In the Circuit Court of the United States,

For the Fifth Judicial Circuit and the District of Alabama at Mobile,

Transferred from the Middle District of Alabama.

Robert T. Chisholm

vs.

The City Council of Montgomery,

James M. Wilson

vs.

The City Council of Montgomery.

Archibald Johnson, et al., Ex'rs,

vs.

The City Council of Montgomery.

REPLY OF MORGAN, BRAGG & THORINGTON,

Att'ys for Plaintiffs, to Rejoinder of Counsel for Defendant.

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From the argumentative explanation, made by the counsel for the defendant, it appears, that in asserting, that "the charters of these companies show that no part of the "roads was authorized to be constructed within the limits "of the city," they "intended to mean" "that by the terms "of their charters *proprio vigore*, they had no authority to "construct their roads within the city of Montgomery."

We have never contended, that by virtue alone of their charters, and without more, these companies could extend their roads within the limits of the city of Montgomery, and adopting the modest expression of the counsel for the defendant, "In our simplicity we suggest," what difference

does it make, whether by the terms of their charters "*proprio vigore*," they were "authorized" to construct their roads within the city of Montgomery or not, if by the terms of their charters they were "authorized" to do so, upon the granting of the right of way to them, by the city, and the city having express authority to do so from these same charters, has granted them the right of way. On such a state of facts the proposition cannot be maintained, as matter of fact, that "The charters of these companies "show that no part of the roads *was authorized* to be con- "structed within the limits of the city;" and it is wholly immaterial whether the charters of these companies "*pro- "prio vigore*" authorized them to construct their roads within the city or not. Whether, therefore, we take the original proposition, as stated by them, or as aided by their argumentative explanation, it is evident that the learned counsel for the defendant have run against the rough corners of their own Latin, and in either event have availed themselves of the benefit of their own Poetry, by enjoying the recreation of "a Homeric Slumber."

In explaining the expression, "The facts presented "in the record on which the court made its decision," (*i. e.* in the case of the City Council of Montgomery vs. The Montgomery and Wetumpka Plank Road "Company, 31 Ala. 76–89,) "*are the facts now present- "ed in this case* as to the power of the city to issue "its bonds to aid in the construction of plank roads or "bridges outside of the city, and make substantially, if not "identically, the same case, and the court pronounced that "the city of Montgomery had no power for any such pur- "pose"—the counsel say, "It will be perceived that we "were arguing on the charter of the city, and of these "companies, and with these charters before them, and "nothing else, the Supreme Court of Alabama, *would have "been obliged to decide*, that there was in the charters of the "companies, as in the charters of the city, nothing to au- "thorize the issuance of these bonds." The spirit of prophecy in which this explanation is made, still leaves the stubborn facts standing exposed to view, that when the

Supreme Court of Alabama decided that case, the charters of these companies were not before the court, nor was the validity of these bonds a question in that case, nor was the ratification act of the 25th of February, 1860, in existence. But to save all doubt, that court, in that case, took occasion to say for itself, on this subject, what perhaps is entitled to more weight than *the predictions* of the eminent counsel as to how it would be "obliged" to decide *a supposed case not then before it*, when it said: "The legality "of the issue of these bonds, and the liability of the city "for their redemption, and as affecting this, last inquiry, "the question, whether the bonds are in the hands of first, "or subsequent holders, will perhaps present grave ques- "tions, should they arise. *None of them are presented by "this record, and it would be improper in us now to consider "them.*

II. A defence is urged, that if the plaintiffs recover at all, it can only be for the value of that part of the work done on these roads in the city. On this point the counsel seem to confound the rule applicable to paper not negotiable, with that which is negotiable. Between these two classes of paper, every lawyer understands the well settled distinctions of the law, and none know these better than the counsel for the defendant. The bond discussed by the court, in the City Council of Montgomery vs. The Montgomery and Wetumpka Plank Road Company, 31 Ala. pp. 76–89, was not negotiable paper. The court in that case drew this distinction in relation to *that indemnity bond*, and the counsel for the defendant, by argument, attempt to hold it as applicable to these bonds, which have all the essential requisites of negotiable paper. The implied power of the city of Montgomery to make and issue negotiable paper has not been questioned, and we apprehend will not be. Such a power has been denied to the board of supervisors of a county.—Canal Bank vs. Supervisors, &c., 5 Denio, 517; and to Village Trustees, 4 Denio, 520; and to Trustees of a School Township; Inhabitants vs. Weir, 9 Ind. 224; and we apprehend it would be denied

to County Commissioners, Parish Trustees, Levy Commissioners, Police Juries, and all others standing in the like attitude, upon the same principle, that there is a fixed distinction between the power to incur indebtedness for a County, Parish or Township for work done, by giving proper vouchers, and the power to issue negotiable paper. But the implied power of a corporate city to issue negotiable paper within the scope of its charter authority, stands on different ground.

Kelly vs. Mayor, &c., 4 Hill, 263.

Ex parte Selma & Gulf R. R. Co., 45 Ala. p. 736, per Saffold, J.

See all the authorities cited upon this same point on page 11 of our first argument on these cases. This then being negotiable paper, if the plaintiffs are entitled to recover at all, it must be for the whole amount of each set of bonds.

The substantial features of the contract in every such bond is the promise to pay the amount thereof "to bearer" at a time and place named in the bond. These made the bonds negotiable paper. The fact that these bonds were negotiable paper, was not overthrown or restricted, by the recitals upon the margin of the bonds, to the effect that they were issued as a subscription to one of these plank road companies, or as a loan to each of them. This did not make them any more or less what they would have been, without any such recitals, and that is negotiable paper. The only inquiry put upon the holder of such bonds by law was the same with these recitals that it would have been without them, and that was whether the city of Montgomery had power under any circumstances, either expressly or by fair implication, to make, issue and sell its negotiable paper, and had exercised that power. This settled principle of the law we have already fully discussed. In their first argument the counsel for the defendant attempted to assail the announcement of this principle by Judge Swayne in the case of Gelpcke vs. The City of Dubuque, 1 Wallace 203, by styling it "*a dictum.*"—See page 14 of their first argument. But if it be "*a dictum*"

it is one that was sustained by a large array of highly respectable authorities at the time that decision was made. See authorities cited by the court in that case. And it has been followed as a settled question of law repeatedly since that time.

See Murray vs. Lardner, 2 Wallace, 110.

