will be considered as having been waived. At any rate it would be immaterial error, if it was error at all, because the answer was not relied on, and no evidence offered under it. Counsel treat this case as one of homestead entry, but there is no evidence to show that it was such. It appears from the evidence to have been an application for pre-emption, and the plaintiff has utterly failed to make out his case. He does not show that the law has been complied with, either with respect to occupation of the land or payment of the purchase money. It is urged that the plaintiff ought to recover on the strength of his possession; but it does not appear from the evidence that he was ever in possession of the land at all, except to make a crop on it in 1883. In order to enable the plaintiff to recover on the strength of his possession alone, it should be actual and corporeal, not merely a constructive possession. Lea v. Hernandez, 10 Tex. 137. Again it is not shown that the defendants were mere trespassers. There was no error in rendering judgment in favor of the Morrisons and Bomars for costs, although in their answer there is a cross-action against Franklin, as it does not appear that any costs were incurred thereon. We are of opinion that the judgment of the court below should be affirmed.

PER CURIAM. Affirmed, as per opinion of commission of appeals.

MAYOR, ETC., OF CITY OF HOUSTON v. HOUSTON CITY ST. RY. CO.

(*Supreme Court of Texas.* March 1, 1892.)

MUNICIPAL CORPORATIONS—FRANCHISE OF STREET-RAILWAY COMPANIES—AUTHORITY OF COUNCIL TO GRANT—VESTED RIGHTS—CONSTITUTIONAL LAW.

1. Where a city, in granting a right of way to a street-railway company, is not prohibited by the terms of such grant from extending similar privileges to other companies, the grant is not void on the ground that it confers an exclusive privilege.

2. The charter of the city of Houston gives the city council the exclusive control and regulation of all streets, and of everything concerning street railways. The charter of the Houston City Street-Railway Company provides that all contracts between the mayor and aldermen of Houston and the company, or privileges or rights granted by the mayor and aldermen, shall be in all respects legal and binding on the contracting parties, and that the charter shall continue for 50 years. *Held*, that the city council of Houston was authorized to grant such company the right to use the city's streets for street-railway purposes for a period of 30 years.

3. Such grant, having been duly accepted and acted on by the company, became a vested right, which, in the absence of a constitutional prohibition of the granting of such franchises by the legislature, could not be subsequently impaired by the authorities of Houston.

4. The duration of such grant, as long as it did not create a perpetuity, was a matter for the exclusive determination of the city council.

5. Const. art. 10, § 7, prohibiting the legislature from "granting a right to construct and operate a street railway within any city, town, or village, or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied," clearly recognizes the right of any city to give its consent to the use of its streets by street-railway companies.

Commissioners' decision. Section A. Appeal from district court, Harris county.

Action by the Houston City Street-Railway Company against the mayor, aldermen, and inhabitants of the city of Houston. Judgment for plaintiff. Defendants appeal. Affirmed.

H. F. Ring, for appellants. *Jones & Garnett*, for appellee.

MARR, J. "This suit was brought by the Houston City Street-Railway Company to enjoin the city of Houston from interfering with the laying of a street-railway track by appellee on one of the streets of said city. A temporary injunction was issued, which on final hearing was perpetuated by the decree of the court, from which action of the court, in refusing to dissolve the injunction and in perpetuating same, this appeal is taken." Appellants' only assignment of error is as follows: "The court erred in rendering judgment against defendant, and in behalf of the plaintiff, and in failing to render judgment in favor of the defendant, because the charter of the city of Houston never authorized, nor was authority ever conferred by the legislature upon defendant's council, to grant any special franchise or privilege, of any character whatsoever, in the use of the streets of said city of Houston for a term of years; and because the evidence showed that plaintiff had no right to use for street-railway purposes the portion of the street in question after being notified of the passage of the ordinance of date July 28, 1890, repealing the first section of the ordinance of date August 12, 1889, mentioned in plaintiff's petition; and because no grounds whatsoever existed for the equitable interposition of the court. First proposition under the above assignment of error: Authority never having been conferred upon the said council to grant special franchises to private persons, or corporations of any character whatsoever, in the use of the streets of said city of Houston for a term of years, so much of the ordinance under which the appellee claims a franchise for a term of years was void, and subject to amendment or repeal at any time by the city council."

