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GEORGE P. KANE
vs.
JAMES S. SUTER
AND THE
MAYOR AND CITY COUNCIL
OF
BALTIMORE.

IN THE COURT OF APPEALS.

December Term, 1859.

SPECIAL DOCKET..... .....No. 6.

Appellant's Statement.

This is an appeal from the Equity side of the Superior Court of Baltimore City.

The bill was filed by George P. Kane, and sets out the facts upon which he based his prayer for an Injunction, in so concise a form that reference is made to the whole bill, which will be found on pages 1, 2 and 3 of the Record, for the ground upon which he claimed the equitable interference of the Court. The prayer for the Injunction was, *that the defendants should be restrained from injuring and destroying the complainant's dam, or any of the appurtenances to his mill, and from interfering with the complainant in such use of the water of Jones' Falls for running the said mill as does not interfere with the use of the same by the Mayor and City Council of Baltimore, for supplying the said city with pure water;* and it will be observed that it sets up no claim antagonistic to the City of Baltimore, but only to such use of the water of Jones' Falls by the complainant as shall not interfere with the use of the same by the city.

The Injunction, in this qualified form, was issued as prayed.

The defendants answered jointly, and their answer will be found on pages 6, 7, 8, 9 and 10 of the Record. They also filed as an exhibit with their said answer, the advertisement of Thomas M. Lanahan, Trustee, under whom Kane derived title; which advertisement, after describing by metes and bounds the land to be sold, concludes with the following: "But the City of Baltimore, under the Act of 1853, chapter 376, (as will more fully appear by reference to the inquisition in the matter of the Mayor and City Council of Baltimore vs. S. D. Tonge, in the Circuit Court for Baltimore County,) condemned and took from said Tonge, for the purpose of supplying the said city with pure water, about two acres and ten perches of the said land, and water rights attached thereto, leaving the balance, about twenty-five acres and thirty roods, more or less, as above described, and now offered for sale in fee simple, by order of the Circuit Court for Baltimore County.

"This property is known as the "Rockdale Factory," and is situated about two miles from the City of Baltimore, on the Falls road, and is improved by an extensive stone grist mill and other buildings, with all the necessary gearing and machinery suitable for conducting an extensive business. It is altogether the most desirable property, from its location and peculiar advantages, for manufacturing and other purposes, that has been offered in this city at public auction for years."

They also filed as an exhibit the decree in the Circuit Court of Baltimore City in the case of the Mayor and City Council of Baltimore *against* Tonge and others, by which the condemnation money then in the hands of a receiver in the said cause

was ordered to be paid to Lanahan, the Trustee; and in which decree it is adjudged that the Mayor and City Council of Baltimore are entitled to the fee simple estate in the property condemned.

Upon the filing of the answer a motion to dissolve was made, and before the hearing the testimony was taken under a commission.

On the part of the plaintiff, it was proved by William Dawson, (Record, pages 15 and 16,) that there is nothing in the description of the ground condemned which would enable him, as a surveyor, to locate the land described. He also proved that the distance from Rockdale dam to Whitehall dam is from forty-five to fifty perches, and that using the water for Rockdale mill could not affect the supply of pure water to the city, as the tapping for the city supply is a considerable distance below Rockdale dam.

He also proved by Samuel K. Griffith, (Record, page 16,) that there are six dams below Rockdale dam, viz: Mt. Vernon, Rock Mill, &c., and above are the Whitehall dam, Woodbury dam, &c. That when the Whitehall (Clipper mill) mill stops, the Rockdale mill must stop, as the Whitehall holds the water back. That it takes ten minutes to fill the Rockdale dam.

By William Kennedy, (Record, page 17,) he proved that he, witness, is President of Mt. Vernon Company; that he can see no reason why the dam of the Rockdale mill should in any way interfere with the supply of pure water to the City of Baltimore. In his opinion it would take but a few minutes to fill the Rockdale dam, which is a small one; and the Mt. Vernon dam being below, and being a higher and larger one, it takes longer to fill it; and therefore, if there is any obstruction, (which he does not think there is,) it would be caused by the Mt. Vernon dam, which is lower down the stream. The use of the water by the Rockdale mill does not in the slighest degree affect its purity. And on cross-examination he stated that if the water is held up by the Rockdale dam while it is filling, it would affect the supply of the city for a few moments, but he imagines there is always a sufficient quantity of water in the stream to supply the pipes, even when it is held up by the dams above. He thinks that even in the dryest times he has seen sufficient water in the stream to fill the pipes, although the same may be held up by the dams above.

