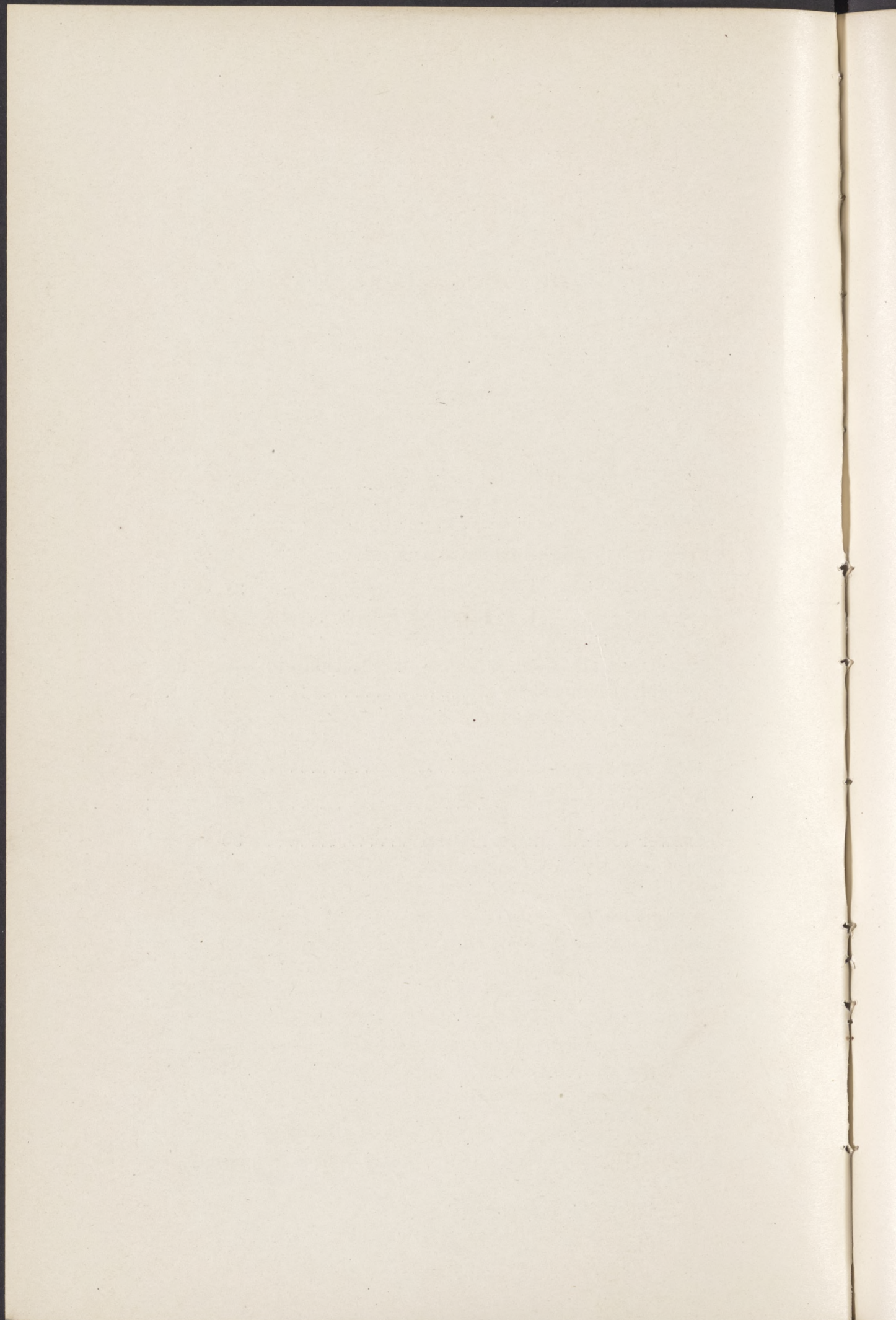


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(Filed May 13, 1917.)

Bill of Complaint.

In Chancery of New Jersey

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

10

The complainant, Weidmann Silk Dyeing Company, a corporation organized and existing under the laws of New Jersey, whose principal office is at Paterson, in the County of Passaic and State of New Jersey, respectfully shows that: *

1. From the year 1887 continuously until the present time the complainant has been seized in fee and has been in the possession and occupation of certain silk dyeing works, lands and premises, with the appurtenances, situate, lying and being in the City of Paterson aforesaid, consisting of a united tract of land whereon were erected the buildings, fixtures, machinery, appliances and property constituting the plant which during all said time has been used and now is used by the complainant in its business of dyeing goods, which said premises are bounded as follows, viz.: on the Northerly side thereof said premises are bounded by and extend along the Northerly line of the Passaic River as the same runs for a distance of about 1500 feet; on the East by Twelfth Street; on the South by Fifth Avenue, and on the West by East Sixth Street; which said premises extend over the whole bed of said river along said distance of 1500 feet and contain about 15 acres of land, exclusive of the said bed of said river.

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2. The said Passaic River is, and from time immemorial, has been a natural water course flowing

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Bill of Complaint.

10 from its source above the said City of Paterson, through the said City of Paterson, through and along the said premises of the complainant ultimately to its outlet into the Newark Bay in the State of New Jersey. The said premises of the complainant are situated on said Passaic River, wholly above the point where the tide ebbs and flows in said river and said river at and above said premises of the complainant is a private stream or water course.

20 3. Before and at the time of the empounding, confining, interruption and diversion of the water as hereinafter set forth, the complainant of right ought to have had and enjoyed and still of right ought to have and enjoy the benefit and advantage of the waters of said river, which during all that time of right ought to have run and flowed in its natural, usual and accustomed manner, and until the empounding, confining, interruption and diversion thereof hereinafter mentioned, of right had run and flowed in its natural, usual and accustomed manner and still of right ought to run and flow unto said lands and premises and dye works of the complainant, whereby the complainant would be supplied with water sufficient and proper for the operation and use of the business of the complainant in dyeing goods.

30 Prior to the said empounding, confining, interrupting and diversion of the water as hereinafter mentioned and until said empounding, confining, interrupting and diversion thereof the complainant had used the said water of said river for the purpose of dyeing goods in its said business.

40 4. The defendant, The East Jersey Water Company, is a private corporation organized under the general corporation laws of the State of New Jersey.

Bill of Complaint.