By his second proposition, under the above assignment, the counsel for the appellants contends that the ordinance passed by the city council, and "under which the plaintiff claims a franchise for thirty years, is unreasonably broad and comprehensive, and for this reason is void, even if the city council had authority from the legislature to grant special privileges in the streets to corporations for a term of years, and therefore any subsequent city council had authority to repeal such privilege at any time." This proposition is scarcely embraced by the assignment of error, but we will notice the questions in their order.

It appears that the city council, by an ordinance passed July 28, 1890, attempted to repeal or annul the franchise or privilege of the plaintiff, in so far as it had been previously authorized to construct its road "on Congress and Louisiana streets, between Travis street and a con-

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nection with its Glenwood line on Fifth street;" and that while plaintiff was proceeding to make, and was in the act of making, such "connection," (as above described,) by the construction of the necessary line of railway, etc., the city officials, in virtue of said repealing ordinance, immediately upon its passage, notified plaintiff thereof, interfered with the further prosecution of said work, and forcibly prevented the plaintiff from building and completing said line of railway upon said streets, and from making said connection with its other lines. The acts of the city council and the city officers are made the basis of the suit for injunction. We may remark, in this connection, that the question of the right of the plaintiff to an injunction is not properly presented in this case. The defendants filed only a general demurrer to the petition, and the record fails to show that it was called to the attention of the court below. It was not acted upon by the court, and should therefore be deemed to have been waived. It is unnecessary, under such circumstances, to enumerate the allegations of the petition upon which the plaintiff relied for equitable relief. We may, however, say, generally, that the facts alleged would indicate that the plaintiff might suffer irreparable injury, unless the defendants should be duly restrained by the process of the court. Port of Mobile v. Railroad Co., (Ala.) 4 South. Rep. 106.

The original grant of the franchise to the plaintiff by the city of Houston was, by an ordinance of its common council, passed on the 5th day of November, 1883. The provisions of this enactment, so far as need be quoted, are as follows: "*First.* That the right of way is hereby granted to the Houston Street-Railway Company, organized under a charter passed by the legislature of the state of Texas on the sixth (6th) day of August, 1870, with the privilege of laying, using, maintaining, and operating a single or double track street railway, and all necessary side tracks, turn-outs, turn-tables, and switches, for the purposes and uses for which this grant is made, through and over any and all streets of the city of Houston, and the bridges thereon, including the bridges crossing Buffalo and White Oak bayous, which may be owned by the city of Houston, excepting that portion of Main street south and west of Capitol street, and that portion of Franklin street east of San Jacinto street, which portions of said streets are hereby reserved from this grant." The sixth section of said ordinance is as follows: "That the using of any of the streets of Houston by said street-railway company, after the passage of this ordinance, for any of the uses and purposes specified in this ordinance, shall be deemed an acceptance of the grant herein made, and an acceptance of the terms and conditions herein imposed upon it, which said grant is to be used and enjoyed by said company; that said railway company shall avail itself of this grant of right of way within two years from the passage of this ordinance." Section seventh of said ordinance is as follows: "*Seventh.* That said street-railway company, complying faithfully with the terms and conditions imposed by this ordinance, and the provisions of the charter of the city of Houston, as required by the city council, shall have and enjoy the right, powers, and privileges herein granted and conferred for a term of thirty years from and after passage of this ordinance."

It is agreed and admitted by the parties that the plaintiff accepted the franchise granted by the city within due time, and has fully complied with all of the terms and conditions of the grant; that it has, in accordance with the rights and privileges granted, "constructed, equipped, and put in operation on the streets of said city fully fourteen miles of its street railway, and in accomplishing this result has expended over seventy-five thousand dollars," etc. These things were all done by the plaintiff prior to January 1, 1888.

