

New Jersey Court of Errors and Appeals.

OWEN MCFARLAND, *Complainant,*

and

THE ORANGE AND NEWARK HORSE CAR
RAILROAD COMPANY, *Defendants.*

Bill for Injunction.

Filed April 14, 1860.

~~On the foregoing bill an Injunction issued April 14, 1860.~~

*To the Honorable Henry W. Green, Chancellor of the State of
New Jersey :*

Humbly complaining sheweth unto your Honor your Orator, Owen McFarland, of the city of Newark, in the said State, that your Orator does business and resides in the said city, and that he is seized and possessed of two tracts or parcels of land fronting on Market street in said city, the one situated on the corner of Lawrence street and said Market street, and fronting sixty-one feet on said Market street, on which he caused to be erected a few years since a large and expensive brick building, four 10 stories high, and fronting sixty-one feet on said Market street, in part of which he now carries on an extensive manufactory of saddlery, the other parts of said building being occupied by other persons, under him, for other manufacturing and business purposes—the said building being situated between Mulberry street, in said city, and the depot of the New Jersey Railroad and Transportation Company; and the other tract or parcel of land situated on the said south side of said Market street, between Broad street, in the said city, and the said Mulberry street, on which is the dwelling house, fronting on Market street, 20 in which your Orator resides—the said last mentioned tract or lot of land fronting twenty-four feet on the said Market street.

And your Orator further shows unto your Honor, that by an act of the Legislature of this State, approved March fifteenth,

A. D. eighteen hundred and fifty-nine, William Pierson, Benjamin F. Barrett, and others in said act named, and such other persons as might thereafter be associated with them, were constituted and made a body politic and corporate, by the name of "The Orange and Newark Horse Car Railroad Company," and were made capable of purchasing, holding, and conveying any lands, tenements, goods and chattels whatsoever necessary or expedient for the objects of the said corporation; the third section of which act enacts, that the persons named in the said act, 10 or a majority of them, shall be commissioners to open books to receive subscriptions to the capital stock of the said company; and the fourth section of which act enacts, that as soon as the sum of twenty-five thousand dollars of the capital stock is subscribed for, the said company shall be organized by the said commissioners, who shall be the first directors of the said company, and continue such directors until such time in the year eighteen hundred and sixty as the said company, by their by-laws, may appoint for the annual election of directors; and that the said directors, as soon as may be convenient after said sum 20 is subscribed, and the directors chosen at every annual election of said company, shall choose out of their own number a president, who shall be a resident of this State: that by the seventh section of the said act it is enacted in the words following: "That the president and directors of the said company be and they are hereby authorized and invested with all the rights and powers necessary and expedient to survey, lay out and construct a railroad from some suitable point in the township of Orange, in the county of Essex, to some suitable point in Orange street, or some street north of said street, or south of Market street, in 30 the city of Newark, with one or more branches in the township of Orange, and to locate and construct said railroad not exceeding one hundred feet in width; and it shall be lawful for the said president and directors, their agents, engineers, superintendents and others in their employ, to enter at all times upon lands for the purpose of exploring, levelling, surveying and laying out the route of such railroad and of locating the same, and to make and erect all necessary works, buildings and appendages thereof, doing no unnecessary damage to private property; and when the route and location of said railroad shall have been determined upon, and a survey thereof deposited in the office of the 40

Secretary of State, then it shall be lawful for said company, by its officers, agents, engineers, superintendents, contractors, workmen, and other persons in their employ, to enter upon, take possession of, hold, use, occupy and excavate any such lands, and to erect embankments and all other necessary works thereon, and to lay rails and to do all other things which may be suitable and necessary for the completion or repairs of the said railroad and to carry into full effect the objects of this act, subject to such compensation, and upon such terms, as are hereinafter provided for." And that by the eighth section of the said 10 act it is enacted in the words following: "That if the said railroad shall be located on any public street or highway, except for the purpose of crossing the same, in the city of Newark, the said company shall not lay any rails along said street or highways, nor commence the work for the purpose, without first obtaining the permission of the common council of said city, upon such conditions and restrictions as the said common council may designate, to lay the same; and if the said railroad shall be located upon any public highway, except for the purpose of crossing the same, in the township of Orange, the said company shall 20 not lay any rails along such highway without first obtaining the consent, in writing, of the township committee, surveyors of the highways and chosen freeholders of said township, or a majority of them, to lay the same, which consent shall be filed in the office of the clerk of the county of Essex; and the said railroad and the rails thereof shall be constructed in such manner, and of such size and pattern, as to impair as little as possible the ordinary travel in any street or highway in which the said road may be located, and that the track of said road shall be restricted to the run or track of wagons as now established by law of 30 this State." That the ninth section of the said act provides for the appointment of commissioners to examine and appraise the land of any owner required for the said road with whom the said company cannot agree for the use or purchase thereof, and the land of any owner so required who is legally incapacitated or absent, and to assess the damages, and to make just and equitable appraisal of the value of such lands, and an assessment of the damages to be paid by the said company, taking into consideration all the benefits to be derived from or in consequence of said railroad, as the case may be, to such owner or owners. 40