From June, 1906, to June, 1912, the defendant, The East Jersey Water Company, at a dam, reservoir and works owned and operated by it at Little Falls, in the County of Passaic and State of New Jersey, on said Passaic River above the said premises of the complainant, has empounded, held back and diverted from said Passaic River, during said last named six years, an average daily quantity of 16,000,000 gallons of water and conveyed from said Passaic River to other places said last named water which was not returned to said river and which otherwise would have flowed through the complainant's said premises. 10

From June, 1912, continuously until the present time the said defendants, The East Jersey Water Company, the Montclair Water Company, a corporation, and the Acquackanonk Water Company, a corporation, by concert and agreement among themselves have jointly owned and operated said works at Little Falls for their joint and common benefit and by concert and agreement have jointly diverted from said Passaic River at Little Falls for their joint and common benefit, quantities of water averaging from about 21,000,000 gallons daily during the year 1912 to about 23,000,000 gallons daily during the year 1914, and that from the year 1914 until the present time, and at the present time the said three defendants at said works at Little Falls aforesaid, have constantly, jointly diverted and are now so jointly diverting quantities of water from said Passaic River for their joint and common benefit considerably in excess of 23,000,000 gallons daily, and during said time have and now are conveying the same from said Passaic River to other places and consuming the same for their joint and common use, so that the same has not been and is not returned to said river and has not and does not flow through the complainant's said 20 30 40

Bill of Complaint.

premises as it otherwise would, and that said three defendants are still diverting said last named quantities of water from said Passaic River as aforesaid, and intend to do so hereafter in constantly increasing daily quantities.

10 5. The complainant has operated its said plant and conducted its said business therein continuously from the year 1887 or thereabouts until the present time; during which time said property of the complainant has been and now is of great value, as hereinafter stated; and the complainant has employed and now employs several hundred employees daily, and has done and now does a large and profitable business.

20 The said water which has been so empounded, confined, interrupted and diverted and prevented from flowing into the said works of the complainant has been during all of said time necessary for the use of the complainant in supplying its said works for the use and operation of its said business therein, and would have been used during all of said time by the complainant in its said business, if the complainant had not been deprived of the use thereof by said defendants as aforesaid, and the complainant for want of said water of which it was deprived by the defendants as aforesaid could not use said works nor carry on its business therein as it otherwise would have done. By reason of said empounding, interruption and diversions of said water by said defendant, The East Jersey Water Company, during the period from June, 1906, to June, 1912, the complainant was deprived of the use of said water in its said business, for which deprivation the complainant recovered damages by the judgment in the action at law hereinafter next set forth.

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Bill of Complaint.

In an action at law in the Supreme Court of New Jersey commenced on or about June 13th, 1912, wherein the complainant was plaintiff and the defendant, The East Jersey Water Company was defendant, such proceedings were had that on or about March 6, 1914, judgment final was entered as of February 24, 1913, in said Supreme Court in favor of the complainant and against the defendant, The East Jersey Water Company in the sum of \$22,212.00, together with costs of said action at law, for said damages sustained by the complainant for said deprivation of said water of which the complainant has been deprived as aforesaid during the 6 years from June 13, 1906, until June 13, 1912, as aforesaid. The amount of said judgment together with costs of suit and interest thereon the said defendant, The East Jersey Water Company, paid to the complainant on or about March 12, 1914; to the record of which judgment and all proceedings whereon the same was entered, or duly certified copies thereof, the complainant refers; which the complainant will produce on the hearing hereof if required so to do.

The complainant shows and avers, that the legal right of the complainant to recover against said defendant, The East Jersey Water Company, for the empounding, interrupting and diversion of said water at said dam, reservoir and works at Little Falls aforesaid, was established at law in said action at law, and that the said empounding, interruption and diversions of said defendant, The Montclair Water Company, and said defendant, The Acquackanonk Water Company, jointly with said defendant, The East Jersey Water Company, were made at the said dam, reservoir and works at Little Falls theretofore owned and operated by the defendant, The East Jersey Water Company, and that the said establishment of said right in

Bill of Complaint.

10 said action at law against said The East Jersey Water Company for said diversions at said dam, reservoir and works at Little Falls aforesaid operated to establish and did establish said right of the complainant to recover against said three defendants for said joint empounding, interruption and diversions at said works at Little Falls by said three defendants; and that the right of the complainant is fully established by said action at law with respect to said water as against each and all of said three defendants for the purposes of the relief asked for herein.

20 6. The complainant's said plant consists of said land and many buildings erected thereon exceeding in value the sum of one million dollars. The said plant may be used for dyeing purposes and for many kinds of manufacturing and other purposes.

The right to the natural, undiminished and uninterrupted flow and use of said water of said river at said plant is a large element of value in said plant for its use in the business of dyeing goods or for any of the various uses to which said plant may be put.

30 The said empounding, interruption and diversions have greatly and materially reduced the quantity of water which would naturally flow to and past complainant's said premises during the time of said diversions, and thereby have greatly diminished the value of the use of said plant. By reason of said empounding, interruption and diversions, the natural flow of the water of said river has been so diminished that the banks and bed of the said river at said complainant's premises are rendered bare, unsightly, noxious and unhealthy, due to the deposit of material which the natural flow of said river would have carried away if said empounding, interruption and diversions had not

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Bill of Complaint.

been made; and said condition will so continue hereafter, if said empounding, interruption and diversions are continued; and the said empounding, interruption and diversions, if continued, will greatly lessen the value of the complainant's said premises for any use to which the same may be put, not only by reason of the deprivation of the use of said water which is and will hereafter be necessary and valuable for said premises, but the value of said premises now is and will be hereafter greatly impaired by reason of the said bare, unsightly, noxious and unhealthy condition caused as aforesaid. 10

7. All the said empounding, interruption and diversions of said water heretofore and now made by the defendants hereinbefore set forth were and are unlawful, and without the license, agreement or consent of the complainant and against the right of the complainant. 20

The said three defendants are empounding, interrupting and diverting and intend to empound, interrupt and divert said water in gradually increasing quantities and thereby deprive the complainant of the use of said water to which it is entitled as riparian owner, without any right, agreement, leave or license from the complainant so to do. 30

By reason of said empounding, interrupting and diversions of said water, the complainant, during all the time since the recovery of said judgment until the present time has been and now is damaged thereby in the sum of about ten thousand dollars per year, and the complainant will hereafter be damaged in a larger yearly sum therefor unless the defendants are enjoined by this Court from further diversions, interruption and interference with said water. 40

Bill of Complaint.

The damages sustained and which will be sustained by the complainant by said illegal acts of the defendants are permanent and irreparable.

