

John M. Allison 10

OPINION

OF

JOHN M. READ, ESQUIRE,

AGAINST THE

RIGHT OF THE CITY COUNCILS

TO

SUBSCRIBE FOR STOCK

IN THE

PENNSYLVANIA RAILROAD COMPANY,

AND TO

INCREASE THE CITY DEBT AND TAXES

FOR THAT PURPOSE.

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PHILADELPHIA :

PRINTED FOR THE COMMITTEE.

1846.



*Philadelphia, August 29, 1846.*

JOHN M. READ, ESQ.,

SIR : It has been proposed to the Councils of this City, and a joint Committee of that body have recommended the adoption of a resolution authorizing the Mayor, in the name of the Corporation, to subscribe for 50,000 shares, amounting to two and a half millions of dollars, of the stock of the Pennsylvania Railroad Company.

The undersigned request your legal opinion in answer to the question, "Have the Councils legal authority to order a subscription to the stock of that company ; and if they borrow the money to pay the amount of it, have they the legal right to levy a tax upon the persons and estates of the citizens for the repayment of the loan and its interest ?"

Yours, very respectfully,

ANDREW MILLER,  
EVANS ROGERS,  
CLEMENT C. BIDDLE.

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# OPINION.

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On the 13th April, 1846, the Legislature of Pennsylvania passed an act to incorporate the Pennsylvania Railroad Company, with a capital of \$7,500,000, (with power to increase it to \$10,000,000,) divided into shares of \$50 each, and each share of stock to be entitled, at all general meetings or elections by the stockholders, to one vote. When fifty thousand shares or more are subscribed, and five dollars paid on each and every share, the Governor is to issue letters patent constituting the subscribers a body corporate. The road is to commence at Harrisburg, beginning at and uniting with the western terminus of the Harrisburg, Portsmouth, Mountjoy and Lancaster Railroad, and to terminate at or near Pittsburg, with authority in the Company to extend the road or a branch thereof to the town or harbor of Erie.

By the first section of this act, it is enacted that the commissioners named in the act, "by themselves, or by committees to be by them appointed, shall attend and furnish to all persons duly qualified, who shall offer to subscribe, the opportunity of so doing, and it shall be lawful for all such persons, and for all firms, co-partnerships and bodies politic and corporate, to subscribe for shares in said stock."

On the 28th April last, a meeting of citizens of the city and county of Philadelphia was held at the Chinese Museum, and the following, amongst other resolutions, was then passed:

"Resolved, That this meeting do most earnestly recommend to the City Councils, and to the Commissioners of the several incorporated districts of this county, to make subscriptions to the capital stock of the said Pennsylvania Railroad Company, *agreeably to the authority conferred by the charter of the said Company*, and we advise a subscription, on the part of the City of Philadelphia, of *at least one third of said capital stock*, say two millions five hundred thousand dollars, and on the part of said districts, such amounts, according to their several ability, as will in the aggregate amount to not less than *twelve hundred and fifty thousand dollars*, making the whole subscription, on the part of the city and districts, equal to *one half* the capital stock authorized, *leaving the other half for individual subscriptions.*"

It is now so generally conceded that this construction, placed by the town meeting upon the act to incorporate the Pennsylvania Railroad Company, is erroneous, that it is unnecessary to do more than to point out some of the practical consequences which would inevitably result from it, and which are entirely at war with the settled policy of the government.

The State, for the purposes of municipal regulation; is divided into counties, and these again are subdivided into townships, cities, boroughs and districts, whilst in some parts of the Commonwealth, particular portions of the police are entrusted to separate bodies, such as the Guardians of the Poor and the Board of Health in this city and county. All these commu-

nities are bodies politic and corporate, and if all subscribed to this Company, it would virtually be a State subscription, pledging the whole of the taxable property of the State for the payment of its interest and the redemption of its principal.

The Legislature certainly did not contemplate this, and it is therefore unreasonable to suppose that they intended to transfer their taxing and borrowing power to subordinate communities, with extremely limited administrative authorities.

Besides, these words are to be found in the act of 1792, incorporating the Bank of Pennsylvania, and it was never supposed that the city of Philadelphia might, under such language, have subscribed to the whole of the stock thrown open to the public, and have thus united a Bank of discount, deposit and circulation to their ordinary municipal powers.

These general words have certainly sufficient effect given to them when they are construed to allow those corporations to subscribe who are permitted to do so by their own charters, for, as in the case of the Insurance Company of North America, there are some who are expressly authorized to invest their funds in companies incorporated for the purposes of internal improvement.

The town meeting therefore proceeded upon a clearly erroneous view of the law, and there are consequences resulting from it and other circumstances which it is certain they did not anticipate.

The private subscriptions amount to only a million of dollars, or not one third of the sum fixed as indispensable by the meeting of the 28th April. Some of the incorporated districts of the county, it is acknowledged by all, have no power from their acts of incorporation to subscribe to this road, and all of them are unable or unwilling, in the face of their heavy debts and taxation, to contribute any portion of the sum of \$1,250,000, assigned to them as their share by the terms of this resolution.

The question then is narrowed down to this: Have the Select and Common Councils of the City of Philadelphia the power, by the terms of the act of 1789, to make the Pennsylvania Railroad, providing the whole means therefor except the meagre sum of one million of dollars? Or to put it still more plainly, have they the power conferred upon them by their act of incorporation to make the Pennsylvania Railroad from Harrisburg to Pittsburg, with a branch to the Harbor of Erie?

In examining the act of the 11th March, 1789, to incorporate the City of Philadelphia, I find the necessary authorities given in express terms for pitching, paving, cleansing, lighting, watching and watering the streets of the city, with ample powers vested in the Mayor, Recorder and Aldermen, as judges and magistrates, and with civil and criminal courts for the especial accommodation of its citizens; but I can find no trace of any power vested in this municipal corporation, or any of its officers, to dig canals, make turnpikes and railroads, establish banks, engage in insurance, pawnbroking, manufacturing, or any of those numerous employments which contribute so largely to the promotion of trade, industry and happiness.

This act contains forty-four sections, and it is attempted to be construed by excluding from view all the sections except the sixteenth and the incorporating clauses, and by reading the preamble as if connected only with the general power to make by-laws, which is to be found in the sixteenth section. This is certainly not logical, because the preamble applies to the

whole act, and is to find its execution in the various provisions distributed through it.

It is read, therefore, as if the declaration "that the administration of government within the City of Philadelphia is, in its present form, inadequate to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry and happiness; and in order to provide against the evils occasioned thereby, it is necessary to invest the inhabitants thereof with more speedy, vigorous and effective powers of government than are at present established," was followed by the 16th section, declaring "That the Mayor, Recorder, Aldermen and Common Councilmen, in common council assembled, shall have full power and authority to make, ordain, constitute and establish such and so many laws, ordinances, regulations and constitutions, (provided the same shall not be repugnant to the laws and constitution of this Commonwealth,) as shall be necessary or convenient for the government and welfare of the said city, and the same to enforce, put in use and execution by the proper officers, and at their pleasure to revoke, alter and make anew as occasion may require."

The argument then concludes, that from these general words there is an enlarged power given to the corporation, (much larger than is usually possessed by such bodies,) by which the City of Philadelphia can undertake enterprises which are forbidden to corporate bodies possessing only the incidental power of making by-laws.

The city may therefore subscribe to and own a bank; they may insure on lives, fire, or marine risks, or subscribe to an insurance company for such purposes; they may found or subscribe to a savings institution, or engage in pawnbroking or manufactures: because all these different undertakings will either promote trade or the happiness of the citizen. Under such a construction the city might at its own expense have made the Lehigh Navigation, the Chesapeake and Delaware Canal, the Philadelphia, Germantown and Norristown Railroad, the West Philadelphia and the Valley Railroads, the Tide Water Canal, and the Conestoga Navigation, and they might now be the undisputed owners of the Germantown, Bristol and Lancaster Turnpikes.

It is conceded, if the city of Philadelphia had only the incidental power to make by-laws possessed by every body corporate, without any other grant than the simple act of incorporation, that all these enterprises, including the Pennsylvania Railroad, would be entirely beyond its legitimate authority.

Now the peculiar and extensive power claimed for the city under the act of 1789, is supposed to arise from the intrinsic and overpowering force of the word "welfare," in the clause of the 16th section, which gives the Common Council power "to make, ordain, constitute and establish such and so many laws, ordinances, regulations and constitutions, (provided the same shall not be repugnant to the laws and constitution of this Commonwealth,) as shall be necessary or convenient for the government and *welfare of the said city.*"

Though the power to make by-laws be given by special clause in charters of incorporation, yet that is needless, for it is included by law in the very act of incorporation, like the power to sue and to purchase. And where a power of making by-laws relative to the purposes of the institu-

tion is expressly given, it is apprehended that this neither enlarges nor abridges the powers they would have had without such an express clause.

All by-laws must be reasonable, and their reasonableness is a question for the court solely.

The real question therefore is whether the words in the 16th section are larger and more comprehensive than the incidental power, or in other words, whether the words used in this section are a proper and true description of the incidental power to make by-laws.