That the tenth section of the act gives an appeal from the report of the said commissioners to the circuit court of the county of Essex, which court is empowered to direct a proper issue and to order a jury and a view of the premises, and making it the duty of the jury to assess the value of the said land and the damages sustained. That by the twelfth section of the said act the said road authorized thereby is declared a public highway, and free for the passage of any railroad carriage thereon with passengers or property, upon payment of the tolls prescribed by
 10 the said act, provided that the said carriages shall conform to those used by the company, and be regulated as to the time of starting and running and rates of traveling by the said company, in the same manner as the carriages of the company are. That by the fourteenth section of the said act it is enacted "that the said company may purchase, have, hold and occupy such real estate at or near the commencement and termination of said road, and at such points along the line of said road, as may be necessary for the convenient transaction of business, not exceeding five acres in each place, and may erect and build thereupon
 20 depots, warehouses, and such other buildings and improvements as they may deem expedient for the safety of their property and the necessary use appertaining to their business."

And your Orator further shows unto your Honor, that the said Market street in the city of Newark, from Broad street to the depot of the New Jersey Railroad and Transportation Company, is the most crowded thoroughfare of the city of Newark for carriages, omnibuses and wagons of all kinds, and transportation wagons for transporting manufactured articles and large boxes containing bulky manufactures to New York, and for
 30 bringing goods from New York to Newark, the said street leading not only to the depot of the New Jersey Railroad and Transportation Company, but also to the plank road from Newark to New York, and that there are several large manufacturing establishments fronting on the said Market street, between Broad street in Newark and the depot of the said New Jersey Railroad and Transportation Company. And your Orator further saith, that he manufactures largely of harness for transportation to New York, to be thence shipped to different parts of the United States; and the said manufactures are loaded on transportation
 40 wagons backed up to the curb-stone at the sides of the wagon

road in front of his manufactory and of the said other manufactories fronting on the said Market street, between Broad street and the said depot, for the loading of the manufactures of the said other manufactories, the manufactures of which are sent to New York by transportation wagons, except that your Orator frequently loads in Lawrence street, and the goods brought from New York to Newark on transportation and express wagons to be unloaded at the depots of express companies, of which there are several between Broad street in Newark and the said railroad depot of the New Jersey Railroad and Transportation Com-10 pany, are unloaded by backing the said wagons to the curb-stone between the wagon-way and the side-walk. That the width of said Market street between the curb-stones is but forty-four feet. That the said the Orange and Newark Horse Car Railroad Company have commenced laying down rails in said Market street, between Broad street and the depot of the said New Jersey Railroad and Transportation Company, and have laid one track on a part of the said street, the line of which is but fourteen feet from the curb-stone on the south side of said Market street, your Orator's said manufactory and his said dwelling house be-20 ing on the south side of said Market street; the said company proposing and being about to lay on the other side of the wagon way in said Market street, at the same distance from the curb-stone on that side, rails for another track of their said railroad; and your Orator sheweth, that fourteen feet between the curb-stone and the iron rail laid and being about to be laid in said Market street, is an insufficient distance for the said transportation and express wagons to stand backed up to the said curb-stones to load and unload, and that the said railroad as proposed to be laid will be not only a private injury or nuisance to him, 30 as the owner of said manufactory and dwelling house, but a public nuisance, in his judgment, to all the inhabitants doing business or residing upon the said street.

And your Orator further shows unto your Honor, that he is advised and believes that no act of the Legislature of this State has ever been passed, or ever applied for, for the construction of any railroad of any kind on and along the said Market street in the city of Newark, and that the said act of the Legislature, incorporating the said the Orange and Newark Horse Car Railroad Company, does not give to the said company any authority 40

whatever to construct a railroad on and along the said Market street, but expressly confines the said company to a termination of their said railroad in Newark at some suitable point in Orange street, or some street north of said street or south of Market street, in the city of Newark.