The complainant is without adequate remedy in the Courts of Law, and therefore prays:

1. That the defendants, The East Jersey Water
10 Company, The Montclair Water Company and the
Acquackanok Water Company and each of them
be enjoined from empounding, confining, retarding,
diverting or in anywise interfering with or hinder-
ing or changing the natural flow of the waters of
the Passaic River at said plant at Little Falls or
at any other place or any of its tributaries above
the said premises of the complainant, so as to in
anywise hinder, interrupt, or change the natural
20 flow of said waters of said rivers to and past the
premises of the complainant.

2. That each of the said defendants hereinabove
named may without oath, full, true and perfect
answer make to all and singular the matters and
things hereinbefore stated and charged.

3. That a writ of subpoena may issue com-
manding said defendants to answer this bill of
complaint and to abide by such decree as this Court
30 may make in the premises.

GRIGGS & HARDING,
Solicitors and Counsel with Complainant.

(Filed July 12, 1917.)

Answer.

IN CHANCERY OF NEW JERSEY.

WEIDMANN SILK DYEING COM-
PANY,
Complainant,

vs.

EAST JERSEY WATER COMPANY,
and others,
Defendants.

On Bill.

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The answer of the defendants, the East Jersey Water Company, the Montclair Water Company and the Acquackanonk Water Company. 20

These defendants, the East Jersey Water Company, the Montclair Water Company and the Acquackanonk Water Company, answering the bill of complaint say that:

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is denied, except that portion thereof which alleges that prior to and until said alleged impounding, confining, interrupting and diversion, the complainant had used the said water of said river for the purpose of dyeing goods in its said business, which excepted matter is admitted. 30

4. Paragraph 4 is admitted.

5. As to Paragraph 5, these defendants deny so much of the statements in said paragraph as alleges that the said complainant for want of said water, of which it was deprived by these defend- 40

Answer.

ants, could not use said works, nor carry on its business therein as it otherwise would have done, and that the legal right of the complainant to recover against the East Jersey Water Company for the impounding, interruption and diversion of said water at said dam, reservoir and works at Little Falls was established at law in the action at law referred to in said paragraph against the East Jersey Water Company, and that the establishment of the legal right of the complainant in the action at law referred to in said paragraph against the East Jersey Water Company for said diversions at said dam, reservoir and works at Little Falls operated to establish, and did establish, said right of the complainant to recover against these defendants for said alleged joint impounding, interruption and diversions at said works at Little Falls by these defendants, and that the right of the complainant is fully established by said action at law, with respect to said water as against each and all of these defendants for the purpose of the relief asked for by said bill, or for any other purpose. The remainder of said paragraph 5 is admitted.

6. As to paragraph 6, these defendants have no knowledge or information sufficient to form a belief as to the value of the complainant's land and buildings or as to whether they are available for any other use or purpose than for dyeing purposes. But for reasons which will be hereinafter stated, these defendants deny that said undiminished flow of water in said river at said plant is a large or anything but an insignificant, element of value in said plant for its use in the business of dyeing goods, which is the only business in which the complainant has ever used it, and the only business in which the complainant has been, and is now engaged, and deny that the diminished flow of water

Answer.

in the river, due to these defendants' diversions has greatly or appreciably diminished the value of the complainant's plant and deny that the natural flow of said river if said impounding, interrupting and diversions had not been made would have carried away the noxious material deposited in the river, and that the said impounding, interruption and diversions if continued, would greatly lessen the value of the complainant's premises for any use to which the same might be put. But these defendants admit that the value of said premises now is, and probably will be hereafter, largely impaired by reason of the noxious and unhealthy condition of the river due, however, not to the impounding, interruption and diversions of water, by these defendants, but to the discharge of noxious sewage, chemicals and discolored and polluted matter into the river by the City of Paterson and by the complainant itself and by various dyers who operate their works on the Passaic River above the works of the complainant.

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7. As to paragraph 7 so much thereof as alleges that all the said impounding, interruption and diversions of said water by these defendants were without the license, agreement or consent of the complainant is admitted. The remainder of said paragraph is denied.

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8. These defendants further answering say that notwithstanding their impounding of the water of the Passaic River and their diversion thereof, complained of in the complainant's bill, there has at all times remained in the Passaic River and flowed past the complainant's works sufficient water available for reasonable riparian uses, and the fact that the complainant ceased to take its water supply from the Passaic River since about November,

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Answer.

1905, was not because of insufficient water available for its uses, but because the water in the Passaic River, though sufficient in quantity, had become unfit for the complainant's uses through pollution, not caused by these defendants, but caused by the City of Paterson and by the complainant itself, and by other dyers and manufacturers whose works were and are located above the complainant's works on the Passaic River.

9. These defendants further say that ever since the complainant has occupied its said works on the Passaic River and during the period that it took its supply of water from the Passaic River opposite its works, and at times on either side of said river, and more recently during the whole period that it has taken its supply of water from wells and from the Passaic Water Company, through what is known as the dyer's pipe, through which the supply of water is taken from the Passaic River above the Great Falls in the City of Paterson, it has always used said water supply for the dyeing of fabrics whereby the water has been discharged into the Passaic River by the complainant, below its dye works, in a polluted condition, and in such a condition as to constitute a public nuisance, and these defendants aver that if they had not impounded or diverted any water from the Passaic River at any time, the use that the complainant would have made of the water of which it alleges these defendants deprived it, would have been in like manner for the dyeing of fabrics whereby the water would have been discharged into the river by the complainant, below its dye works, in a polluted condition, and would have been a common nuisance, and at all events would have been an unriparian use of said water.

Answer.

10. As to the judgment referred to in said bill, recovered in the Supreme Court of New Jersey, wherein the complainant was plaintiff and the East Jersey Water Company was defendant, and which is claimed by said bill established the complainant's right against these defendants to recover against these defendants for said alleged joint impounding, interruption and diversion of the waters of the Passaic River at said works at Little Falls by these defendants, these defendants say that subsequently, to wit, on or about July 27th, ¹⁹¹⁴~~1904~~, the complainant (as plaintiff) brought another suit against these defendants (as defendants) in the New Jersey Supreme Court to recover damages for an alleged impounding and diversion of the waters of the Passaic River by these defendants at Little Falls in the County of Passaic from June 13th, 1912, to the date of the trial of said action, and in said action such proceedings were had that judgment was recovered therein on February 18th, 1915, in favor of the plaintiff and against these defendants for the sum of \$8,849.59, including costs. In said action one of the issues as between the complainant as plaintiff and the East Jersey Water Company as defendant was whether the judgment referred to in the bill as having been previously recovered by the complainant as plaintiff against the East Jersey Water Company as defendant, concluded the East Jersey Water Company (as was claimed by the complainant as plaintiff), and prevented and estopped it from alleging or setting up certain matters and defenses which had been adjudged and decided against it, the East Jersey Water Company, as defendant and in favor of the complainant as plaintiff by said judgment in said former action; the East Jersey Water Company, as defendant, claiming in said second action that the first action in which judgment was recovered

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Answer.

