

Statement of the case.

VAN HOSTRUP v. MADISON CITY.

1. An authority to a city to take stock in any chartered company for making "a road or roads to said city," authorizes taking stock in a road between other cities or towns, from the nearest of which to the city subscribing there is a direct road; the road in which the stock is taken being in fact a road in extension and prolongation of one leading into the city.
2. Where authority is given to a city to take stock in a road, *provided* the act be "on the petition of two-thirds of the citizens," this proviso will be presumed to have been complied with where the bonds show, on their face, that they were issued in virtue of an ordinance of council of the city making the subscription; the bonds being in the hands of *bonâ fide* holders for value. In the case before the court the minutes of council recorded that the citizens, "with great unanimity," had petitioned.

ERROR to the Circuit Court for the District of Indiana.

The suit was brought in the court below against the city of *Madison*, in Indiana, for moneys due upon coupons attached to certain bonds issued by the city authorities, signed by the mayor and the city clerk, and to which was affixed the seal of the corporation, by which the city acknowledged, that in virtue of an ordinance of the Common Council, passed 2d September, 1852, it owed and promised to pay the president of the *Columbus and Shelby Railroad Company*, or bearer, \$1000, redeemable on the 1st of November, in the year 1872, with interest at the rate of six per cent. per annum, semi-annually, on the first days of May and November of each year, from the date of the bonds, at the banking house of Winslow, Lanier & Co., in the city of New York.

These bonds were negotiated and put into circulation by the *Columbus and Shelby Railroad Company*, and purchased in the market by the plaintiffs, *bonâ fide*, and for a valuable consideration. They had been issued to the railroad company for stock subscribed in *that* company by the city of *Madison*, aforesaid.

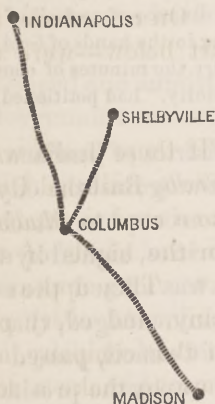
As respected the authority of the city to subscribe, it appeared that one section of its charter* authorized it "to take

* § viii, subdivision 38.

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stock in any chartered company for making a road or roads to said city, *provided*, that no stock shall be subscribed, &c., unless it be *on the petition of two-thirds of the citizens* who are freeholders, &c., and *provided*, that in all cases where stock is taken, the Common Council shall have power to borrow money," &c.

At the time when the subscription to the Columbus and Shelby road was made and the bonds issued, a railroad called the Madison and *Indianapolis* Railroad, a road leading from



Indianapolis, in the interior of the State, to Madison, was in operation, and brought down from one part of the interior where Indianapolis is, to Madison, on the Ohio River, the products of the State. This road passed *through* Columbus. The Columbus and *Shelby* Company (the company to which the subscription was made), was organized to construct a road from Columbus to Shelby County, terminating at Shelbyville. *But Columbus was forty-six miles from Madison*; Shelbyville being about twenty-three north of it. Through

Columbus, and by means of the connection with the Madison and *Indianapolis* road, the Columbus and Shelby road did lead to Madison and nowhere else; though if regarded as an independent and isolated road, and as one between Shelby and Columbus only, it could not be said to be a road to the city designated. The diagram will elucidate the matter.

As respected the required "petition of two-thirds of the citizens," the matter rested apparently upon an entry on the minutes of the City Council, which stated that "the freeholders of the city of Madison, *with great unanimity*, had petitioned," &c.

The defences set up by the city, were "that the bonds were issued to the Columbus and Shelby Railroad Company, to pay for a subscription by the city to the capital stock of the *said* railroad company, and for no other consideration;

Argument for the City.

that the said Columbus and Shelby Railroad Company was not a chartered company for the purpose of making a road to the city of Madison aforesaid, but to make a road from Columbus to Shelbyville, the nearest terminus of said road being forty-six miles distant from Madison."