And he proved by Horatio N. Gambrill, (Record, page 18,) that the dam of the Rockdale mill does not in any degree interfere with the supply of the city with pure water. It might check the supply at certain seasons of the year for a few minutes at a time, but could not interfere with the supply. The difference in the size of the Rockdale and Rock mill dams is very slight—he means in the water surface. If the Rockdale dam was entirely removed, there would be the same check to the supply of water there is now, because when the mills above are stopped, the Rockdale mill must stop also. All the mills must shut down and open their gates about the same time. When Rockdale mill-dam has run down so low that it is unprofitable to grind in the mill, it takes from five to fifteen minutes, in proportion to the flow of the water, to fill the dam so that the mill may grind with profit. On cross-examination he said that there is always a larger quantity of water in the stream than is necessary to fill the pipes.

By Artemas Donaldson, (Record, page 18,) he proved that by actual trial it took from five to seven minutes to fill the Rockdale dam.

By Daniel Warfield, (Record, page 19,) he proved that the use of the water by the Rockdale mill could not interfere with the supply of pure water to the city, since when the mill is running it passes through the mill, and when not, it passes over the dam.

And he proved by Lewis P. Clark, (Record, page 23,) that he was first assistant commissioner of the Water Board of the city for three years and two months; that his duty was to attend to the mill-dams and the repairs under the present Water Commissioners. That if he were to control the gates of the Rockdale mill himself, he does not see how he could use the water so as to affect injuriously, to any amount, the supply of water to the city. He cannot see any necessity, either with reference to the quantity or quality of the supply of water to the city, to remove the Rockdale dam. The city never took the whole supply furnished by the falls during the witness' service. That the time of keeping the main pipe open at Rockdale, for restoring the daily consumption, depends upon the height to which the gate is raised; if raised one-fourth, it remains open three or four hours; if one-third, it remains open a proportionably less time. It never remains open all the time. The average supply of the city is from three to four millions of gallons per day. And on cross-examination he said it is important for the city to have the control of the dams.

The complainant then filed the following exhibits, viz:

No. 1.—A plat of the property, made by Mr. Dawson.

No. 2.—(Record, page 25.)—Mr. Dawson's certificate that the pipe through which the city receives its supply will discharge 13,324,608 gallons in twenty-four hours.

No. 3.—(Record, page 25.)—Order of the Water Board to strip the Rockdale dam.

No. 4.—(Record, page 25.)—The following notice given by the Water Board to the complainant, viz:

Baltimore, June 10, 1858.

Col. GEORGE P. KANE:

Sir—I am directed to say to you that before using the water at Rockdale mill, you will call and make arrangements for the same as to the price you will be charged per annum by the Water Board.

Yours, respectfully,

WM. STEPHENSON, *Registrar.*

No. 5.—(Record, pages 26, 27 and 28.)—The Record of proceedings on the warrant, inquisition and return for the condemnation of the bed of the falls for the use and occupation of the city.

No. 6.—(Record, page 29.)—Deed from Horatio N. Gambrill and wife to the city, in which, for the consideration of $45,000, they convey to the city the bed of Jones' Falls constituting White Hall mill-dam, *retaining the right to use the surplus water for running the mill, and to build additional dams for using the same.*

No. 7.—(Record, page 31.)—Deed from William E. Hooper and wife to the city, in which, for a consideration of $50,000, they grant to the city the bed of Jones' Falls constituting the Woodberry dam, *reserving the right to use the surplus water, and to build an additional dam or dams to use the same.*

No. 8.—(Record, page 33.)—Deed from the Mt. Vernon Company to the city, by which, for a consideration of $73,500, the said Company grants to the city the bed of Jones' Falls constituting the Mt. Vernon dam, *reserving the right to use the surplus water.*

No. 9.—(Record, page 34.)—Decree from T. M. Lanahan, Permanent Trustee of Tonge, to complainant, by which he grants to complainant all Tonge's interest in the land conveyed to him by Tagart, Trustee, &c., subject to the rights of the city, &c.

No. 10.—(Record, pages 35 and 36.)—Mr. Dawson's certificate that the Rockdale dam contains 284,063 gallons of water; also that the flow of Jones' Falls is 34,122,240 gallons in twenty-four hours.