10 by the complainant as plaintiff against the East Jersey Water Company as defendant was brought to recover (as the fact was) damages for a diversion of water by said East Jersey Water Company during a period different and distinct from that in respect of which the East Jersey Water Company as defendant was charged with diverting water in the second action, and that there was no identity between the second action and the first action either in the thing sued for, the cause of action, or the persons and parties to said respective actions.

Said second judgment against these defendants was afterwards reversed by the New Jersey Court of Errors and Appeals, and the record remitted to the Supreme Court for retrial, and that case is now pending in the said Supreme Court, and may be noticed for trial at any time by the complainant.

20 In reversing said second judgment, the New Jersey Court of Errors and Appeals necessarily held that the East Jersey Water Company was not concluded in said second action by the judgment in the first action; and as to these defendants the Montclair Water Company and the Acquackanonk Water Company, they were not parties to said first action and were not bound by the judgment therein.

30 11. That although complainant was well aware on June 13th, 1912, when it commenced its aforesaid first action against the East Jersey Water Company, and for many years previous thereto, that the East Jersey Water Company was impounding and diverting the waters of the Passaic River at Little Falls for the use of the inhabitants of the cities of Paterson and Passaic and other municipalities and for the municipal uses of said cities and municipalities, and that the supply of
40 said water for said uses of said cities and municipi-

Answer.

palities was essential to the health, comfort and lives of the inhabitants of said cities and municipalities, no injunction was sought by complainant at that time or at any previous time to enjoin the East Jersey Water Company from impounding and diverting the said waters of the Passaic River, nor at any time subsequently thereto to enjoin these defendants until on or about May 9th, 1917, when the present suit was instituted. The complainant during all that time acquiesced in the impounding and diversion of said waters by these defendants for said municipal purposes and contented itself with experimenting in law suits seeking to recover from these defendants damages claimed to have been sustained by it as a result of said impounding and diversions of said waters, and that it was only when the complainant's judgment in the Supreme Court against these defendants was set aside (as it was), by the New Jersey Court of Errors and Appeals on the ground that the trial court on the trial of said action had erred in refusing to charge, as requested by counsel for these defendants, ^{as defendants} in that action, as follows: "(1) If they (the jury) should find that the plaintiff would use the diverted water, if it were not diverted, for the purpose of further polluting the river, then the plaintiff cannot claim more than nominal damages from the defendants, who stand in the shoes of the municipalities whom they are supplying with the water for depriving the plaintiff of that water. (2) That the plaintiff had no right to complain of the diversion by the defendants if you (the jury) find that the only damage the plaintiff suffered was being thereby prevented from committing a nuisance"—that complainant filed its present bill of complaint in this Honorable Court praying for an injunction, and these defendants submit that the

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Answer.

complainant has acquiesced in said impounding and diversion of said water by these defendants for an unreasonable length of time and that it would be now inequitable to these defendants and to the inhabitants of the cities and municipalities whom they supply with water, at this late date to enforce an injunction against them, but that the
10 complainant should be left to its legal remedy against these defendants, if any it has under the circumstances.

12. That the complainant has been operating its dye works at their present site on the Passaic River in the City of Paterson since on or about the year 1887, and that in or about the summer of 1897 the East Jersey Water Company commenced to erect its reservoir and works, now owned and
20 operated by it at Little Falls, on the Passaic River, and that it completed said water works on or about the month of November, 1899, at an expense of some \$3,400,000. That it was a matter of common knowledge throughout the community of the City of Paterson and elsewhere prior to the erection of said works, and during their construction that they were being erected for the purpose of enabling the East Jersey Water Company to furnish water supplies therefrom to the City of Paterson and the
30 City of Passaic and various other municipalities, and that the result of their operation would necessarily be to substantially diminish the flow of water in the Passaic River below said point of diversion; that the complainant was well aware and had full knowledge of the facts aforesaid, nevertheless the complainant took no proceedings at that time to enjoin the East Jersey Water Company from erecting said works, but stood mutely by, permitting the said East Jersey Water Company to expend the said large sum of money, to wit, the sum
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Answer.

of nearly \$3,500,000, in the erection of its works, and defendants submit that for this reason the complainant should now be held estopped from obtaining an injunction against them, but that it should be left to its legal remedy against these defendants, if any it has under the circumstances.

13. That complainant is one of a number of dyeing concerns in the City of Paterson who carry on their businesses below the Great Falls and above East 12th Street in the City of Paterson, all of whom, including the complainant are jointly polluting the Passaic River by casting their sewage and discharged chemical waste water into the river; that if it were not for that pollution the cities of Newark, and Jersey City and the cities of Paterson and Passaic and the other municipalities which use up the water which is diverted from the Passaic River by these defendants, and by the Passaic Water Company, and by the City of Newark and the City of Jersey City, could take and use that water and yet leave sufficient water in the river for all the legitimate uses of said dye houses and other riparian owners below the points of diversion (including the complainant), and that there would be plenty of water left in the river for their uses if there were no pollution in it, and these defendants submit that under these circumstances the complainant does not come into this Honorable Court seeking an injunction with clean hands, and should be denied any equitable relief on that account.

14. These defendants further show that the Passaic River and its tributaries above Little Falls, constitute the only available source from which water in sufficient quantities can be provided for the cities and towns of northern New Jersey, and

Answer.

10 that the supply is more than adequate, not only for the present, but for all future needs within the bounds of reasonable forecast, if said waters are properly impounded and protected from pollution; that all the water now taken by these defendants is taken under legislative authority for public uses of an imperative character, and apart from the reasons above given why the complainant is not entitled to the relief sought for, that the injury, if any, to the complainant from the impounding and diversion of said waters is nominal and inconsequential.

20 If, however, the complainant should be entitled to any relief in this Court (which these defendants deny), then these defendants offer to pay to the complainant the damages, if any, resulting from the taking by them of the water of said Passaic River, or which may result therefrom up to the full capacity of their mains, such damages to be ascertained by this Court pursuant to its practice in like cases.

HUMPHREYS & SUMNER,
Solicitors of Defendants.

We hereby consent to the filing forthwith of the within answer as of time July 11th, 1917.

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GRIGGS & HARDING,
Solicitors for Complainant.

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(Filed January 26, 1918.)

Notice of Motion to Dismiss Answer.

IN CHANCERY OF NEW JERSEY.

