se, a nuisance. See, also, Attorney General v. Metropolitan R. R., 125 Mass. 516–518. Indeed, the bill practically admits this, in its lack of averment, and notably in concession that the object sought by the bill is purely the resale of the license to some other corporation, which will pay a larger sum for the privilege now exercised by the defendant. But while admitted that the use of the streets sought to be enjoined is consistent with the public easement of travel, the conclusion is reached that the extension of the easement by the common council being void, as wholly ultra vires the city, the defendant's occupancy of the streets with its tracks, and in the operation of its railway, being therefore unauthorized by law, it is the province and duty of a court of equity to enjoin such use. The only authority cited for this conclusion is Denver v. Denver City Ry. Co., 2 Colo. 673. The case cites Davis v. Mayor, 14 N. Y. 525, which, in its turn, cites several authorities holding that the unauthorized obstruction of the public highway is a nuisance,—a proposition which, in the abstract, no one will question. Nor is it denied that, in a proper case, equity will enjoin the continuance of such an obstruction. But in this state it is held that a public nuisance must be something that subjects the public to inconvenience or annoyance. The mere use of the street does not make out the offense. People v. Carpenter, 1 Mich. 273; Clark v. Ice Co., 24 Mich. 508; Attorney General v. Evart Booming Co., 34 Mich. 462; Everett v. City of Marquette, 53 Mich. 450–452, 19 N. W. Rep. 140.

In the latter case the common council had granted complainant a license to construct a railway from the sidewalk down to the basement of his store. Ten years afterwards the council directed the stairway to be removed, and the opening in the sidewalk closed. It was contended on the part of the city that the common council had no power to give permission for the permanent appropriation of any one of the public streets for private purposes. Referring to the permission granted by the first council, Judge Cooley said:

"If the permission was effectual for no other purpose, it at least rebutted any presumption, which might otherwise have existed, that this practical appropriation of the street was, per se, a nuisance. If the permission was a mere license, and the subsequent action of the city council is to be regarded as a revocation of the license, it does not follow that the plaintiff had, by the revocation, immediately been converted into a wrongdoer."

The decree of the court below awarded a perpetual injunction against the city, which the supreme court affirmed. It seems to me impossible to reconcile this case with the conclusion of the circuit judge that the revocation of the ordinance of 1879 by that of March 29, 1892, operated to convert the defendants into wrongdoers, and make them amenable to injunction. To warrant the interposition of a court of equity against unauthorized acts, even at the instance of the state, there must be a tangible grievance,—a substantial invasion of the public right. Attorney General v. Metropolitan R. Co., 125 Mass. 516; Brick Co. v. Foster, 115 Mass. 432–438; Attorney General v. Sheffield Gas Consumers' Co., 3 De Gex, M. & G. 304–320, on appeal 4 Ch. App. 71. It may be said, in

this connection that it admits of grave doubt whether, in its corporate capacity, the city can maintain this bill, under any conditions, to redress a public grievance. Its standing as complainant in the case, where it sought like relief against the occupation of its streets by a railroad company, was characterized "as not by any means clear, upon the authorities." Detroit v. Detroit, etc., R. Co., 23 Mich. 216. See, also, City of Georgetown v. Alexandria Canal Co., 12 Pet. 97.

2. As a bill quia timet, it must fail. Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. Rep. 1129. The second question, of almost equal importance, is, conceding that the city exceeded its powers in granting an extension of the easement in its streets for a period beyond the life of the grantee, will a court of equity relieve either party from the contract? Upon this question the case of St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., 145 U. S. 393, 12 Sup. Ct. Rep. 953, leaves nothing to be said. It is conclusive against the complainant. If, as is claimed, the city acted ultra vires in the extension of the easement granted to the Detroit City Railway Company, and the latter exceeded its chartered powers in accepting the grant, both are in pari delicto, and can have no relief. If the street railway, by mistaken construction of the city's charter, is precluded from compensation for its expenditures, and recovery of the sums paid for taxes, as is held by the circuit judge, is the same mistake of law on the part of the municipality to be made a ground for granting it affirmative relief? The only answer to the case last cited necessarily affirms this strange result, for which I can find no sanction.

3. The construction given to section 34 of the tram-railway act, (which makes the consent of the municipal authorities the condition precedent to the local exercise of its franchises by a street-railway company,) by which it is interpreted as a limitation of the power upon the city to grant, and of the corporation to receive, the easement in question, seems to me an utter perversion of its purpose. Independent of that section, and under the powers conferred by its charter, the city could license the use of its streets by such corporations, the privilege being in furtherance of the purpose of the street, although it could not grant an exclusive right. That section has been thus authoritatively construed:

"The purpose of section 34, in allowing street railways to be organized under it on such terms as should be agreed upon, was to enable the roads and the cities to fix upon some equitable standard of local taxation for municipal purposes." City of Detroit v. Detroit Ry. Co., 76 Mich. 425, 43 N. W. Rep. 447.