All which actings and doings of the said the Orange and Newark Horse Car Railroad Company are contrary to equity and good conscience, and tend to the manifest wrong and injury of your Orator.

- 19 In tender consideration whereof, and forasmuch as your Orator is without remedy in the premises except in this Honorable Court, where matters of this nature are properly cognizable and relievable. To the end, therefore, that the said the Orange and Newark Horse Car Railroad Company may make in the manner required by the practice of this Court, full, true, direct and perfect answer to all and singular the matters hereinbefore stated and charged, and that in the meantime an injunction may be issued out of this Court restraining the said company from further proceeding in the laying of the said railroad on and along the
20 said Market street in the city of Newark, until the further order of this Court. May it please your Honor, the premises considered, to grant unto your Orator not only the State's writ of injunction, issuing out of and under the seal of this Honorable Court, to be directed to the said the Orange and Newark Horse Car Railroad Company, restraining them, their agents and workmen from further proceeding in the laying of any rails for a railroad on and along said Market street in the city of Newark, but also the State's writ of subpoena, to be directed to the said the Orange and Newark Horse Car Railroad Company, com-
30 manding them at a certain day, and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer the premises, and to stand to, abide and perform such decree as to your Honor shall seem meet. And your Orator, as in duty bound, will ever pray, &c.

O. S. HALSTED,

Solicitor and of Counsel with Complainant.

New Jersey, ss. :

Owen McFarland, the complainant in the foregoing bill, being duly sworn, on his oath saith, that the facts, matters and things therein set forth, so far as they relate to his own acts and deeds are true, and so far as they relate to the acts and deeds of any other person or persons, he believes them to be true.

OWEN MCFARLAND.

Sworn and subscribed at Newark, this 14th day of April, A. D. 1860, before me.

GEORGE B. HALSTED, 10
Master in Chancery.

On the bill in Disjunction very replied, Apr. 14, 1860

IN CHANCERY OF NEW JERSEY.

The Orange and Newark Horse Car
Railroad Company, defendants,

and

Owen McFarland, complainant.

Answer.

Filed April 26, 1860.

The Answer of the Newark and Orange Horse Car Railroad Company, defendants, to the Bill of Complaint of Owen McFarland, complainant.

These defendants now and at all times hereafter saving and 20
reserving to themselves all manner of benefit and advantage of
exception to the many errors and insufficiencies in the complain-
ant's said bill of complaint contained, for answer thereto, or unto
so much and such parts thereof as these defendants are advised
is necessary for them to make answer unto, they answer and say
that they admit that the said complainant resides in the city of
Newark, in the State of New Jersey, and that he is seized and
possessed of two tracts or parcels of land, fronting on Market
street, in said city of Newark, and that they are situated as in
said bill stated, and that there are buildings on the same and 30

which are occupied as in said bill stated, and that the said complainant carries on an extensive manufactory, as in said bill stated, and that the dwelling house of said complainant, and in which he resides, is situated as is stated in said bill.

And these defendants further answering admit, that by an act of the Legislature, approved March fifteenth, eighteen hundred and fifty-nine, William Pierson, Benjamin F. Barrett, and others, were constituted a body politic and corporate, by the name of "The Orange and Newark Horse Car Railroad
10 Company;" and that the powers and privileges of these defendants, the said Orange and Newark Horse Car Railroad Company, as set forth in said bill, were by said act granted to these defendants, and that the several sections of said act, so far as the same are in said bill set forth, are as in said bill stated.

And these defendants further answering admit, that Market street, in said city of Newark, from Broad street to the depot of the New Jersey Railroad and Transportation Company, is the most crowded thoroughfare of the city of Newark for carriages, omnibuses and wagons of all kinds, as in said bill stated; and
20 that the complainant manufactures harness largely for transportation, as in said bill stated, and that said manufactures are loaded in transportation wagons, backed up to the curb-stone at the side of the wagon road in front of the complainant's manufactory and of other manufactories fronting on Market street, as in said bill set forth, and that the said manufactures are sent to New York and other goods are brought from New York to Newark, as in said bill stated, and that the same are unloaded as in said bill stated.