WEIDMANN SILK DYEING COM-
PANY,
Complainant,

vs.

THE EAST JERSEY WATER COM-
PANY and others,
Defendants.

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TAKE NOTICE, that on Tuesday, the eleventh day
of September, 1917, at 10.30 o'clock A. M., or as
soon thereafter as counsel can be heard, before the
Chancellor at the Chancery Chambers at Trenton,
on behalf of the complainant, pursuant to the stat-
utes in such case provided and the rules and prac-
tice of this court, we shall object on motion to the
answer of the defendant filed in the above-stated
cause, and move that the same be stricken out, on
the ground that said answer discloses no defense
to the relief prayed for by the complainant in its
bill of complaint filed herein, or if said answer or
any part thereof should be deemed to be good, or
to be a defense to the relief prayed for in said bill,
we shall at the same time and place object to and
move to strike out and expunge the following por-
tions of said answer upon the grounds hereinafter
stated, that is to say:

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Notice of Motion to Dismiss Answer.

1. All that portion of paragraph 6 of said answer in the words following, that is to say:

10 “But for reasons which will be hereinafter
stated, these defendants deny that said un-
diminished flow of water in said river at said
plant is a large or anything but an insignifi-
cant, element of value in said plant for its use
in the business of dyeing goods, which is the
only business in which the complainant has
ever used it, and the only business in which the
complainant has been, and is now engaged, and
deny that the diminished flow of water in the
river, due to these defendants diversions has
greatly or appreciably diminished the value of
the complainant’s plant and deny that the na-
20 tural flow of said river if said impounding, in-
interrupting and diversions had not been made
would have carried away the noxious material
deposited in the river, and that the said im-
pounding, interruption and diversions, if con-
tinued, would greatly lessen the value of the
complainant’s premises for any use to which
the same might be put. But these defendants
admit that the value of said premises now is,
and probably will be hereafter, largely im-
30 paired by reason of the noxious and unhealthy
condition of the river due, however, not to the
impounding, interruption and diversions of
water, by these defendants, but to the discharge
of noxious sewage, chemicals and discolored
and polluted matter into the river by the City
of Paterson and by the complainant itself and
by various dyers, who operate their works on
the Passaic River above the works of the com-
plainant.”

Notice of Motion to Dismiss. Answer.

And each part of the above portion of said paragraph 6, on the grounds that said portion and each part thereof is irrelevant, immaterial and impertinent, and, if true, constitutes no defense to the complainant's right to the injunction or relief prayed for in the complainant's bill, and is uncertain, evasive, contradictory and repugnant to the allegations in other parts of the said answer, wherein the facts denied in said portion of said paragraph 6 of said answer are admitted. 10

2. All that portion of paragraph 6 of said answer in the words following, that is to say:

“And deny that the diminished flow of water in the river, due to these defendants' diversions, has greatly or appreciably diminished the value of the complainant's plant and deny that the natural flow of said river if said impounding, interrupting and diversions had not been made would have carried away the noxious material deposited in the river, and that the said impounding, interruption and diversions, if continued, would greatly lessen the value of the complainant's premises for any use to which the same might be put,” 20

on the grounds that the said last-named portion and each part thereof is irrelevant, immaterial and impertinent, and if true, constitutes no defense to the complainant's right to the injunction or relief prayed for in the complainant's bill, and that it is contradictory and repugnant to the allegations in other parts of said answer, and particularly in paragraph 4 of said answer, wherein the defendants admit the truth of the allegations of paragraph 4 of the complainant's bill, which alleges that the de- 30

Notice of Motion to Dismiss Answer.

fendant, The East Jersey Water Company, has from June, 1906, to June, 1912, empounded, held back and diverted from said river an average daily quantity of 16,000,000 gallons of water, and that from June, 1912, continuously, until the filing of said bill of complaint, all the defendants have jointly diverted quantities of water, averaging from
10 about 21,000,000 gallons daily, during the year 1912 to about 23,000,000 daily during the year 1914, and that from the year 1914 until the time of the filing of the said bill of complaint, and at the time of filing the same said three defendants were jointly diverting quantities of water from said river in excess of 23,000,000 gallons daily, and that they intended to divert the said water thereafter in constantly increasing quantities; and also is contradictory and repugnant to the allegations in paragraph
20 12 of said answer, wherein it is alleged that the result of the operation of the works at Little Falls by the defendants, where the defendants diverted said water, necessarily substantially diminished the flow of water in said river below said point of diversion and at complainant's works; and that it is uncertain and evasive and no defense to the relief prayed for in the complainant's bill, inasmuch as it merely denies that the natural flow of said river, if
30 said impounding, interrupting and diversions had not been made would have carried away the material deposited in the river, which was noxious merely, but said denial constitutes no defense or answer to the allegation in the said bill that by reason of said impounding, interruption and diversions the natural flow of the water of said river has been so diminished that the banks and bed of said river at the complainant's premises are rendered bare, unsightly and unhealthy, as well as noxious,
40 due to the deposit of material which the natural

Notice of Motion to Dismiss Answer.

flow of said river would have carried away, if said impounding, interruption and diversions had not been made, and that said portion of said answer admits that said condition will so continue hereafter if said impounding, interruption and diversion are continued; whereby said last-named portion of said answer is no defense to the said allegation of the bill as to the bare, unsightly and unhealthy character of the bed and banks of the said river at the complainant's premises caused by the defendants' acts, for which the injunctive relief is prayed for in the complainant's bill. 10

3. All that portion of said paragraph 6 of said answer in the words following, that is to say:

“But these defendants admit that the value of said premises now is, and probably will be hereafter, largely impaired by reason of the noxious and unhealthy condition of the river, due, however, not to the impounding, interruption and diversions of water, by these defendants, but to the discharge of noxious sewage, chemicals and discolored and polluted matter into the river by the City of Paterson and by the complainant itself and by various dyers who operate their works on the Passaic River above the works of the complainant.” 20 30

On the ground that said last-named portion is irrelevant, immaterial and impertinent and, if true, constitutes no defense to the complainant's right to the injunction or relief prayed for in the complainant's bill.

4. All that portion of paragraph 7 of said answer which denies all of paragraph 7 of the com- 40

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10 plainant's bill, except that portion of said bill which alleges that all the impounding, interruption and diversions of said water by the defendants in said bill mentioned were without the license, agreement or consent of the complainant, on the ground that the said portion of said answer which denies said portion of paragraph 7 of said bill of complaint, and every part thereof, is irrelevant, immaterial and impertinent and is no defense to the complainant's right to the injunction or relief prayed for in the complainant's bill and is uncertain, evasive and contradictory and repugnant to the allegations in other parts of said answer, wherein the facts denied in said paragraph 7 of said answer are admitted.