The defendants examined two witnesses only to prove the alleged necessity to take down the Rockdale dam. They were Columbus O'Donnel, one of the Water Board, who gave the order to tear down the Rockdale dam, and the other Mr. Manning, the City Engineer of the new water works.

Columbus O'Donnel, in his examination in chief, (Record, page 20,) utterly fails to prove a necessity to move the Rockdale dam. The strongest expression he uses is, that "if the consumption of water by the city is increased, it will be absolutely necessary for the city to have the control of the dam above the one from which the supply is taken."

In his cross-examination he states that the recent condemnations are in furtherance of the plan now being carried out to supply the city from Beatty's mill, distant six miles from Baltimore. That at the time the destruction of the Rockdale dam was commenced, it was not necessary to the use of the water by the city at that time. It is necessary that the city should have the control of the Mt. Vernon dam, but he does not think it necessary that the dam should be taken down; it is sufficient for the city to have the control of the gates. He does not think it more necessary that the city should have the control of the Rockdale dam gates, than the gates of the Mount Vernon dam; considers it equally necessary to have the control of the one as the other, since there is very little water comes in between the two dams.

In the ordinary action of a mill wheel, no injurious effect of any amount is produced upon the quality of the water, with reference to the city's use of the same. There is no injurious effect produced on the quality of the water by holding it up and then letting it off, except the evaporation.

He also stated on cross-examination, that Mr. Suter commenced to open the dam at Rockdale by the command of a Committee of the Water Board, of which witness constituted one. *The city ordered the dam to be torn down, because it had purchased the property, and considered that it had a right to take down the dam.*

Mr. Manning—(Record, page 24)—also on behalf of the defendants, testifies that a supply of water, perfect and sufficient at all seasons for the city, depends upon its having the control of all the dams or artificial obstructions above the Rock mill, where the supply is.

On cross-examination he states that his duties are limited to the new water works; he has nothing to do with the water works as at present existing. Conceding that the city had the control of all the dams above Rock mill, he considered that such dams would be of decided benefit for purposes of storage. In a dry season the dams answer to store up showers of rain, which would otherwise pass off into the basin. The city then having the control of the dams, could suffer the water to pass off as it would be needed.

The motion to dissolve was heard, and the Court passed what is designated as a "decretal opinion and order," in which the opinion part is altogether in favor of the complainant, and the order part altogether against him. Hence this appeal, in which the appellant will contend—

FIRST.

That the condemnation by the city under the Act of 1853, ch. 376, is limited to such use and occupation of Jones' falls as may be necessary to supply the city with pure water.

Redfield on Railways, 114, 115 and 116.
The People vs. White, 11 Barbour S. C. R., 26.
Albany Street Case, 11 Wend., 151, '2.
Varick vs. Smith, 5 Paige, 147.
Taylor vs. Porter, 4 Hill, 143.
Embury vs. Conner, 2 Sand. S. C., 98, 106.
Dunn vs. City Council of Charleston, Harp. L. R., 189, 199.

SECOND.

That the proof in the cause shews conclusively that there was and is no necessity whatever, for any purpose of supplying the city with pure water, to destroy the Rockdale mill dam, by means whereof the said mill was operated at the time of, and before, the condemnation.

THIRD.

That the condemnation by the city, whilst it took from Tonge all the use and occupation of the stream which is necessary for the supplying of pure water to the city, left in Tonge all such use of it as did not injuriously interfere therewith, and that Kane acquired by his purchase from Lanahan, Trustee of Tonge, all the title to such use which Tonge had.

United States vs. Appleton, 1 Sumner R., 501.
Story vs. Odir, 12 Mass., 160.
Angell on Water Courses, 165, '6, sec. 159.
White vs. Flannigan, 1 Md., 540.
McTavish vs. Carroll, 7 Md., 352, '6.
Ely vs. Stewart & Speed, 2 Md., 417.
Kilgour vs. Ashcom, 5 H. and J., 82.

FOURTH.

That Equity has jurisdiction to restrain in this case by the Writ of Injunction.
White vs. Flannigan, 1 Md., 543 to 548.
Shipley vs. Ritter, 7 Md. 413.
Samborn vs. Covington Co., 2 Md. Ch'y R., 412.

GEORGE W. DOBBIN,
For Appellant.