It is said in 10 Modern 131, "But by-laws to regulate trade good, whether they are for the *advantage* of the town or of trade;" and in T. Raymond 326, "All by-laws are accommodated to the *utility and advantage* of the place;" and in 5 Coke 63, "Also corporations cannot make ordinances or constitutions without a custom or the king's charter, unless for things which concern the *public good*, as reparations of the church or common highways, or the like;" and in 1 Lord Raymond 498, "for of common right every corporation may make a by-law concerning a franchise granted to them, because it concerns the *welfare of the body politic*, and is included in the very act of incorporation."

In all these authorities the limits of the incidental power to make by-laws are described by the words "advantage," "utility and advantage," "public good," which is equivalent to "public welfare," and by the very word "welfare," and would seem to show conclusively that this word was knowingly used by the framers of the act of 1789, as a full description of the strictly limited municipal powers which they intended to convey to the new city corporation. And this view is strikingly corroborated by Dr. Wooddesson's lectures, which though delivered at Oxford in 1777, were not published until 1792. In his first volume, page 296, in speaking of the incidental and implied powers subsisting in corporations, he says, "Lastly, and the incidental and implied right of corporations aggregate, at least of the civil kind, is that of making by-laws or private ordinances for the *due regulation and welfare of the community*."

The Legislature of 1789, therefore, clearly intended to give to the Common Council of that day only just such powers to pass by-laws as would have been vested in the whole body corporate, as an incident to the act of incorporation.

The words "due regulation" are synonymous with "government," and welfare is identical.

I can have therefore no difficulty in saying, that we are to look to the law of corporations and to the common law, and not to the constitution of the United States nor to the treasury reports of General Hamilton, for the true exposition of the sixteenth section of the act to incorporate the subordinate municipality of the City of Philadelphia, with its two square miles of territory, and its then population of some 40,000 souls.

I am therefore clearly of opinion, that the Select and Common Councils of Philadelphia have no more right to connect a railroad over the Allegheny mountains with the corporation of the city, than they have a bank, an insurance company, a manufacturing company, a canal, or a turnpike.

There are other views, however, connected with the case, which will show conclusively that this is the only construction which can be put upon the act of 1789, consistent with the history and the law of that day.

In the course of this inquiry into the legislative powers of the city of

Philadelphia, allusion has been made to the city of London, the oldest and most powerful civil corporation in Great Britain, whose customs and privileges were left untouched when the hand of municipal reform reached all the other cities and boroughs of England. It is certainly proper to look at the history of the country from which we have derived our whole law of corporations, and particularly to the history of that portion of its local government which undoubtedly furnished the model for the charter of 1701, and all the subsequent legislation of the last century.

The city of London, like the city of Philadelphia, is surrounded by other municipal communities entirely distinct from it as to revenue, expenditures, and local administration; and whilst the whole metropolis covers a surface of 10,000 acres with a population of nearly two millions, its territory is limited to about one square mile, or 600 acres, and its population to 129,251 souls. The corporate and parochial income of the city of London for public objects, and derived from trust estates for the relief of the poor, care of the sick, education, religion and general purposes, local rates, coal and metage duties, street and market tolls, freedom and livery fines, and other charges for corporate and trading privileges, the port of London and the conservancy of the river is estimated to amount to the enormous annual sum of £900,000 sterling, or four millions five hundred thousand dollars.

The city was a corporation by prescription, and its customs and privileges were conferred or recognized by various statutes and charters from the crown, and finally by an act of Parliament, passed in 1690, reversing the judgment in the great quo warranto case, it was declared that the mayor and commonalty and citizens of London should forever thereafter remain, continue, and be and prescribe to be a body corporate and politic, with all its former rights, customs, privileges, and estates of every kind.

It might naturally be supposed that so ancient a corporation as this was invested with the largest possible powers of local government, consistent with the general law of civil corporations of a public character, and yet it appears that its citizens were strict constructionists, who never dreamed of the extensive powers claimed for a small corporation of very limited means, and in a republican State on this side of the Atlantic.

By the act for rebuilding the city of London after the great fire, the corporation of London were authorized to appoint commissioners for making and repairing the common sewers, and for pitching and paving the streets in the city and liberties, and for cleaning the said sewers and streets, which commissioners were authorized to impose any reasonable tax upon all houses in the said city and liberties, in proportion to the benefit they should receive, with power to levy the same by distress and sale of the goods of the party chargeable.

The act "for the better paving and cleaning the streets and sewers in and about the city of London," passed in 1670, made this clause perpetual, and then prescribed a variety of rules for carrying the same into full effect.

By the 11th and 12th sections of this act, the corporation of the city were authorized to purchase pieces of ground for the receipt of the dirt and rubbish, which lots were to be paid for out of the imposition upon coals.

In 1736 an act was passed "for the better enlightening the streets of the city of London," by which the corporation of the city were authorized

to erect and fix glass lamps to or near any house or place within the city or liberties, and to keep them lighted or burning from sunset to sunrise throughout the year; and for the purpose of buying, erecting, supplying, and repairing the same, were empowered to raise certain assessments on the inhabitants annually, according to a scale fixed by the act.

Collectors were to be appointed in each ward by the proper aldermen, and in case of a refusal to pay the rate after demand made, they were authorized by a warrant from the lord mayor or the proper alderman to distrain and sell the goods of the person so refusing.

These rates were to be collected half-yearly, and paid to the chamberlain of the city of London, who was to give receipts which were to be presented to the alderman of the ward at the time of the settlement of the annual account of the collectors.

A penalty was imposed upon any person wilfully or maliciously throwing down or extinguishing any lamp hung out or set up to light the streets, or wilfully damaging the posts, irons, or other furniture thereof. In the preamble to this act, it is expressly assigned as a reason for its passage that, although the citizens had agreed to such a tax, it could not be effectually done but by the aid and assistance of an act of Parliament.

In the next year (1737) another act was passed "for the better regulating the nightly watch and bedels within the city of London and the liberties thereof, and for making more effectual the laws now in being for paving and cleaning the streets and sewers in and about the said city."

By this act the common council in each year were to appoint the number of the watchmen and bedels, and to direct how they ought to be armed, and how long they were to watch; their wages and allowances, and what number of constables should attend in each ward every night. They were also to determine what sums of money should be raised in each respective ward, and to direct the alderman, deputy, and common councilmen of each ward, to make an equal rate upon all the inhabitants and occupiers, which rates were to be collected quarterly by the constables or bedels, who, in case of refusal, were by warrant in the form prescribed in the preceding act of 1736, to distrain and sell the goods of the delinquent, and for want of such distress to imprison him.

The selection of the watchmen, and the making of rules and regulations for them and the bedels, were confided to the authorities of the respective wards, who were empowered to remove them in case of misbehaviour.

The constables were to be provided with a copy of these nominations and orders, and one or more of them were to attend in each ward every night by turns, and keep watch and ward therein, and to arrest all night-walkers and malefactors. The watchmen were invested with power to arrest and carry the offender before the constable of the night.

In 1744 another act was passed "for making more effectual provision for enlightening the streets of the city of London."

By this act the rate was not to exceed sixpence in the pound of the yearly rent.

It was in fact an enlargement and extension of the original act.

In 1766 another act was passed, which was, however, repealed, and supplied in 1768 by an "act for the better paving, cleansing, and enlightening the city of London and the liberties thereof and for preventing annoyances and obstructions within the same, and for other purposes therein



mentioned, and for repealing an act made in the sixth year of his majesty's reign for those purposes."

By this act it is declared that the sole power and authority of pitching, paving, cleaning, enlightening and regulating the streets, shall be vested in the mayor and commonalty and citizens of the said city, to be executed by such persons as are appointed to be commissioners of the sewers by virtue of the act of 1670 abovementioned.

Another act was passed in 1771.

Such was the progressive legislation of the English Parliament, expressly granting at different periods the necessary powers to pitch, pave, light, watch, and cleanse the city of London, and to drain it by sewers, to the legislative body of the corporation, expressly authorizing them to lay and collect taxes for these purposes, which are of a strictly municipal character. The great city of London depended not upon its power to pass bye-laws for carrying on these branches of the police, but upon enactments emanating from the highest legislative authority.

Pennsylvania was a strictly English colony, deriving its laws and usages, the names of its officers and their authorities, and its local divisions and subdivisions, from the mother country; and a diligent search into the early legislation of the province will show how much of the subsisting English system was at once introduced into it by positive legislative enactment.

The charter of Charles the Second gave the proprietary power for the good and happy government of the country to enact any laws whatsoever for the raising of money for the public uses of the province, or for any other end appertaining either unto the public state, peace, or safety of the country, or unto the private utility of particular persons according unto their best discretion, by and with the advice, assent, and approbation of the freemen of the said country, or the greater part of them, or of their delegates or deputies.

And it was one of the fundamental laws of the province, that no money or goods shall be raised upon or paid by any of the people of this province and territories annexed, by way of a public tax, custom, or contribution, but by a law for that purpose made by the governor and freemen of the said province and territories thereof; and whosoever shall levy, collect, receive, or pay any money or goods contrary thereto, shall be held and punished as a public enemy to the province, and a betrayer of the liberties of the people.

