

HOUSE...No. 252.

Commonwealth of Massachusetts.

HOUSE OF REPRESENTATIVES, April 30, 1856.

The Joint Special Committee, to whom were referred the several Petitions of Ambrose Lawrence and others, of the city of Lowell, Sewall Parkhurst and others, of the town of Chelmsford, Samuel Nichols and others, of the town of Wilmington, George W. Gould and others, of Andover, Jonathan Morrill and others, of Amesbury, Samuel Richardson and others, of Methuen, Larkin Trull and others, of Tewksbury, G. W. Coburn and others, of Dracut,—also, the Petitions of Francis Tuttle and others, of Stowe, and Francis Conant and others, of Acton, in aid of the Petition of Ambrose Lawrence and others, in relation to the Fishway in the Essex Company's Dam, at Lawrence, have attended to the duty assigned them, and submit the following

REPORT:

In entering upon the investigation of the subject embraced in the aforesaid petitions, the Committee were not unmindful of the great responsibility which devolved upon them, or of the

deep interest which was felt by thousands of petitioners in the Valley of the Merrimack River, in the work committed to their charge.

The so called Fishway in the Dam of the Essex Company was not a matter wholly new to them. It was impossible they should not have heard of it quite frequently; several of them had often seen it, and all had listened to complaints of its utter worthlessness, and of the folly or knavery of those who erected such a structure.

Although, as a Committee, they desired to enter upon their duties with unprejudiced minds, they are free to confess that they sympathized with the petitioners, and felt a preconception that their complaint was not without a cause.

It was with such feelings that they entered upon the investigation of this subject, and if they have been swayed at all by their own preferences, wishes, or former opinions, it has been towards, and not in opposition to, the granting of the petitioners' prayer.

The Committee have thought proper to make these introductory remarks, in view of the result of their investigations, in justice to themselves and to all parties concerned. The examination of this case was a work which occupied several days, and the Committee having to adjourn, from time to time, because of other engagements, it was several weeks from the time of its commencement to its close.

The petitioners proved, to the satisfaction of the Committee, that there has been good and sufficient cause for the complaint set forth in their petition,—that the fishway in the Dam of the Essex Company was not, and never has been, a “*suitable*” or “*reasonable*” fishway, and that no fish have ever, or can in any way, get from below said dam, to the river above the same.

The Committee have been upon the spot, since the case was committed to them for investigation, and they can but say that if any one ever supposed a fish could either jump or swim over such a fishway, he must have been wanting, not only in sound judgment, but good common sense. Indeed, the remonstrants did not pretend that even *salmon* could get over said fishway. They acknowledged that, in all probability, no fish had ever gone over said dam.

The value of the fisheries above the dam, previously to its erection, was shown to be very great, and that now they are entirely worthless. It was also shown that the fisheries below the dam have greatly diminished in value since the dam was erected, and the Committee were satisfied that said dam is the chief, if not the only cause of this; as it prevents the fish from going up to their natural spawning grounds.

The respondents attempted to prove that the manufactories at Lawrence prevented the fish from coming up the river as they used to do, by the great amount of coloring matter and poisonous substances which they caused to be thrown into the river; but the Committee were not satisfied, beyond a doubt, that this has had any effect in driving the fish away. There may be something in this theory, but if so, it was not clearly shown.

So far, then, as the obstruction of the dam to the ascent of the fish up the river is concerned, the case made out by the petitioners was as strong as facts could make it.

The Essex Company, in applying to the legislature for a charter, asked for authority to build a dam across the Merrimack River, that, among other things, they might improve the navigation of said river. The petitioners alleged, and attempted to show, that in this there was a fraudulent representation, inasmuch as the dam which the company did build hinders and obstructs navigation. But the Committee fail to see how there was any fraud in this representation, as the legislature granting said company their charter to build said dam must have known the effect of the same, in this respect, and if so, there could have been no fraud in the case. It was not shown that the construction of said dam was not in accordance with the authority granted for building the same, or that the locks and canal were not sufficient for the purpose contemplated in their construction. It was shown, that when the wind was blowing up the river, a raft or boat could not get down through the still waters above the dam, so quickly as they could have done over the same ground and distance before the dam was built; but, that this would have been the natural result of flowing back the waters at this point, for several miles, must have been known as well by the legislature granting the charter aforesaid, as by the witnesses who testified before the com-

mittee in this case. This was, at least, the conclusion to which the Committee arrived, after a careful examination of this point, and the inadequacy of the fishway is all which, by the testimony, was charged home upon the company as a neglect or fault for which they are responsible,—if, indeed, *they are in any way responsible*. In the seventh section of the act incorporating said company, it was provided that the county commissioners for the county of Essex should prescribe the mode of constructing the fishway to be made and maintained in the dam of said company, and filed in this case is the following prescription, which two of said commissioners swore to, as the exact prescription which they made:—