Supervisors vs. Schenck, 5 Wallace, 784.

City of Lexington vs. Butler, 14 Wallace.

No instance has been brought to our notice where "*a dictum*" has acquired such extensive and continued recognition as settled law by any court, much less the highest court in the land, and "in our simplicity we suggest" if this is "*a dictum*" what is law. Is it any the less true, that the work done, and to be done, within the limits of the city of Montgomery, constituted a consideration for these bonds, because the bonds themselves were issued generally, as subscription for stock bonds, or loan bonds? Is that the new system of logic, counsel have discovered, somewhere in the region of "*post hoc, propter hoc?*" We commend our learned friends to *the English facts* of these cases, while they are introducing a general muster of Latin phrases.

III. Another proposition asserted by the counsel for the defendant for the first time, is found in their rejoinder, and that is, that the contract of the Montgomery and Wetumpka Plank Road Company to construct its plank road through the streets of Montgomery was *nudum pactum*, on the ground that the city could stipulate for no greater benefit than the return of the money loaned, principal and interest; and therefore, the promise of the company to build its road through the streets of the city was without consideration. Our surprise at this defense is increased by the fact, that the counsel did not "run the argument out in detail" and plead *usury!*

This was not a loan of money, to be repaid as such, with principal and interest by these companies to the city. These bonds were loaned by the city to these companies, and in case the companies paid them, then the companies

owed the city nothing, but if the companies failed to pay them and the city had to pay them, then the companies bound themselves by bonds and mortgages to make good their default to the city. In the case of the Montgomery and Wetumpka Plank Road Company, it is specially covenanted and agreed as part of the consideration of these bonds, that the company shall build and construct part of its road within the city limits.

Agreed Facts, pp. 62, 67 and 72.

The counsel for defendant deny the legal validity of such a stipulation of benefit for the city, but as the doctrine of *ultra vires* does not exactly apply, this part of the contract becomes "null and void," in tender consideration that it was *not a good trade* for the Montgomery and Wetumpka Plank Road Company! This, we suppose, is on their doctrine that in "stress of weather" it is permissible to find "any port in a storm."

IV. As matter of fact we do not think there can be any doubt that among others, one of the considerations moving to the city of Montgomery which induced the issue of bonds for subscription to the stock of the Montgomery South Plank Road Company, was the construction of the road of that company within the city limits. This we discussed in our reply to the first argument of the counsel for defendant.

See pp. 4 and 7, and authorities cited on page 8.

All the facts and circumstances that led to the issue of these bonds, and the order in which they occurred are there set forth, as shown by agreed statement of facts, and that during that period all the reports of committees of the city council of Montgomery and of the officers of said city council and of the written business transactions of said city council from the first day of January in the year 1850, up to the first day of January in the year 1855, are lost and destroyed, and there is "*no evidence thereof*, except "so far as the same have been transcribed into the minutes "of said city council, or referred to in said minutes." It will thus be percieved by the court, that the Agreed State-

ment of Facts utterly negatives the idea that any living member of the board of aldermen or city council, or any clerk who was the keeper of those lost and destroyed records could have recollected and testified in relation to their character and contents, because the Agreed Statement of Facts distinctly states that as to all these lost records, documents and papers, there is *no evidence thereof, except as stated.*

Agreed Facts, p. 99.

But the counsel for the defendant evidently overlooking this feature of the Agreed Facts, say, on page 10 of their rejoinder: "Again, if any such contract was ever made, "although the written evidence may have been lost, the "members of the board of the city council, and the clerk, "who was the keeper of the records, have not passed away, "and certainly could have recollected and testified in re-"lation to its character." In making this statement, the counsel go outside the Agreed Facts, and in their journey make a small but passing performance *in the witness stand.* This combination of somnambulism and somniloquism was, we suppose, a "Homeric slumber." If, however, it is allowable for us "in our simplicity" to make a similar journey, we take this occasion to say from bitter experience, that no living member of the boards of the city council, or clerk, or keeper of the records knows or pretends to know the contents of these lost records, reports and written business transactions.

While contending that the facts upon which we rely can have no fixed significance as tending to establish any feature of contract in their relations to each other, and insisting that if transposed in regard to time, their meaning would have been the same, the counsel for defendant with all their ingenuity and distinguished ability, are careful to avoid the effects of any such attempt at transposition of these events themselves. The issue and delivery of these bonds to this company by the city, was of all else the most conclusive upon the city, that the company was *then* entitled to them, and had complied with all engagements which rendered such issue and delivery a duty on the part

of the city. This proposition will not be disputed. If then, the city had issued and delivered these bonds to this company on the 4th day of June, in the year 1850, and had not granted the right of way to the company to construct its road along the streets of the city till the 20th day of September of the same year, with these two events standing in this relation, without more, it might well have been contended that the granting of the right of way, and having this pledge of the company that it would build its road within the city limits, being an event long subsequent was in no way connected with the issue and delivery of the bonds; and that if it had been connected with the issue and delivery of the bonds, that such issue and delivery would have been deferred until the company had done something indicating its undertaking to build the road within the city limits. Between the two events, under such circumstances, there would have been no necessary connexion. The last act on the part of the city making a finality of its contract of subscription would have been done long before any steps were taken by the company to build its road along the streets of the city. But until these bonds were issued and delivered, the making of this contract was in *fieri*. Nearly seven months elapsed from the time the vote of subscription was taken on the 22d of February, 1850, till the 20th of September in the same year, before these bonds were issued and delivered. The Mayor had announced in putting the subscription to a vote, that the conditions of $40,000 subscribed stock had been complied with by the company, so that this delay could not have been attributable to that cause. During all this long period the company does not appear to have manifested the unmistakable indication that it had put itself in an attitude to claim these bonds as matter of right by demanding them. The subscription had been made by a vote of the city council, on a petition of citizens, and on the part of the city was therefore entirely under the control of the city council, and it was entirely within the power of both parties to have had such an agreement or understanding as this before the subscription was accepted