It may be observed at this point of the investigation that the franchise or privilege granted to the plaintiff by the city of Houston, though it extends to nearly all of the streets of that city, is not of an exclusive character. The city, by the terms of the grant, is not prohibited from extending similar privileges to other railway companies. This view of a similar grant was directly announced by the supreme court in the case of Gulf City St. Ry. Co. v. Galveston City Ry. Co., 65 Tex. 502; and it was further held that, subject to the right of the railway company to an easement in the streets to the extent in which the streets were occupied for that purpose by its "tracks, switches, and turn-outs," the city's "dominion over the streets remained unchanged and unimpaired, and was as full and complete, for all purposes," as it was before the extension of the grant. Such, at least, is the effect of the decision there made, and it coincides with our own views of the question. The grant to the plaintiff, as extended by the city of Houston, is not, therefore, void, upon the ground that it confers an exclusive privilege, as it would have been under the constitution if it had in fact created a monopoly in favor of the plaintiff. City of Brenham v. Water Co., 67 Tex. 542, 4 S. W. Rep. 143.

Upon the 12th day of August, 1889, the city council (for some reason which is not very apparent to us) passed an additional ordinance, which gave its permission to the plaintiff "to build and operate its street railway" upon a number of the streets of the city, including the right upon the part of the plaintiff to establish the "connection with its Glenwood line on Fifth street," as before described. This ordinance did not specify the character of the privilege granted, but it was enacted "subject to the terms and conditions of the original ordinance of November 5, 1883," etc. It was this ordinance of August, 1889, which the city council attempted to repeal, as before stated, in July, 1890. This the appellants claim the city had the lawful right to do, because the ordinance of 1889 did not extend the privilege for any definite length of time. We think that this position is of no consequence, as affecting the merits of the con-

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troversy, if the right of the appellee to the exercise of its franchise had become vested and irrevocable before the expiration of the term, by reason of the original contract between the parties made or created in pursuance of the ordinance of November 5, 1883.

Whether the privileges originally granted to the plaintiff had become perfect or vested rights, which the city could neither impair nor take away, must, of course, depend, in the first place, upon the validity of the original ordinance of November 5, 1883. It is claimed by the appellee that the city council possessed adequate authority to enact this ordinance, not only under the charter of the city, but also by reason of express authority to that effect, as contained in the act of the legislature incorporating the plaintiff company. The charter of the plaintiff, which was granted by the legislature upon the 6th day of August, 1870, contains, among others, the following provisions: "Sec. 8. That all contracts made and entered into by and between the mayor and aldermen of the city of Houston and the said company, or any privileges or rights granted by the said mayor and aldermen of the city of Houston to the said company, shall be in all respects legal and binding on the aforesaid contracting parties." Section 9 of said act of incorporation provides "that this charter shall remain in full force and effect for the period of fifty years." The object of the legislature in incorporating this company was to enable it to build a street railway in the city of Houston, and section 8 of the above charter was evidently intended by the legislature to confer upon the city government plenary powers, at least to make any contract (otherwise valid) with this company in reference to the establishing and constructing of its street railway, and in express terms contemplates the granting upon the part of the city, by contract or otherwise, the necessary "rights or privileges" to effectuate this purpose. Railway Co. v. City of Covington, 9 Bush, 127.

We also find in the charter of the city of Houston which was in force when the ordinance of November 5th was passed the following provisions: "The city council shall have the exclusive control and regulation of all streets, alleys, public grounds, and highways within the corporate limits of the city, and to direct and control the laying and construction of railroad tracks, turn-outs, and switches, and to require that they be constructed and laid so as to interfere as little as possible with the ordinary travel and use of the streets; to control and regulate everything concerning street railways," etc. We are of the opinion that, by the terms of both of these charters, (clearly by that of the street-railway company,) the legislature intended to and did confer ample authority upon the city council to grant the franchise in question to the plaintiff, and to extend it for a term of years, as it did do.