“It having been made to appear that all persons and corporations interested therein had been duly notified of the time and place of meeting,—We, the County Commissioners for said county, did, on the 24th of September, A. D. 1847, proceed to view the premises and hear all parties interested; and having completed said view, and heard all parties who desired to be heard upon the subject, we did adjudge the following as the mode of constructing said fishway, and do now prescribe said mode as follows, according to the plan filed herewith, viz.: The said Essex Company shall erect and maintain a wooden sluice-way or channel, not less than thirty feet wide, and not less than fifty feet in length, rising in an inclined plane from the rocks which make the bed of the river, near the southerly end of said dam, at an inclination of not more than one foot in four from the lower end of said sluice-way to the upper end thereof; the floor of which upper end shall be within two feet of the stone crest of the dam, and its centre shall be eighty feet from the wall on the southerly side of the Merrimack River. And said sluice-way shall have sides two feet in height, and its centre shall be gradually deepened towards the lower end. Rests, or cross partitions, shall also be constructed therein of timber ten inches in depth, and extending from each side across to the centre, and the same shall be six feet apart.”

This was dated October 12th, 1847, and signed by Asa N. Wildes, Benjamin F. Newhall, and John I. Baker.

Said Newhall and Wildes were before the Committee, and testified that they were at the dam to view the fishway, after it was built, and found it constructed in all respects as they had prescribed.

In view of these facts, have not the company complied with the letter of the requirement made of them by the legislature? Have they not done precisely what the legislature, in granting them a charter, required them to do? That they have built such a fishway as it was intended that they should build—"a reasonable and suitable fishway,"—cannot be pretended for a moment; and yet they followed the prescription made for, and given them by the umpires in the case, appointed by the legislature.

Why such a prescription should have been made by three intelligent and respectable men is indeed hard to conceive. One of them testified that when the prescription was made he supposed the fishway would be an entire failure,—and the other commissioner would not say that when the plan adopted was under consideration, he had any idea that a fish could ever get over such a fishway. Why then did he—why then did the others, make such a prescription? This is a question the Committee cannot answer. The intention of the legislature was clearly expressed. The commissioners could not have mistaken that. They were to say what a "*reasonable and suitable fishway*" would be. Instead of this, they prescribed one which they knew would be wholly *unsuitable and worthless*.

It was a most singular, unjust, not to say unprincipled prescription, for which the company might have been, or might not have been, to some extent, responsible. That, however the petitioners did not succeed in showing; and the company, from all that appears to the contrary, have done, *in form*, and according to the prescription given them, all they were required to do by their charter and act of incorporation. The question now is, can we require them to do more than this?

A few years ago, this company asked of the legislature an increase of their capital stock. At that time, it would have been both proper and right for the legislature to have said to the company, build a reasonable and suitable fishway in your dam, or we will not grant your petition. This, that legisla-

ture did not say; but they made another and different requirement of said company, touching the same subject. They said,—You have prevented the fish from ascending the river above your dam, and the owners of fish-rights are damaged thereby to the extent of many thousand dollars. Buy up those fish-rights,—pay those men the damages they have sustained, and we then will grant your prayer for an increase of capital stock. It was right, and perfectly within the province of the legislature to say this, and the company had their choice to buy up those rights, or to go on without an increase of capital. They chose to buy them, and they paid the owners for the same \$25,625.11. Had they, at that time, been required to build a fishway instead of the requirement which was made of them, it would have been equally within the province of that legislature, and the company would have taken their choice to build it or have their prayer for increase of capital refused.

But the petitioners ask this legislature to do an entirely different thing from this, and one which involves a different principle.

The original charter was granted to said Company on condition they would comply with certain requisitions. An umpire was appointed to see that those requirements were complied with. The men composing that umpire, or two of them, come forward and swear that the work required of said company, the form and construction of which they were to direct, was performed to the very letter. The company then wanted more capital, and the legislature said to them,—Do another certain thing which we prescribe, and you shall have the right for which you ask. The company complied, accepted the terms, and received the equivalent.

On each of these occasions, the legislature prescribed exactly what the company should do in order to receive the powers and privileges for which they petitioned. The terms were accepted, and that which had been prescribed was done *in form, and to the letter*, according to the prescription.

The contract between the parties was thus complete, and the State cannot say to said company, do yet an additional work, until said company ask of the State additional favors. They ask no favor now; and the State, as the Committee feel compelled to say, cannot compel them to expend some thirty

or forty thousand dollars in building a fishway, without giving them an equivalent therefor, for which they do not ask.

Again,—the Committee, while they were unanimously of opinion that a fishway might be built over which fish could pass from the waters below to the waters above the dam, can but entertain some doubts in regard to the success of such an enterprise. Can fish be made to ascend so long and so high an artificial water-course, is an unanswered question. The Committee think they could; yet the experiment was never tried, and there may be a question as to whether or not, even had the State a right so to do, it would be just to require said company to make such an expenditure, the result of which might prove an entire failure.

These and other considerations, such as the effect of the manufactories upon the river, and the noise upon the bridges over the very spot where the foot of a fishway would have to terminate, in driving the fish away, have induced the Committee to report, that the petitioners have leave to withdraw their petitions.

JOHN A. BUTTRICK,
WILLIAM HALL,

Senate.

L. J. FLETCHER,
FRANKLIN KNIGHT,
JAMES OLIVER,
ASA SWALLOW,

House.