The proprietary by the charter was empowered to appoint and establish judges, justices, and magistrates, and other officers; to divide the province into towns, hundreds, and counties, and to erect and incorporate towns into boroughs and boroughs into cities, and to constitute fairs and markets therein, and to erect sea-ports.

The early province laws made provision for overseers of the highways, overseers of the poor, for raising county levies, and the appointment of assessors, and for the regulating of streets and water courses in the cities and towns.

By an act of 1700, commissioners or assessors are to be appointed by the governor and four of his council for regulating the streets and water-courses, the pitching, paving and gravelling thereof, the clearing of docks and repairing landing-places and bridges in the towns, (the water-courses under ground to be arched and laid with brick or stone,) and to defray the

charge of pitching, paving, gravelling, and regulation of the said streets, and scouring and cleaning said docks, each inhabitant concerned was to pay towards the same in proportion to the number of feet of his lots or landings adjoining on each or either side of the said streets or docks, and for defraying the charge of repairing landing places, bridges, making common sewers, and paving, pitching, gravelling, and regulating any part of the streets, scouring and cleansing any part of the docks belonging to the public, each inhabitant in the said respective town or place was to pay his proportional rate according to his estate in each town.

The commissioners, with the advice of the justices of the peace of the county, were to compute the charges, and with the assent of the governor and four of the council equally to lay the assessment upon the inhabitants of their towns and cities respectively; and the said assessors were to appoint collectors, and in case of non-payment, such collector, by a warrant from the proper justice, was to levy the same by distress and sale of the delinquent's goods.

On the 28th of October, 1701, William Penn granted the charter of privileges to the inhabitants of Pennsylvania and territories, which subsisted until the revolution. This charter established an assembly, yearly chosen by the freemen, with power to prepare bills in order to pass into laws, and with all the other powers and privileges of an assembly, according to the rights of the free-born subjects of England.

On the 25th of October, 1701, the proprietary granted a charter to the city of Philadelphia, in which he said, "That at the humble request of the inhabitants and settlers of this town of Philadelphia, being some of the first adventurers and purchasers within this province, *for their encouragement and for the more immediate and entire government of the said town and better regulation of trade therein*, I have by virtue of the king's letters patent, under the great seal of England, erected the said town into a borough, and by these presents do erect the said town and borough of Philadelphia into a city."

This charter established a criminal court of the largest jurisdiction for the city of Philadelphia, to be held by the mayor, recorder, and aldermen, who were ex-officio justices of the peace and justices of oyer and terminer.

The city had a sheriff of its own, and a mayor, recorder, aldermen and common councilmen, who constituted the body corporate by the name of the mayor and commonalty of the city of Philadelphia, with the power of choosing a mayor annually out of the aldermen, and of adding to the number of aldermen and common councilmen, and of admitting freemen into their corporation and society, with authority to erect a gaol or prison and court-house; and they were also clothed with as large a power to pass bye-laws as would have been vested in the whole body corporate as an inseparable incident to the act of incorporation.

Market days and fairs were established, and the mayor was empowered to appoint the clerk of the market, who had the assize of bread, wine, beer, and other things, and the city itself was erected into a port or harbor of the most extensive kind.

The charter, in fact, made it a close proprietary corporation, for the aldermen and common councilmen were originally appointed by William Penn, and held their offices for life.

It is clear, therefore, that the old corporation of the city had as large

legislative powers as any municipal body of a similar kind in England. Its practice, and the legislative action of the provincial assembly, are, however, the best evidence of the really limited nature of all such corporate powers, and form a striking contrast to the latitudinarian doctrines of the present day, which assign to a small subordinate municipality authorities almost commensurate with those of the sovereign governments of the State and the Union.

The city was early divided into ten wards, and the watch consisted of ten constables, one of whom, with nine citizens summoned for that purpose, attended each night.

The revenue of the corporation consisted of the rents of wharves and market stalls, of fines and forfeitures, of fees on the admission of freemen, of fines imposed upon officers elect for refusing to serve, of voluntary donations and sometimes of subscriptions raised by the citizens, and afterwards of ferry tolls and rents upon the establishment of the Market street ferry across the Schuylkill.

With these limited means, and certainly with no direct power of taxing the estates of its citizens, the corporation labored under great difficulties, and after repeated applications by them and also by the inhabitants to the General Assembly, it ended in the passage of two acts in the year 1712, the history of which is somewhat curious as illustrative of the legislation of that early day.

In the votes of the Assembly for 1709, p. 29, is this entry: "The petition of sundry inhabitants of the city of Philadelphia, desiring that provision be made to empower the inhabitants of the said city to raise money for repairing of streets, wharves, &c. within the said city, being again read, *ordered* that leave be given to the said petitioners to prepare and bring in a bill for that purpose, as by the said petition is desired."

At the session of 1712, the Assembly passed a bill for raising money on the inhabitants of the city of Philadelphia, for the public use and benefit thereof, and sent it to the governor, who objected to that part of it confirming ordinances of the city to be yet made; instead of which these ordinances may be passed into laws, or after they are made and viewed an act may be passed to confirm them; and he said that as the bill now stands it would certainly be rejected by the ministry, unless the ordinances themselves were exhibited with the act; and he proposed in the conference that the bill be separated and made two bills, which was conceded to, and the House ordered the same to be altered accordingly, and that the title of the second bill be *for the better government of the City of Philadelphia*.

This last act, which was afterwards repealed in council, is to be found in Bradford, p. 157, and was, with the exception of one section, a simple re-enactment of certain ordinances of the city, giving them the force of laws. By one clause any constable refusing or neglecting his duty to watch, shall forfeit and pay for every offence ten shillings; and every other person refusing or neglecting their duty therein, shall forfeit and pay two shillings and six pence for every offence.

The act of the 7th June, 1712, is perhaps the strongest possible exemption of the limited authority of a municipal corporation, depending simply upon the usual power to pass by-laws. The preamble which is framed after one of the acts relating to county levies, recited that "there is great occasion for a public stock to pay the just debts, and defray the

necessary charges of the city for building a work-house of correction, building and repairing free wharves and bridges, pitching, paving, and regulating the highways, streets, and water-courses, making and erecting new and convenient stalls and shambles to accommodate butchers and all others that bring goods to sell in the said city ;” and it authorized the inhabitants annually to elect six assessors, who were empowered after a calculation made by the magistrates of the city, with the assent of the assessors, agreeably to the directions of the act, to lay a rate or assessment upon themselves, and all other persons and estates, to and for the aforesaid uses, by a poll and pound rate, according to the manner and method then used in making assessments in the province for raising of county levies.

Collectors, with all the usual powers, and a treasurer, were to be appointed by the assessors, and the disbursements of the treasurer were to be made by order of the mayor, recorder, and any four of the city magistrates.

It will be observed, therefore, that the whole taxing power for these strictly municipal objects, emanated from the legislative department of the province, and was conducted by officers unconnected with and irresponsible to the city corporation, and it will be found that the same course was strictly pursued in all the subsequent provincial legislation.

The house of correction or work house for the city and county of Philadelphia was finally built, not under this act nor the city charter, but under a general law passed on the 22d February, 1717-18, at the charge of the city and county ; and the market stalls and shambles were usually erected by the city, with money raised by private subscription, whilst the streets were often voluntarily paved with pebble stones by the citizens, from the kennel to the middle of the streets before their respective tenements.

In January, 1740, a great number of the inhabitants of the city, representing the difficulty of carrying into effect the act of 1712, owing to the neglect of the city magistrates, petitioned the assembly to grant the citizens the same power to choose commissioners to act with their assessors as in the county. This was opposed by the city corporation, and after a full hearing of all parties, the assembly passed a bill for the better raising of money on the inhabitants of the city of Philadelphia for public uses, and for repealing a former act made to like purposes, which was however finally negatived by the governor.

In 1742 the grand jury of the city made a presentment in relation to the conduct of the watch, which was considered by the Common Council, who determined that a stated watch to be paid by the inhabitants would be the most effectual method, and in order to obtain this they presented a petition to the assembly, praying leave to bring in a bill for regulating the watch in the said city, and raising money on the inhabitants for the support of the same, which leave was granted. Upon the second reading of the bill thus brought in, “It was observed, that as it is proposed by the bill to lay a tax on the inhabitants of the city of Philadelphia, it would therefore be proper that the inhabitants should be acquainted therewith, and the house not usually sitting to do much business at this season of the year, it is thought proper to defer the consideration of the said bill to the next assembly, and in the meantime it is ordered to be printed and dispersed by the clerk, [Benjamin Franklin,] with his newspapers among the inhabitants of the city for their perusal.” In 1744 the city contained 1500 houses and 13,000 people.

