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REPLY

TO THE

STATEMENT TO THE PUBLIC

IN REFERENCE TO THE

ACT OF THE LEGISLATURE

TO REMOVE

THE DAM ACROSS THE CONCORD RIVER

AT BILLERICA.

BY REMONSTRANTS AGAINST THE REPEAL OF SAID ACT.

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BOSTON:  
PRINTED BY GEO. C. RAND & AVERY,  
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1861.

Eng 1018.61.9  
✓



James R. Baldwin

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## REPLY.

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AN anonymous pamphlet having recently appeared in circulation, purporting to be a Statement to the public in reference to the Act of the Legislature to remove the dam across the Concord River, at Billerica, containing most unwarrantable assumptions and statements of the evidence contained in the Report of the Committee to the Legislature of 1860, calculated to mislead the public, to whom it is addressed, in relation to the impropriety and injustice of the Act, passed by that Legislature, for the lowering of the dam at Billerica, and the destruction of the property of the Messrs. Talbot and the Messrs. Faulkner, for the purpose of enriching the meadow lands of the petitioners; and, as therein set forth, was an extraordinary piece of legislation, passed by that Legislature, unasked for by the petitioners, and against the recommendations of the Report of the Committee who investigated the cause of complaint in the several petitions on that subject. This irresponsible document, without date, appears simultaneously with the date of the petition of the Messrs. Talbot and the Messrs. Faulkner, for the repeal of the Act of 1860 to the Legislature of 1861; and is evidently put forth as an unanswerable argument to be addressed to the present Legislature, to again reopen for review the whole subject of the flowage of the Concord and Sudbury River question, in aid of that petition.

If the "author" had merely set forth his own views of the facts, or those for whose interest he evidently labors



to promote, they would not seem to demand more than a passing notice. But as he has chosen to base his statements upon the report of the evidence as taken by the authorized Committee of the Legislature of 1859, to that report he must be held to answer for the truth of his statements and assumptions, as therein shown.

The author proceeds upon three presumptions of the facts in the case, that are denied by the petitioners for the Act of 1860.

I. That the Messrs. Talbot purchased the property and right in the dam across Concord River, at Billerica, of the proprietors of the Middlesex Canal, to hold as it now exists on said river.

II. That the height of the dam is substantially the same as it was in 1711, when it was first erected.

III. That the dam, as it is now constructed, is not an obstruction appreciably affecting the flow of water in Concord and Sudbury River.

The first right to the natural flow of water in a running stream is in the proprietors of the lands through which it flows. It becomes necessary to inquire into the nature of the grant upon this presumption in the argument of the author, for the proprietors of the dam on Concord River; and it is found in evidence that the town of Billerica first parted with its right to the natural flow of the Concord River, within its own limits, by a grant to one Osgood in consideration of his erecting a dam across said river, at the falls, within two years next ensuing hereof (see p. vi.); in Appendix B. for grant to Osgood in Report dated Oct. 4, 1708, one of the provisions being: "And the said Osgood doth engage to secure and defend the town of Billerica from any trouble and charge that may arise for damage that may be done to the meadows of the towns above us by said mill-dam."

This grant was specially inserted or referred to in all

the transfers made of the dam, and water rights, conveyed down to the purchase and sale of the property by Thomas Richardson, to the proprietors of the Middlesex Canal, by deed dated 25th day of March, 1794 (see p. xlviii.), in the Appendix L. of the Report.

The public are specially invited to an examination of this deed as a carefully drawn instrument for the protection of the rights of all parties interested in its provisions. In general terms, it is a grant "for the consideration of thirteen hundred and fifty pounds, paid by the directors of the proprietors aforesaid, and their assigns forever, the following estate, and on the following conditions, viz: about forty acres of land lying in said Billerica, as described in said deed, together with all the buildings and privileges to the same, including the mills, mill-privileges, and conveniences thereunto belonging; being the same which was formerly granted by the town of Billerica to Christopher Osgood, together with the milldam and stream." Now mark the provisions contained in the proviso, which was accepted with the deed by the proprietors aforesaid. "Provided, the said proprietors and their assigns shall do and perform the same conditions that I, the said Thomas Richardson, shall be obliged to perform if I do not convey said premises to said proprietors, by virtue of a vote of said town of Billerica to Christopher Osgood, the 4th of October, 1708; also to keep a proper passage for fish, agreeable to law; also their fulfilling the agreement made by said Richardson, as set forth in his last deed to Timothy Sprague, about the year 1791. To have and to hold," &c.