That the inquisition found is so vague and uncertain in the description of the land intended to be ~~located~~ condemned for the use and occupation of the City, that the said land cannot, with requisite certainty be located by the terms of said description and that the inquisition and condemnation founded thereon are therefore void

Wilson vs Inloes 6 Gill 134
Thomas vs Turney 1 H & G. 438
Neal vs Hughes 10 G & J 10

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Filed 25th Jany 1860

GEORGE P. KANE.
vs.
JAMES S. SUTER,
AND THE
MAYOR AND CITY COUNCIL,
OF BALTIMORE.

COURT OF APPEALS.

SPECIAL DOCKET.

APPELLEES STATEMENT AND BRIEF.

The facts involved in the present suit are as follows: The Mayor and City Council of Baltimore, in the exercise of certain powers conferred upon them by an Act of the General Assembly of Maryland, passed at the session of 1853, chapter 376, and entitled, "An Act to supply the City of Baltimore with pure water," proceeded to condemn, *in fee-simple*, a piece of property situated upon Jones' Falls, "*with all water-rights whatever thereto attached*," (Rec. page 27,) of which Daniel Warfield held the reversion, and Samuel D. Tonge was his tenant for ninety-nine years, renewable forever, Rec. pages 1, 7, Id. pages 26, 27, 28, 29. The ground rent to which the land was subject was subsequently extinguished by Tonge, (Rec. 1,) so that he became the absolute fee-simple owner of all the property, excepting that which the city had condemned. After the confirmation of the inquisition of the jury by the Circuit Court, the Mayor and City Council received notices, from several persons, not to pay over the thirty-two thousand dollars which had been awarded by the jury to the said Tonge, on the ground that they had legal claims against the same. Under these circumstances the corporation ordered G. L. Dulany, its attorney, to file a Bill of Interpleades in the Circuit Court for Baltimore city. This was accordingly done, but before the suit was terminated, Samuel D. Tonge petitioned for the benefit of the insolvent laws, and Thomas M. Lanahan becoming his permanent trustee, applied to the court for the sum awarded by the jury as above mentioned to the said Tonge, and which had been paid therein at the time of filing the Bill of Interpleades. The court, in passing its *final* decree, ordered that the money claimed should be handed over to the said trustee, and *awarded the absolute fee-simple in the land condemned to the Mayor and City Council;* as prayed by the bill—Rec.

pages 7 and 8. The proceedings before the Circuit Court were not produced at the time the testimony in the cause was taken by the commissioner; but an agreement was subsequently entered into between the respective solicitors of the parties by which it was declared that they might be "used in evidence as though filed under the commission issued in this case, and subject to the same exceptions"—Rec. pages 36 and 37. (The decree of the Circuit Court, above referred to, will be found on page 12 of the printed record, and will be relied on by the defendants *as vesting in them an absolute fee-simple title to the property condemned.*) Upon the final termination of the interpleading suit, Thomas M. Lanahan, permanent trustee as aforesaid, advertised what remained of Tonge's property for sale—Rec. pages 10, 11 and 12. George P. Kane, the complainant, became the purchaser, entered into possession of the same, and began to use the water-rights which the Mayor and City Council had acquired absolutely by condemnation, as if the same was his property —Rec. 2, 8. After the water had been thus used for some time, notwithstanding frequent warnings and remonstrances from the agents of the city, Mr. James S. Suter, the water engineer, received written instructions from a committee of the Baltimore Water Board, "To strip the dam at Rockdale mill *so as to prevent any obstruction to the flow of water*"—Rec. page 25. In pursuance of these instructions, Mr. Suter proceeded to remove the waste-gate of the said dam, *which abutted on both sides of the falls upon the property which had been condemned by the city authorities, they being also the fee-simple owners of the bed of the falls upon which the said dam dreste*—Rec. 7, 27. Whereupon the complainant instituted an action for damages in the Superior Court, and afterwards filed a bill on the equity side thereof, setting forth some of the facts as above stated and praying for an injunction restraining the city from interfering with his use of the water until the said action should be determined, and also asking the court to entertain jurisdiction over the matter, alleging as a reason for the demand, that the party had no adequate redress at law.—Rec. 1, 2, 3, 4. The ground alleged in the bill for the right claimed by the complainant to use the water as he had done, was, that the city could not acquire, by process of condemnation, a fee-simple title, but only such *use* of the land and water-rights condemned as might be *absolutely necessary* for the purpose of supplying the city with pure water.—Rec. 2. The defendants, in their answer, admit