by the company. There is no evidence that the company was a party to the contract of subscription prior to the time it received the bonds, or that the company ever gave its assent to the contract of subscription until it received the bonds. On the part of the city, therefore, it amounted to nothing more than a proposition or offer to subscribe for the stock until it was accepted by the company, and the proof does not show that it ever was accepted by the company until the company received the bonds of the city. When the proposition of the city to subscribe for stock was accepted by the company, the preponderating inference from the facts in proof is that one consideration connected with and inducing it, was that the company by obtaining the right of way had undertaken to build its road through the streets of the city. This was a matter of direct interest and benefit both to the city and the company, it went to the value of the stock for which the city was proposing to subscribe, and independent of that was a matter within the immediate power of the city authorities. We say therefore, that while this mere proposition to subscribe was in this shape, to exclude from the range of its operation so important and material a transaction as the granting of the right of way and building of this road within the limits of the city, as being no part of the consideration of benefit to the city upon which it was predicated, is to ignore one of its most leading and essential features. Such a construction of this contract would be to strip it of that feature in reference to which the city council had the most undoubted power to contract as a corporate enterprise and to put it upon a skeleton structure not of their making. However counsel in their zeal to establish results favorable for their client may insist upon taking only a part of the facts, the law will look at nothing less than all the facts which constituted the consideration and inducement for this contract of subscription and the issue and delivery of these bonds. No court would believe, for nobody would believe, that upon this state of facts the work to be done within the city limits upon this road was not one of the considerations that induced this contract of

subscription and the issue and delivery of these bonds. In the nature of things, the proof is silent as to what may or may not have been the intentions and negotiations of the parties in every particular detail concerning this subscription, but while this proposition of subscription was pending, it is a marked fact that before it became a finality then, if not before, there stood out the high inducement to it and as part of it that this company by obtaining the right of way, had thereby promised and undertaken to build its road through the streets and within the limits of the city of Montgomery. In all this we see nothing conjectural, nor do we think that a court will see anything conjectural in it. We are simply dealing with the plain facts of the case. If in this, there is any occasion for any peculiar logic or special pleading, we have failed to see it. We submit that the resolutions and ordinances and all the facts in proof sustain this view of this case. At the same time we deny the correctness of the proposition insisted on by the counsel for the defendant, to the effect that to be valid such a contract must be entered into by the city by resolution or ordinance. No provision of the charter of the city made any such requirement.

See cases cited in our reply to the first argument of counsel for defendant, p. 20.

The court will observe, that we have never contended that the proof shows that there was any entire contract separate and distinct from the contract of subscription for the stock and delivery of the bonds by which the company agreed to build its road within the city limits in consideration of this subscription and these bonds. But what we contend is, that upon all the facts it sufficiently appears that among others, one of the considerations for this subscription and bonds, was that the company had undertaken to build its road within the city limits. Part of a contract may be in writing and part of it not in writing, part of it made at one time and part at another, and all be upheld as one contract.

2 Parsons on Contracts, (5th Ed.) p. 553, note h, and authorities there cited.

We lay no stress on the mere grant of the right of way alone, taken by itself, but it is in connection with the other facts that we insist upon it as showing an undertaking on the part of the company to build its road within the city limits, and this while according to the proof, the proposition to subscribe was pending.

But aside from this view of the case and for the sake of argument, taking it on the ground assumed by the defendants, suppose this grant of the right of way was a gratuity, did that make the fact that the company had thereby undertaken to build its road through the streets of the city any the less a consideration of benefit to the city which induced the city council to adhere to and make this subscription and deliver these bonds? Was it for that cause any the less a part of the facts and therefore one of the considerations of benefit to both parties upon which the subscription was made and the bonds delivered? If a gratuity was it not still a valuable right? The building of the road within the limits of the city was certainly no gratuity. But if a gratuity it was not also a valuable right, and for the sake of argument admitting that this last was a gratuity, did that make it any the less a part of the facts and one of the considerations of benefit to both parties upon which the subscription was made and the bonds delivered?

V. At this stage of this discussion, we consider it unnecessary to again discuss the points made in our previous arguments and which seem to be so thoroughly misunderstood as well as summarily disposed of by the counsel for the defendant, on pages 11 and 12 of their rejoinder. We are satisfied the court will understand them. What is supposed to be a mistake of fact on our part, is attempted to be corrected on page 13 of this rejoinder. In our second argument on page 17, we had stated, "and when the facts "show that the city of Montgomery was engaged in build- "ing that plank road, (the M. S. P. road) through the "streets of that city, &c." This is supposed by the counsel for defendant to be a mistake of fact, and is referred

to accordingly. In brief, our reply to this is, that the Agreed Facts show that no part of the work was done on this road until after the city had subscribed for stock and delivered its bonds therefor, and that the work on the road was commenced "beginning at the Exchange Hotel in the "central business part of said city, and continued along "Montgomery street to the south line of said city, and "thence south a distance of twenty miles."

Agreed Facts, p. 98.

As a leading stockholder in the company, the city was therefore engaged in building that plank road through the streets of the city. This was the sense in which we used the expression, and the only sense in which it could have been used upon the proof in this case, and there was no mistake of fact about it.

VI. The Agreed Facts nowhere shows what was the number of members provided by the charter as constituting the Board of Mayor and Aldermen of the city of Montgomery during the period elapsing between the 21st day of February, in the year 1850, and the 23d day of November, in the year 1853; nor during that period, does the Agreed Facts show what number of the members constituted "a quorum" of the board of mayor and aldermen for the transaction of business.

See extracts from the City Charter, Agreed Facts, pp. 31, 36, 56 and 60.

In what we have said, we include also the "Supplemental Act approved February 10th, 1852, brought forward on pp. 39 and 40 of the first argument of the counsel for defendant. It will be perceived, that this is rather an unfortunate attitude of the proof for the counsel for the defendant, to stoutly contend as they do on pages 14 and 15 of this rejoinder, that six members of the board of mayor and aldermen present and voting was not "three-fourths of the whole number of that board," and to further assert that these *six members* did not constitute "a quorum" of the board of mayor and aldermen, and to attempt to prove these things by a reference to pages 67, 73 and 74 of the