2. That the bonds were issued without the petition or memorial of two-thirds of the freeholders of said city requesting the Common Council to take the stock and issue the bonds.

The court below gave judgment in the case, which was upon the pleadings wholly, for the city. On error here, the validity of the defences—as in the court below—were the points in issue.

Mr. Johnson, for the city of Madison: If these bonds were issued, as alleged, to the *Columbus and Shelby* Railroad Company;—a company not chartered to make a road to *Madison*, but to *other* points,—they were void in the hands of said railroad company when delivered to it.* They appear on their face to be issued to such company, and every person must take notice of the charter of that company, and must know that it is a chartered company to make a road to Madison, because such charter is a part of the law of the land, and because it is the very thing that is required to exist to enable the city of Madison to act. Parties dealing with a corporation must know that the facts exist upon which its power to act is founded. The city of Madison, without special authority from the legislature, has no power to subscribe for stock in railroad companies. It cannot compel the citizens to become parties or stockholders in private corporations, nor pledge or incumber the individual property of the citizens in speculative undertakings. Its powers are only coextensive with its duties. The Common Council may borrow money for the special purposes of the trust and authority intrusted to them, and may levy taxes to raise money for these purposes, but none other.†

* *Commonwealth v. Erie, &c., Railroad*, 27 Pennsylvania State, 339.

† *Beatty v. Knowler*, 4 Peters, 153; *Sharp v. Speir*, 4 Hill N. Y., 87;

Argument for the creditor.

If the city of Madison may subscribe to a road whose nearest terminus is forty-six miles away from it, because *another* road leads from that terminus to the city, it may subscribe not only to a road in parts of Indiana the most distant from Madison, but to roads in the most distant parts of the United States. It may build a road between any towns in California, provided only, that any other road or series or concatenation of roads exists by which a traveller can get from either terminus of that California road by rail, to Madison. It is easy to see how capable of abuse is such a power.

There is no sufficient evidence of a "two-thirds" petition. The expression, "great unanimity," is loose. It is impossible to say, in reference to the population of a city, what it means. Whatever it may mean, it is no record of that fact which the act authorizing the subscription declares must pre-exist, and is therefore valueless.

Messrs. Porter and Roelker, contra :

1. In *La Fayette v. Cox* (5 Indiana, 38), it was held that the city had no power, under any circumstances, to subscribe for railroad stocks. In *City v. West* (9 Id., 74), that city had a power as this one has, "to take stock in any chartered company for making roads to the city." The Ohio and Mississippi Railroad Company was chartered to make a road between Lawrenceburgh and Vincennes, and to extend east to Cincinnati, and west to St. Louis. The city of Aurora, some five miles below Lawrenceburgh, on the Ohio River, was not mentioned in the charter; but the road was located *through* Aurora, and it was held that the city might subscribe for its stock as a road to the city. The court say, "This case is entirely different from that of *Lafayette v. Cox*. There the charter did not confer the power to take stock, but it was attempted to be inferentially derived. Here the power is expressly granted, and the question is merely whether the road in which the stock was subscribed is one contemplated by the charter."

The geographical facts within the cognizance of the court,

Graves v. Otis, 2 Hill N. Y., 466; People v. Goodwin, 1 Selden, 568; La Fayette v. Cox, 5 Indiana, 38; Rex v. Sutton, 4 Maule & Selwyn, 546.

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will not enable it to say, that the judgment of the people of Madison, in attempting to make the counties with which this road brought them into direct connection, tributary to the commercial and manufacturing interests of their city, was erroneous.

The city would undoubtedly have been authorized to take stock in a company for building a road from Shelbyville directly to the city line. But this would have secured her no greater commercial advantages, and would have involved a useless outlay of capital, since two-thirds of such a road must have run alongside the Madison and Indianapolis Railroad, already in operation. May not the city use the economical discretion that a natural person might? Must she pay three dollars instead of one, that the road to which she subscribes may fall within the *literal* description of the roads to which her privilege extends? Hills of solid rock surround the city of Madison. Did the legislature contemplate that the city should aid in making no roads except such as *unnecessarily* cut through them?