On the 6th November, 1749, at a meeting of the Common Council, the mayor acquainted the board that he had called them together at this time, on occasion of the great complaint that had been made to him of the want of a sufficient and regular watch being kept up in this city, and from an examination of the constables, it appeared to the board that the watches had of late been frequently so very weak and insufficient as to be of no manner of use or security to the city, and that this was occasioned chiefly by some of the housekeepers who refused to pay watch money, pretending they would attend to the watch duty when warned, but frequently neglecting to do it.

It was the unanimous opinion of the board of Common Council, that the only effectual way to remedy this evil would be *the obtaining of an act of Assembly for raising money by tax for supporting a regular and stated watch, as is done in London and other great towns in England.* But as an application to the Legislature would require time, the mayor was requested to take measures to oblige the delinquents to perform their duty.

At the next meeting of the Common Council, on the 8th of January, 1749-50, the mayor represented to the board that notwithstanding the steps he had taken in pursuance of the request of this board, in order to bring the nightly watch of the city under some regulation, the matter since that time was growing rather worse than better, and that the grand jury of the city had again presented the weakness and insufficiency of the watch at the last city sessions. They had also presented the extreme dirtiness of the streets, not only for want of pavement in some places, but through the disorderly practice of throwing out all manner of dirt and filth, without any care taken to remove the same, whereby the streets that have been regulated at a public expense are rendered deep and miry in wet weather.

The board being of opinion then, as formerly, (with regard to the first mentioned affair,) that there could be no effectual measures found for keeping up and maintaining a full and regular watch without the aid of a law for that purpose, and that as the assembly of the province was then sitting, it was necessary to make a new application to them in order to obtain such a law.

In pursuance of this resolution the mayor, Alderman Shippen, *William Logan, Benjamin Franklin, Samuel Rhoads, and William Coleman*, were appointed a committee to draw up a petition to the assembly, recounting the former application from the board in 1743, and the continued disorders and inconveniences arising from the want of means for maintaining a strong and regular watch in the city, which had been the subject of a late presentment of the grand jury, and requesting them earnestly to resume the consideration of this affair, and make such effectual provision therein as to them should seem meet. The same committee were likewise desired to consider of what had been observed relating to the bad condition of the streets, and by what means the people may be induced or obliged to pave and keep them clean for the future.

Out of these proceedings grew the first act for the better regulating the nightly watch within the city of Philadelphia, and for enlightening the streets, lanes and alleys of the said city, and for raising of money on the inhabitants of the said city for defraying the expenses thereof, passed the 9th of February, 1750-51.

The preamble of this act is almost a literal copy of the preamble to the English act of parliament of 1737, and nearly all its provisions are copied from the statutes relating to those branches of the police in the city of London. These powers, however, were not vested in the corporation of the city, but in six wardens originally appointed in the act, and one third of them to be annually thereafter elected by the inhabitants.

This act, which was temporary, was supplied by the act of the 15th September, 1756, which was limited to seven years and the end of the next session of the assembly, and which last act was continued by the act of the 30th September, 1763.

To the act of 1756 a supplement had been passed on the 18th January, 1757, relating to the public pumps; and a supplement to the act of 1763 was passed on the 8th February, 1766.

These acts having expired, the improved act of the 9th March, 1771, (made perpetual by the act of 6th April, 1776,) was passed "for regulating and continuing the nightly watch, and enlightening the streets, lanes, and alleys of the city of Philadelphia, and for other purposes therein mentioned."

The streets (the second branch of the presentment of the grand jury in 1749) became the subject of legislative enactment on the 26th March, 1762, when the assembly passed the act for "pitching, paving, and cleaning the highways, streets, lanes, and alleys, and for regulating, making, and amending the water-courses and common-sewers within the inhabited and settled parts of the city of Philadelphia, and for raising money for defraying the expenses thereof." It was followed by three supplemental and one amending act, passed respectively on the 4th March, 1763, 15th February, 1765, 8th February, 1766, and 21st February, 1767.

All of these acts, with the exception of that of the 15th February, 1765, relating to the dock, were repealed and supplied by the improved act of the 18th February, 1769, upon the same subject.

By this act, commissioners for paving and cleaning the streets were appointed and elected in the same manner as the wardens.

These commissioners were empowered to consult respecting the best method of paving and keeping clean such of the streets and public lanes and alleys of the city as were within the inhabited and settled parts, and of amending and repairing the common sewers, and of making, amending, and repairing such as should be thereafter made for discharging and carrying off the water into the river, *and of making, amending, and repairing the public streets, roads, and highways, within the said city, leading from any of the public roads in the country to the paved and regulated parts of the said streets,* and contract with any persons for sand, stone, gravel, or any other materials *convenient and necessary* for the uses and purposes aforesaid, and to contract, agree with, and hire pavers and workmen, and to agree on, execute and perform every other act, matter and thing, which to them shall appear necessary for the effectual paving and keeping clean the said streets, lanes and alleys, when paved, and other purposes; and the mayor or recorder, and any four of the aldermen, with the commissioners, were from time to time to agree on *which of the said streets and public lanes and alleys, within the inhabited and settled parts of said city, should be first paved, having regard to the streets that are most used by the country*

*in bringing their produce and effects to market, which were thereby directed to be first paved.*

Rules were prescribed for the regulation of the streets and sewers, and the commissioners were directed to hire scavengers, and the inhabitants were obliged to sweep their footways at least once a week. No person was allowed to throw any ashes or other annoyance on the pavement, and all persons were prohibited from throwing down out of any cart or carriage any rubbish or dirt into the streets, except in such parts as should be appointed by the commissioners.

And in order to preserve the pavements, particular rules were prescribed as to the breadth of the felloes of the wheels of wheel carriages and drays, and the number of beasts of draught to be used; and carters hauling wood were obliged to have in their carts hewn standards marked with the initials of their christian and surnames.

The act also included various sanitary regulations as to distillers, soap-boilers, tallow-chandlers, and butchers, and against throwing carrion on the commons near any of the streets, or into the docks, and very salutary enactments in relation to cellar-doors, steps, porches, jut windows, bulks, spouts, signs, sign-posts, boards and poles.

Both the acts of 1769 and 1771 invested the commissioners and wardens respectively with ample powers, with the aid of the city assessors, to lay and collect taxes, and jointly or severally to appoint clerks, collectors and treasurers.

The wardens had under their charge the lighting, watching, and watering the streets.

The municipal duties, therefore, of paving, pitching, cleaning, lighting, watching, and watering the streets, were entrusted to two separate boards, entirely irresponsible to the city corporation, and who exercised powers copied almost literally from the acts of the English Parliament in relation to the city of London, whose example was strictly followed by the provincial legislature.

Such was the state of the municipal affairs of the city at the commencement of our revolution. No taxing powers were exercised by the city corporation, and all *their* disbursements were made out of the corporate revenue, whose sources have been already pointed out, whilst ample taxing powers, for certain specified and limited purposes, were vested in the wardens and commissioners for paving and cleaning the streets.

By the revolution, according to the expressive language of the legislature of 1777, all powers and jurisdictions not founded on the authority of the people only, became null and void, and the corporation of the city was therefore dissolved, and all its powers and jurisdictions entirely ceased.

To remedy the defects occasioned by this dissolution, various acts were passed. The act of the 14th March, 1777, substituted the justices of the peace of the city for the mayor or recorder and aldermen, in performing any duties or services required by the existing laws in relation to the city.

The act of the 21st March, 1777, established the city court with five judges, (for whom by the 9th section of the act of the 31st March, 1784, the justices of the peace of the city were substituted,) with the same powers and jurisdiction as the late mayor, recorder and aldermen, or the Mayor's court had exercised or enjoyed; and the president and executive council were empowered to appoint clerks of the market, corders of

wood, measurers of grain, salt, and other officers that were annually appointed by the mayor, recorder, and common council, or any of them, and were also to let out upon rent and receive the rents for the use of the inhabitants of the city from the ferries, wharves, stalls, standings, and places.

On the 5th April, 1779, an act was passed for the regulation of the markets in the city of Philadelphia.

On the 30th September, 1779, a further temporary supplement to the paving act of the 18th February, 1769, was passed, which, after reciting that the paving of the streets, lanes and alleys, within the inhabited and settled parts of the city of Philadelphia, and the keeping of the same clear of filth and rubbish, had greatly contributed to the convenience as well as the *health* of the inhabitants, empowered the street commissioners to levy an additional tax rate not exceeding nine pence in the pound.

By the act of the 18th March, 1780, all the city taxes for supporting the nightly watch, lamps and pumps, and for pitching, paving, and cleansing the streets, lanes and alleys, and regulating, making and amending the water-courses and common sewers, were to be apportioned and assessed according to the last State tax.

An act of the 5th April, 1779, which enabled the wardens and assessors to raise and levy an additional tax not exceeding sixpence in the pound, and authorized their treasurer to receive the rents and income of the market-houses, ferries, wharves, and public landings, being about to expire, another act was passed on the 30th May, 1780, which authorized the wardens of the city to let the said city property, and with the assessors to raise a similar tax of six pence in the pound, and empowered the treasurer to receive the said rents, and all other the incomes, fines, forfeitures and emoluments, which were formerly received by the treasurer of the mayor and commonalty of the city of Philadelphia, and obliged the clerk of the market to collect quarterly and pay over to the said treasurer of the wardens and assessors the rents of the market-houses, stalls and stands, in the market places.

