neglect to levy, collect and pay over the taxes.”

Charleston vs. Stacey, 10 563.

“ Assumpsit is never the proper remedy against a public officer, for neglect in executing the duties of his office.”

McMillan vs. Eastman, 4 Mass. 378.

6 Greenleaf, 471, 472.

Barley vs. Butterfield, 2 Shep. 112.

See also —

Toram vs. Howard Beneficial Association, 4 Barr. 519.

Bisquay vs. Jeunclot, 10 Ala. 235.

Force vs. Haines, 2 Harr. 385.

Knowlton vs. Plantation No. 4, 2 Shep. 20.

Turnpike Co. vs. Smith, 12 Verm. 212.

Paris vs. Paris, Hardin, 456.

Selectmen, &c. vs. Johnson, Brayt. 24.

Burnett vs. Lynch, 5 B. & C. 609 (per Littledale J.)

E. ANTHONY,

Attorney for Defendant in Error.

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Wheeler

City of Chicago

Abstract

Filed April 28, 1860
L. DeLeon
Clerk

United States of America }
State of Illinois }
Cook County } Gp.

Plas before the Honorable the Judges
of the Superior Court of Chicago within and for
the County of Cook and State of Illinois at a
regular Term of Said Superior Court of Chicago
begun and holden at the Court House in the
City of Chicago in said County and State
on the first Monday being the sixth day
of February in the year of our Lord Eight-
teen hundred and sixty and of the Inde-
pendence of the United States of America
the eighty fourth

Present the Hon John M Wilson
Chief Justice of the Superior Court of Chicago
Van H Higgins and Grant Goodrich Judges
Casper Haven Pro. Attoner
John Gray Sheriff of Cook County
Attest
Walter Kimball clerk

It is Reminded, that here
before took on the twenty third day

2

of March Eighteen hundred & fifty nine
William Miller plaintiff by Samuel Smith
his attorney filed in the office of the Clerk
of the Superior Cook County Court of Common
Pleas his declaration in a plea of trespass
on the case on promiss, against the City
of Chicago Defendant, which said decla-
ration is as follows to wit

Cook County Court of
Common Pleas.
of the April Term A.D. 1859

State of Illinois

County of Cook fs.

William Wheeler plaintiff in
this suit by Goodrich Farwell & Smith
his attorneys complains of The City of
Chicago Defendants therein who have
been summoned &c of a plea of Gaespar
on the Case upon promises:

For that whereas the
said plaintiff heretofore brought on the
fifteenth day of October in the year of
our Lord one thousand eight hundred
& fifty five was and thence until and
at the time of the appropriation there
of for street purposes by said Defendant
as herein after stated seized in fee of
the west thirty feet of Sub Lot eight
and all of Sub Lot seven in Lots one
and two six blocks one hundred
and eighteen in school section
addition to the city of Chicago in
the County of Cook and state of Illi
ois together with the buildings and
appurtenances thereon which said

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Lands and premises have been sub-
jected to the proceedings herein
after named to condemn such
property for the purpose of opening
over the same a highway or street
being an extension South of La
Salle street, to wit; at said County of
Cook;— and said plaintiff further
says that heretofore to wit on the said
fifteen day of October in the year
aforesaid to wit at the ^{said} County of
Cook; the said City of Chicago Defendants
did, through their Common Council
in pursuance of their power conferred
upon said Defendants by their Charter,
order a survey for the extension of
said ~~said~~ La Salle Street from its
then present terminus at Madison
Street in said City of Chicago South
to Jackson street in said City, which
said survey was made accordingly
and afterwards the said Defendants
through their said Common Council
gave the notice required by their
Charter, of their intention to appro-
priate and take the land necessary
for the extension of said La Salle
street South from said Madison