And these defendants further answering, deny that the width
30 of said Market street, between the curb-stones, is only forty-four feet, as in said bill stated; but these defendants say that the width of said street, between the curb-stones, varies from forty-four to fifty-nine feet; and that in front of the manufactory of the complainant the said Market street, between the curb-stones, is forty-four feet, and that in front of the dwelling house of said complainant and in which he resides, the width of Market street, between the curb-stones, is fifty-nine feet.

And these defendants further say, that these defendants, by virtue of the power and authority vested in them by the afore-
40 said act of the Legislature of the State of New Jersey, located

their railroad in said Market street from its junction with South Orange Avenue, running easterly along the centre of said Market street to its junction with Alling street, and thence running southerly along the centre of Alling street to a point in said Alling street fifty feet south of Market street, and the said Market street being a public street of said city of Newark, and that said Market street is in the route between the beginning point of their said road in Orange and the point of termination of said road south of Market street; and the common council of said city, by an ordinance entitled "An ordinance to authorize the 10 Orange and Newark Horse Car Railroad Company to lay down tracks in the said city of Newark," approved November seventh, eighteen hundred and fifty-nine, did empower these defendants to lay down a double track for a Horse Car Railroad in the middle of the street from the Market street depot of the New Jersey Railroad and Transportation Company, through Market street to South Orange Avenue; and these defendants, on or about the fifth day of April, instant, did commence laying down rails in said Market street at its junction with Alling street, near the Market street depot of the New Jersey Railroad and Transpor- 20 tation Company, and between said depot and Broad street, which is between said depot and the South Orange Avenue, as by the said act and said ordinance of said common council they had full right and lawful authority and permission to do; and that these defendants have laid one track on a part of said street, on the south side of said Market street, and that in some parts of said Market street, where it is narrowest, the said railroad is but fourteen feet from the curb-stone, but in other parts of said street it is twenty feet six inches, and that these defendants propose and intend, pursuant to the provisions of the aforesaid or- 30 dinance of the common council, to lay another track on the north side of said Market street, at the same distance from the curb-stone on the north side of said street as on the south side of said street. And these defendants further answering say, that the said track already laid, and the track proposed and intended to be laid, are as near the centre of said Market street as it is possible to lay them to be used with safety for cars to run on them, the same being laid two feet six inches from the centre of said street, and the said track is five feet two inches wide.

And these defendants further answering say, that the rail laid 40

by them in Market street, and which they have procured and intend to lay in the remainder of the track in said street, is of a pattern that will not in any manner or degree materially hinder or obstruct the passage of carriages, wagons or vehicles of any kind across or along or upon the same, but on the contrary will facilitate the passage of all such vehicles that have a corresponding track; and that said railroad, or the running of cars upon it, will not impede or obstruct the ordinary travel on said street, or the use of it for travelling thereon, any more than the
 10 like quantity of cars or the same number of vehicles passing over said street, without iron rail tracks, would obstruct or impede the travel on said street.

And these defendants further answering say, that if the said distance between the said rails and the curb-stones on either side of said Market street is insufficient for transportation and express wagons to stand backed up to the said curb-stone to load and unload, it is no sufficient reason to restrain these defendants from constructing the said double track, as by law and said ordinance they are authorized to do. And these defendants fur-
 20 ther answering, deny that the said railroad, as proposed to be laid in said Market street, will be a private injury or nuisance to the complainant as the owner of said manufactory and dwelling house, or either of them; but these defendants charge that the said railroad, as proposed to be laid, will be a benefit and advantage to the said complainant as such owner.

And these defendants further answering, deny that the railroad as proposed to be laid in said Market street will be a public nuisance to all or any of the inhabitants doing business or residing upon said Market street; but these defendants charge
 30 that the same will be a benefit and advantage to said inhabitants, by giving increased facilities to do business and diminishing the number of omnibuses running in said street, and causing said street to be less crowded with vehicles, and making said street more quiet and pleasant for said inhabitants.

And these defendants further answering, say that an act of the Legislature of this State has been passed for the constructing of a railroad in said Market street, and that the act of the Legislature, incorporating these defendants as a company, did give authority to these defendants to construct a railroad in and
 40 along said Market street or any other street of said city in which

these defendants should obtain the permission of the common council of said city to lay the rails for the same, with the termination of said railroad at a point in some street south of Market street, which point these defendants have designated to be a point in Alling street, fifty feet south of Market street.

