

JOURNAL
OF THE
SELECT COUNCIL

OF THE
CITY OF PHILADELPHIA,

FOR 1842-43.

BEGINNING OCTOBER 14, 1842,

AND

ENDING SEPTEMBER 29, 1843.

WITH AN APPENDIX.

PHILADELPHIA:
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City of Philadelphia, at the distance of ninety feet from the east side of Water Street, containing in breadth, north and south, parallel to the east side of Water Street, forty feet, and in length or depth, east and west, on Sassafras Street, forty-seven feet, more or less. Bounded westward by ground of John Livezly, northward by ground of Abraham S. See, eastward by Delaware Avenue, and southward by Sassafras Street aforesaid; for such price, and on such terms as they may think fit: *Provided*, that the price of the same shall not be less than \$4,250, and that the proceeds of said sale be placed by the City Treasurer to the credit of the Sinking Fund of the Mayor, Aldermen and Citizens.

NUMBER XL.

The Commissioners of the Girard Estates report the following resolution:

Resolved, That the Commissioners of the Girard Estates be authorized and directed to invest any sum, not exceeding \$50,000, of the income of the residuary estate of Stephen Girard, not heretofore specifically appropriated, in 5 per cent. Loan of the State of Pennsylvania, heretofore appropriated to the construction of the College, and now standing to the credit of that Fund.

CHAS. GILPIN,
CHAS. A. REPLIER,
SAMUEL NORRIS,
THOMAS SNOWDEN,
JOS. R. CHANDLER,
GEO. CAMPBELL.

NUMBER XLI.

The Watering Committee, to which was referred "An Act of Assembly, entitled An Act to authorize the Commissioners of the incorporated Districts of the County of Philadelphia to construct works for supplying said Districts with water from the Schuylkill river,"

REPORT:

That while the passage of this, or of a similar act, was in agitation, the Committee, under the direction of Councils, prepared

a remonstrance against it, and caused the same to be placed in the hands of each member of the Senate and House of Representatives of the Commonwealth. A copy of this remonstrance is hereto annexed. Your Committee also obtained the written opinions of Messrs. Binney and Meredith, as to the rights of the City to the water and water power of the river Schuylkill, above Fairmount Dam, under the grant of the State to the Schuylkill Navigation Company, and the grant by said Company to the City. Copies of those opinions are also annexed.

The act in question authorizes the adjacent Districts to take the water from the pool of the Fairmount Dam, while at the same time it provides, in express terms, that the act itself shall not be so construed as to impair any grant made by the Commonwealth to the Schuylkill Navigation Company.

Your Committee do not intend to discuss the question whether the City has the right to the *water*, as well as the *water power*, at Fairmount Dam, which distinction has been ingeniously attempted, to furnish a pretext for the passage of the act—but refer Councils to the able opinions accompanying this report.

Although a confident reliance is placed on the opinion that the rights of the City are such, under the grants of the State and the Schuylkill Navigation Company, as not to be liable to interruption or interference by any grant to the adjacent Districts from the Commonwealth, still your Committee consider it proper to call the attention of Councils to that portion of the act which provides that it shall not go into effect if the City should, within three months from the passage of the act, before the 18th of July, 1843, reduce the water rents of all the adjacent Districts to the same rate as is now charged in the City, and at no time increase them beyond the present rates of the City.

The only consideration required at the moment is, whether the City should, by immediate reduction of the water rents in the Districts, and an abandonment of the right to increase them at any time hereafter, in the City or Districts, render the act inoperative by a compliance with the terms of this proviso. Your Committee say, without hesitation, that they cannot recommend such action to the Councils.

There are many reasons to be adduced to sustain this conclusion: their confident reliance on the rights of the City, and their opinion that the grant in the act to the Districts is in direct conflict with the former grant to the Schuylkill Navigation Company, would alone justify the Committee in recommending to Councils to disclaim at once, and unhesitatingly, any intention on the part of the City to act under the proviso, and reduce the rents. Whatever our rights are, we prefer that they should be ascertained and enforced by the proper judicial

tribunal, rather than make them the subject of capricious assault, or legislative coercion.

Your Committee do not wish to be understood, now, as turning a deaf ear to any application, by any District, for a reduction of rents. They would, on the contrary, feel disposed to recommend a gradual or prospective reduction of the District rents, provided the Districts would agree to continue water takers for some definite period of time; but without a new contract, containing this essential feature *of time* during which they were to continue customers to the City, such a course would not be recommended, for the existing contracts leave them at liberty to quit when they please, and the act of Assembly provides that the acceptance of the proviso, by the reduction of rents by the City, shall not prevent the Districts from supplying themselves with water from below the Fairmount Dam, or from any other stream.