By the 9th section of the act of the 19th December, 1780, the office of city assessor was abolished, and the whole of the act of 1712 was thus either distinctly repealed or supplied by the existing laws.

By the act of the 1st April, 1784, the wardens were incorporated by the name of "The wardens of the city of Philadelphia."

They were empowered to repair and let for a term not exceeding three years the market-houses, public ferries and ferry-houses, wharves, landing places, the fish-house and scale-house, reserving rents and establishing rates and prices for the toll or wharfrage of articles usually brought to such wharves and landing places.

The wardens were also authorized to appoint clerks of the market and corders of wood and constable of the night, and, with two justices of the city, were empowered to fix and regulate the rates of all wagoners, carters, draymen, porters, and woodsawyers, as fully as the mayor, recorder, aldermen and wardens could do before the revolution.

Regulations were also made as to keeping fire wood on any of the public wharves and as to vessels lying at them.

By the act of the 8th April, 1785, the bills, bonds, obligations and mortgages belonging to the former corporation of the city, were vested in the corporation of the wardens of the city of Philadelphia, who were ena-



bled to sue and receive the moneys due on the same; and also all other moneys which *on the* 4th July, 1776, were due or becoming due to the said city corporation.

The lot on the north-east corner of the State House lot, being vested in the wardens, they were directed to erect a court house upon it.

By the 39th section of the act of the 13th September, 1785, the election of the wardens and commissioners for paving the streets, was to be conducted in like manner as the elections for representatives for the city were to be conducted by virtue of that act.

On the 23d March, 1786, an act was passed authorizing the wardens to build and extend the market house in High street from Third to Fourth street, and to extend it westward from street to street as often as they shall think proper; and they were authorized to borrow not exceeding the sum of £2000, and to raise by tax sufficient to pay said sum, and all debts contracted over and above that amount.

One half of the market house to be free for the country people, and the stalls in the other half to be let by the wardens, and the rents paid to their treasurer for the use of the city.

By the 7th section of the act of September 29, 1787, for regulating chimney sweepers, the wardens, with three of the justices for the city and county, were to appoint a register for granting certificates to chimney sweepers, and collecting the fines and forfeitures; and by the act of 15th April, 1782, the appointment of surveyors or regulators was vested in the commissioners for paving and cleansing the streets of the city, and any four of the justices of the city and county.

It will be observed, therefore, that in the year 1789 the municipal government of the city was parcelled out between the wardens of the city of Philadelphia and the commissioners for paving and cleansing the streets, who formed separate boards and had entirely separate powers of taxing; and the city court, which was held by the justices of the peace of the city, who in their individual capacities also had certain authorities in connection with one or other of the above mentioned boards of local police.

The jealousy of the proprietary which had subsisted under the provincial government, and which had prevented the Legislature from vesting the close corporation of the city with the taxing and other powers, liberally granted to officers appointed by the assembly or elected by the people, and which had made even the laws passed for these objects temporary in their character, having disappeared with the revolution, it naturally became the desire of the citizens to have a popular restoration of an old form of government, which should unite the various branches of the police already subsisting in different and necessarily discordant hands.

Under these circumstances the act of the 11th March, 1789, to incorporate the city of Philadelphia was passed.

So much of this legislative charter has been repealed or altered by subsequent and frequent legislation, that it is necessary to examine the law itself as it was originally enacted, in order to understand the true and real meaning of its original provisions.

The second and third sections, after creating the body politic, are simply express declarations of the incidental powers to have perpetual succession to purchase, to sue, and to have a common seal, which would have been followed by the remaining incident to make by-laws, but that it was first

necessary to organize the legislative body of the corporation, to whom this power was to be confided. Accordingly, the subsequent sections to the 15th inclusive, are occupied with the details of its organization.

Fifteen aldermen were to be elected every seven years, and thirty common councilmen every three years; and the aldermen were annually to elect one of their own number mayor, and the mayor and aldermen were to elect a recorder for the term of seven years; and the mayor, recorder and aldermen, were to be vested with all the powers and jurisdictions of justices of the peace within the said city, and were liable to impeachment and also removable for misconduct by the general assembly, and the common councilmen were removable from office by the mayor, recorder, and common councilmen, who, in common council assembled, were by the 16th section authorized to make by-laws, which were to be published and recorded with proof of their publication. The sections from the 19th to the 33d inclusive, are occupied with the arrangements of the mayor's court and alderman's court. The mayor, recorder and aldermen, were constituted justices of oyer and terminer and gaol delivery; and the mayor, recorder and aldermen, or any four or more of them, (whereof the mayor or recorder for the time being shall be one,) were to hold the Mayor's court for the city of Philadelphia, with ample criminal jurisdiction, and with power to try all offences against the ordinances of the city, and to cause all encroachments in the streets and all nuisances to be removed.

The mayor or recorder could issue writs of *capias* and *subpœna* into any part of the commonwealth; and the constables of the city, under the warrants of the mayor or aldermen, or any of them, were authorized to arrest offenders in any part of the county of Philadelphia, and to bring them before the city authorities.

To the end and intent that the administration of justice within the city in matters of a civil nature might be free from extortion or undue oppression, "the alderman's court" was established, consisting of three aldermen, to be appointed by the mayor and recorder four times in each year or oftener, to try causes where the debt or demand amounted to forty shillings, and did not exceed ten pounds, with the same right of appeal and stay of execution as in similar cases before any one justice in the State, and with process and fees prescribed by the act.

Debts under forty shillings were cognizable before the mayor or any of the aldermen, with the right of appeal to the alderman's court. The city court and justices of the peace for the city were abolished, and all the records of the city court were transferred to the Mayor's court.

The mayor was authorized to appoint clerks of the market with the usual powers; and by a provision copied from the city of London, brokers were to be licensed by the mayor or recorder, aldermen and common council in common council assembled, who, for the well-governing of the city, and the ordering of the affairs thereof, were empowered to appoint such officers at such salaries or other compensation as they should direct; and all the rights of the old city corporation to all lands, ferries, wharves, markets, stalls, landings and landing places, goods, chattels and moneys, and also all other lands, property, rights and franchises, held by any persons or bodies politic for the use of the citizens of the city, *were vested in the new corporation for the use and benefit of the said citizens and their suc-*

*cessors forever*, and provision was made for the delivery over of the same with all their muniments.

The city wardens and the commissioners for paving and cleansing the streets were abolished, and the mayor, recorder and aldermen and common councilmen were invested with their whole authority, and empowered by themselves or persons appointed by them to do all such matters and things as the said wardens and street commissioners were at, and immediately before the passing of the act respectively authorized or enabled by law to do; and the mayor or recorder, and any four of the aldermen, were also empowered by themselves or persons appointed by them to execute all such matters and things as the said wardens and street commissioners respectively were authorized or enabled by law to do, in conjunction with any justice or justices of the peace of and for the city and county of Philadelphia.

And not content with the incidental power to make by-laws as expressed in the 16th section, the mayor, recorder, aldermen and common councilmen in common council assembled, were empowered "to make, ordain, and establish such ordinances, regulations and provisions concerning the same, as by them shall be deemed necessary and expedient, and also to allow and make such rewards and compensation to the several officers of the said corporation and persons to be employed in the service thereof, as shall be just and reasonable." The consent of the mayor or recorder, and of a majority of the aldermen, and also of the common councilmen, being made necessary to the making of any rules, regulations, appointments, laws, ordinances and constitutions, as they in common council assembled were "in and by the said act authorized or empowered to make, ordain, and establish."

They were also obliged once in every year to publish an account of all the moneys accrued to them in their corporate capacity during the next preceding year, and of the disposition thereof, and to lay a copy of it before the general assembly.

It would certainly have been difficult to have invested the inhabitants of a small city in a republican commonwealth with more speedy, vigorous, and effective powers of government, than were given by this act, which, according to the simple notions of that day, were amply sufficient without any extravagant constructions to suppress vice and immorality, advance the public health and order, and promote trade, industry and happiness.

The fifteen aldermen combined in themselves legislative, executive, and judicial functions, both civil and criminal. The city had its own magistrates and its own civil and criminal courts, its own corporate estate and income and officers, with the entire charge of the lighting, watching, pitching, paving, cleansing, and watering of the city, with all the taxing powers necessary for those purposes as defined by the existing laws, with the power to extend the market in High street, and the appointment of surveyors or regulators, the regulation of chimney-sweepers, woodsawyers, carters, wagoners and porters, and the appointment of corders of wood, with all the various and numerous powers that had been exercised by the wardens or the street commissioners.

And, in fact, if all the powers that were vested in the new corporation by the transfer to them of the authorities of the wardens and street com-

missioners had been introduced specifically into the charter, it would have made it as long as any customs act of the English Parliament.

It is therefore perfectly clear, that it is entirely illogical to construe this act by striking out all these numerous provisions in which the preamble finds its entire execution, and by reading that section solely in connection with the incidental power to pass by-laws as expressed in the 16th section.