20 5. All of paragraph 8 of said answer which are in words following, that is to say :

30 "These defendants further answering say that notwithstanding their impounding of the water of the Passaic River and their diversion thereof, complained of in the complainant's bill, there has at all times remained in the Passaic River and flowed past the complainant's works sufficient water available for reasonable riparian uses, and the fact that the complainant ceased to take its water supply from the Passaic River since about November, 1905, was not because of insufficient water available for its uses, but because the water in the Passaic River, though sufficient in quantity, had become unfit for the complainant's uses, through pollution, not caused by these defendants, but caused by the City of Paterson and by the complainant itself, and by other dyers and manufacturers, whose works were and are

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located above the complainant's works on the Passaic River."

On the grounds that said paragraph 8 of said answer and each part thereof is irrelevant, immaterial and impertinent, and, if true, constitutes no defense to the complainant's right to the injunction prayed for in the complainant's bill.

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6. All of paragraph 9 of said answer which are in words following, that is to say:

"These defendants further say that ever since the complainant has occupied its said works on the Passaic River and during the period that it took its supply of water from the Passaic River opposite its works, and at times on either side of said river, and more recently during the whole period that it has taken its supply of water from wells and from the Passaic Water Company, through what is known as the dyer's pipe, through which the supply of water is taken from the Passaic River above the Great Falls in the City of Paterson, it has always used said water supply for the dyeing of fabrics, whereby the water has been discharged into the Passaic River by the complainant, below its dye works, in a polluted condition, and in such a condition as to constitute a public nuisance, and these defendants aver that if they had not impounded or diverted any water from the Passaic River at any time, the use that the complainant would have made of the water of which it alleges these defendants deprived it, would have been in like manner for the dyeing of fabrics, whereby the water would have been discharged into the river by

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the complainant, below its dye works, in a polluted condition, and would have been a common nuisance; and at all events would have been an unriparian use of said water."

10 On the grounds that said paragraph 9 of said answer and each part thereof is irrelevant, immaterial and impertinent and, if true, constitutes no defense to the complainant's right to the injunction prayed for in the complainant's bill.

7. All of paragraph 10 of said answer which are in words following, that is to say:

20 "As to the judgment referred to in said bill, recovered in the Supreme Court of New Jersey, wherein the complainant was plaintiff and the East Jersey Water Company was defendant, and which is claimed by said bill established the complainant's right against these defendants to recover against these defendants for said alleged joint impounding, interruption and diversion of the waters of the Passaic River at said works at Little Falls by these defendants, these defendants say that subsequently, to wit, on or about July 27th, 1904, the complainant (as plaintiff) brought another
30 suit against these defendants (as defendants) in the New Jersey Supreme Court to recover damages for an alleged impounding and diversion of the waters of the Passaic River by these defendants at Little Falls in the County of Passaic from June 13th, 1912, to the date of the trial of said action, and in said action such proceedings were had that judgment was recovered therein on February 18th, 1915, in favor of the plaintiff and against these defendants

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for the sum of \$8,849.59, including costs. In said action one of the issues as between the complainant as plaintiff and the East Jersey Water Company as defendant was whether the judgment referred to in the bill as having been previously recovered by the complainant as plaintiff against the East Jersey Water Company as defendant, concluded the East Jersey Water Company (as was claimed by the complainant as plaintiff) and prevented and estopped it from alleging or setting up certain matters and defenses which had been adjudged and decided against it, the East Jersey Water Company, as defendant, and in favor of the complainant as plaintiff by said judgment in said former action; the East Jersey Water Company, as defendant, claiming in said second action that the first action in which judgment was recovered by the complainant as plaintiff against the East Jersey Water Company as defendant was brought to recover (as the fact was) damages for a diversion of water by said East Jersey Water Company during a period different and distinct from that in respect of which the East Jersey Water Company as defendant was charged with diverting water in the second action, and that there was no identity between the second action and the first action either in the thing sued for, the cause of action, or the persons and parties to said respective actions.

Said second judgment against these defendants was afterwards reversed by the New Jersey Court of Errors and Appeals, and the record remitted to the Supreme Court for retrial, and that case is now pending in the said Su-

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preme Court, and may be noticed for trial at any time by the complainant.

10 In reversing said second judgment, the New Jersey Court of Errors and Appeals necessarily held that the East Jersey Water Company was not concluded in said second action by the judgment in the first action; and as to these defendants, the Montclair Water Company and the Acquackanonk Water Company, they were were not parties to said first action and were not bound by the judgment therein."

On the grounds that said paragraph 10 of said answer and each part thereof is irrelevant, immaterial and impertinent and, if true, constitutes no defense to the complainant's right to the injunction prayed for in the complainant's bill.

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8. All of paragraph 11 of said answer which are in words following, that is to say:

30 "That although complainant was well aware on June 13th, 1912, when it commenced its aforesaid first action against the East Jersey Water Company, and for many years previous thereto, that the East Jersey Water Company was impounding and diverting the waters of the Passaic River at Little Falls for the use of the inhabitants of the cities of Paterson and Passaic and other municipalities and for the municipal uses of said cities and municipalities, and that the supply of said water for said uses of said cities and municipalities was essential to the health, comfort and lives of the inhabitants of said cities and municipalities, no injunction was sought by complainant at that time or at any previous time to enjoin the

40 East Jersey Water Company from impound-

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ing and diverting the said waters of the Pas-
saic River, nor at any time subsequently there-
to to enjoin these defendants until on or about
May 9th, 1917, when the present suit was in-
stituted. The complainant during all that time
acquiesced in the impounding and diversion of
said waters by these defendants for said munic- 10
ipal purposes and contented itself with ex-
perimenting in law suits, seeking to recover
from these defendants damages claimed to have
been sustained by it as a result of said im-
pounding and diversions of said waters, and
that it was only when the complainant's judg-
ment in the Supreme Court against these de-
fendants was set aside (as it was) by the New
Jersey Court of Errors and Appeals on the
ground that the trial court on the trial of said 20
action had erred in refusing to charge, as re-
quested by counsel for these defendants, as de-
fendants in that action, as follows: '(1) If
they (the jury) should find that the plaintiff
would use the diverted water, if it were not
diverted, for the purpose of further polluting
the river, then the plaintiff cannot claim more
than nominal damages from the defendants,
who stand in the shoes of the municipalities
whom they are supplying with the water for 30
depriving the plaintiff of that water. (2) That
the plaintiff had no right to complain of the
diversion by the defendants if you (the jury)
find that the only damage the plaintiff suffered
was being thereby prevented from committing
a nuisance.'—that complainant filed its pres-
ent bill of complaint in this Honorable Court,
praying for an injunction, and these defend-
ants submit that the complainant has ac-
quiesced in said impounding and diversion of 40

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10. said water by these defendants for an unreasonable length of time, and that it would be now inequitable to these defendants and to the inhabitants of the cities and municipalities whom they supply with water, at this late date to enforce an injunction against them, but that the complainant should be left to its legal remedy against these defendants, if any it has under the circumstances."