Agreed Facts. Here then, we might rest this objection and all the argument of the defendants counsel predicated upon it. But we have no objection to all the facts in regard to this matter coming out just as they are. A similar mistake of fact was made by defendants counsel on page 5 of their first argument, in which they say: "By the "second section of the act of the 23d December, 1837, in- "corporating the city, it is divided into six wards and each "ward is entitled to two aldermen, making the number of "aldermen twelve. The board of mayor and aldermen "then, (i. e. when the action of the city council was had "on the issue of the loan bonds) consisted of thirteen and "the board of common council of six members." The only part of this that is correct in fact, is that at the times when the action of the city council was had upon the loan bonds, the board of common council then consisted of six members. This mistake of counsel, attracted our attention when their first argument was published, but not feeling that this branch of their argument was a matter of such serious importance as they seem to regard it, it escaped our attention to point out this mistake in our reply. We therefore attach to this argument as part of it marked A, the charter of the city of Montgomery, approved December 23d, 1837. By this, the court will perceive that the entire number of members composing the board of mayor and aldermen during the period embraced between the 21st of February, in the year 1850, and the 23d of November, in the year 1853, was six aldermen and the mayor. As to this, during all this last named period, the charter approved December 23d, 1837, was in full force. About this, there can be no question. The counsel for the defendant will admit it. But the court itself will take judicial notice of the fact, for these are public local statutes. The counsel for the defendant have evidently confounded the second section of the act approved November 23d, 1853, with the act approved December 23d, 1837. Until the passage of the act approved November 23d, 1853, (Agreed Facts, pp. 58 and 60) the city of Montgomery was divided into only "three wards" with *two aldermen for each ward.* This was

not changed by the act approved January 17th, 1852, providing for the board of common council, for the first section of that provides that "the board of mayor and alder-"men shall be constituted as now required by law."

It is also a matter of fact, as well as of law, of which the court will take judicial notice, that the charter in force regulating what number of the members of the board of mayor and aldermen of the city of Montgomery should constitute "a quorum," for the transaction of business, during the period elapsing between the 21st day of February, in the year 1850, and the 23d day of November, in the year 1853, was this same charter, approved December 23d, 1837, nor will this be disputed by the counsel for the defendant. The court will further observe, that by the 11th section of the act approved December 23, 1837, it is provided that 'the mayor and three aldermen, or four "aldermen, shall form a quorum." This shows that the objection made by the counsel for the defendant, that there was not "a quorum" of the board of mayor and aldermen present, in the two instances named by them on pages 14 and 15 of their rejoinder, is without any foundation in fact, and that the counsel are simply mistaken in asserting it, because, in each instance, there was present, and voting, *six members of the board of mayor and aldermen, of* whom *five in each instance voted in favor of the bonds*, and *one* against them. If "drill" that caused us *to lose flesh* in the days of our youth under the superintendence of grave professors in the old Bay State, had not made us approach the quotation of Latin phrases very much in the same spirit, we would make tracks in advancing towards a masked battery, we would be tempted after the manner of our learned friends to indulge in a few at this juncture.

But we pass on.

It may be contended, however, by the counsel for defendant, that although there was "a quorum" present, yet that "three fourths" of the entire number of the board—seven—did not vote in favor of the bonds. To this, there are several answers, either of which we think is sufficient.

1. In the first place the court will observe that by the 5th section of the act to amend the city charter of Montgomery, approved January 17, 1852, (see Agreed Facts, p. 57,) it is provided—

"That no member of either board, during the time for "which he may have been elected, shall make any contract, "or have any dealings with said corporation, (*i. e.* the city "of Montgomery,) or sell, or contract to sell to, or buy "from, or contract to buy from said corporation, any goods, "effects, commodity, estate, or thing whatsoever, *nor shall* "*any member vote, or attempt to influence the vote, on any ques-*"*tion in which he, or any company of which he is a member, or* "*is personally interested, or which may specially benefit his pro-*"*perty, or the property of any company of which he is a* "*member, or of which he may be in possession more than* "*others, or on the alteration, or improvement, or grading to be* "*made on any street, or public property, within three hundred* "*yards of his residence or property, and no one, not qualified* "*to vote, can be counted in forming a quorum.*"

This was subsequently amended by the third section of the act, supplemental to an act, to amend the city charter of Montgomery, approved January 17, 1852, which was approved February 10, 1852.—See first argument of counsel for defendant page 40, as follows:

"SEC. 3. Be it further enacted, That no member of either "board shall be restricted in voting, upon alterations, or "improvements, to be made, upon any public street, or "public property, in said city, in consequence of the prox-"imity of the same, or otherwise, to his residence, or pro-"perty. *Provided, such alterations, or improvements be for* "*the public benefit, and are not within one hundred yards of* "*his residence and property.*"

Now the court will see that here were a variety of instances in which a member was disqualified from voting, and was not to be counted in forming "a quorum;" and if not allowed to vote and not counted in forming "a quorum," then of course not counted for any purpose. With these statutes before them, and under the responsibility of their oaths of office, six members of this board of mayor and

aldermen, (every member being present *and voting except one,*) did adopt these resolutions, and did do these other corporate acts in reference to these loan bonds, and did have the same recorded in their book of minutes. No question has ever been raised about the validity of this action of the board of mayor and aldermen till now. We therefore insist that when this objection is made, at this late day, in a manner and for a purpose as little favored in courts of justice as a collateral attack would be upon the validity of a sale of property, the benefit of which sale had been enjoyed by the party making the collateral attack, that to sustain the action of the board of mayor and aldermen, if necessary, the court will presume that *the one member not voting* was present and disqualified to vote for one of the statutory causes named, or was absent because he was disqualified by one of the statutory causes. And in either event could not be counted, or that his office was vacant by death, resignation, or other disability which would leave this action of the board of mayor and aldermen adopted by "a three fourths vote" of the members.

2. In the second place, this objection impliedly admits that the city council had the power to make and issue these loan bonds, but takes the ground that as to mode and form the power was not exercised in accordance with the provisions of the charter. As to the mere mode and form of entering into the contract, we reply, that the city has repeatedly admitted that there was no objection to the mode and form of the contract, by paying interest on the bonds, and afterwards, by suing on and enforcing the contracts of indemnity made to secure the bonds.

Grant on corporations, p. 63.

5 Manning & Granger, 192.

3. These bonds are *negotiable paper*, issued, or purporting to be issued, under authority conferred by law, and upon all the facts of these cases, and in the hands of innocent holders, for value the city is estopped from denying that a quorum was not present, or that the requisite number did not concur in the act of their making and issue.

Dillon on Municipal Corporations, p. 256, and authorities there cited in chapter on contracts.

The provision of the amended charter requiring the yeas and noes to be entered on the journals of each board is simply directory.

Striker vs. Kelly, 7 Hill, N. H. pp. 9, 24, 28; S. C., 2 Denio, 323.