This was, at that time, their title to the property in the milldam on Concord River, with all the conditions and agreements contained in the aforesaid proviso, including the engagement of Christopher Osgood. "To secure and defend the town of Billerica from any trouble and charge that may arise for damage that may be done

to the meadows of the towns above us by said mill-dam."

This title was acquired by purchase, after the grant of the charter for the Middlesex Canal, by the Legislature of Massachusetts, passed on the 22d June, 1793: and subsequent to the additional Act passed on the 28th February, 1795. From this date the dam ceased to be governed by the law regulating mill privileges, and passed under the provisions of the charter for the use of the waters of Concord River, without limitation, and without notice to any party that might suffer injury by the exercise of the extraordinary power vested in that corporation.

We have now arrived at an important period in the history of the title, granted to the Messrs. Talbot, of this property in the water rights and dam in Billerica, from the Middlesex Canal Corporation, passed on the 22d September, 1851. (See Appendix, p. lv.) The proprietors of the Middlesex Canal having so far perfected the survey and adapted the canal to the head of water raised by the dam purchased of Thomas Richardson, and, in the fall of the year 1797, opened the western section of the canal between the two rivers for use. The property of the land-holders on said river was then taken possession of by the raising of this dam at this time, and before the passing of the additional Act of 1798, which granted no power to be exercised under the original Act. It is claimed that this act legalized the former act of the proprietors. How could it be necessary to legalize a lawful act, which would necessarily defeat the proper claim of land-holders for damages for acts already done, and always after successfully defended under the former Act of legislation to this time, as shown in evidence that no damage for injury to these lands was ever recovered. (P. xiv. Appendix.) It is seen by the provisions of this Act that the corporation were not authorized to create

mill-seats by the exercise of any power granted in the original charter. The corporation were simply authorized to purchase mill-seats and land, and thereon erect mills in the corporate capacity, liable to the statute laws of the Commonwealth. In the Act of 1795 (p. xiii. Appendix), the said corporation were authorized to render Concord River boatable, and to open any canal at any place in the county of Middlesex, by virtue of the provisions contained in the original charter. It was under this Act that the proprietors commenced to raise the head of water by an additional flash-board above the height of the "Richardson Dam."

Testimony of Theophilus Manning (p. 172): "The first I saw of the flash-boards on the old dam was in the Fall of '98, when I went past and saw them making the timbers for the new dam. The canal was then open from Billerica Mills to Chelmsford. They brought down timber."

Jonathan Manning (p. 77): "In 1798 I helped to build the dam. There was a dam previously there. The dam I helped to build was higher than the former one" (P. 78): "I do not know how much higher the new dam was than the old one; but, from their raising the water in the canal so much higher than before, I should think from nine to twelve inches high" (P. 79): "After the dam was built, timber, principally, was brought down. The timber and rafts were larger than before. I think I saw one log from which seven planks were sawed, with two slabs." Cross-Ex. (p. 80): *Ques.* — "And with the old dam they had about two and a half feet of water?" *Ans.* — "I should think so. By their taking the small rafts up, I should think it took two and a half feet of water. I should think, from the difference in the height of the water, after we made the new dam, the dam would have been raised from nine to

twelve inches. I think it made the water about a foot higher in the canal.”

That the dam was raised in 1798 is conclusively shown by the evidence referred to in the Report. No living witness introduced contradicts the evidence given by two witnesses on that point. But it is assumed by the author of the “Statement,” that there is still existing marks and objects about the dam, which control the evidence in regard to the raising of the dam in 1798, which conclusively shows that this dam must have been as high as that which was built in 1828; that there were old Clothing Works which were operated by water taken through a ditch, the depth of which would require as much water as that now raised by the present dam. By reference to the testimony of George R. Baldwin (p. 311), the average depth of this race-way was 53 inches. The testimony of Warren Nixon (p. 297): “I found the apron 4 feet 5 inches below the flash-boards; I measured 12 feet above the lock towards the pond, and found it 4 feet 5 inches below,” making just 53 inches. Now, then, if 33 inches be cut down from the top of the present dam, 20 inches will remain for the depth of water in this ditch.