If the Districts generally should be inclined to negotiate new contracts, with this stipulation, that they should continue water takers for some definite period, to be agreed on, your Committee would be then prepared to recommend a general, prospective, or gradual reduction of the rates out of the City.

A conference with the Committees of Southwark and Moyamensing was interrupted by the passage of the act of Assembly: the Watering Committee will be ready to resume it whenever the Districts are ready to negotiate a new contract, with a stipulation to continue water takers for some definite period.

JOHN P. WETHERILL, Chairman.
CHARLES GILPIN,
JAMES J. BOSWELL,
JOHN TRUCKS,
HENRY F. RODNEY,
OWEN SHERIDAN,
M. NEWKIRK.

Attest—SAMUEL W. RUSH,
Register of Watering Committee.

June 22, 1843.

*To the Honorable Senate and House of Representatives of
the Commonwealth of Pennsylvania.*

The Memorial of the Select and Common Councils of the City of Philadelphia, respectfully sheweth :—

That by an act of the Legislature of this Commonwealth, entitled "An Act to authorize the Governor to incorporate a company to make a Lock Navigation on the river Schuylkill," passed the Eighth day of March, Anno Domini one thousand eight hundred and fifteen, "The President, Managers and Company of the Schuylkill Navigation Company" were duly constituted "a body politic and corporate in deed and in law, by the name, style and title" aforesaid, and empowered "to enter upon the river Schuylkill, to open, enlarge or deepen the same, in any part or place thereof, which shall appear to them most convenient for opening, changing, making a new, or improving the channel," "and to form, make, erect, and set up any dams, locks, or any other device whatsoever, which they shall think most fit and convenient to make a complete slack water navigation, from one end thereof to the other." That by the XVth section of said act it is provided "that the said President, Managers and Company shall have the privilege and be entitled to use the water power from the said river, sluices or canals, to propel such machinery as they may think proper to erect on the land which they may previously have purchased from the owner or owners, or may sell in fee simple, lease or rent, for one or more years, the said water power to any person or persons, to be used in such manner and on such terms as they may think proper : *Provided*, it be so done that it shall not at any time impede or interrupt the navigation ; and shall apply the moneys arising from the sale of the water power to the improvement of the navigation, or repairing of any damages that the dams or locks may have sustained."

That by virtue and in pursuance of the powers and authority granted under said act of Assembly, the said Navigation Company, by sundry agreements made with the Mayor, Aldermen and Citizens of Philadelphia, in the years 1819, 1820 and 1824, did "grant, bargain and sell to the said Mayor, Aldermen and Citizens of Philadelphia, and their successors, the whole water power of the said river, produced by the dam at Fairmount, and the use of the whole water of the said river at Fairmount, aforesaid, that shall remain after drawing off what shall be necessary for the purpose of the navigation of said river." That in consideration of the said grants, the said Mayor, Aldermen and Citizens erected a dam across said river

at Fairmount, and "caused to be made and built a guard lock, chamber locks, and canal," and "put the same into the possession of the said Navigation Company, together with sufficient and suitable ground for a toll house, adjoining said locks," at a cost to said Mayor, Aldermen and Citizens, of	\$160,904 77
And paid in addition thereto to said Navigation Co.,	26,000 00
Your memorialists paid in addition thereto, damages for overflow of land adjoining the river, and injury to mills,	40,000 00
And for the purchase of water power at the Falls of Schuylkill, destroyed by the erection of the dam at Fairmount,	150,000 00

Making together the sum of \$376,904 77
 Paid and laid out by them as a consideration for the grant made as aforesaid to them, by said Navigation Company.

In addition thereto your memorialists have expended during the past summer, in rebuilding the dam at Fairmount, upwards of \$40,000 00

The completion of the repairs to said dam, which will be done during the coming season, it is estimated will cost 20,000 00

Making, with the before mentioned sum of 376,904 77

A total sum of \$436,904 77

All of which has been expended in furtherance and aid of the object of said act of Assembly, viz: "to make a lock navigation on the river Schuylkill, and in consideration of the grant aforesaid, made by said Navigation Company to your memorialists.