Under this act the revenue of the city was derived from two sources—the corporate estate, fines and amercements; and the taxes specially authorized to be raised in the same manner and to the extent pointed out by existing laws for pitching, paving, cleansing, lighting, watching, and watering the streets of the city, and which acts, in the opinion of preceding legislatures, had contributed so largely to the health, convenience, comfort and happiness of the citizens and to the trade of the city.

It is perhaps not necessary to moot the question whether the city corporation by this act possessed any other taxing powers than those expressly given, a doctrine entirely consonant to the later legislation of England, to the theory and practice of our provincial and State governments, and to the fundamental principle that taxation should be certain, definite, and restricted within the narrowest possible limits required by the public good, as every tax is a direct abstraction of so much of the private property of the citizen.

Without, therefore, conceding the point, it may be remarked that no municipal corporation can pretend to exercise such a power by implication, *except where a burthen or duty is imposed upon them by the law of the land*, which they have no other means to meet; and with such limitation, this doubtful incidental power can have no bearing upon the present question. The practical difficulties attending on any exercise of such a power are very great, as the details of raising such a tax with the necessary authority to enforce payment, must be prescribed by the legislature of the State.

And this review of our legislation up to the charter of 1789, fortifies and strengthens the position which I have laid down in the earlier part of this opinion, that the 16th section is but a description of the incidental power to pass by-laws, and that the descriptive words used in it have no other effect or operation whatever.

I have before me the first account of the city, published on the 3d August, 1790, in "The Pennsylvania Packet and Daily Advertiser" of that day, which separates the two branches of city revenue and city expenditures, appropriating the taxes assessed for lighting and watching, and supporting and repairing the public pumps—to those objects only, and those assessed for paving, gravelling, regulating, and cleaning the streets, &c., in a similar manner, whilst the corporate income proper arising from fines, debt due by the managers of the house of employment to the late corporation, the balance arising from account of public markets, High street ferry and public landings on the Delaware, are appropriated to objects for which no taxes are expressly authorized to be raised by the charter.

A similar division of revenue and expenditure is also made in several of the early ordinances of the city.

It will be recollected, also, that the education of the citizens, the support of the poor, the health of the city, and the charge of the port of Philadelphia have, by special legislation, been entrusted to different local

bodies entirely distinct from the city corporation, such as the controllers of the public schools, the guardians of the poor, the board of health, and the wardens of the port.

The laws passed in relation to the city government immediately after the act of 1789, furnish unanswerable arguments in favor of the construction I have placed upon its sixteenth section.

The first supplement of the 9th December, 1789, fixed the fees of the clerk of the alderman's court; and the 2d supplement of the 2d April, 1790, after reciting that the appointment of collectors of taxes for paving, lighting, and watching the streets, had been formerly vested in the city assessors, and these officers no longer existing, the authority of appointing such collectors had lapsed; and also referring to the 35th and 36th sections of the act to incorporate the city, and the convenience of uniting all these powers in such persons as should be ordained by the common council, and that some of said existing laws relating to paving, lighting, and watching, contained regulations which were somewhat inconvenient, and some which might be improved, and that it was more convenient "to invest the said mayor, aldermen and citizens of Philadelphia, with the power of legislating, estimating, and raising of taxes, so far as respects the lighting, watching, watering, pitching, paving, and cleaning the streets of the city, unrestrained by any of the said existing laws relative thereto," invested the common council with full power to make such and so many ordinances as shall be convenient and necessary for the purposes of estimating, assessing, raising and laying of taxes upon the persons of single men, and upon the estates, real and personal, of the inhabitants of the city of Philadelphia, *for the purposes of lighting, watching, watering, pitching, paving, and cleansing of the streets, lanes, and alleys of the said city*, and directing, appointing, and regulating the time, order and manner of estimating, assessing, raising and collecting of the said taxes, and of *lighting, watching, watering, pitching, paving, and cleaning of the said streets, lanes and alleys*; and by the 3d section, the same power of passing ordinances was extended to the regulation of wagoners, carters, draymen, porters, wood-sawyers and chimney-sweepers, and also for doing whatsoever the wardens and street commissioners separately or in conjunction with others could have done by law.

It is clear that by this act the power of taxation was expressly limited to six objects, all of which had been specified in the act of incorporation, and it therefore excludes the conclusion, that any other taxing power was intended to be vested in the city authorities.

By an act of the 8th March, 1792, provision was made for filling vacancies in the aldermen and common councilmen occasioned by death, resignation, or otherwise; and the act of 22d April, 1794, authorized the common council by ordinance to prohibit future interments, and to sell certain lots, and to purchase others for a place of general interment.

By an act of the 12th February, 1795, certain persons are prohibited from occupying the stalls in the western moiety of the market house in High street, between Third street and Fourth street, and the corporation were authorized to pass ordinances to carry the same into effect; and the common council were empowered to lay taxes to extend the market in High street, which were to be levied and collected in the same manner as city taxes are.

By an act of the 18th April, 1795, the common council were authorized to make ordinances to oblige the owners and occupiers of houses to provide leathern buckets to be used only in extinguishing fires; and another act of the same date empowered them to pass ordinances to prevent the erection of wooden buildings east of Tenth street.

There are numerous other acts illustrative of the narrow limits of corporate authority beyond the powers expressly given and defined by the charter; and any one who will take up the Digest of the ordinances of the city, will find under nearly every separate head some portion of an act of assembly which forms the foundation of the legislation of the city corporation.

The select and common councils have been substituted for the single body of the old common council, composed of forty-eight members. The mayor is a citizen elected by the people, the recorder is appointed by the Governor, and the aldermen are simple justices of the peace elected by the people, and unconnected with the city administration, whilst the alderman's court and the Mayor's court, the two powerful city tribunals, have been abolished; but still the original restrictions of the charter remain untouched, as to the legislative and taxing powers of the corporation, and the construction of the sixteenth section must be the same as it was on the day of its original enactment.

I am aware that certain ordinances passed by the city and acts done by its authorities are cited to show that a more liberal construction has been put upon the act of 1789; and from these precedents, we are asked at this day to throw down all the barriers erected by the legislature against an abuse of the limited powers entrusted by them to the municipal government of the city.

I think there are none for the first quarter of a century which are not easily explainable, and the others are clear usurpations of power and infractions of the act of incorporation.

The ordinances for supplying the city with wholesome water from the Schuylkill, were founded upon the express power to water the streets and to lay taxes for the purpose. Such was the argument of Mr. Ingersoll, and such virtually the decision of the supreme court in *Stiles v. Jones*, 3 Yeates, 491.

The city were the owners of the Market street Ferry, and sold it with all its rights to the Permanent Bridge Company for \$40,000, one-half of which, or twenty thousand dollars, was paid to them in bridge stock.

The expenditure of \$175,000 in 1814 for the defence and preservation of the city, and the amount expended for a similar purpose in 1813, are not to be justified by any of the powers vested in the municipal government of Philadelphia, but upon the plea of necessity, and they are to be judged of by the same rules as the proclamation of martial law by General Jackson at New Orleans.

The subscription to the Schuylkill navigation was unauthorized by law, and the building of the ice boat unwarranted by any construction that would not have permitted the city to build iron steamers to ply between here and China.

The ordinance of the 11th May, 1837, for the issue of small notes, was a violation of the spirit of the constitution of the United States, and in direct contravention of the laws of the Commonwealth; and the payment

of the city debt in January, 1840, in checks upon the broken Bank of the United States, was in fact making depreciated bank paper a legal tender.

The acts of corporate bodies form indeed but bad precedents. All our banks have repeatedly suspended specie payments in the very teeth of their charters, and have substituted paper for coin in the discharge of their just debts; and one great bank, by a direct violation of its act of incorporation, lost five millions of dollars for its stockholders, and produced practical repudiation to that amount in one of our sister States.

The act of 1789 is therefore not to be construed by violations of law, but by itself; by the law of corporations and the common law; by the legislation of England on similar subjects; by the legislation and practice of the provincial and State governments, and by the laws in existence at its passage: all of which clearly negative any power in the corporation of the city to subscribe to or make the Pennsylvania railroad, to borrow money to pay for such subscription or expenditure, or to tax its citizens for its payment.

The citizens of Philadelphia are governed by three distinct local corporations, each of which have taxing and borrowing powers which operate directly upon their persons and estates. Each of them have heavy debts, and raise large annual taxes which cannot be diminished, but which will inevitably be increased unless the legislature by an imperative act should prevent all further loans by these bodies for several years to come.

I speak of the corporation of the city, the corporation of the county, and the corporation of the guardians of the poor. The real debt, therefore, of the citizens of Philadelphia is composed first, of the city debt proper; second, of their proportion of the county debt; third, their proportion of the guardians of the poor debt; and last but not least, their proportion of the State debt. The effect of all this aggregated debt is to raise for the present year out of the real estate of the city improved and unimproved, houses and vacant lots, \$1  $\frac{3}{100}$  in the \$100 on its cash value, which is assessed at \$56,393,138 60, and which produces the very large sum of \$767,947 64, which is taken from the pockets of the citizens of Philadelphia, and the net product of which finds its way into the city, county, poor and State treasuries. The city have, therefore, four sets of taxes and four sets of debt, over three of which they have practically no control. All that lies exclusively within their own power is the city debt proper, and the taxes to be imposed and the money to be borrowed by the select and common councils.