We also think that, according to the current of the authorities, the grant, having been duly accepted and acted upon by the appellee, became a vested right or perfected contract, which could not be subsequently repealed or impaired by the common council or the authorities of the city of Houston: provided, however, that there is no constitutional prohibition to the granting of such special privileges by the legislature or under its authority. Railroad Co. v. City of Brownsville, 45 Tex. 96; 2 Dill. Mun. Corp. (3d Ed.) pp. 696, 718, § 727; 1 Dill. Mun. Corp. § 314; Port of Mobile v. Railroad Co., (Ala.) 4 South. Rep. 106; Railway Cases, 79 Ala. 469; Milhan v. Sharp, 27 N. Y. 611; City of Burlington v. Railway Co., 49 Iowa, 144; Dartmouth College Case, 4 Wheat. 519; Fletcher v. Peck, 6 Cranch, 137; Stein v. Mayor, 49 Ala. 362; Railway Co. v. Anderson Co., 59 Tex. 667; State Const. art. 10, § 7. Those decisions cited by counsel for the appellants, which deny the power of the city government, under its general authority over its streets, to grant the right to operate a street railway in such streets for private gain, were rendered in cases where the legislature had not conferred upon the municipality the necessary authority to extend such franchise.

In reference to the second proposition submitted by the appellants, we hold that, as the common council had legislative authority to grant the franchise in question, its duration was a matter for their exclusive determination. Whether it should be extended for 2, 5, or 30 years was left to their wisdom and discretion. They could not, perhaps, abandon or transfer their ordinary control over the streets of a legislative character, so as to prevent the proper and legitimate exercise of this authority by their successors in office. But this, as we have seen, they did not do. Nor was it in the power of the common council to create a perpetuity. Subject to these limitations, however, the wisdom and reasonableness of the grant, and the length of time during which it should continue, were addressed solely to the good judgment of the members of the common council. 1 Dill. Mun. Corp § 95. There is no pretense in this case that the use of the streets by the plaintiff has become a nuisance or amounts to an injury to the public, so we need not go into that branch of the subject. City of Burlington v. Railway Co., 49 Iowa, 144. While section 7[1] of article 10 of the state constitution is entirely prohibitory, and not permissive, still it is a clear recognition of the right of any city to give its consent to the use of its streets by street-railway companies, and it contains no limitation of the length of time for which such consent may be given.

We might end the discussion here, and affirm the judgment of the district court. But there is another provision of the constitution of 1876 which may have some bearing upon the power of the legislature or any municipal government under its

[1] Prohibits the legislature from "granting a right to construct and operate a street railway within any city, town, or village, or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied."

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authority to create, for a definite period, an "irrevocable or uncontrollable grant of special privileges," like the franchise granted to the plaintiff. Bill of Rights, § 17. This provision has not been involved nor cited by counsel for the appellants, nor has it been discussed by counsel for either party. It is claimed, however, by the appellants (as already stated) that, even if the legislature had conferred authority upon the common council of the city of Houston to grant special privileges to corporations for a term of years, still the ordinance of November 5, 1883, which extended the franchise for the period of 30 years, would be void because "unreasonably broad and comprehensive." This proposition most evidently does not directly present the question of the constitutionality of the ordinance in question. We are loath to decide a constitutional question where it has not been directly raised nor argued by counsel; yet we do not see how it can be ignored entirely. That the question is indirectly involved there can be doubt, for the reason that, although the plaintiff's charter was granted before the adoption of the present constitution, still the rights claimed in this suit had not become vested, nor was the franchise granted by the city until long after the constitution had gone into operation. Mississippi Society v. Musgrove, 44 Miss. 820. The article of the constitution, above cited, reads as follows: "And no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof." There is no doubt that the franchise, as granted to the plaintiff, is, in legal acceptation, "a special privilege." Bank v. Earle, 13 Pet. 595; 79 Ala., supra, 474; 27 N. Y., supra, 619; 3 Kent, Comm. 458.