Your memorialists further set forth, that on the faith of said purchase and grant, under said act of Assembly, they proceeded, at great cost, to purchase the necessary grounds, and to construct and erect the necessary reservoirs, mills and machinery, and to lay the requisite mains and pipes to furnish a full and ample supply of pure and wholesome water for the City of Philadelphia, and the adjoining districts; and they have expended for the objects last enumerated, . . . \$1,574,735 22
 in addition to the cost of water power, . . . 436,904 77

And they are now about contracting, in order to keep up the supply, for two additional wheels and pumps, which, with the necessary accompaniments, will cost 28,000 00

Making a total expenditure, on completion of two new wheels and repairs to dam, of \$2,039,639 29

Your memorialists further state, that by the means and expenditure aforesaid, they have furnished to the City and Districts an ample supply of pure and wholesome water for the extinguishment of fires, the supply of manufactories, for the cleansing of streets, lanes and alleys, necessary to the health and comfort of the inhabitants, and for domestic and culinary purposes, at a fair and reasonable price, as low, and it is believed lower than in any other City or town in the United States. Contracts with the adjoining districts, for the purposes enumerated, were made on easy and equitable terms, at the following periods :

Spring Garden, April 26, 1826.

Southwark, June 1, 1826.

Northern Liberties, June 6, 1826.

Moyamensing, January 6, 1832.

Kensington, October 5, 1833.

These contracts with the Districts have all been made on liberal terms and no charge is made therein for the use of the water in the extinguishment of fires.

Now your memorialists conceive that under the said act of Assembly and the grants of said Schuylkill Navigation Company, they became legally and equitably entitled to and invested with a right to "the whole water power of the said river produced by the dam at Fairmount, and the use of the whole water of the said river at Fairmount that shall remain after drawing off what shall be necessary for the purpose of the navigation of said river," and they have therefore learned with astonishment and regret that an application has been made to your honorable bodies by the District of Spring Garden for the right of drawing water from said river, for the uses and purposes to which it is now applied by your memorialists, at any point between the south line of Coates street and the northern boundary of the said District, a grant or application which your memorialists believe to be a direct infringement and violation of their own indisputable right, established by no less authority than an act of the legislature, and a legal purchase for a valuable consideration under the provisions of said act, and in furtherance and promotion of the avowed objects of said act.

Your memorialists are informed that it is alleged in said application, that it is necessary in order to supply with water a portion of said District which is above the level of the reservoirs at Fairmount. It will suffice perhaps to say in answer to this allegation ; first, that such a necessity, if it did exist, can furnish no justification for the violation of a right of property vested, under the most solemn sanction known in the law, in the Mayor, Aldermen and Citizens of Philadelphia. Secondly, if it does exist, no application has ever been made

to your memorialists to supply the want of water of which they complain—such an application would have met with a prompt reply and been responded to on terms more easy and liberal than the same could be done by the said District in the manner now proposed. Of this the readiness of the city to furnish on former occasions a supply of water to all the Districts affords sufficient proof. If therefore the said District desires that water should be raised to a higher point than the level of the present reservoirs, your memorialists believe they have both the power and the will to furnish the same at any elevation to be found in said District, at a fair and liberal price, and more advantageously for said District than any other mode they can adopt.

Your memorialists further protest against the violation of their rights, secured by act of assembly, in the proposed opening and widening of Biddle street. They respectfully suggest that inasmuch as this guard has been thrown around their property by the laws of the land, they may not find themselves deprived of a protection on which they have relied, and on the faith of which they have contracted loans and expended large sums of money.

In conclusion, your memorialists beg leave respectfully but earnestly to remonstrate against the grant of said rights and privileges by your honorable bodies to said District of Spring Garden, not only on account of the special damage and detriment to your memorialists, but for the reason that it would be establishing, by the action of the legislators of our commonwealth, a precedent that no title could be so good as to guard against invasion, nor right so sacred that it may not be assailed. The faith of the state once pledged has always been regarded by your memorialists as beyond all reach or attempt at violation, and they have always considered that they have had the solemn sanction of legislative action for the security of their investments—investments made not for private or selfish purposes, but for the public good and general welfare of our fellow-citizens. They therefore appeal with confidence to your sense of justice and ask that the prayer of said petitioners may be dismissed.

And as in duty bound they will ever pray, &c.

Signed by order of Councils.

January 23, 1843.

WM. M. MEREDITH,
President of the Select Council.

J. C. FISHER, *Clerk of Select Council.*

SAMUEL NORRIS,
President of the Common Council.

LEVI HOLLINGSWORTH, *Clerk of Common Council.*

OPINION OF WM. M. MEREDITH.

The Commissioners of Spring Garden have petitioned the Legislature to grant them authority to construct works on or adjacent to the Schuylkill, between Fairmount Dam and the Falls, for the purpose of pumping up water to supply the inhabitants of Spring Garden, and my opinion is requested by the Watering Committee on the question,—“Has the Legislature a right to make the grant asked for?”