The result of these four aggregated city debts is a real city debt at the present moment of \$10,729,631 20. (See Appendix A.)

Independent of taxation, the whole net revenue of the city which can be depended on for the future, consists of two branches only: the income of the corporate estate, and the net water rents. Every dollar of expenditure beyond the product of these two sources must be raised by taxes.

The income of the corporate estate for 1845 was - \$63,591 38

The net water rents of this year appropriated for general city purposes, after correcting an error of the watering committee—(See Report of 8th January, 1846, page 9)—are but - - - - - 38,213 35

Making only a clear city revenue of - - - \$102,804 73  
to be used for general city expenditure.

The revenue of the gas establishment is entirely appropriated to improving the gas-works and the extinguishment of the gas debt of \$600,000.

The only other supposed source of revenue is the residuary real and personal estate of Stephen Girard, which must certainly terminate the moment the present college is finished, for the whole of the income of all of the remaining estate of our deceased fellow-citizen will then be required for its maintenance and support.

A brief history of this property will explain the causes of its present depreciated and exhausted condition, and offers the best argument against entrusting a municipal corporation with the execution of any trust or work at all removed from its ordinary functions.

Stephen Girard died in December, 1831, and left the city of Philadelphia the trustees and to a certain extent the beneficial owners of his immense real and personal estate, consisting of lands, houses, and stocks; after some devises, and the payment of certain legacies and annuities, the residue was divided into three portions: two millions of dollars being devoted to the erection and maintenance of his college for orphans, five hundred thousand dollars for the improvement of the city front, and the income of the remainder not required for the purposes of the college, was to be applied to the improvement of the police of the city, of the city property, and the general appearance of the city itself, "*and in effect to diminish the burden of taxation now most oppressive, especially on those least able to bear it.*"

On the 4th July, 1833, the corner stone of the present college was laid. The fund of two millions in city, Pennsylvania, and United States bank stocks, valued above par, having been previously set aside not only for its erection but for the future support of the poor white male orphans, the real objects of the testator's bounty. The college and out buildings were to be completed in six years and to cost \$900,000, and to be built principally out of the annual income of the fund, so as to leave when finished a large amount of its capital unexpended, to provide for its organization and permanent support.

This plan was a direct violation of the will of the testator, and I believe no professional opinion was ever obtained from any counsel employed by the city in its favor. Its costliness and the entire inadequacy of the estimate were pointed out, as well as the perishable character of the investments of all the personal property, which were advised to be changed and gradually laid out in safe mortgages in the city and county of Philadelphia, which would keep the capital whole, and at the same time improve this district, by affording an additional sum to be expended in the improvement of real estate.

|                                                                        |                |
|------------------------------------------------------------------------|----------------|
| Thirteen years have rolled round, and                                  | \$1,643,298.27 |
| have been already expended, and by the last estimate of the architect, | 285,283.00     |

|                                                          |                |
|----------------------------------------------------------|----------------|
| more will be required to finish it, making the real cost | \$1,928,581.27 |
|----------------------------------------------------------|----------------|

The whole of the fund of two millions has also disappeared during this long interval, except a small balance of stocks, amounting at their present value to \$238,016.14, which will leave a deficiency to be provided by the city from some other source. (See appendix B.)



The stocks in the residuary fund have depreciated in a like ratio, and the gross income of the whole of this fund, composed both of real and personal estate, has sunk from \$134,171.70 in 1839, to \$92,037.79 in 1845. It is clear, therefore, that after deducting from this decreased annual income the taxes, water rents, salaries and permanent expenses, there will not be left more than sufficient to maintain the college and its orphans, and of course no part of it can be devoted thereafter to city purposes, or to decrease the burden of city taxation.

There cannot possibly be a stronger proof of the entire unfitness of a municipal corporation to manage a great public trust or its revenues, or to execute any work unconnected with the original objects of its establishment.

I firmly believe if Stephen Girard had selected, instead of the city, two of its present officers, the superintendent of the water works and the city treasurer, Frederick Graff and Cornelius Stevenson, (one of whom has spent his life and the other a large portion of it in the service of the public,) as the trustees of his will, that his college would have been opened seven years ago for the reception of the orphans; a large portion of the two millions would have remained untouched, and the whole of the income of the residuary fund would have been preserved for the general uses of the city. Stephen Girard's statue would now have been surrounded by his adopted children, instead of being gazed at by curious thousands in the unoccupied halls of an unfinished specimen of Grecian architecture.

It is at this period, and with this example before us, that the citizens of Philadelphia have been called upon by public spirited men, many of whom do not live within our limits, nor are burthened with our debts or our taxation, to enter upon a new enterprise, that of making a railroad from Harrisburg to Pittsburg, with a branch to the harbor of Erie, and to borrow money and to tax themselves for this object.

The city of Philadelphia is limited on the north by Vine street, on the south by Cedar street, on the east by the Delaware, and on the west by the Schuylkill—one mile by two miles—or two square miles, with a population of one hundred thousand inhabitants; whilst the surrounding county of Philadelphia has in it six incorporated districts, four boroughs, and an area of 118 square miles, with a population of two hundred thousand souls.

The city is therefore confined within very narrow limits, and its improvements, which can only be carried westward, must stop at the Schuylkill, whilst those of the county may be extended almost indefinitely.

The incorporated districts will not subscribe to this road, (see appendix C.) and instead therefore of the whole metropolis, containing 250,000 souls, being called upon to make it, the whole burthen is to fall upon a small portion of it, consisting of two-fifths of the whole.

The plans proposed for this road are to be found in the three reports of Mr. Schlatter, in 1840, 1841 and 1842, to the canal commissioners; but although he is entitled to every confidence, his estimates must be corrected by the invariable experience of the last quarter of a century, and I therefore am led to the conclusion, that taking the Western Railroad of Massachusetts and the Reading Railroad for guides, such a road of the first quality, with the heaviest rail and the fewest curves, a double track, and with its whole apparatus and furniture complete, including cars and locomotives, will not cost less than fourteen millions of dollars.

The road to be of any use must be a *continuous one*, without inclined planes, and be so calculated that the same trains and engines may pass through uninterruptedly to the respective depots at Pittsburg and Philadelphia, on the navigable waters of the Ohio and the Delaware. This involves a connection with the Harrisburg and Lancaster and the Columbia railways, both of which must be altered radically before such a result can be obtained. The Harrisburg road must have a double track, with decreased grades, and be increased in strength throughout; whilst the Columbia Railroad must be straightened, and widened so as to throw the tracks further apart, and the inclined plane at Peters' must be avoided by using the Valley route and crossing the Schuylkill above. Who is to provide the means for these improvements is not stated, but it is at least doubtful whether the Harrisburg Company or the State have the ability to do so. Will the city be called upon to furnish the funds for these works also?

All great railways must terminate on navigable waters, and their depots must be so placed as to load and unload directly from the cars and vessels all freight which is not to stop at the terminus of the road. This will naturally carry the depot of these united roads above or below the city proper, and our means will thus have been charitably expended for the benefit of our neighbors.

The question therefore is not whether such a road, made by individual enterprise, would benefit the city or the state, but whether the city can derive any compensation for a forced contribution from her citizens, by tax or mortgage of thirteen millions of dollars.

I presume there can be but one answer to this proposition.

The city is then called upon, with her experience in the Girard College and Trust, to undertake the making and management of a railroad one hundred miles off, and thus to unite a private enterprise with its ordinary municipal functions. That it will be expensive and ruinous to the credit and property of the city cannot be doubted, and that it will be used for political purposes both here and in the interior is equally certain. Every share of stock is entitled to a vote, and thus the select and common councils will elect all the directors, and in return the directors will elect the councils, and manage all the counties through which the work passes, as well as our own county of Philadelphia. This is not imagination, for it is well known that the Bank of the United States, in the days of its prosperity, had sometimes a representation in Councils of one third, composed of directors and stockholders and their connections, and a really unlimited control over both bodies, and it has always been believed that the expenditures of the Girard estates contributed to the support of the dominant party in the city.

All parties are subject to these influences, and therefore all should unite to prevent them, by all honorable means, from being inseparably connected with our municipal government.

There is another feature in this scheme which seems to revive the arbitrary taxation of the time of Charles the First, and that is the absolute forcing of every resident of Philadelphia to contribute his property to a private enterprise, without allowing him to be the judge of the propriety of the investment. That the undertaking is not popular as a profitable means of investing money, is evident from the fact that in the whole State

and Union not more than one million has been obtained, after three months' continued effort.