most of the facts as set forth in the bill, but contend that the city *did* obtain, by the condemnation, an *absolute fee-simple estate*, and that the use of the water by the said Kane *was inconsistent with the free and unobstructed use* of it on the part of the corporation.—Rec. 7. After the answer had been put in, a motion to dissolve the injunction was entered, (Rec. 10,) and an order thereupon made by the court fixing a day for the hearing of the same and giving permission to either party, in the mean time, to take testimony before a commissioner.—Rec. page 13. A commission was accordingly issued to Henry R. Dulany, Esq.—Id. 13. The testimony by him taken, in pursuance of the requirements of the commission, will be found in the printed Record, commencing at page 14 and ending at page 25 and the exhibits filed therewith from that page to page 36. After the return of the commission the suit was adjourned to the January term of the court, when upon a hearing of the motion for a dissolution the said injunction was accordingly dissolved.—Rec. page 37. Whereupon the said Kane prayed leave to appeal; which prayer was allowed by the court.—Rec. 38. Upon this statement it will be argued.

I. That according to the true construction of the act of 1853, ch. 376, sec. 1, 2 and 3, the Mayor and City Council of Baltimore are authorized to acquire by agreement or process of condemnation, *any* property which *they* may *conceive expedient* and *necessary* to promote the purpose mentioned in the act, and to hold the same in *fee simple*, for a term of years, or merely as an easement, *as to them may seem best*. And, in the case of a condemnation, the confirmation of the inquisition of the jury by the Circuit Court for Baltimore county, and the payment or tender of the "valuation" thereby assessed to the owner of the property taken, entitle the corporation to the "use, estate and interest" in the same "as *fully* as if it had been *conveyed*" by the said owner—vide sect. 3.

II. Supposing *this* construction to be correct, the Legislature in passing the act did not exceed the limits of their legitimate powers.

1. The only restriction imposed upon the exercise of the right of Eminent Domain by the Constitution of Maryland is, that a "just compensation" must be paid or tendered in the first instance to the owner of the property taken.

Const. Md. art. 3d, sec. 46, p. 40.

The *express mention* of this limitation occludes the supposition of the existence of any other. Expressio unius est exclussio alterius et expressum facit cessare tacitum.

Broom's Maxims, m. p. 517, t. p. 423.

Dwar. Stats. 9, Law. Lib. m. p. 713, t. p. 54.

The Warden St. Paul's v. The Dean 4. Price 65, p. 78.

2. In a State where there is a written constitution, the judiciary cannot invalidate an act of the Legislature, *independently* of any considerations drawn from the organic law, on the *vague* ground that it violates tne dictates of natural justice, or is contrary to the fundamental principles of republican government and the teachings of political æthics.

Md. Dec. Rts. art. 6. Const. Md. p. 11.

Sedg. Stat. and Const. Law, (ed. 1857,) 180 to 187.

Crane v. Meginnis. 1 G. & J. 463, p. 472.

Watkins v. Watkins, 2 Md. 341, p. 356.

Commonwealth v. M'Closkey, 2 Rawle, 369, p. 374.

Commonwealth v. M'Williams, 11 Penna. (State,) Reps. 61, p. 70.

Kirby v. Shaw, 19 Id. 260.

Sharpless v. Mayor, &c., Pha. 21, Id. 147, p. 158.

Clark v. Saybrook, 21 Conn. Reps. 313, p. 324.

Patrick & Manigault v. Comm'rs. 4, McCord, 541.

R. R. C. v. Davis, 2 Dev. & Batt, Law Reps. 451, p. 458.

The question is very clearly stated and ably considered in the American Law Register for 1859, vol. vii, No. viii, (June No.) p. 449 to 462.

3. The Legislature is the sole judge of the *exigency* which justifies the taking of private property for a public purpose.

10 Law Reporter, (Prize Essay Em. Domain,) pages 481, 490.

Beekman vs. S. R. R. Co. 3 Paige's Ch. Reps. 45 p. 73.

Spring v. Russell 7, Greenlf. 273, ps. 291, 292.

Harris v. Thompson 9 Barbour p. 350.

Hartwell et al v. Armstrong et al, 19 Barbour 168.

Of the *amount* to be taken, and the *quantity of estate* to be had therein. A *fee simple* may be acquired by *condemnation*.

10 Law Reporter (Prize Essay Em. Domain,) p. 441.

Rexford v. Knight, 15 Barbour's Reps. 627, p. 642, 643.

Affirmed on Appeal. 1 Kernan, p. 308.

Heyward v. The Mayor, &c., N. Y. 3 Selden, p. 214.