Those old Clothing Works had no right to use the water when it was below a certain point. All the water-rights used upon the original dam were held in subjection to the original grist-mill, and must shut down the gates when there was not sufficient for its use (see all the deeds from Osgood to grantees down to Richardson, and Richardson especially reserves the prior right of the town of Billerica). The proprietors of the canal had purchased this right, and therefore had control of the privilege of the Clothing Works of 1795. They adapted the height ~~of the dam~~ to the ~~necessity of the canal~~, and to nothing else (see Manning’s cross-examination, p. 83):  
*Ques.* — “How was the water carried from the dam to the

fulling-mill; in penstock or flume?" *Ans.* — "I don't know. The fulling-mill was not altered in any way at that time that I know of." The assumption of the "Author" is made to convey the idea that the fulling-mill had the right to use the water at any stage, and at all seasons of the year, which was not a fact before that time; nor is it so now. The dam only filled the canal on the west side of the river then, in the summer, and that section was excavated 18 inches lower than the section on the east, and flash-boards had to be added when the water was first let into this section in 1802; and still more in 1805, when the canal was in operation; to make up for the difference. Jonathan Manning (p. 79): "Flash-boards were put on the dam I built, before I left; saw them there the last two years; they said they were ten inches high. Theophilus Manning (p. 169): "A foot and a half was put on; they called it a figure 4; in 1806 the flash-boards were on." "The bottom of the canal on the west side of the river, at its entrance from the pond, is hard and ledgy; and that a less depth of water than that now raised by the present dam could not have floated boats into the canal, of the size used upon it." Against this assumption stands the evidence of Warren Nixon (p. 185): "On the west lock, on the sill, I found 5 feet  $7\frac{3}{4}$  inches of water, and the average of the first cross-section was about 6 feet  $6\frac{1}{2}$  inches deep when it was 5 feet  $7\frac{3}{4}$  inches on the wooden sill." Then follows cross-sections, taken at ten feet distances, and the last one, eighty feet eastward from the lock "was 6 feet 3 inches," (p. 86.) "I estimated the top of the sill to be 5 feet lower than the top of the flash-board." Subtract 5 feet  $7\frac{3}{4}$  inches from 6 feet 3 inches, gives  $7\frac{1}{4}$  inches for the height of the mitre-sill of the west lock above the bottom of the canal, ~~at the entrance from the pond.~~ Colson's testimony (p. 275): "The mitre-sills were lower than the bottom of the canal, 18 or 20 inches." For the

height of the flash-board above the sills of the locks, on each side of the river, see Nixon's testimony (p. 186): "I recollect the top of the stone sill, on the east side, was 4 feet  $2\frac{3}{4}$  inches below the top of the flash-board. The top of the wood sill was 5 feet; the difference is  $9\frac{1}{4}$  inches." The testimony for respondents reverses these measurements at these two points. Colson makes the sill of the west side lock 18 or 20 inches below the bottom of the canal, and Nixon about 8 inches higher. Avery (on Plate IV.) makes the excavation of the east section of the canal 5 inches lower than the west. Nixon makes the sill of the east lock about 18 inches higher than the excavation of the canal on the west side, which is in accordance with the evidence and observation of all other witnesses.

#### THE PENSTOCK.

It has been shown by the evidence that there was no penstock existing in 1798, when the dam was first built by the canal corporation; that the water-wheel for driving the mill was below the dam, and abreast of the gate in the dam; that the gate was hoisted and let the water directly down upon the wheel without penstock or trough. This dam only raised the water sufficiently to fill that portion of the canal then in use, on the west side of the river, in the summer. The power for the mill was only the surplus water above the dam. On the east side the canal is not excavated so low by from ten to twelve inches, as it is on the west side; and when the water was first let in to a part of the eastern section in 1802, a flash-board of about a foot had to be added to the height of the dam at that time. Jonathan Manning (p. 79): "Flash-boards were put on the dam I built, before I left." In 1806, when the canal had got into operation, the height of water had again been raised to eighteen inches above the dam, by erecting thereon a

structure called a figure 4, in 1805. Theophilus Manning (p. 169): "After the dam was built they were obliged to put something on it, to fill the canal. A foot and a half was put on; they called it a figure 4."