Boston did not meddle with any of its numerous railroads, nor did New York with its Great Erie Railway, which was to connect it directly with the lakes, and the example of Baltimore, under the authority of the legislature of the State, is certainly not encouraging. Its stock was depreciated, its credit tarnished, and the whole circulation of the city was at one time composed of railroad orders, at a large discount. Its city debt alone is \$5,493,773 03; of which \$4,967,215 30 were incurred for railroad investments; of which \$1,330,000 were expended in the Tide Water Canal and Susquehanna Railroad Company—the one a dead loss and the other entirely unproductive.

If it is proposed that the city of Philadelphia should run the same course of small note currency and corporate discredit as Baltimore, then it would be proper to put our house in order and prepare for such a calamity at once.

The State of Pennsylvania has also a very deep interest in this question, for her solvency and the future payment of the interest on her debt depend upon its proper settlement. This debt amounted on the 1st of December, 1845, to - - - - - \$40,986,393 22  
And the annual interest upon it to - - - - - \$2,023,996 09

Whilst the public works of the State for the year 1845,

according to the report of the Canal Commissioners,  
produced a nett revenue of only - - -

\$641,579 67

And the balance, therefore, of this interest and all the expenses of the government of every kind, must be paid by the direct or indirect taxation of the people.

The state tax on real estate, is thirty cents in the hundred dollars, increased by taxing the same twice over in the shape of mortgages. This, however, represents but a portion of the real State debt, and but a small portion of the real State taxes raised for public purposes. To these are to be added all the debts of all the municipal bodies in the State; and all the taxes raised by them for the purposes of local government. They all bear upon and encumber the property of the State. We have thus seen, that in the City and County of Philadelphia alone, the local debts amount to the sum of \$6,554,142 80, which is to be added to the principal of the state debt beforementioned.

If all the local debts of the other parts of the State were collected, and added to this aggregate of \$47,541,138 39, it would present an amount calculated to strike terror to the heart of the boldest speculator. Now a local addition of \$13,000,000 of incumbrance to the small territory of the city, comprising but a twenty three thousand five hundredth part of the State, must inevitably lead to practical repudiation by its citizens, an event both to be deplored and guarded against by the State authorities, for whenever the city stops the payment of its interest, the State interest will no longer be paid, and Pennsylvania must rank again amongst the defaulting states of the union.

I trust this will never happen; but if the city authorities undertake to make the Pennsylvania Railroad, the day is certainly not far distant.

The state, however, has another debt to provide for, and another taxing power to consult, which overshadows all the others, whether the poor, city, county, or state. I mean the general government and the surplus

revenue deposited with us, amounting to \$2,867,514 78. If we are obliged to continue the war with Mexico, the recalling of these deposits from the states, or a direct tax on lands, or both must follow, and then Pennsylvania, just staggering under her already enormous debt and heavy taxes, must resort to the strongest measures of taxation, even to keep her credit in its present uncertain condition.

Under these circumstances it would be impossible for the State to allow a local corporation to make away with her resources, and particularly for the construction of a road which is to run side by side with her own expensive and costly improvements.

Having thus stated, in detail, the grounds of my opinion on the question submitted to me ; it affords me the strongest gratification to know that upon the law of the case, I am sustained by the deliberate opinion of Horace Binney, Esq., the ablest and most accomplished lawyer our State has ever produced.

I must therefore answer the question put to me in the negative, for I am of opinion :

First—That the select and common councils have no authority either to subscribe to, or to order a subscription by the Mayor to the stock of the Pennsylvania Railroad Company, nor have they power to borrow money to pay for such subscription, nor to lay a tax upon the persons or estates of the citizens for the payment of the interest, or the repayment of the principal of such a loan.

Second—That such powers were impolitic, inexpedient and dangerous to be vested in a municipal body, and were so considered by the framers of the act of 1789, who never intended to connect a railroad, a bank, a canal or a turnpike with the corporation of the city.

JOHN M. READ.

*Philadelphia, October 6, 1846.*

# APPENDIX.

## A.

The State debt on the 1st December, 1845, according to the report of the Auditor General, was - \$40,986,393 22  
Of which the proportionate indebtedness of the city and county of Philadelphia, based upon the equalized assessment of 1845, of all the counties of the State, is - 11,585,820 67

And of this amount, the proportion of the city of Philadelphia alone is - 6,488,059 20  
Of the county debt of \$1,734,233, the city portion is - 971,171 00  
Of the guardians of the poor debt of \$788,049 66, the city portion is - 491,501 00  
The city debt is composed of city debt - \$2,178,900  
And gas debt, - 600,000  
2,778,900 00

So that the total amount of real city debt is - \$10,729,631 20  
To which it is proposed to add what will make the Central Railroad.

The Great Western Railroad from Worcester to Albany, 156 miles, with a single track, cost - 8,000,000 00

The Reading Railroad, of 94 miles, with a double track, cost \$10,338,530 91, and making every reasonable deduction for commissions, discounts, &c., it must have cost, in cash, - 8,000,000 00

The first runs over a hilly country, but not a mountainous one, and the second follows the course of one river, and both were made by the best engineers in the United States, and in the best manner.

The Central Railroad begins at Harrisburg, and is 241 miles to Pittsburg. [See Report of Committee of Councils, page 32.]

It passes over or through the Allegheny mountain, and must be made without a single inclined plane, with vast tunnels and heavy viaducts, and must be of the most durable character, with a double track, and fitted with 20 ton engines, and, at the lowest calculation, must cost - 14,000,000 00

Of this, private subscription furnishes only - 1,000,000 00

And the adjoining districts not one dollar, so that - \$13,000,000 00

Is in fact (if any subscription be made by the city) to be provided by the citizens of Philadelphia, and added to their present enormous debt.

The account will then stand thus—

Present debt, - 10,729,631 20  
Add railroad debt, - 13,000,000 00

\$23,729,631 20

Which is certainly a large proportion of the real estate of Philadelphia, which is only - 56,393,138 60

Being more than forty-two per cent.

## B.

*Cost of the Girard College.*

|          |   |   |   |   |   |             |
|----------|---|---|---|---|---|-------------|
| In 1833, | - | - | - | - | - | \$69,996 00 |
| 1834,    | - | - | - | - | - | 112,048 00  |
| 1835,    | - | - | - | - | - | 121,079 00  |
| 1836,    | - | - | - | - | - | 153,949 74  |
| 1837,    | - | - | - | - | - | 181,839 79  |
| 1838,    | - | - | - | - | - | 229,937 00  |
| 1839,    | - | - | - | - | - | 231,018 23  |
| 1840,    | - | - | - | - | - | 102,913 92  |
| 1841,    | - | - | - | - | - | 84,496 76   |

(See Report of Architect, appendix to Journal Com.  
Council, vol. 7, page 61.)

|       |   |   |   |   |   |            |
|-------|---|---|---|---|---|------------|
| 1842, | - | - | - | - | - | 76,600 42  |
| 1843, | - | - | - | - | - | 54,681 96  |
| 1844, | - | - | - | - | - | 65,978 60  |
| 1845, | - | - | - | - | - | 158,859 55 |

See Girard accounts for these years,

\$1,643,398 97

And by the last estimate of the same architect, in the Thirteenth Annual Report of the Building Committee and Architect of the Girard College for Orphans, it will take - 285,283 00

more to complete it, making a total cost of - 1,928,681 97

College fund of \$2,000,000 00

Of the two millions consisting of 6,331 United States Bank shares and of city and Pennsylvania stock, all has disappeared except 331,330 13 Pennsylvania five per cents, which, at \$70, are \$231,931 05  
and 1217 shares of United States Bank stock, at \$5 per share, 6,085 09

\$238,016 14

which, taken from the sum still to be expended as above stated, 285,283 00  
leaves a balance of \$47,367 15 to be provided by the city from some other source.

## C.

*Debts of the County of Philadelphia, exclusive of the City.*

|                                                                    |                |
|--------------------------------------------------------------------|----------------|
| The residue of the State debt which falls on the county proper, is | \$5,097,761 41 |
| The county portion of the county debt, is                          | 763,062 00     |
| And of the poor debt, is                                           | 296,543 66     |
| Debt of the Kensington District,                                   | 167,622 24     |
| Debt of the Incorporated Northern Liberties,                       | 248,000 00     |
| Debt of Spring Garden,                                             | 413,040 00     |
| Debt of Moyamensing,                                               | 93,443 15      |
| Debt of Southwark,                                                 | 330,859 75     |

Making a total of county debt proper of - \$7,410,332 21

This shows clearly why the districts will not comply with the resolution of the town meeting of the 28th April last, requesting them to subscribe \$1,250,000 to the Railroad.

|                                                      |   |   |                     |
|------------------------------------------------------|---|---|---------------------|
| The taxes for 1846 for the county are                | - | - | 50-100 on the \$100 |
| For the guardians of the poor,                       | - | - | 20-100 " "          |
| The aggregate taxes in Kensington are, in the \$100, | - | - | 1 50-100            |
| " " Northern Liberties,                              | " | - | 1 30-100            |
| " " Spring Garden,                                   | " | - | 1 30-100            |
| " " Moyamensing,                                     | " | - | 1 85-100            |
| " " Southwark,                                       | " | - | 1 60-100            |