By their charter the Schuylkill Navigation Company were authorized to make a complete slackwater navigation on the Schuylkill, by dams, locks, sluices and canals, and by the same act it is further provided that the Company shall have the privilege and be entitled to use the water power from the said river, sluices or canals,—or may sell in fee simple, lease or rent, for one or more years, the said water power, to any person or persons, to be used in such manner, and on such terms as they may think proper. *Provided*, That it be so done that it should not at any time impede or interrupt the navigation.

Under, and in pursuance of this act, the Schuylkill Navigation Company made certain contracts with the City of Philadelphia, under which the City, at her own expense, erected the Dam and Works at Fairmount, and paid all damages occasioned thereby, and the Company granted to the City in fee, the whole water power of the river, procured by the Dam at Fairmount, and the use of the whole water of the river at Fairmount, that shall remain after drawing off what shall be necessary for the purpose of the navigation of the said river, the water, however, not to be reduced below the surface or top of the Dam. The first of these contracts, made the 3d June, 1819, recites, that the City Corporation were desirous to increase the supply of water raised from the river Schuylkill for the use of the City, and for vending the same, if they saw fit, to the adjoining districts, as well as for the other purposes therein mentioned, by means of a new and enlarged power to be obtained by the erection of a dam. &c.

The City, accordingly, at great expense and risk, erected their works and made contracts (under the express authority of divers acts of Assembly passed for the purpose) with the adjoining Districts, and among the rest with the District of Spring Garden, to supply them with Schuylkill water on certain terms, mutually agreed on.

I am clearly of opinion, upon this state of the facts, that the granting the authority asked for by the District of Spring

Garden would be a direct infringement of the rights of the City of Philadelphia.

I do not understand it to be denied by the Commissioners of Spring Garden, that the City is legally entitled to the whole *water power* at Fairmount, remaining after the uses of the navigation have been supplied: in other words, that the City have a right to draw off the water from the pool until it is drawn down to the top of the Dam; but they allege that the Navigation Company had no right to grant the *water itself*, and that the City, therefore, can have no right to it. I confess I am wholly unable to understand this argument: I cannot conceive that a water power would not be destroyed by diverting all the water, or that the rights of an owner of a water power would not be infringed by diverting any part of the water. I think if the principle were applied to a common mill-dam, there are very few persons who would be found hardy enough to advocate it.

The question of the right of the City to the water of the pool above Fairmount Dam, is wholly disconnected in my opinion, with any public right. A navigable river is a highway, not a common. It is under the control of the Legislature for purposes of improvement as a highway. The rights of fishing, washing, and drinking, are merely incidental. When they are so used as to impede the navigation, the use becomes unlawful. If the Legislature authorize an improvement of the navigation, which prevents their exercise, they must give way, and no damages be recovered for their destruction. (*Shunk vs. Schuylkill Navigation Company*. 14 S. & R., 71.)

I deny utterly the right of any man, or set of men, at common law, to divert, under any pretence, or for any purpose, water from a navigable river, so as to impede, or in the slightest degree affect the navigation.

The Legislature having the right of improving the highway, may incorporate a company for this purpose; in the case of the river Schuylkill, that improvement has been made by a company under authority of law, at a vast expense of money, and with the most signal public benefit. The water power created by this improvement, beyond what can be used for the navigation, is not the subject of a public right, in the sense that every inhabitant of the Commonwealth has a right to use it. It is capable of being the subject of private property, and would otherwise be useless to all. The Legislature had the right to grant it, as a compensation in part for the expense incurred in improving the navigation. They have so granted it. The City of Philadelphia holds it lawfully under that grant, and received it as the sole consideration for half a million dollars, or thereabouts, expended by her in the direct improvement of the navigation, and she holds it, it appears to me, by

a tenure as sacred and inviolable as that by which any citizen holds his lands under the patent of the Commonwealth.

The fact that the City uses part of the water to which she is entitled, for the supply of her own citizens, and those of the adjoining Districts, and not directly as a mechanical power, seems to me wholly immaterial, since it could in no respect give a right to a neighbouring District to diminish the water power which the City holds.

There are many other views of the subject which occur to me, and which lead to the same result at which I have arrived, but I omit them from want of time to develop them.

W. M. MEREDITH.

March 10, 1843.

OPINION OF HOR. BINNEY.

I have examined a bill pending before the Legislature of Pennsylvania, entitled "An Act to authorize the Commissioners of Spring Garden, in the county of Philadelphia," to construct works for supplying said district with water from the Schuylkill river; and have also considered two opinions upon the subject of the bill; one of them by Mr. Meredith, and the other by Mr. Read.

In the reasoning and result of Mr. Meredith, I concur, and am of opinion, that if the bill passes, it will infringe the rights of the City of Philadelphia, derived from a contract and grant of the Commonwealth.