What there is meant by the other words, "irrevocable or uncontrollable grants?" This question is by no means of easy solution, and may possibly be understood in a different sense by different minds, or may give rise to diverse impressions in the same mind:

First. The decision of the supreme court of the United States in the celebrated Dartmouth College Case, where it was declared that a franchise, upon being accepted by the grantee, became a perfect contract, which the state could neither recall nor in any wise impair, has never been universally admitted to have been based upon sound principles of government. Many eminent writers and courts have thought that a franchise is a mere privilege extended by the sovereign power of the state, which it could recall whenever it should be deemed advisable so to do. The courts have generally, however, from necessity yielded to the supreme court of the United States, but many have done so (if not sullenly) under apparent protest. Cooley, Const. Lim. pp. 341, 342, and note 1. The pernicious and evil consequences of that decision have been frequently pointed out by judges and law-writers, and the doctrine announced has never been cordially accepted by those who believe in the sovereign power of the state. Id. p. 340, and note 2. May not, therefore, the framers of our constitution have intended by this provision to render impotent and inapplicable the principle announced in the Dartmouth College Case, not only as to perpetuities, but as to franchises for a term of years? 4 South. Rep., supra, 109. Did they not mean to say to the legislature: "You may extend special privileges to corporations, but the right to recall the grant whenever you may deem it advisable is reserved, and shall be an indispensable condition of the grant?" If so, the grantee would, of course, acquire the franchise subject to this reservation and condition, and it could be revoked or withdrawn by the power which extended it, whether that was the state legislature, or a municipality acting under the authority of the legislature. In many other provisions of the constitution we also observe evidence of great jealousy of corporate powers and franchises upon the part of the framers of that instrument. Articles 10–12. Then, again, there was the celebrated subsidy to the International & Great Northern Railroad Company, including an "immunity" from taxation for 25 years, which had but partly, by an "irrepealable contract," been granted, and perhaps was in the mind of the convention. Generally, when it is said that a power is "irrevocable," we understand that the grantor cannot withdraw nor call back the power.

Second. But the word "irrevocable" is frequently used in a somewhat different sense. It may mean acting, or denote a right or power which cannot be annulled or vacated except for a sufficient cause. It may mean "unalterable" or "irreversible." To "revoke" sometimes denotes the right to annul, rescind, or abolish. Webst. Dict. "Revocation" not only means the recalling of the power, but may denote the vacating of the grant for cause. Bouv. Law Dict. It may be that this is the sense in which the language of the paragraph is used. The framers of the constitution may have intended merely to prohibit the legislature from granting any "special privilege" which could not be annulled, condemned, or vacated in the manner and for the causes as might be prescribed by law. This view of the question is strengthened by the use of the word "uncontrollable" in the same connection, and the same clause most positively declares that all "privileges and franchises" shall be subject to legislative "control" and regulation. When we consider the effect and consequences of declaring that every grant of special privileges or franchises for a term of years by the state could be revoked or withdrawn at the mere pleasure or will of the legislature, we then very much doubt that the framers of the constitution, or the people in adopting it, intended to reserve to or confer such power or authority upon the legislature. The policy of the state seems to have been to encourage the building of railroads and the investment of capital in similar enterprises. If these special privileges or franchises in question can be recalled or terminated at the will of the legislature, then it would follow that, unde