It would be reasonable to suppose that after this addition to the necessary height of the water on the dam, it would become necessary to alter the application of the water to the use of the mill, which could only use the surplus at the present height. And where else "would any sane man" put his penstock other than at the point on the dam necessary to convey only surplus water to his mill-wheel, as it must have been done at this time? By the measurements taken by Mr. George R. Baldwin, the penstock is located just where it would naturally be supposed to have been at that time. Baldwin (p. 312): "I have here a plan, taken at the mouth of the old penstock. The bottom of the culvert was 1.54 below the top of the old stone dam, and 2.21 below the bolt. The top 1.11 feet below the bolt, 0.44 feet below the top of the dam. This is the inside of the top." So, that it is indisputably proven that the dam of 1798 was  $26\frac{1}{2}$  inches lower than the dam of 1828. Adding 9 inches, the lowest estimate of Mr. Jonathan Manning, for the raising in 1798 above the Richardson dam, and we have  $35\frac{1}{2}$  inches;  $2\frac{1}{2}$  inches more than is claimed in the Act of 1860, above the original height of the Richardson dam in 1794. And it is also shown that the dam of 1794 would raise the water in the clothing-mill sluice  $17\frac{1}{2}$  inches, and in the canal on the west side, above the wooden sill in the lock  $24\frac{1}{2}$  inches, and reduce the depth of water on Ford-way bar at least 20 inches, in a dry season, at the lowest stage of water. In an ordinary flow of water, when the river banks were not generally overflowed, it would raise the water on the dam about 6 inches. "It is said that there is a bolt fixed in a rock on the east side of the pond, placed there in 1825, regulating the height



of the dam, as it had been maintained since 1810." We answer that the full effect of the flowage, at that temporary height, had not been realized upon the land, since it was proved and not denied, that it was only maintained for a part of each season, and in the lowest stage of the water; and that by the old dam the floods which gathered in the valley of this river went down 22 inches lower than could be done with the present dam. We claim that the dam of 1828 was permanently raised at least 15 inches.

Some evidence was introduced of the value of this property. Benjamin L. Judkins was an assessor in Billerica (p. 281): "I have been a member of the Board of Assessors, in that town, in 1850, and since. At the time the Talbot property was in the hands of the canal, I thought it worth \$17,000. I had occasion to appraise it. A year ago last May, my judgment was \$82,000" (P. 282): "The mill privilege causes the value. The increase of value comes from the use of power as mill privilege instead of for canal." The consideration in the deed of the property to the canal proprietors was £1,350, about \$4,500, and was appraised in 1850 at \$17,000; after the petition for the surrender of the franchise of the charter as a canal, \$82,000. Did Messrs. Talbot expect to hold the charter rights, under his quitclaim title deed? The Messrs. Talbot appeared by counsel to oppose the petition of the canal proprietors against the surrender of their charter in 1852. (See Report, p. 296): "J. W. Simonds. — They have a large interest in a mill privilege at Concord River, and other rights, growing out of titles derived long time ago, and they now stand in possession of these rights, at this time, which will be injuriously affected by a complete surrender of the charter of this corporation." The injury could not operate against their rights included in the deed of grant to the property, but they knew in that

case the charter right which they did not purchase must fall by the express conditions in their deed. Daniel Wilson had so declared in conversation with Jonathan Hill, before the purchase; and Hill (p. 305) had conversation with Mr. Talbot about the premises; these conversations were not recollected. The action of the respondents was in perfect accordance with the facts set forth by Mr. Hill.

The reason for this great difference in the measurements and representations given in the testimony as presented, is further explained by the obvious fact that the respondents employed a great number of persons to make measurements and representations calculated to produce a given result. Take, for example, the elaborate representation of the former complaints of the owners of those lands, from an early period in the first settlement of the country, down to the more recent causes of complaint caused by the raising of this dam. The Committee who went on view of the premises, saw and knew from a personal examination the truthfulness of the representations made by the petitioners, as stated in the evidence, that these lands were located upon different levels above the water line, varying from one to two, six, and eight feet. So that at one period, the occupants of the lowest grade of meadows would complain, and at another period, upon the raising of the dam, the occupants of another still higher grade; and at each successive raising, another; and so on, until the complaint became general in every grade of land, as detailed by the Committee in their Report, and this explanation perfectly reconciles the testimony of Mr. John B. Wright, on page 145. As, also, the remark made by the Committee upon the Broad Meadow and Neck Farm in Bedford, which was in a good state of cultivation at the time when those complaints were made in former times, which has since been abandoned entirely, and which the

Committee represent (p. 51), "as high land as any in the vicinity, the arable land being little better than a bog, and the wood bordering on the meadows stunted in growth in many cases, decaying rapidly."