Indianola vs. Jones, 29 Iowa, 282.

In Re Mount Morris Square, 2 Hill, 20.

Elmendorf vs. Mayor, &c., of N. Y., 25 Wendell 693.

The counsel say that we touched "very lightly" on the 4th section of the supplemental act approved February 10, 1852. They meant the 5th section of this act, for they quote the 5th section. If we touched "very lightly" on it, this was because we did not think there was any necessity in touching on it in any other way, or indeed at all. This supplemental act was also amendatory of the act approved January 17, 1852. The language of this 5th section is ungrammatical, and its meaning is thereby rendered obscure, but the obvious intention of the Legislature was to substitute "seven days" for "ten days" where the latter expression occurs in the act of the 17th of January, 1852, leaving the power of the two boards untouched in making an exception to it upon a "three fourths vote." We also make the same answers to this that we have made to the objection that three fourths of the entire number of members of the board of mayor and aldermen did not vote upon these resolutions, and insist that substantially they are each directly applicable, and in this we include also the objection that a period of at least "seven days" must have elapsed after these resolutions were adopted in one board before they were acted on by the other. We believed that this last point was covered by the authorities cited on page 20 of our reply to the first argument of the counsel for the defendant, and we still think so. Our attention at that time may also have been diverted from discussing this matter more in detail by the supposed imperilled *condition* of "the constitution" as disclosed by the

luminous argument of the counsel for defendant in defence of the fundamental law. We cannot avoid becoming more or less excited, when it is seriously intimated that our clients are about to overthrow "the constitution." And while upon this subject, we call the attention of the court to the fact that although this rejoinder abounds in the learning of our noble profession, and is even rendered more refreshing by copious extracts from the ancient Latin poets, it is singularly silent and does not so much as "very lightly" touch upon our assertion that the constitution of Alabama of 1819 was in force during the period covered by all the transactions in relation to these bonds and at the time of the enactment of the statute approved February 25th, 1860, and that it did not contain the particular provision relied on by counsel.—See page 33 of our reply. There is a like silence as to the authorities cited on page 24 of our reply to the first argument of defendant's counsel, showing the construction of the constitution of 1819 relative to acts of the legislature authorizing aid to internal improvements; and a similar silence exists in reference to the supposed "surety" and "guaranty" feature of these loan bonds. But "the surety" and "guaranty" features are small matters, we confess, when compared to the threatened breach of "the constitution." We are gratified to believe that no injury has yet been done to "the constitution" by anything that has occurred in these cases.

VII. As we have shown the corporate powers of the city of Montgomery were exercised by only *one board* from the 23d of December, 1837, to the 17th day of January, 1852, and that was the board of mayor and aldermen, composed of the mayor and six aldermen. The act to amend the charter of the city of Montgomery, approved February 2, 1846, (see Agreed Facts, p. 35), authorized the city council "to raise a sum of money, not exceeding seventy-"five thousand dollars, by the sale of the bonds of said "city, for that amount," and "that the holders of said "bonds *shall not be required to inquire into the use, or appli-*

"*cation of the sums of money that shall be raised by the sale* "*of or advanced upon said bonds*, but that said holders shall " be entitled against said corporation to all the advantages "of the holders of foreign bills of exchange." This last statute is a general authority to the city to raise seventy-five thousand dollars by the sale of bonds, *and the statute is silent as to the object and purposes for which this is done.* By the express provisions of this statute the holders of these bonds are not "required to inquire into the use or " application of the sums of money that shall be raised " by the sale of or advanced upon said bonds." The Agreed Facts, page 100, does show that this last statute was enacted to enable the city of Montgomery to raise a sum for the building of the capitol in the city of Montgomery, and that the bonds authorized under this statute were all issued in the year 1846 and sold by the city. But the Agreed Facts do not show *when* these bonds were sold, or to whom, or where. This statute was in existance, and of recent date, at the times when these plank road bonds were issued and sold. These plank road bonds amounted in the aggregate to seventy thousand dollars, *a sum just inside the amount fixed as the limit to be raised under this statute.* That the plank road bonds stated on their face that part of them were issued for stock to one of these companies, and the balance for a loan to these companies, was no notice whatever to the holders that they were not issued under this statute, for this statute did not itself state what the bonds it authorized to be issued should be issued for, and further provided that the holder need not "inquire" what they were issued for. So far as the *bona fide* holder was concerned these plank road bonds, if issued under this statute, would have been valid.

Here, then, this city had express authority to issue its negotiable bonds for an unnamed purpose, and upon a state of circumstances to be determined by the city alone. The bonds contemplated by this statute, and these plank road bonds, followed each other in quick succession. With such extraordinary powers as these conferred upon the

city by a public statute which was notice to all the world, the *bona fide* holder had the right to presume that these plank road bonds were issued under the circumstances that gave the city the requisite authority to do so, and they are no more liable to be impeached in the hands of such a holder than any other commercial paper.

It has been contended, however, that the holders of these plank road bonds cannot insist upon any right, as acquired under the act of the 2d of February, 1846, because it is claimed that the resolutions, under which these bonds were issued, "were not adopted by the two boards " as expressly required by the act of the 17th of January, " 1852."

We see that we misapprehended the particular bonds to which the counsel for defendant made this objection—they confining it originally to the *loan bonds*. We do not contend that the power of *one board alone* to issue the bonds authorized by the act of February 2, 1846, continued beyond the 17th of January, 1852. On the facts there is no difficulty whatever. When the stock bonds were subscribed and issued the board of mayor and aldermen then consisted of a mayor and six aldermen, and not of a mayor and twelve aldermen, as contended for by the counsel for defendant; and "a quorum" of that board then consisted of "the mayor and three aldermen, or four aldermen."

The stock bonds *were issued on the 20th of September* 1850, *long before there were two "boards," and were subscribed and issued by the vote of "a quorum" of the board of mayor and aldermen.*—See Agreed Facts, pp. 53, 54, 26, 56, 59, 60. See, also, the charter of the city of Montgomery, approved December 23, 1837, a copy of which is printed with this argument. The charter did not then provide that corporate acts of this description should be done by anything more than "a quorum" of the board of mayor and aldermen.