On the grounds that said paragraph 11 of said answer and each part thereof is irrelevant, immaterial and impertinent and, if true, constitutes no defense to the complainant's right to the injunction prayed for in the complainant's bill.

20 9. All that portion of paragraph 11 of said answer in the words following, that is to say:

30 "The complainant during all that time acquiesced in the impounding and diversion of said waters by these defendants for said municipal purposes and contented itself with experimenting in law suits, seeking to recover from these defendants damages claimed to have been sustained by it as a result of said impounding and diversions of said waters, and that it was only when the complainant's judgment in the Supreme Court against these defendants was set aside (as it was) by the New Jersey Court of Errors and Appeals on the ground that the trial court on the trial of said action had erred in refusing to charge, as requested by counsel for these defendants, as defendants in that action, as follows: '(1) If they (the jury) should find that the plaintiff would use the diverted water, if it were not di-

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verted, for the purpose of further polluting the river, then the plaintiff cannot claim more than nominal damages from the defendants, who stand in the shoes of the municipalities whom they are supplying with the water for depriving the plaintiff of that water. (2) That the plaintiff had no right to complain of the diversion by the defendants if you (the jury) find that the only damage the plaintiff suffered was being thereby prevented from committing a nuisance.—that complainant filed its present bill of complaint in this Honorable Court, praying for an injunction, and these defendants submit that the complainant has acquiesced in said impounding and diversion of said water by these defendants for an unreasonable length of time, and that it would be now inequitable to these defendants and to the inhabitants of the cities and municipalities whom they supply with water, at this date to enforce an injunction against them, but that the complainant should be left to its legal remedy against these defendants, if any it has under the circumstances.”

And each part of the above portion of said paragraph 11 on the grounds that the said portion and each part thereof is irrelevant, immaterial and impertinent, and, if true, constitutes no defense to the complainant's right to the injunction or relief prayed for in the complainant's bill, and is uncertain, evasive, argumentative and alleges acquiescence of the complainant in the impounding and diversion of said waters by the defendants, as a legal conclusion, without alleging any facts from which acquiescence may be legally inferred, and is contradictory and repugnant to the allegations in

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other parts of the said answer wherein it is admitted or alleged in the complainant's bill of complaint that the complainant brought said actions at law for said impounding and diversions and recovered therein, and that the complainant by its actions did not acquiesce in said impounding or diversions, but acted inconsistently with such acquiescence and did nothing inequitable or operating to raise any estoppel and did nothing by which the complainant should be deprived of or affected in its right to the relief prayed for in its bill of complaint; and upon the further ground that the facts alleged in said portion of paragraph 11 of said answer constitutes no acquiescence by or estoppel against the complainant whereby its right to said relief against the defendants is impaired or affected.

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10. All of paragraph 12 of said answer which are in words following, that is to say:

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"That the complainant has been operating its dye works at their present site on the Passaic River in the City of Paterson since on or about the year 1887, and that in or about the summer of 1897 the East Jersey Water Company commenced to erect its reservoir and works, now owned and operated by it at Little Falls, on the Passaic River, and that it completed said water works on or about the month of November, 1899, at an expense of some \$3,400,000. That it was a matter of common knowledge throughout the community of the City of Paterson and elsewhere prior to the erection of said works, and during their construction, that they were being erected for the purpose of enabling the East Jersey Water Company to furnish water supplies therefrom

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to the City of Paterson and the City of Passaic and various other municipalities, and that the result of their operation would necessarily be to substantially diminish the flow of water in the Passaic River below said point of diversion; that the complainant was well aware and had full knowledge of the facts aforesaid; nevertheless the complainant took no proceedings at that time to enjoin the East Jersey Water Company from erecting said works, but stood mutely by, permitting the said East Jersey Water Company to expend the said large sum of money, to wit, the sum of nearly \$3,500,000, in the erection of its works, and defendants submit that for this reason the complainant should now be held estopped from obtaining an injunction against them, but that it should be left to its legal remedy against these defendants, if any it has under the circumstances." 10

On the grounds that said paragraph 12 of said answer and each part thereof is irrelevant, immaterial and impertinent, and, if true, constitutes no defense to the complainant's right to the injunction prayed for in the complainant's bill, and upon the further ground that the allegations of said paragraph are uncertain, evasive, argumentative and allege or suggest knowledge by the complainant of the erection and operation of the works by the defendants therein mentioned, as a legal conclusion, without alleging any facts from which said knowledge of the complainant may be inferred, and that said paragraph alleges an estoppel against the complainant without alleging any facts from which an estoppel may be legally inferred as against the complainant, and that the allegations of said para- 30

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graph are contradictory and repugnant to the allegations in other parts of said answer wherein it is admitted, as alleged in the complainant's bill of complaint, that the complainant brought said actions at law and recovered for said diversions, and that the complainant by its conduct did nothing to estop it from its right to the relief prayed for in
10 its bill of complaint.

11. All of paragraph 13 of said answer which are in words following, that is to say :

20 "That complainant is one of a number of dyeing concerns in the City of Paterson who carry on their business below the Great Falls and above East 12th Street in the City of Paterson, all of whom, including the complainant, are jointly polluting the Passaic River by casting their sewage and discharged chemical waste water into the river; that if
30 it were not for that pollution the cities of Newark and Jersey City and the cities of Paterson and Passaic and the various other municipalities which use up the water which is diverted from the Passaic River by these defendants and by the Passaic Water Company and by the City of Newark and the City of Jersey City could take and use that water and yet leave sufficient water in the river for all the legitimate uses of said dye houses and other riparian owners below the points of diversion (including the complainant), and that there would be plenty of water left in the river for their uses if there were no pollution in it, and these defendants submit that under these circumstances the complainant does not come into this Honorable Court seeking an injunc-

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tion with clean hands, and should be denied any equitable relief on that account."