2. The City Council was the proper judge whether or not the required number of resident freeholders had petitioned for a subscription to the stock of the company to which the bonds were issued.* Conceding that the entry was not in the precise language of the proviso, we nevertheless submit, that the plain implication is, that a greater proportion than two-thirds had petitioned. The entry is, that "the freeholders of the city of Madison, with great unanimity, had petitioned," &c.

Mr. Justice NELSON delivered the opinion of the court:

One point of objection to the bonds is that the Columbus and Shelby Railroad does not, by the terms of its charter or in fact, terminate at the city of Madison; and hence, that the road is not within the description of one in which the city was authorized to take stock.

* *Bissell v. The City of Jeffersonville*, 24 Howard, 287; *Commissioners of Knox Co. v. Aspinwall et al.*, 21 Id., 539; *The Evansville, &c., Railroad Co. v. The City of Evansville*, 15 Indiana, 395

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The words are, "to take stock in any chartered company for making a road or roads to the said city." It is supposed that the authority to subscribe is tied down to a chartered road, the line of which comes within the limits of the city; and that the words are to be taken in the most literal and restrictive sense. But this, we think, would be not only a very narrow and strained construction of the terms of the clause, but would defeat the manifest object and purpose of it.

The power was sought and granted, with the obvious idea of enabling the city to promote its commercial and business interests, by affording a ready and convenient access to it from different parts of the interior of the State, and thus to compete with other cities on the Ohio River and in the interior which were or might be in the enjoyment of railroad facilities. This object and purpose, we think, should be kept constantly in view in giving a construction to the clause in the charter. For while it will operate to prevent a narrow and fruitless interpretation, it will have the effect of guarding against any abuse or unreasonable extension of the power.

We think it quite clear, a subscription to a road wholly unconnected with roads leading to the city, would not be within its fair meaning and intent, but are equally satisfied that a subscription to a road in extension and prolongation of one leading into the city is within it.

It will be admitted if a railroad had been chartered, originally, from the city of Madison to Shelbyville, by the way of Columbus, a subscription to the stock would have come within the very words of the charter, and what difference, in good sense or principle, or with reference to the object and purpose of the clause, is there between that case and the one before us? The object of the subscription in the first was to extend the facilities of railroad communication through the interior between the two towns, the termini of the road. In the second, as a road had already been made to Columbus, and in operation, the intercommunication is accomplished by a subscription to a line from Columbus to Shelby. The

difference between the two cases is simply a dispute upon words.

The terms of the clause do not limit the subscription to one road or to one company, "road or roads in any chartered company." The argument, therefore, against the power rests exclusively upon the effect to be given to the concluding words, "to said city." We have already considered and given our construction of them.

It was strongly argued, that upon this construction great abuses may be committed by the city corporation in subscriptions of stock to remote companies, in which it would have but little, if any, interest or advantage. In the construction of the grant of powers, extreme cases may be suggested against it, which it is difficult to answer. But in the present and kindred cases, something may be trusted to the wisdom and integrity, as well as the interest, of the body appointed to execute the power.

Another objection taken is, that the proviso requiring a petition of two-thirds of the citizens, who were freeholders of the city, was not complied with. As we have seen, the bonds signed by the mayor and clerk of the city recite on the face of them that they were issued by virtue of an ordinance of the Common Council of the city, passed September 2d, 1852. This concludes the city as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds, as has been repeatedly held by this court.

Our conclusion upon the whole case is, that full power existed in the defendants to issue the bonds, and that the plaintiffs are entitled to recover the interest coupons in question. Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and in the hands of *bonâ fide* purchasers for value, we should have felt bound to acquiesce in it.

JUDGMENT REVERSED WITH COSTS, AND CAUSE REMANDED, &c.