As to the loan bonds issued to these companies, we make the same answer to this objection that we have already made under the sixth head of this argument, in which we

have discussed this subject; and to that we respectfully refer the court as our answer to this objection. We respond to such strong military expressions of our learned friends, as "surrender at discretion" and "lay down arms," by reminding them that there is such a condition of affairs in the history of war as "the result of the campaign not com-"ing up to the sounding tone of the manifesto by which it "was inaugurated."

VIII. Another point of view in which we call the attention of the court to the charter of the city of Montgomery as it stood amended by this act of the 2d of February, 1846, is, as it supports the construction of the power of the city to issue these bonds under the other provisions of the charter which we have heretofore discussed, it shows that general powers were given to this city of the most extraordinary character, coupled with a most extensive discretion. Between the extent of the powers granted by *necessary implication to such a city*, and those granted to a county or town, there is an essential difference.

In discussing this question, in *Ex parte* Selma and Gulf Rail Road Company, (45 Ala. 736,) Saffold, J., says:

"A distinction, now more apparent than real, but of "which every one retains a consciousness, between a county "and a city, *has no inconsiderable influence in directing the "legislation, and in construing the laws applicable to them.* "The county has never been any more than a civil division "of a country, for judicial and political purposes, or circuit "or portion of the realm; while the city was once a state "or nation itself, as the name signifies. The memory of "this independence and greatness is traceable in the char-"ters of cities, *and acts conferring legislative powers upon "them. Their transition to complete subordination to a larger "State has not effaced the notion of their sovereignty, or done "away with the habits or practice of according to them a local "and restrictive legislative and judicial power. In Alabama, "no such separate existence has ever been claimed for the coun-"ties.* Their officers have been the executors of the State

"laws only, and frequently the most important of them "have been chosen outside of their boundaries. At no "time have they exercised even a semblance of independent "authority, *or any discretion in their acts.* Their duties "have been rigidly prescribed by the legislature, and the "mode of their performance minutely appointed."

The same views are substantially expressed in Cooley on Constitutional Limitations, (ed. of 1868,) pp. 240, 247, 248. On page 248 the author says: "*Larger powers of self-gov-*"*ernment are conferred, than are confided to towns or coun-*"*ties; larger privileges in the acquisition and control of cor-*"*porate property; and special authority is given to make use* "*of the public highways for the special and peculiar conve-*"*nience of the citizens of the municipality in various modes* "*not permissible elsewhere.*"

These considerations, we think, are entitled to great weight, in construing the powers granted to this city by necessary implication. And upon this point we also refer the court to the authorities cited on page 21 of our first argument in these cases.

IX. The counsel for defendant refer to the agreed facts, as sustaining them in their supposition that the city did not receive the proceeds of the sale of these bonds, (pages 98 to 102,) and therefore they contend that no recovery can be had against the city upon any implied liability. But the proof shows that the city assumed control over the proceeds of sale of the stock bonds.

Agreed Facts, p. 54.

As stockholders in the Montgomery South Plank Road Company, the city was concerned in receiving, controlling and spending the proceeds of sale of the loan bonds issued to that company.

Agreed Facts, p. 55.

In addition to this, the city had mortgages and indemnity bonds from both of these companies, to cover the risk assumed in issuing these bonds. These facts, we insist, together with the other facts upon which these bonds were issued and sold, are such as to attach an implied liability

to the city for the value of the proceeds of sale of all the bonds.

We have never believed, that upon the law and facts of these cases, the court would find it necessary to come to this point of the implied liability of the city, but have, nevertheless, felt it to be our duty as counsel to present this view of them for the consideration of the court.

We deem it unnecessary to add anything to what we have already said on the ratification act of the 25th of February, 1860, and the other points relied on in our former arguments in these cases.

X. We also print herewith the several acts of the Legislature of the State of Alabama amendatory of the charter of the city of Montgomery, approved January 24, 1839, January 13, 1844, and February 13, 1850. These, with the first section of the act of December 23, 1837, incorporating the city of Montgomery, are consolidated *as section 1 found on pages 32 and 33 of the Agreed Statement of Facts*, and will explain to the court, as matter of fact, (of which, however, it would take judicial notice,) how it is that this section, as found in the agreed facts, embraces larger boundaries than are found in the first section of the act of December 23, 1837, while on its face in the agreed statement of facts it purports to be the first section of the act of December 23, 1837.

This explanation and the printing of these several amendatory acts was a matter of no importance until, as in this argument, it became necessary to print the entire act of December 23, 1837, in order to place distinctly before the court, in several essential particulars, the provisions of the charter relied on by the plaintiffs in these cases. These amendments, for the purposes here named, and the act of December 23, 1837, and the provisions in the city charter in the agreed facts, and those printed in the argument of counsel, embrace all the charter powers of the city, and the several changes made in them, so far as is material to, or have any bearing upon the facts, or any question, either of law or fact, raised in either of these cases.

[A.]

No. 66.] AN ACT

To incorporate the City of Montgomery.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened*, That the town of Montgomery in said State, shall hereafter be called the city of Montgomery, and that the said town or city shall include within its corporate limits fractional section twelve in township sixteen and seventeen east of the Alabama river, and so much of the north-east quarter of section thirteen, in township sixteen and range seventeen, as has been heretofore surveyed and laid out into lots of a size less than one acre, and so much of the north-west quarter of section seven, in the last named township and range, as has been heretofore surveyed and laid out into lots of a size less than one acre, the inhabitants whereof shall be a body corporate and that the mayor and aldermen of said city, when elected and qualified as hereinafter directed, shall be named and styled "The City Council of Montgomery," and by that name may purchase, receive, hold or let, sell, grant, alien or assure property, real and personal, and sue and be sued, plead and be impleaded, and to do and perform any other acts incident to bodies corporate, to have a common seal, which may be changed at pleasure, and that the jurisdiction shall extend to and include all the lands above described, and all the Alabama river opposite to said fractional section twelve.

