

express the terms and conditions upon which you grant the necessary street rights."

The ordinance under consideration widely departs from the power conferred upon the city by this statute. So far as it consented to the occupation of the streets included within the route described as beginning at the intersection of Main and Gay streets and terminating at the junction of Broad and Jackson, it is in conformity with the power, and valid. The remainder of the grant is in excess of the power of the city. The effort to add to that specific grant the power to occupy every other street within the city, and all which should at any time thereafter be laid out or extended, amounts to nothing more or less than a renunciation of the power of control over the entire streets of the city, and a delegation to the Knoxville Street-Railroad Company of the right to determine which of a medley of streets should be thereafter occupied by it for street-railroad purposes and the routes to be occupied by future extensions of the line actually designated by both charter and ordinance.

To say that the whole of the grant constitutes a route or system is absurd. The grant covers every street, and, if occupied, would result in a railroad upon the four sides of every city square. The city would be covered by a line of railroad having the system of a checkerboard, regardless of the public interest, and in defiance of the public necessity. No community would for a moment tolerate such an unnecessary and harmful obstruction of its streets, and no company could possibly contemplate such a multiplication of parallel lines, crossed at right angles at each cross street by another series of like parallel lines. The clear purpose of this ordinance was to enable the grantee to elect from time to time what streets it would occupy, and what new lines, or extensions of old ones, its interests as a private corporation would justify. To delegate this power to a street-railroad company is wholly inadmissible, violates every principle of public policy, and has no sanction in law. The provision of the statute which we have heretofore cited, providing that "no one of the streets of said city shall be used by said company * * * until the consent of the city authorities has been first obtained and an ordinance shall have been passed prescribing the terms on which the same may be done," is a clear implication that the city authorities shall know what streets the proposed railroad is to occupy, and intelligently determine whether the public interests will thereby be subserved.

This principle, that a municipal government may not delegate its power to determine which of the streets of the city may be occupied by such companies, was lately recognized and applied in a case where the delegation was of much less importance than that here involved. A city ordinance empowered a street-railroad company "to construct any and all necessary curves, sidings, crossovers, and switches that may be required for the proper, safe, and economical operation of the railway." The ordinance was held invalid, as delegating a discretion which the municipal government was itself bound to exercise. *State of New Jersey v. Mayor,*

etc., of Jersey City (Sup. Ct. N. J.; 1894) 30 Atl. 531. In the case of Railway Co. v. Jones, 34 Fed. 579, where the opinion was by Circuit Judge Caldwell, the same question arose upon an ordinance of the city of Pine Bluff, Ark., by which an exclusive right of way was granted to certain named persons for the purpose of constructing and operating a street railroad. The grant was of the right to occupy certain named streets, "and all other streets, within the present and future corporate limits of the city of Pine Bluff, as the parties of the second part think the public necessities require." The ordinance required, as in the case at bar, that a particular line over certain streets should be constructed within a limited time. After this line had been constructed, the city granted a right of way over other streets to Jones. The original grantees sought to enjoin the junior grantee, claiming that their right of way was exclusive, and embraced all the streets in the city. The claim was held invalid, the court holding that:

"The power and duty of determining when and on what streets the public convenience requires street railroads is devolved by law on the city council, and that body cannot refuse to discharge this duty, or devolve it on a street-car company, whose action would be controlled by its own, rather than the public, interest."

The conclusion we reach is that the complainant has no right to occupy the streets in controversy, to wit, Oak, Church, and Central avenue, and that the fragments of track put down upon them, under the circumstances stated heretofore, were unlawfully constructed, and are a nuisance, which the city may lawfully remove therefrom. The injunction was improvidently granted. The case will be remanded, with direction to discharge the injunction and dismiss the bill, with all costs.

On Petition for Rehearing.

(December 8, 1896.)

LURTON, Circuit Judge. These cases are again before us upon a petition to rehear certain points complained of by appellants, and upon an answer of the appellee filed by direction of the court. (1) The court failed to take notice of the fact that Central avenue and Crozier street are one and the same street, the name of Crozier street having been changed to Central avenue since the incorporation of the Knoxville Street-Railroad Company. This change of name does not affect the validity of the easement granted by the ordinance of January 11, 1876, in so far as that ordinance, by reference to the charter, granted a right of way over the disputed route, described in the charter as beginning at the intersection of Main and Gay streets, "and extending thence over said Gay street to Jackson; thence on and over the same to Broad street; thence on and over the same to the point of intersection with Crozier street; thence on and over Crozier to Vine street; thence on Vine to Gay; thence from same to Asylum; thence on same to Broad street; thence on same to its junction with Jackson street." (2) This correction involves a hearing upon certain other defenses which are now said to be applicable to a part of the right of way