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the same reservation in the original law, every charter granted, since the adoption of the present constitution, to any railroad, telegraph, or telephone company, ice factory, gas or electric-light company, etc., could be repealed or revoked at the pleasure of the legislature, without the necessity of a judicial forfeiture. If the language of the constitution admitted of no other construction, it would, of course, be the imperative duty of the courts to so interpret it, regardless of consequences. If any injustice results, "the remedy for such injustice must be found in the action of the people themselves, through an amendment of their work when better counsels prevail." Cooley, Const. Lim. 88. Where the construction would lead to "monstrous and absurd consequences," the same honored author concedes the right and duty of the courts to "question and cross-question closely" the clause to discover if it will not admit of another construction more in harmony "with the general purposes of such instruments." And hence we invoke section 19 of the bill of rights, which not only protects property, but also "privileges or immunities," from destruction, "except by due course of the law of the land." While not conclusive of the question, still this provision affords some evidence of the general purpose of the constitution; and that its authors did not intend, by the declaration contained in section 17, to announce that the continuance or duration of every privilege or immunity, which might be created by the legislature or under its authority, should be entirely dependent upon its caprice or will. See, also, section 22, art. 41. With the light before us at this time, we think that the better opinion is that this particular clause of the constitution was intended to prohibit the legislature from granting any "special privilege or immunity" in such way, or of such character, as that it could not be subsequently annulled or declared forfeited for such causes as might be defined by the law, or condemned in the exercise of eminent domain, (Cooley, Const. Lim. 341-344;) and it was further intended that "all privileges and franchises" granted by the legislature, or under its authority, should at all times remain subject to legislative control and regulation. We are perfectly aware that we have not by any means exhausted the subject, but, as the question under consideration has not been directly raised by the assignment of error nor discussed by counsel, as before remarked, we think that a mere expression of opinion upon our part ought to suffice for the present, without attempting a definite decision of the question. We have merely indicated what, as it seems to us, would be the proper construction; but we do not finally commit ourselves to that view of the subject. We leave the question open to future investigation, should it be presented in another case. We will add, this provision of the constitution could hardly be held to refer only to the grant of exclusive special privileges, for the reasons that no such language is used, and, besides, monopolies are prohibited by another section of that instrument. Section 26. Our conclusion is that the judgment of the district court ought to be affirmed.

PER CURIAM. Affirmed, as per opinion of commission of appeals.

SCHMIDT v. HUFF *et al.*

(*Supreme Court of Texas.* March 1, 1892.)

TRESPASS TO TRY TITLE — EVIDENCE — DECLARATIONS.

1. Where plaintiff, having purchased, at an execution sale against B., land standing in the name of M., brings trespass to try title against the administrator of M., and there is evidence that S. acquired the land, with money furnished by B., holding it in trust to defeat B.'s creditors, and that he deeded it to B., but the deed is not produced, it is error not to submit the issue to the jury.

2. The declarations of M., who was not in possession of the land, are inadmissible to show title in him.

3. But his declarations that the land belonged to B., and that he held it in trust for B. to enable the latter to avoid payment of his debts, are admissible to show title in B. Plaintiff need not show paper title to recover.

Commissioners' decision. Section A. Appeal from district court, Wilbarger county.

Trespass to try title by Joseph Schmidt against S. P. Huff, administrator, and others. Verdict and judgment for defendants. Plaintiff appeals. Reversed.

R. D. Britt and *Barrett & Eustes*, for appellant. *F. P. McGhee*, *H. C. Thompson*, and *Stephens & Huff*, for appellees.

HOBBY, P. J. This suit was originally instituted by the appellant against J. T. Tolbert, administrator of the estate of W. R. Morrison. By an amended petition, filed November 11, 1890, the appellee S. P. Huff, who succeeded Tolbert as administrator, was made a party defendant. Mrs. M. A. Byars, the surviving wife of C. M. Byars, together with his children and the heirs of W. R. Morrison, were also joined in the suit, an action of trespass to try title to 320 acres of land, described in the petition as the S. ½ of section 20 of 640 acres, block 12, surveyed by virtue of land scrip No. 610, issued to the Houston & Texas Central Railroad Company. The cause was tried before a jury. After the evidence was closed, the court instructed the jury to find for the defendants. This was done, and the plaintiff has appealed.

The plaintiff purchased the land at an execution sale, made under a judgment in favor of P. J. Willis & Bro. against C. M. Byars, for $4,157, rendered in the district court of Galveston county, July 5, 1883. The deed of the sheriff of Wilbarger county was dated October 7, 1885. It conveyed an undivided one-half interest in the south half of the section of land mentioned. The land was patented to the heirs of Morrison in October, 1888. The leading object of this suit was to show that it was paid for with Byars' money, and was held by Morrison in trust for Byars, whose property it was when sold under execution to appellant. It constituted originally a part of the public school land of the state. Byars, who had been engaged in the mercantile business in the town of Vernon,

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