SEC. 2. *And be it further enacted*, That the said city shall be divided into *three wards* as follows, to-wit: all that part of said city lying westwardly of Commerce street and Court street continued south to the southern limits of said city shall form the first ward; all that part of said city lying east of Court street continued to said southern limit

and south of Market street and Line Creek road, shall form the second ward; and all that part of said city lying north of Market street and Line Creek road and eastwardly from Commerce street, form the third ward; and that each ward shall be entitled to two aldermen, who shall reside in the same, and to be elected by the qualified electors thereof; an election shall be held in each ward on the third Monday in January next, and the third Monday in January in each and every year thereafter for a mayor, who shall reside within the limits of said city, and two aldermen for each ward; and the person having the greatest number of votes for mayor in said city, shall be mayor; and the two persons in each ward having the greatest number of votes for aldermen, shall be aldermen for such ward; but if two or more persons have an equal number of votes for mayor, the aldermen shall determine who shall be mayor; and if no two persons in any ward shall have a higher number of votes than any other persons, the mayor and aldermen shall determine who shall be aldermen for that ward, the one having the highest number always being one. The said mayor and aldermen shall hold their office until the next succeeding election after their election or appointment, and until their successors are duly elected and qualified; if a vacancy occur in the office of mayor or aldermen by death, resignation, removal or otherwise, such vacancy shall be filled by the mayor and aldermen, or by the aldermen, as the case may be; the aldermen shall judge of the qualification of the mayor; and the mayor and aldermen shall judge of the qualification of each alderman.

SEC. 3. *And be it further enacted*, That the intendant and council of the town of Montgomery shall appoint at least two discreet and respectable freeholders or lotholders in each ward, who shall be managers of the next election, and the said city council shall make such appointments thereafter; all white male citizens of this State above the age of twenty-one years, who shall have resided within said city six months immediately preceding an election

who shall have paid a city or corporation tax, and shall not be in arrears for taxes or debt due the town of Montgomery or said city of Montgomery, shall be qualified electors for mayor and aldermen; and no person shall be eligible to the office of mayor or alderman, unless in addition to the qualification of elector, he shall have resided in said city one year next preceeding an election, and be a freeholder or lotholder in said city; Provided, that so much of this section as provides the payment of taxes as a qualification of an elector, or mayor or aldermen, shall not apply to persons living at the next election on the above described lands and out of the limits of the town of Montgomery.

SEC. 4. *And be it further enacted*, That the said mayor and aldermen shall severally before they enter upon the duties of their office, in addition to the oath prescribed for civil officers of the State, make and subscribe an affidavit, that they will endeavor to prevent and punish all tumultuous and riotous assemblies, assaults and batteries, gaming, keeping gaming houses, and all other public offenses and violations of the laws of the State and ordinances of said city, and will faithfully to the best of their skill and judgment execute their office without favor or partiality, which affidavit shall be filed in the office of the clerk of said city.

SEC. 5. *And be it further enacted*, That the said mayor and aldermen in council assembled, shall have power and authority to pass by-laws and ordinances necessary and proper to prevent contagious and infectious diseases from being introduced into said city, and to preserve the health thereof to prevent and remove all nuisances at the expense of the person causing such nuisance, or upon whose property it may be found; to license taverns, regulate and restrain theatrical amusements and shows, to restrain and prohibit gaming, and keeping gaming houses, and houses of ill fame; to establish night watches, and day watches, and patrols, and to appoint leaders and captains thereof; to make, alter and ascertain new streets and alleys; to clean and keep in repair the streets and alleys; to regulate the

stationing, moving and anchorage of steamboats and other boats and crafts within their jurisdiction; to have a general control and superintendence over the wharf, wharfages, ferry, ferriages, public springs and wells; to establish necessary inspections; to erect and regulate markets, and the assize of bread; to regulate the convayance of water from the vicinity into the said city; to regulate the sales at auction, and to appoint auctioneers; Provided, that the same shall not extend to sales under execution by order of court, or by executors or administrators; to erect public scale houses, with proper scales, weights and measures, and to appoint weighers and measurers, to weigh and measure in case of disagreement between buyer and seller; to license and regulate carts and wagons, drays and such hacks and carriages running from one part of said city to another for hire; and generally to pass such by-laws and ordinances not contrary to the constitution and laws of this State and the United States, as the said mayor and aldermen shall from time to time deem necessary and proper to carry into effect the true intent and meaning of this act, and the same to enforce alter and repeal. The said mayor and aldermen shall have power to appoint and remove at pleasure a clerk, treasurer and such number of marshals and other officers as they may deem necessary and proper, and require such bond and security as they may deem necessary, and to annex such fees and salaries to their several offices, and to impose such fines for neglect of duty in office, not exceeding one hundred dollars, as they may deem necessary; the said mayor and aldermen are also empowered to levy such fines, not exceeding fifty dollars, for breach or breaches of their by-laws and ordinances as they may deem proper, and to enforce and collect the same in such manner as may be prescribed by ordinance, by execution against the person or property, or committing to jail, as they may deem necessary or proper, which fines shall be appropriated in such manner as the said city council may prescribe; Provided, that this act and all the by-laws and ordinances of said

city shall at all times be subject to revision or repeal by the general assembly.

SEC. 6. *And be it further enacted*, That the said mayor and aldermen shall have power and authority annually to assess, levy and collect a tax, not exceeding one per centum, upon all real estate in said city; a poll tax, not exceeding two dollars, on each white male inhabitant above twenty-one years of age; Provided, he shall have resided in said city two months immediately preceding the time said tax shall be levied; on each slave over ten and under fifty years of age, not exceeding one dollar; on every free negro or mulatto who shall reside in said city, not exceeding ten dollars; a tax on all pleasure carriages, gigs, chairs and sulkies, not exceeding one per cent. on the value thereof; on every cart, dray, wagon and other vehicle, used for transportation of goods and commodities from one part of said city to another for hire, a tax not exceeding twenty dollars; on every retailer of spirituous liquors, a tax not less than forty, nor more than five hundred dollars; on every vendor of goods, wares, merchandise, drugs and medicines, or either of them, a tax not exceeding twenty-five dollars per annum; on all goods sold at auction a tax not exceeding one per cent. on amount of sales, or not exceeding fifty dollars per annum.

SEC. 7. *And be it further enacted*, That the said mayor and aldermen shall be *ex-officio* vested with and may exercise in said city, all the powers and authority that belong to justices of the peace by the the laws of this State, and the said marshal shall be *ex-officio* a constable, and be vested with and exercise all the powers and authority of other constables of this State; and the said mayor, aldermen and marshals shall respectively be liable to the same penalties and restrictions as are imposed by the laws of this State upon the several offices with which they are invested; and the sheriff of said county of Montgomery and all ministerial officers shall obey the said mayor and aldermen, and truly and faithfully execute the warrants and processes committed to them for service, according to the mandate;

and it is made the duty of the jailor of said county to receive all prisoners committed by warrants of the said mayor and aldermen, and the person or persons so committed, safely to keep confined in close jail till delivered therefrom by due course of law; and the said city council are hereby authorized to hold their meetings and to keep their records and papers in any room in the court house of said county, not at the time occupied by the county or any of the county officers.