street to said Jackson street, to the owners of said lands, by publishing said notice ten days, as required by said Charter in the Corporation newspaper of said Defendants the first publication of which said notice being on the twentieth day of October in the year aforesaid and the same being published ten days consecutively thereafter and the said Plaintiff further says that afterwards and after the expiration of said notice to wit on the tenth day of January in the year of our Lord one thousand eight hundred and fifty six to wit at said County of Cook, the said Defendants through their said Common Council, and in pursuance of the requirements of their said Charter did choose three disinterested freeholders to wit: F. A. Bragg, Thomas Church and W. M. Saltonstall residing in said City, as Commissioners to ascertain and assess the damages and recompense due the owners of such lands respectively and at the same time to determine what persons would be benefited by such

improvement, and assess the damages and expenses thereof on the real estate benefited in proportion as nearly as may be to the benefits resulting to each which said Commissioners were then and there elected by a majority of all the aldermen authorized by law to be elected; which said Commissioners were afterwards sworn on the sixteenth day of said month of January in the year last aforesaid, duly sworn as required by law faithfully to execute their duties according to the best of their ability, and before entering upon their duties the said Commissioners did give notice to the persons interested of the time and place of their meeting for the purpose of viewing the premises and making their assessment by publishing said notice ten days before the time of such meeting in the said defendants Corporation newspaper to wit at the said County of Cook; and the said Plaintiff further says that the said Commissioners did thereupon, after the expiration of said last married

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notice proceed to make their assessment and did determine and appraise to the owner and owners the value of the real estate appropriate for the said improvement, and the injury arising to them respectively as damages after making due allowance therefrom for any benefit which such owner or owners might respectively derive from such improvement done at the said County of Cook.

and the said plaintiff further says that the said Commissioners did in all things comply with the law and the Charter and the ordinances of said city in regard to said assessment and the opening of said street, and having ascertained the damages and expenses of such improvement as aforesaid the said Commissioners did thereupon apportion and assess the same together with the costs of the proceedings upon the real estate by them deemed benefited in proportion to the benefits resulting thereto from the aforesaid improvement and did describe the real Estate upon which

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their assessments were made and after having completed and signed said assessment, the said commissioners did within the extended time allowed them by the said Common Council in which to complete and return their said assessment, to wit: on the fifth day of April in the year of our Lord one thousand eight hundred and fifty-six return their said assessment to the said Common Council of said City of Chicago as required by law.

And the Clerk of the said City of Chicago did, thereupon after the return of the said assessment, give ten days notice, commencing on to wit the eighth day of April in said year last aforesaid, in the said Defendants Corporation Newspaper, that such assessment had been returned, and that on a day specified in such notice said assessment would be confirmed by said Common Council unless objections were made to the same by some person interested.

And the said Plaintiffs further say that after the expiration of the said last named notice to wit: on

the ninth day of June in the year
last aforesaid at to wit the County
of Cook aforesaid (no objections
having been made) the said assess-
ment of the said Commissioners
so as aforesaid by them returned, was
in all things confirmed by the said
Common Council of the said City
of Chicago in due form of law, and
the said Plaintiff further says that
there was appraised, allowed and
awarded to the said Plaintiff in
and by said assessment so as aforesaid
made and returned by said Com-
missioners and confirmed by said
Common Council, as damages for
the taking and appropriation of the
lands of the said Plaintiff herein
before described and the buildings
thereon for the purpose of opening
said street over and above, benefits
for the land appropriated the sum
of twelve thousand and forty-five
dollars and for the building thereon
three thousand five hundred dollars
making ^{an aggregate of} fifteen thousand five hundred
and forty-five dollars and the said
Plaintiff avers that it thereupon