Now against this array of evidence, and, as a last resort, the aid of science is brought in to vindicate an assumption, not founded upon the merits of the case, in the investigation then in hearing. The assumption now is, that the dam does not materially affect the depth of water upon the bars or natural obstructions in said river. The claim of the land-owners is, that the increased height of the dam does raise the water higher upon their lands, and that the water is held upon the land longer than formerly. It is shown by actual measurement, at the principal bar upon which the evidence is given for the effect of the dam on the water called Ford-way (Plate 2), on line C D, that the top of the dam is twenty-eight inches higher than the lowest point of the bar on that line. This is the line upon which expert testimony is supposed to be given. But in point of fact, the measurements given for the basis of that testimony were not taken on that bar. So that the answers to the hypothesis, as detailed on pages 255-7, are simply the theories of the witness (James B. Francis) based upon his knowledge, deduced from scientific experiments applicable only to the precise statement of the questions as therein detailed in the Report, which might be very much varied by a statement of measurements taken upon the actual state of the case. If we take another hypothesis, based upon the evidence as it is reported, it will be found to stand thus.

Taking it as a fact that by drawing the water at the dam  $28\frac{1}{2}$  inches below the top of the flash-board, in twenty-four hours, it is then found that the depth of water on the line of the Ford-way is twelve inches, and then taking it as a fact that the gates are shut down,

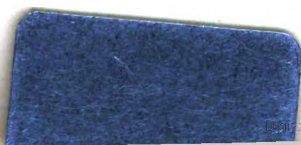
and so remain sixteen hours; and then the depth of water on the Ford-way is thirty-three inches,— what is the effect of the dam indicated? Practically, by actual measurements, and without the intervention of scientific theories, or collusion between parties in order to produce a given result; the effect of the dam, by that experiment, was to reduce the water twenty-one inches on the Ford-way bar, by drawing the water  $28\frac{1}{2}$  inches below the top of the dam in twenty-four hours. The evidence of these measurements are found, first, on p. 260, John Fitzpatrick: “Mr. Faulkner’s son requested me to take it, the 16th and 17th of July. The water was then drawn off. It was  $28\frac{1}{2}$  inches below. The bolt is two inches above the rock. If my memory serves me, the gate was opened at three or four o’clock. The sources of the river were low.” Foster Ham (p. 146): “I recollect the water being drawn on July 16. I saw Mr. Simonds on Monday morning at Billerica. The water was drawn off some time on Saturday afternoon, about two or three o’clock. I did not see the pond, but the Ford-way above. On Sunday morning the water was six or eight inches lower than on Saturday night. I went across, about eight in the morning. It was at the deepest, to my knee,—I should say about twelve inches deep.” On page 161, John W. Simonds: “I found the depth of water at the Ford-way at that time to have been only 2 feet 9 inches at the deepest. This was on Monday.” This testimony taken from three witnesses unknown to each other at the time of making the measurements, and on three succeeding days from the same date, beginning on the 16th July, is not chargeable with the idea of collusion to produce the result. That the Committee who viewed the points in question, should rely more upon the evidence than theory, see p. 52 of the Report: “The Committee think that the claim of the petitioners, that their lands are materially injured by flooding, and

that this injury is far greater than in former years, would seem to have been proved beyond the shadow of doubt."

And now the present Legislature is asked to review this evidence and the past legislation on this subject, by the appointment of another Commission to ascertain, by actual experiment, the effect produced on the meadows by drawing down the river at the dam. What other effect can there be upon the meadows, if the river is drawn down, than that the water will flow into the channel, and there remain, so long as it is drawn down? Will the Legislature grant the petition now? In the former hearing the same remedy was suggested to the respondents, and was not accepted by these petitioners. See the closing argument of the petitioners' counsel in that Report (p. 357) to the Commissioners then in hearing of the case: "If a suggestion could be made to the parties respondent, that they should consent to some mode by which their rights could be ascertained and guarded, that would be sufficient. For the owners of these mills could, if they chose, draw down the water in each year so that the meadows would be relieved of the flowage. In the summer preceding they had actually done so. By such a course, indemnification might be made to the parties injured." So all suggestion made to them then passed unheeded; and the idea of a remedy for injuries sustained by the meadow owners was treated with contempt by these petitioners. But the Legislature took a different view of the case, and passed the act reported by their Committee, which was in accordance with the general recommendations of the Report and evidence in the case. Will the present Legislature further delay the execution of an act of justice, passed as a remedy for past inconsistent legislation, for the relief of these remonstrants?









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