SEC. 8. *And be it further enacted*, That should the election not take place on the day fixed for the annual election of mayor and aldermen, the corporation shall not for that cause be dissolved, but the incumbents shall remain in office until their successors shall be elected and qualified; and it shall be the duty of the mayor and aldermen to fix some day as early as convenient within one month thereafter, on which day the election shall be held.

SEC. 9. *And be it further enacted*, That the said inhabitants of said city shall be exempt from working on roads and highways out of said city, and from patrol duty, except under the authority of said city; but the streets and highways in said city shall be kept in repair by said city, and all male citizens over eighteen and under the age of forty-five shall be liable to patrol duty, and to serve as guard or watch at such times and in such manner as may be prescribed by the said city council.

SEC. 10. *And be it further enacted*, That all property, claims and demands of whatever description belonging to the town of Montgomery, shall be vested in the city of Montgomery, and all debts, contracts and liabilities owing or incurred by said town, shall be good and enforced against said city, and the corporation of said town shall and may subsist as long as necessary, for enforcing and collecting all claims and dues, or the same may be enforced and collected by said city.

SEC. 11. *And be it further enacted*, That it shall be the duty of the mayor to preside and keep order at all meetings of the mayor and aldermen, he shall call meetings of

the aldermen whenever in his opinion the interests of the said city may require it; he shall keep an office in said city and hear and determine upon all causes for breach of the ordinances and by-laws, and shall receive such fees and salary as may be prescribed by the city council; in the absence or inability of the mayor, the aldermen shall appoint one of their own number mayor *pro tempore*, who shall discharge the duties of mayor till the mayor returns or his inability is removed; each of the aldermen may also hear and determine causes for breach of the by-laws and ordinances; two aldermen may call a meeting; *the mayor and three aldermen, or four aldermen shall form a quorum.*

SEC. 12. *And be it further enacted*, That the said city council may cause an assessment of taxes to be made in each and every year by some proper and fit person or persons; the assessment naming the person liable to such taxes when known, and specifying the property when the owner is not known, which assessment shall be returned to the mayor, to be laid before the mayor and aldermen, and the mayor shall cause at least ten days public notice that assessment has been made, and the time when the mayor and aldermen will proceed to hear and determine upon all complaints which may be made against such assessment, and it shall be their duty to correct errors and supply omissions, and when the same has been passed upon by said city council, the said assessment shall have the force and effect of a judgment and execution, and may be collected by levy and sale of property, on giving such notice as is required by law on executions from the circuit court, and where no property to be found is returned upon said assessment, the mayor may issue a *capias ad satisfaciendum;* and all sales of property made under or by virtue of such assessment, shall convey to the purchaser the same title, as if sold by execution from the circuit court; and the collector of said city shall in case of sale of real estate, give the purchaser a deed of conveyance, which shall vest in the purchaser the same interest that the person had against whom such tax was assessed at the time of such assessment;

and where the owner is not known, the entire equitable and legal interest in such real estate discharged of all liens; Provided, that where a tax is assessed upon property, the owners of which are not known, ninety days notice of the sale specifying the property and the tax, shall be given in some newspaper printed in said city; and provided, that the owner of any real estate sold for taxes, shall have the right to redeem, by paying treble the amount of the tax, tonether with costs and charges, within twelve months from the day of sale; And provided further, that the duties required of the said mayor and aldermen, except giving notice and issuing *capias ad satisfaciendum* may be devolved upon a board of assessors, and the assessment approved by them, shall have the same force and effect as if approved by the mayor and aldermen.

SEC. 13. *And be it further enacted*, That retailers of spirituous liquors who may procure a license from said city council of Montgomery, shall be exonerated from paying anything to the county of Montgomery for the privilege of retailing in the city aforesaid.

SEC. 14. *And be it further enacted*, That the said "City Council of Montgomery" shall have full power and authority to make, ordain and enact, such laws and regulations (not contrary to the constitution and laws of this State) as may be deemed necessary in relation to the streets and highways, public buildings and powder magazines, and every other matter and thing which they may deem necessary for the good order and welfare of said city.

SEC. 15. *And be it further enacted*, That all the ordinances and regulations of the "intendant and council of the town of Montgomery," heretofore made and not contrary to the constitution and laws of this State, shall be applicable to the said "City Council of Montgomery," and shall remain in full force until repealed or altered by said city council of Montgomery.

SEC. 16. *And be it further enacted*, That all laws and parts of laws that may contrave this act, be, and the same are hereby repealed, except so much of any law heretofore passed as may be necessary to carry out and complete any contract with or act of the said town council of Montgomery, as may be now incomplete or unsettled.

Approved, December 23d, 1837.

AN ACT

To amend an act entitled "An act to incorporate the city of Montgomery," approved December 23, 1837.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama, in General Assembly convened*, That the city of Montgomery shall hereafter include within its corporate limits fractional section twelve, in township sixteen, east of the Alabama river; the north-east quarter of section thirteen, in township sixteen and range seventeen; the north-west quarter of section eighteen, in township sixteen and range eighteen; the south-west quarter of section seven, in township sixteen and range eighteen; the north-west quarter of section seven, in township sixteen and range eighteen; and the west half of the south-east quarter of section seven, in township sixteen and range eighteen.

SEC. 2. *And be it further enacted*, That all laws and parts of laws contravening the provisions of this act shall be, and the same are, hereby repealed.

Approved, January 24, 1839.

AN ACT

To annex to the city of Montgomery a piece of land therein described.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama, in General Assembly convened*, That the limits of the city of Montgomery shall extend to, and include, a certain piece of land heretofore conveyed to said city, containing nine and thirty-four hundreths acres by Amerson's survey, situated immediately east of that point of said city known as Scott's Town, and inclosed and used as a city burying ground.

Approved, January 13, 1844.

AN ACT

To extend the corporate limits of the city of Montgomery.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama, in General Assembly convened*, That all of the west half of the north-east quarter of section seven, township sixteen, range eighteen, be, and the same is hereby included in the corporate limits of the city of Montgomery as fully as if the same had been included in all the acts incorporating said city.

Approved, February 13, 1850.