And these defendants further answering, say that in laying the said rails in said Market street, as proposed by these defendants, the said complainant is not deprived of any use or enjoyment of said Market street as a public highway to which by law he is now entitled, and that the inhabitants doing business 10 or residing upon said Market street are not, nor are any or either of them, by laying said rails as proposed by these defendants, deprived of any right in or use or benefit of said Market street as a public highway to which they are lawfully entitled.

And these defendants deny all unlawful combination, &c.

DAVID A. HAYES,

Solicitor and of Counsel with Defendants.

The Orange and Newark Horse Car Railroad Company, [L. S.]

WILLIAM PIERSON, *President.*

Sworn to by William Pierson, President, on the 26th of April, 20 1860, before me.

WM. B. GUILD, Jr., *M. C.*

IN CHANCERY OF NEW JERSEY.

Owen McFarland, complainant,

and

The Orange and Newark Horse Car Rail-
road Company, defendants.

} *Order dissolving
Injunction.*

The motion to dissolve the injunction granted in this cause having been regularly argued upon the bill and answer filed by Oliver S. Halsted, senior, Esquire, on the part of the complain- 30

ant, and by David A. Hayes and Abraham O. Zabriskie, Esquires, of counsel with said defendants, and the Chancellor having duly examined and considered the same, and being of opinion that the injunction ought to be dissolved, it is on this eighth day of May, in the year of our Lord one thousand eight hundred and sixty, on motion of David A. Hayes, of counsel with said defendants, ordered, adjudged and decreed by the Chancellor that the said injunction be dissolved, with costs.

HENRY W. GREEN, C.

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COURT OF ERRORS AND APPEALS.

Between

Owen McFarland, appellant,

and

The Orange and Newark Horse Car
Railroad Company, appellees.

On Bill for Injunction.

Petition of Appeal.

To the Honorable the Court of Appeals in the last resort, &c.

The humble petition of Owen McFarland, the appellant in the above stated cause, respectfully shows, that your petitioner finds himself aggrieved by an order or decree made in the Court
20 of Chancery by his Honor Henry W. Green, Chancellor of New Jersey, bearing date the eighth day of May, one thousand eight hundred and sixty, in the said cause, wherein the said Owen McFarland was complainant and the said the Orange and Newark Horse Car Railroad Company were defendants, in this respect, to wit: that the said order or decree orders, adjudges and decrees that the injunction theretofore granted in the said cause in the Court of Chancery, be dissolved, with costs, &c. And your petitioner humbly appeals from the said order or decree of the Chancellor which orders, adjudges and decrees as aforesaid,
30 and from every part thereof, upon the ground that the same and every part thereof is erroneous, for that the said injunction ought not to have been dissolved.

Your petitioner therefore prays that the said order or decree of the said Chancellor may be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

O. S. HALSTED,

Solicitor and of Counsel with the Appellant.

Dated May 12, 1860.

CHANCELLOR'S OPINION.

Owen McFarland, complainant,

and

The Orange and Newark Horse Car Railroad Company, defendants.

} *On motion to* 10
dissolve Injunction.

The whole equity of the complainant's bill rests upon the ground that there was no authority for the location of the railroad in or through Market street, in the city of Newark. If the company were authorized by their charter to locate and construct their road through that street, if its construction there was authorized by law, it could be no nuisance, nor was the injury it occasioned to the complainant of a character which entitled him to relief by injunction.

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The injunction was originally granted on the assumption that the charter of the company, by necessary implication, if not in express terms, excluded the road from being located in or through Market street. Upon a careful examination of the charter, I am satisfied that there is no ground for this opinion. The language of the act (Sec. 7,) is as follows: "The president and directors of the said company be and they are hereby authorized and invested with all the rights and powers necessary and expedient to survey, lay out and construct a railroad from some suitable point in the township of Orange, in the county of Essex, to 30 some suitable point in Orange street, or some street north of

said street or south of Market street, in the city of Newark." This enactment relates not to the *route*, but to the termination of the road. Its design was not to exclude the line of the road but its terminus from the district included between Market and Orange streets. Whether the language be confined to fix the terminus at a *point* south of Market street, or at some point in a *street* south of Market, is immaterial. In either event the statute is complied with. It appears by the answer that although the line of the road is through Market street, its terminus is a *point* 10 and in a *street* south of Market street.

There is authority both from the Legislature and from the corporate authorities of Newark to construct the road in its present location.

The injunction must be dissolved, with costs.