The bill in question, gives authority to the Commissioners of Spring Garden, to construct steam or other suitable works on, or adjacent to the river Schuylkill, at any point between the south line of Coates street, and the northern boundary of the district, or in such other suitable location as they may deem expedient, for the purpose of pumping up water for supplying said district and the inhabitants thereof with water from said river. It consequently authorizes the Commissioners, if they deem it expedient, to take water for these purposes from the pool of the Fairmount dam.

The Legislature of Pennsylvania, by the act of 8th of March, 1815, for a great and valuable consideration, and in the exercise of their undoubted right, granted to the Schuylkill Navigation Company, the water power from the river Schuylkill, to use it themselves, or to sell it in fee simple, or otherwise, to any person or persons, to be used in such manner, and on such

terms as the Company might think proper ; provided it should not impede or interrupt the navigation ; and they also granted to the Company unlimited power to erect and set up dams and other devises whatsoever, as they might see fit ; from which these incidental advantages of water power were to be derived.

By this grant of the Commonwealth, it is not to be doubted, that the whole and entire water power of the river, passed to the Navigation Company, and their assigns : and that no person but the Company or its grantee, can, lawfully, use any part of this water power, or lawfully interrupt, disturb, or impair the use of it, by the Company or its grantee, provided, the use does not impede or interrupt the navigation.

Whether the Company or its grantee does, or does not use the whole of this water power,—whether it uses the same wastefully or otherwise,—whether the use of it, without lawful right by another, would injure the Company or its grantee, little or much, are no more questions that can be legally entertained, in regard to such an estate or interest, than in regard to any other estate or interest whatever. The use is the property. The grant of the use of the water power, is the grant of the property in the water power, and in the whole water power. The Legislature, having already granted the same to the Company, and its assigns, they cannot make a second grant of any part of it to any other person, nor a grant of any other right or property which interrupts, disturbs, or impairs the use of it by the Company or its assigns. These propositions appear, to me, to be self-evident.

What is the water power of a river ? It may be intelligibly and accurately defined by the mere transposition of the terms of the question. It is the power of the water of the river, of the whole water that customarily flows in the river ; as the water power of a dam, or at, or from a dam, is the power of the whole water that customarily flows over the dam.

In what does a water power fundamentally consist ? It consists, beyond all doubt, in the water itself ; and other circumstances being equal, it is directly in proportion to the quantity of water. To take away the water altogether, is to destroy the water power totally. To take it away in part, is so far to diminish the power. The proposition cannot be disproved by pushing it to a ridiculous extent. It is both philosophically and legally true. The Legislature have shown their own sense of its truth, by annexing to the grant of the power, the condition that it shall not be so used as to impede or interrupt the navigation. What the navigation requires may be taken from the water power. What it does not require, belongs to the water power.

If this were the case of the water power of a private stream or mill-dam, the truth would be clear to the apprehension of

every one. It is equally true of the water power of the Schuylkill, all the uses of which the Legislature had a right to make the subject of exclusive grant for public purposes, and all the water power of which it has so granted to the Company, and its assigns, under one condition only, the maintenance of the navigation.

To divert, by a canal, any part of the water from the pool of a dam, so as not to return into the pool again, would be a clear violation of this right of water power. To pump it up into a reservoir, and to carry it off in a number of canals or tubes, is precisely the same thing.

With the aid of these remarks, I proceed to the more immediate question of violation of the rights of the City of Philadelphia.

The Schuylkill Navigation Company, being, by their charter from the Commonwealth, invested in full property with the whole water power of the Schuylkill, and with the power to use it, or to sell, or lease it to other persons to be used, in such manner, and upon such terms as they should see fit, subject only to the saving for the purposes of the navigation, by their contracts, agreements, or grants to and with the City of Philadelphia, especially by the instrument, dated the 14th of June, 1824, for a large and valuable consideration, granted to the City, in fee simple, the whole water and water power of the Schuylkill, at the dam at Fairmount, without any restrictions or reservations, except such, only, as were necessary to the navigation.

That the entire water power, at that dam, under the restrictions necessary for the navigation only, passed to the City by that grant, and is now vested in the corporation, has never, to my knowledge, been doubted, and is certainly not doubted by me. That the entire water, as the necessary and inseparable substratum or foundation of the water power, also passed, subject only to the same restrictions, is what I also suppose, cannot be doubted, unless a water power may pass without a right to the water from which it is derived, or an entire water power without a right to use all the water from which it is derived. The right to all the water passed, not merely by force of the word *water*, which is used in that grant as well as the word *water-power*, but by the necessary force of the word *water-power*, which has no existence but in the water, and cannot be entire except by the use of the whole water. No one, probably, will doubt the effect of this grant against the Navigation Company, if they should draw off water from the pool at Fairmount for any other purposes than those of the navigation; and what they cannot lawfully do, no other person can do. The word *water* is used in this grant, not as conveying more than was included in the word "*water-power*;" but as expres-

sing their assent to the manner in which it was intended to be used by the City, namely, in supplying the city and districts with water.