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then and there became and was the
duty of the said Defendants to proceed
immediately and with diligence to
collect money by the means provided
by their charter sufficient to pay the
aforesaid assessment and award so
as aforesaid assessed and awarded to
said plaintiff and confirmed as
aforesaid and to pay the said sum
to said plaintiff within a reasonable
time and the said defendants in
consideration thereof then and there
undertook and faithfully promised
the said plaintiff to faithfully and
diligently perform their said duty
in all respects in this behalf, yet
the said defendants disregarding
their said undertaking and prom-
ise in the premises did not
within a reasonable time pay to
the said plaintiff the said award
and assessment or any part there-
of but on the contrary thereof the
said plaintiff avers that the said
Defendants since the confirmation
of said assessment as aforesaid for
an unreasonable long space of time
to wit for the space of two years and

eight months and over wholly failed
and neglected to pay to the said
plaintiff the said sum of money,
so appraised, awarded and allowed
to him as such damages as aforesaid
or any part thereof, ^{through} after requested so
to do, by means of the premises the
said defendants became liable to
pay the said plaintiff the said sum
of fifteen thousand five hundred
and forty five dollars so as aforesaid
appraised, awarded and allowed
to him as such damages as aforesaid,
and being so liable they the
said Defendants in consideration
thereof afterwards writ on the first
day of March in the year of our
Lord one thousand eight hun-
dred fifty-one, at writ the
County of Cook aforesaid undertook
and then and there faithfully
promised the said plaintiff to
pay to him the aforesaid sum of
fifteen thousand five hundred and
forty-five dollars so as aforesaid
appraised, awarded and allowed
to him.

And whereas also the said Defend

ants heretofore. At wit on the first day
of March in the year of our Lord one
thousand eight hundred and fifty
nine at wit the County of Cook
aforesaid were indebted to the said
plaintiff in a large sum of money
at wit in the sum of twenty-five
thousand dollars for money by the
said plaintiff before that time
lent and advanced to the said de-
fendants at their special instance
and request and for other money
before that time by the said
plaintiff paid, laid out and expend-
ed to and for the use of said defend-
ants at their like special instance
and request and for other money
before that time by the said defend-
ants had and received to and for
the use of said plaintiff and for
other money before that time and
then due and owing from the said
defendants to the said plaintiff for
damages assessed appraised, awarded
and allowed to the said plaintiff
for lands and their appurtenances
appropriated and taken by said
defendants belonging to said

plaintiff, for street purposes and being so indebted they the said defendants afterwards to wit on the day and year last aforesaid at to wit the County of Cook aforesaid undertook and then and there faithfully promised the said plaintiff to pay to him the said sum of money when they the said defendants should be thereunto afterwards requested;

And whereas also the said Defendants heretofore to wit on the day and year and at the place last aforesaid accounted with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said Defendants to the said plaintiff and there being in arrears and unpaid and upon such accounting the said defendants then and there were found in arrears and indebted to said plaintiff in a further large sum of money to wit in the sum of twenty-five thousand dollars and being so found in arrears and indebted to the said plaintiff in consideration thereof afterwards to wit on the day and year and at

the place last aforesaid undertook and then and there promised the said plaintiff to pay to him the said sum of money last mentioned when they the said Defendants should be thereunto afterwards requested.

But the said Defendants not regarding & have not paid the said several sums of money or any or either of them or any part thereof to the said plaintiff (though often requested so to do) but so to do have hitherto refused and still do refuse to the damage of said plaintiff of twenty five thousand dollars and therefore he brings suit &c

Goodrich, Farwell & Smith
Plffs Attys.

Copy of account & claim sued upon.
The City of Chicago

To William Wheeler Dr.	
To damages assessed on land &c for opening La Salle street in said city	\$15,545.00
To money lent	\$15,545.00
To money due & owing	\$15,545.00
To money had & received	\$15,545.00
To account stated	\$15,545.00
To interest on above	\$15,545.00

And afterwards to wit on the sixth day
of April A D 1859 the said City of Chicago
by Henry Anthony Attorney General in
the office of the Clerk of said Court a return
or to said plaintiffs declaration which
said return is as follows to wit

Cook County Court of Common Pleas
of the April Term A.D. 1859.

The City of Chicago } Deft
acts.

William Wheeler } Plff.