on Central avenue between Broad street and Vine street. These defenses were originally made to all the streets upon which complainant claimed a right of way under the ordinance of 1876, which had not been actually occupied by his predecessors in the title prior to the repealing ordinance of 1895. It is urged now that a portion of the right of way on Central avenue between Broad and Vine, being that portion included in the right of way over the route definitely described, has not been actually occupied, and that, although the grant was originally valid, it has now no validity for several reasons, namely: (a) That the fragment of track laid south of Broad on Crozier, September 30, 1895, was laid for obstructive purposes only, and was not such a bona fide prior occupancy as should give it a prior right of occupancy; (b) that, whatever the rights of the Knoxville Street-Railroad Company originally, they have lost by nonuser or by specific and intentional abandonment; (c) that any such right of way has been terminated as to all unoccupied parts of the general route granted by the consolidation of 1889; (d) that the repealing ordinance of 1892 was valid as to any unoccupied part of said line; (e) that the conduct of complainant and his predecessors has been such as to estop him from claiming that any right of way now exists on unoccupied parts of said right of way.

These defenses were mentioned in our opinion, and their consideration reserved. Upon the assumption that Central avenue, as well as Church and Oak streets, were not included within the valid part of the ordinance granting a right of way to the Knoxville Street-Railroad Company, it became unnecessary to pass upon any other question than that arising upon the face of the ordinance of January 11, 1876. Holding that complainant had no street rights, under that ordinance, not included within the designated route sufficiently described by reference to the charter, we declined to consider any other question. These other defenses, in view of the correction now made, should be heard upon their merits, so far as they affect complainant's rights upon the unoccupied part of Central avenue between Broad and Vine streets. The appeal was from an interlocutory injunction. So far as the propriety of that injunction depended upon the validity of the ordinance of January 11, 1876, we were in possession of a complete record, and could do full and final justice by determining the matters of law upon which the street rights claimed under that grant depended. It now appearing that one of the unoccupied streets in controversy is claimed by complainant under the valid part of the ordinance of 1876, it becomes essential, before he shall be adjudged to now have a valid right to occupy that street, that each of the other defenses should be heard and disposed of upon its merits. The prima facie right of the complainant to occupy Central avenue between Broad and Vine streets is an ascertained right, resulting from the validity of the grant under which it is claimed. Whether or not that grant has been lost depends upon a great variety of facts, which can only fully appear after proof has been taken. No such abuse of discretion appears as would justify an entire dissolution of the temporary injunction granted pendente lite, and the record is not in

such a condition as to justify a final disposal of the questions of fact upon which the ultimate rights of the parties must depend. *Thompson v. Nelson*, 18 C. C. A. 137, 71 Fed. 339. What we have said as to any unoccupied portion of Central avenue applies equally to any unoccupied portion of any other street included within the valid general route. If there be any such unoccupied portion of such street, the defendants are at liberty to present any defense to a present claim of right of way thereon not inconsistent with the questions actually decided. We did not undertake to pass upon any question in respect of the validity or construction of the charter of the Citizens' Street-Railway Company, or upon the extent and validity of any ordinance under which it claims street rights. Neither did we, nor do we now, intimate any opinion touching any rights of way claimed by complainant under other ordinances, either to him or to any predecessor in title, or as to any rights of occupancy dependent upon limitation or matter of estoppel. All such questions are reserved until final hearing.

The reopening of the cases seems necessitated by the discovery of the identity of Central avenue and Crozier street, and by the fact that an insignificant portion of Central avenue is not under the actual occupancy of complainant. The former direction to dismiss complainant's bill must be retracted. The causes will be remanded, with directions to dissolve the injunction, except in so far as it operates to restrain defendants from interfering with any tracks or other equipment belonging to complainant, pending this litigation, upon any part of the right of way under the ordinance of 1876 held by this court to have been validly granted. The causes will be remanded for such further proceedings as may not be inconsistent with this opinion. Each party will pay its own costs of appeal. The costs below will abide the final decree.

SOCIETY OF SHAKERS v. WATSON et al.

(Circuit Court of Appeals, Sixth Circuit. December 8, 1896.)

No. 422.

1. **BILL OF REVIEW—AFFIRMED DECREE—APPLICATION TO APPELLATE COURT.**
An application for leave to file a bill of review after the decree has been affirmed is properly made to the appellate court.
2. **SAME—NEWLY-DISCOVERED EVIDENCE—IMPEACHING WITNESSES.**
The discovery of new evidence, or of new witnesses, impeaching witnesses upon the original hearing, or for the purpose of showing subornation or perjury of such witnesses, is not generally regarded as a sufficient ground for allowing a bill of review. And this is especially the case where the credibility of the witnesses was directly put in issue at the original hearing.
3. **SAME—CUMULATIVE EVIDENCE.**
Where the newly-discovered evidence does not consist of documents or other irrefragable evidence, but in the mere cumulation of witnesses to a fact once litigated, permission to file a bill of review should rarely be allowed. The new evidence, if cumulative merely, should be very clear, highly pertinent, and so well proven as to be controlling in its influence.