The City of Philadelphia, then, has acquired and now possesses the clear property, at law and equity, in the whole water power at the Fairmount dam, and in the use of the whole water, as it customarily flows over that dam, subject to no diminution, except such as the necessities of the navigation may make. Whoever pumps up or leads off water from that pool, that is not to return into it again, violates this right of property. The purpose for which it is led off, be it for washing, drinking, or manufactures, is wholly immaterial. There are no savings of such uses in the Act incorporating the Navigation Company. There is a comprehensive saving of the navigation; but with this exception, and this only, the grant of water power, and with it, necessarily, the grant of its essence, the use of the water, is absolute. If this reasoning be correct, the grant of a power by the Legislature to the district of Spring Garden, to take water from this pool, for the use of the district, must impair this previous grant to the Company and its assigns, and is not in accordance with the Constitution of the United States.

The argument in favour of the bill I understand to be, that the citizens of the district, have as good a right to use the water of the Schuylkill for drinking, etc., as the citizens of the City; and that if the City can rightfully take out the water for distribution to their citizens, the Commissioners of the district may do it also, especially under a permission by the Legislature: for the City has no legislative grant for such a purpose, nor was the Navigation Company authorized to grant such a permission, if they did grant it.

The right of the City to take and distribute the water of the Schuylkill, is not involved in the present question. I do not mean to investigate it in this place. That it is thought by any one to depend upon the grant by the Schuylkill Navigation Company, can hardly be supposed, since the City did the same thing before that grant, and before the erection of the dam at Fairmount. The question on the bill, is, whether the Legislature can lawfully grant to any one the power of taking water from the pool of a dam, the whole water power of which they have already granted to another. Whatever the original rights of the city and district in this matter, may have been, there are now two restraints upon the exercise of any right over the waters of the river, which for great public purposes, the Legislature have rightfully imposed. The first is a restraint upon any one which interferes with the navigation, as it is improved under the charter of the Navigation Company. The second is upon any use, saving that for the navigation, that interferes with the grant of water power.

The first binds the city and all other persons, by the general provisions of law, the grant by the Company to the City, making the right of water power at the Fairmount dam, expressly subject to it.

The second does not operate upon the City, so far as it regards the water power at the Fairmount dam, because she has become the purchaser of it; but it operates upon all other persons without qualification, and as to this dam even upon the Navigation Company itself, except so far as the saving for the navigation relieves the Company.

It might be conceded then, though it is not, that the city and district, before the purchase of the water power by the City, stood on the same footing as to the use of the water of the Schuylkill for the purpose of supplying the citizens. The present difference between them is, that the City, for a valuable consideration, has purchased the grant of water power from the State, or what is the same thing, from the grantee of the State, and the use of the whole water, constituting the water power at Fairmount dam; and that any other person who takes the water from the said pool, violates the water power which the Legislature granted to the Company, and the Company to the City.

The only possible reply, as it appears to me, that can be given to these remarks, is, that the use granted by the bill will not materially impair the water power; but this, I think, is inadmissible, either as a legal or as a conscientious reply. The whole water power belongs to the City. Her's is the right to the full and absolute enjoyment of the grant and contract, and there can be no conscientious claim by any person, either independently or under the Commonwealth, to impair it at all. It is the same as strictly at law and in equity. The uses of property, direct and indirect, belong exclusively and entirely to him who is the exclusive owner of the property. The indirect use may consist in not permitting others to use it gratuitously at all. The prohibition leads to sales, to bargains, or contracts for the use.

A partial use, by the proprietor, may be more valuable than even such sales or bargains would be. Any unauthorized use of such a right by any body, though the direct injury be not material, may be fatal to all the indirect ones I have spoken of. I hold it to be abhorrent to every principle of law and justice, and to every suggestion of an enlightened conscience, to contend for the use of another man's right, on the ground that it will not materially injure him, or that he wastes what he has, or that he has more than he uses, or that by a discreet use after the interference, he will enjoy more than he did before. All these are suggestions in violation of property. What is mine, is mine to use or not to use,—to use partially or completely—

to use parsimoniously or liberally—directly or indirectly; and property would cease to be one's own, if the Constitution and the principles of justice did not protect it from the least invasion, upon any such pretences. I need not say that the law rejects them all.