And the said Defendants,
by Ghervey & Anthony, its attorneys,
comes and defends the wrong and
injury when &c and says that the
said first count of the said declara-
tion and the matters therein con-
tained in manner and form
as the same are above stated and set

facts are not sufficient in law for the said Plaintiff to have or maintain his aforesaid action thereof against the said Defendant and it the said Defendant is not bound by law to answer the same.

And this it is ready to verify wherefore, by reason of the insufficiency of the said first count of the said declaration, in this behalf, the said Defendant prays judgment, and that the said Plaintiff may be barred from having or maintaining his aforesaid action thereof against it &c.

Crocker, Theron & Anthony
Attys for Deft.

And the said Defendant, as to the said second and third counts of the said declaration by Theron & Anthony its attorneys, comes and defends the wrong and injury when &c and says that it did not undertake and promise in manner and form as the said Plaintiff hath above thereof in his said second and third counts complained against it and of this it puts itself upon the country &c.

Crocker, Theron & Anthony
Attys for Deft.

And afterwards to wit on the Seventh day
of October A.D. 1857. the said Plaintiff filed
in said Court his petition to said Defendants
demurer, which said petition is as follows
to wit,

Superior Court
William Wheeler

vs

The City of Chicago.

And the said Plaintiff says
that the said first Count of said
Declaration and the matters therein
contained in manner and form as the
same are above stated and set forth are
sufficient in law for him the said plain-
tiff to have and maintain his aforesaid
action thereof against said Defendants
and the said plaintiff is ready to verify
and prove the same as the Court here
shall direct and award, wherefore in as
much as the said defendant has not
answered the said first count of
said declaration nor hitherto in any
manner denied the same the said
plaintiff prays judgment ^{and his damages} by reason
of the not performing of the said

promise and undertaking in said
declaration mentioned to be adjudge
to him &c

Farwell & Smith

Plffs Atty.

And afterwards to wit on the twenty
fifth day of February A D Eighteen Hun
dred & Sixty, said day being one of the days
of the February term of said of said Court,
the following proceedings were had in
said Court and entered of Record to
wit,

William Wheeler

City of Chicago. ^{vs} Applicant

This day comes said plain
tiff by Farwell Smith & Thomas his Attorneys
and said Defendant by Kenney & Anthony
Attorneys, and Plaintiff withdraws all the
Counts in his Declaration but first Count,
and the Defendant having filed Answer
to said first Count of plaintiffs Declaration,
and being argued by counsel, and the Court
being freely advised, sustains the demur
er to said first Count, and plaintiff elects

to stand by his remaining first Count in
Declaration

Therefore it is considered that said
Defendant recover of said plaintiff its Costs
and Charges in this behalf expended on Dem-
urer and have execution therefor

State of Illinois
County of Cook, J.S.

I Walter Kimball Clerk
of the Superior Court of Chicago in & for the
County & State aforesaid do hereby certify
that the foregoing transcript contains a true
copy of the pleadings filed and of the
Order and Judgment of the Court in the
Case of William Wheeler vs City of Chicago

In Testimony whereof I hereunto
set my Hand and affix the
Seal of said Court at Chicago
in said County this 7th Day
of March A.D. 1860

Walter Kimball
Clerk

Supreme Court
William Wheeler

vs
The City of Chicago

And now comes the said
William Wheeler plaintiff by
Hornell & Smith his attorneys
and says that in the record
and proceedings aforesaid
and also in the giving the
judgment aforesaid there
is manifest Error in this
1st

The Court below Erred in
sustaining the demurrer to said first
Cause of said Declaration and
in rendering Judgment in favor
of the Defendants below upon
the issue of law formed by said
demurrer and Joinder
2nd

The said Judgment rendered
in said Court is erroneous
and contrary to law

Hornell & Smith
attys for Plff

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William Wheeler

City of Chicago

Transcript

Filed March 19. 1860
L. Leland
Clerk

Samuel Smith &
Thomas. Patts
Fees Drang Recd. of 4.00