This construction of section 34 binds this court. By section 12 of the act of 1855, companies formed thereunder may acquire and sell real and other property for their uses, and the same right is conferred by section 15 of the street-railway act, (chapter 95, 1 How. St. p. 911,) which, by section 29, gives to companies formed under the tram-railway act all the rights, powers, and privileges granted by it. It has not been contended that either of these sections disabled such corporations from acquiring the fee of realty, or the ab-

solute title to any other property. Had it been the purpose of section 34 to restrict the dealings of the company with the municipality, that intent would have been so easy of expression that the absence of a prohibitory or limitation clause is persuasive, per se, that the term as well as the conditions of the easement were committed to the wisdom and integrity of the city authorities, who were vested with the contract power of the city. Putnam v. Grand Rapids, 58 Mich. 419, 25 N. W. Rep. 330. But it is said that, if it be held that the city may grant to a corporation a privilege extending beyond its corporate life, it necessarily follows that it may make a grant in perpetuity. There are several answers to this proposition: (1) This case does not involve the power to make a perpetual grant. The question here is whether the extension of the easement for 16 years, for the considerations received by the city, was a reasonable exercise of the municipal power. It does not follow from the fact that power is liable to be abused that it does not exist. If the power is abused, the remedy is with the legislature. Wiggins Ferry Co. v. City of East St. Louis, 107 U. S. 367, 2 Sup. Ct. Rep. 257; Gilman v. Philadelphia, 3 Wall. 732. (2) The legislature alone can challenge the propriety of the exercise of the power. It has reserved to itself the power to annul, alter, and repeal both the municipal and the corporate charter. Whether the city or its grantee have transgressed their organic acts is solely for the state. If the company acquires more property, or a larger estate, than the legislature has authorized it to receive, the other party to the contract cannot object, when the contract has been perfected by extension. Railway Co. v. Mills, 85 Mich. 648, 48 N. W. Rep. 1007, and cases cited; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. Rep. 336; California State Tel. Co. v. Alta Tel. Co., 22 Cal. 399.

Another argument for the construction that the grant must be limited to the life of the corporation is that such a construction consists with the policy of the state relative to corporations. It has been aptly said of this argument that the supposed policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each varying from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of the statutes. Hadden v. Collector, 5 Wall. 111; Railway Co. v. Phelps, 137 U. S. 536, 11 Sup. Ct. Rep. 168. Again it is said that it is not the function of a court of equity to decide, even upon all the facts in the case, whether the contracting question is or is not a reasonable exercise of the municipal power. That, however, was exactly the question decided by the supreme court in New Orleans v. Steamship Co., 20 Wall. 387. There is no legal obstruction to prevent the court from passing on that feature of the case. Is there any practical difficulty attending the solution of the inquiry? It is a mere question of mathematics,—a schoolboy's problem.

Given an enterprise, the construction, equipment, and operation of a railway for example, for thirty years,—the company to furnish

the funds, and take all the hazards of the business and of remunerative returns, and to pay a prescribed percentage of its gross receipts in return for the license,—is the contract a reasonable one for the grantor of the license, having in mind the amount of the investment required, the equalization of the burdens of municipal taxation among the community, and the increased facilities of cheap transportation? That it may result eventually in large returns to the investors is plainly not a negation of its fairness now. If it fail to prove as remunerative as expected, can the grantee, on that ground, escape his burdens? If acted upon for 14 years, and regarded by both parties as superseding a prior contract and defining their relations, and affirmed by one party as the basis of recovery against the other, by successful litigation, there is no principle, consistent with sound morality, that will permit its reasonableness, or even its constitutionality, to be questioned now, at the suit of the grantor, who seeks, in bad faith, to impugn its own grant. Daniels v. Tearney, 102 U. S. 421. The bill should be dismissed, with costs.

FLAHRITY v. UNION PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1893.)

No. 243.

FEDERAL COURTS—CIRCUIT COURT OF APPEALS—ASSIGNMENT OF ERRORS—TIME OF FILING.

In pursuance of rule 11 of the circuit court of appeals for the eighth circuit, requiring an assignment of errors to be filed with the petition for the writ of error or appeal, and declaring that errors not assigned according to this rule will be disregarded, that court will not review a judgment when the assignment of errors has not been filed until after the writ of error was allowed, nor until more than six months after the judgment was rendered. U. S. v. Goodrich, 54 Fed. Rep. 21, followed.

In Error to the Circuit Court of the United States for the District of Colorado. Affirmed.

Statement by SANBORN, Circuit Judge:

David Flahrity, the plaintiff in error, brought an action against the Union Pacific Railway Company, the defendant in error, to recover for personal injuries alleged to have been caused by the negligence of the defendant. A trial was had, which resulted in a verdict and judgment in favor of the defendant. To reverse this judgment the plaintiff sued out this writ of error. The judgment was rendered July 21, 1892. The writ of error was issued and filed December 6, 1892. The assignment of errors was filed January 24, 1893. No assignment of errors was filed before that date.

A. B. McKinley, (Hugh Butler, on the brief,) for plaintiff in error.

Willard Teller, (H. M. Orahood, E. B. Morgan, and J. M. Thurston, on the brief,) for defendant in error.

Before SANBORN, Circuit Judge, and SHIRAS and THAYER, District Judges.

SANBORN, Circuit Judge, (after stating the facts.) The assignment of errors in this case was not filed until after the writ of