As the bill in question does not propose a compensation, I need say nothing on this point. The States are prohibited from passing any laws impairing the obligation of contracts, and the prohibition is unconditional, unqualified, and absolute. I repeat my concurrence in the opinion of Mr. Meredith, that the bill, if it becomes a law, will infringe the rights of the City.

HOR. BINNEY.

Philadelphia, March 18, 1843.

NUMBER XLII.

The Watering Committee, to which was referred a communication from the Watering Committee of Spring Garden, "enclosing a petition of a number of Citizens of the District of Spring Garden, complaining of an insufficient supply of water,"—and a further communication from said Watering Committee of Spring Garden, containing their report to the Board of Commissioners of said District, on the petition enclosed in their former communication,

REPORT:

That they have not enquired whether the supply to the petitioners has been "*insufficient*," but assuming it for the purposes of this report, they have examined the contract between the City and said District, in order to determine what are the relative rights and duties of the City and District under the contract.

The District Committee rely on the following language of the 3d proviso of the fifth article in the contract; "That in cases in which, without wholly stopping the water, there shall, for the cause aforesaid, (*that is*, by reason of an insufficient supply from the works at Fairmount,) be a partial supply, in such case there shall be a proportional abatement of the said rents during the time of such defective supply, to be allowed as aforesaid."

Let us enquire first, what did the City contract to do—we give the words of the contract—1st section of the 1st article.

"That the party of the second part, and their successors, shall and may, from time to time, hereafter, at their proper cost and charge, lay and attach iron or leaden pipes, of the same strength and construction with the iron or leaden pipes used in the City of Phi-

Philadelphia for the time being, to the branches attached by the party of the first part, to the iron mains laid, or to be laid, in Vine street, for supplying the said City with Schuylkill water; and from the said pipes convey and introduce the said water into the several streets and public alleys within the said District, and from thence, by pipes of the said material, connected with the ferrules of the same diameter as those used in the said City in similar cases, convey the said water into the premises and houses in the said District."

And 3d section of same article, to wit: 3d. "That the said party of the first part, and their successors, shall and will furnish to the party of the second part, and their successors, a supply of Schuylkill water through the same mains through which the said City shall receive it, so long as they shall be enabled, by the works at Fairmount, to afford a greater supply of water than shall be requisite for domestic purposes in the said City, for cleansing the same, and for extinguishing fires therein; and that they shall and will extend their works at Fairmount, by means of additional wheels and pumps, from time to time, as an increase of water may be required, until all the water power of the said works shall be applied for the purposes herein mentioned."

Has the City complied? Certainly. The City authorities have allowed all the attachments included and described in the contract, and extended their works at Fairmount, by means of additional wheels and pumps, from time to time, as an increase of water was required.

They have always kept a full supply of water in their reservoirs at Fairmount.

The proviso, an extract of which has been given by the District Commissioners, runs thus: "*Provided further*, That in all cases where the water is directed to be stopped, by reason of an insufficient supply from the works at Fairmount, that then, and in such case, the rent shall cease from that time for such persons, manufactories and establishments, as shall not be supplied with the same, until supplied again by the party of the first part, and shall be allowed for accordingly, in the settlements between the parties hereto; and that in cases in which, without wholly stopping the water, there shall, for the cause aforesaid, be a partial supply, in such cases there shall be a proportional abatement of the said rents during the time of such defective supply, to be allowed for as aforesaid."

Therefore, a proportional abatement is to be made in two cases: 1st. "where the water is directed to be stopped by reason of an insufficient supply from the works at Fairmount," and 2d, "Cases in which, without wholly stopping the water, there shall, for the cause aforesaid, be a partial supply."

Neither of these cases has arisen. "The water has not been directed to be stopped," nor "without wholly stopping the water" has there been "a partial supply," "by reason of an insufficient supply from the works at Fairmount."

The insufficient supply complained of must, therefore, arise either from the inadequacy of the pipes of conduit and distribution laid by the District, or the elevation of the points to be supplied; if attributable to either, it does not impose a duty on the City, under the existing contract, either to furnish a remedy or make the abatement asked. The City has not covenanted any where to raise the head of water by elevating the reservoirs;—she has covenanted, with certain reservations, to allow her mains to be tapped, and her reservoirs to be drawn from.

Your Committee cannot coincide with the opinion avowed by the District Committee, that “the City has contracted to supply Schuylkill water into that part of the District of Spring Garden incorporated by act of assembly, passed March 2d, 1827.” No such stipulation or covenant by the City can be found in the contract.

The City permits her mains and reservoirs to be used on certain conditions, by the District, for the purpose of obtaining a supply; but she does not bind herself to raise her reservoirs, to make new ones at higher points, or in any manner to cause the supply to flow to a higher point than her reservoirs, from which her own supply is drawn.