Morris Canal and Banking Co. v. Townsend, 24 Barb. Reps. 658, p. 665.

Arthur v. Commer. & R. R. Bank of Vicksburg, 9 Sm. & Mar. (Miss.) Reps. ps. 430, 431.

The Tide Water Canal Co. v. Archer, 9 G. & J. ps. 509, 510, 511.

The question of the *degree* of *necessity* is *always* for the Legislature to decide.

Glenn v. Mayor &c. Balto. 5 G. & J. p. 429.

McCulloh v. State Md., 4 Wheat. 423.

4. Courts are *very reluctant* to set aside an act of the Legislature. *Every* presumption will be made in its favor, and in a *doubtful* case it will be declared valid.

Sharpless v. The Mayor Pha. 21 Penna. (State) Reps. p. 610.

Cotton et al v. Co. Commr's. Leon Co. et al, 6 Florida Reps. p. 610.

Baugher et al v. Nelson, 9 Gill, p. 304.

III. But the question as to whether or not the estate taken was *necessary* to accomplish the *purpose* contemplated by the act is not now an open one. It has been *conclusively* settled:

1. By the confirmation of the inquisition of the jury by the Circuit Court for Baltimore Co.—Hamilton v. Annap. & Elk Ridge R. R. Co. 1 Md. p. 567.

2. By the decree of the Circuit Court for Baltimore City adjudging the fee simple in the property condemned to the Mayor and City Council.—(Rec. 12, Defd'ts. Ex. B. Id. 36.)

3. Tonge, or Thomas M. Lanahan, his permanent trustee, having *received* the condemnation money, he and all persons claiming under him are *estopped* from saying that the Mayor and City Council acquired a larger estate than was *necessary* for the purpose intended.

Baker v. Braman, 6 Hill, 47.

Embury v. Conner, 3 Comstk., 511.

IV. Taking it for granted then that the act in question is a legitimate exercise of legislative authority it will next be contended that the powers and discretion (See p. t. I.) thereby conferred and vested, have not been transcended or abused by the Mayor and City Council of Baltimore.

1. The act itself must not be too *strictly* construed. The rules of construction applicable to English railway companies have not been domesticated by the courts of this State.

Tide Water Canal Co. v. Archer G. 9. & J. page 482.

Mayor, &c. Balto. v. B. & Ohio R. R. Co. 6. G. 290, page 297.

Av. Co. v. Merryman 10. Md. 536, page 542.

Bradley v. N. Y. & N. H. R. R. Co. 21. Connect. Reps. 306.

2. Where the power of determining upon the *necessity* of a measure or thing, is given to a municipal corporation, courts will not interfere with its *judgment* in a particular instance; *at least*, unless it can be *clearly* shown that the corporation has exceeded the limits of its authority or *grossly* abused the discretion vested in it.

Harrison v. Mayor & C. C. Balto.

1. Gill, 264, page 276.

Meth. Prot. Church v. Mayor & C. C. Balto. 6. G. 391, page 400.

Glenn v. Mayor, &c. Balto. 5 G. & J. page 429.

3. *Neccessary* does not mean physically impossible—like most words it admits of all degrees of comparison, and is qualified by other words in connection with which it may be used. It is frequently employed as synonymous with "expedient," "conducive to," "promotive of," &c. &c. Wherever the means resorted to have a *tendency* to produce a certain end, in the propriety of the English tongue, it *may* be said, that those means are *necessary* to accomplish that end.

McCulloh v. State Md. 4 Wheat. 316 fn. 413.

1. Kent Comm. t. p. 271. m. p. 253.

Cotton v. Co. Commr's Leon et al. 6 Florida Reps. p. 629.

4. That *absolute control* on the part of the city, over the water contained in the dam at Rockdale mill *is necessary* for properly carrying out the purpose had in view.

Vide testimony Wtns.—Rec. pages 16, 17, 18, 20, 21, 22, 24.

V. *Admitting* that the use of the water by the said Kane does not *in the least* obstruct or affect the city's supply, it does not follow that he would be *entitled* to such use. If there is any surplus water the corporation may rent it out. At any rate a third person cannot claim to use it without the city's permission.

Harris v. Thompson, 9 Barb. 350, p. 361.

Varick v. Smith, 5 Paige, ps. 146, 147.

Hamilton v. Annap. & Elk Ridge R. R. Co. 1 Md. 553.

G. L. DULANY,

HENRY R. DULANY,

Solicitors for Appellees.