She does not, in this particular, bind herself to introduce the water, but to allow the Commissioners to draw the supply required.

The second contract with the District does not vary from the first, except in allowing additional attachments by the District, and a more extensive distribution of the water.

Your Committee are, therefore, of the opinion that an allowance cannot be claimed of the City under the contract, and inasmuch as the District have left unpaid on their duplicate for 1843, and due June 1, 1843, a balance of three hundred and twenty-eight dollars and sixty-four cents, being the amount of the allowance claimed by them, the Watering Committee submit the following resolution:

Resolved, That it is inexpedient to make the allowance claimed by the Commissioners of Spring Garden, and that the Watering Committee be directed to inform said Commissioners, and to request the payment of the balance due on their duplicate for water rents, and payable the 1st of June, 1843.

JOHN PRICE WETHERILL,
HENRY F. RODNEY,
JOHN TRUCKS,
OWEN SHERIDAN,
CHAS. GILPIN,
JAMES J. BOSWELL,
M. NEWKIRK.

Attest—SAMUEL W. RUSH,

Register of Watering Committee.

June 22, 1843.

Spring Garden, May 23, 1843.

The Watering Committee Report,

That the petition signed by a number of owners of property, asking to have refunded to them a portion of their water rents, in consequence of their supply being insufficient, has been sent by your Committee to City Councils.

No information in relation to it having as yet been received from the Committee to whom it was referred by Councils, and the time for settlement being at hand, we have thought it expedient to submit our views, and obtain the sense of the Board on the subject.

The petitioners, after stating the fact, which is too well known to require proof, that they, with many others, suffer great inconvenience from the want of a sufficient supply of water, ask to have a portion of the rent paid by them, refunded; founding their claim in a stipulation contained in the 5th article of the agreement made between the City and District, February 21, 1831, which provides "that in cases in which, without wholly stopping the water, there shall for the cause aforesaid, (*that is*, by reason of an insufficient supply from the works at Fairmount,) be a partial supply, in such case there shall be a proportional abatement of the said rents during the time of such defective supply, to be allowed for as aforesaid:" *id est*, in the annual settlements between the City and District.

Now, in the opinion of your Committee, this stipulation is so explicit, that to establish the fact of a defective supply, is to establish the claims of the petitioners, and all those similarly situated, and it only remains to be settled *how much*, or what proportion of the rents should be refunded. The cases of the petitioners are the precise cases contemplated in the proviso, and we can scarcely conceive how any objection can be made against the demand, it being so obviously equitable and just, and in strict accordance with the terms of the contract.

The justice of the claim appears so evident to your Committee, that they believe that the petitioners could individually recover from the City, or from this Corporation, as its agent, irrespective of the agreement made between the Corporations, as the City, at the time of countersigning every permit, enters into a contract to furnish the requisite supply of water; and the City is as firmly bound to comply with its part of the contract, by supplying water, as the individual is bound to comply with the other part, by paying the rent.

It may be said that a portion of our District is too high to be supplied from the works at Fairmount, but this cannot be used as an argument against the claim, inasmuch as the City has expressly contracted to supply Schuylkill water into that part of the District of Spring Garden, incorporated by act of Assembly, passed March 2d, 1827, which embraces the whole of our present territory.

This argument is, therefore, entitled to no weight, and if a portion of our territory is too elevated to be supplied from their reservoirs, it is the duty and business of the City to make them higher.

We would advert to another fact, which, though not stated in the petition, is worthy of being considered in connexion with it. Among the advantages which the City agrees to render are the rights of the public to the water, for cleansing the streets and extinguishing fires. Throughout a large portion of the District, even where the conduit pipes are laid, we are deprived of both those advantages during a large portion of the year.

In regard to the amount which ought to be refunded, your Committee, after diligent inquiry and examination, have come to the conclusion, that all the properties situated north of Wallace street and west of Twelfth street are entitled to a deduction of one-half; and in other locations, where the supply is rather better, but nevertheless very insufficient, a deduction of one-third should be made.

Agreeably to instructions, the Superintendent has furnished the Committee with the accompanying lists.

According to the above suggestions, the deduction on properties within the bounds prescribed would amount to \$220 62, and on other properties \$129; making altogether \$349 62.

The Committee submit the following :

Resolved, That an order be drawn on the Treasurer for \$22,546 22, being the amount after the said deductions are made.

Extract from the Minutes.

On motion of Mr. Lippincott, seconded by Mr. Higgins, the resolution, embodied in the Report, was read a second time, considered and adopted.

WM. RQDERFIELD,
Secretary to Board of Com. D. S. G.



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