On the grounds that said paragraph 13 of said answer and each part thereof is irrelevant, immaterial and impertinent, and, if true, constitutes no defense to the complainant's right to the injunction prayed for in the complainant's bill, and on the further ground that said paragraph 13 is uncertain, evasive, argumentative and alleges legal conclusions instead of facts and is repugnant to allegations in other parts of the answer, and alleges no facts from which it can be properly inferred that the complainant does not come into court with clean hands or that it by its conduct should be denied the equitable relief which it seeks. 10

12. All of paragraph 14 of said answer which are in words following, that is to say: 20

"These defendants further show that the Passaic River and its tributaries above Little Falls constitute the only available source from which water in sufficient quantities can be provided for the cities and towns of northern New Jersey, and that the supply is more than adequate, not only for the present, but for all future needs within the bounds of reasonable forecast, if said waters are properly impounded and protected from pollution; that all the water now taken by these defendants is taken under legislative authority for public uses of an imperative character, and apart from the reasons above given why the complainant is not entitled to the relief sought for, that the injury, if any, to the complainant from the impounding and diversion of said waters is nominal and inconsequential." 30 40

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On the grounds that said paragraph 14 of said answer and each part thereof is irrelevant, immaterial and impertinent, and, if true, constitutes no defense to the complainant's right to the injunction prayed for in the complainant's bill, and on the further ground that the allegation in said paragraph to the effect that the injury to the complainant is nominal and inconsequential is evasive, argumentative and is alleged as a legal conclusion and is repugnant to allegations in other parts of said answer, and upon the further ground that the offer of the defendants to pay to the complainant the damages resulting from the taking by the defendants of said water to be ascertained by this court is a procedure against the settled rules, principles and practice of this court, under the facts and circumstances which under the bill and answer are conceded to exist in this case, and said offer cannot impair or affect the complainant's right to an injunction which applies to future acts of the defendants in the empounding and diversions of said water.

GRIGGS & HARDING,
Solicitors and of Counsel
with Complainant.

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(Filed January 17, 1918.)

Opinion.

IN CHANCERY OF NEW JERSEY.

Between :

WEIDMANN SILK DYEING COM-
PANY,
Complainant,

and

EAST JERSEY WATER COMPANY,
MONTCLAIR WATER COMPANY
and ACQUACKANONK WATER
COMPANY,
Defendants.

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43-379
On Bill, &c.

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1. The chancery act (1915), by rule 51 annexed, which provides that any pleading may be objected to by motion on the ground that it discloses no cause of action, defense or counterclaim, introduces, in effect, a demurrer to an answer in chancery; prior thereto a demurrer to an answer did not lie in any form.

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2. Although demurrer to an answer would not formerly lie, courts of equity have always had the power to strike out pleadings (including answers) as sham and frivolous, the same as courts of common law.

3. Upon a state of pleadings which admittedly show that a diversion of water, by an upper away from a lower riparian owner, is sensible and ap-

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preciable, it is unnecessary and undesirable to send a complainant to final hearing and permit of the taking of voluminous testimony in order that the equitable terms upon which an injunction should issue can be ascertained, as it can readily be done on motion, with leave to take affidavits, if necessary.

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4. Complainant seeks an injunction upon the equitable condition that it shall issue only in case defendants refuse to make compensation, and defendants by their answer offer to make compensation if the complainant's right be established. *Held*, complainant's right being established, that the court, in virtue of such consent, has the power to order compensation made.

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5. If an upper riparian owner diverts water from a lower one, for the purpose of supplying water companies or municipalities which have the ultimate power of condemning the water rights in question, they will be allowed to do so upon compensation being made in aid of the upper owner's diversion for public use, exercising their own rights of condemnation in connection with contracts with the diverting riparian owner.

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6. There is no estoppel against a lower riparian owner's protection of its rights, as such, by mere silence or failure to give notice, or bring suit; this legal right of the riparian owner is barred only by a grant, or by uninterrupted enjoyment by an upper owner for the full prescriptive period of twenty years.

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7. A lower riparian owner, who, with others, pollutes a stream from which an upper riparian owner

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diverts the water, is not thereby estopped from having appropriate injunctive relief upon the principle that it does not come into court with clean hands, because that maxim is confined to misconduct in regard to, and connected with, the matter in litigation; and it does not extend to misconduct, however gross, with which the opposite party has no concern.

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8. Rule 72 under the practice act (1912) provides that in case a new trial is granted it shall only be of the question or questions with respect to which the verdict or decision is found to be wrong, if separable. That rule is now rule 131 of those promulgated by the supreme court, June term, 1913, and by this later one the rule as to limited retrials is expressly made applicable to appeals. *Semble*, that the rule extends to new trials granted by the court of errors and appeals irrespective of the express provision in rule 131.

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9. Where one of the issues in a trial at law between a plaintiff and three defendants was as to whether the latter were all bound on the question of liability, which was established in a former action at law between the same plaintiff and one of the same defendants, the ground of estoppel in the second suit being that the liability so established as against the party who was defendant to the former action, is also established against the other two, because they are successors in interest of, and parties in privity with, it, and that therefore all of the defendant parties are bound when judgment passes against them in the second suit, although a new trial is granted on the question of damages only—it seems that all three are so bound.

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10. Where the bill alleges and the answer does not deny (and therefore admits) that defendants

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Opinion.

are impounding water of a river and diverting it away from complainant, a lower riparian owner, in quantities exceeding 23,000,000 gallons daily, by reason whereof the natural flow of water has been so diminished that the banks and bed of the river are rendered bare; *Held*, upon these admitted facts, that the damage to the complainant is sensible and appreciable and that the maxim *de minimus non curat lex* does not apply.

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11. An answer in chancery must be consistent and a defendant may not insist upon a defense residing in an averment which is inconsistent with, and repugnant to, an admission made in the same pleading.

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12. An answer in chancery may contain within itself such circumstances as will suffice to deprive it of all efficacy.

13. If a pleading appear on its face to be untrue in one of its essential allegations it is bad on demurrer.

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14. A defendant may not make disserving admissions in an answer responsive to a bill, and then, by way of new matter, plead facts inconsistent with those admissions; in other words, a defendant may not, by self-serving statements, avoid the effect of disserving ones—at least, not unless they amount to confession and avoidance.

15. Averments in an answer examined and found not to constitute a defense to the bill. *Held*, that the answer should be struck out upon equitable terms to be settled on motion and on notice.

On motion to strike out answer.

Messrs. Griggs & Harding, for the motion.

Messrs. Humphreys & Sumner, *contra*.

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Opinion.

WALKER, *Chancellor*:

This is a motion to strike out the answer filed by the three defendants. It is the equivalent of a demurrer.

Prior to the passage of the chancery act (1915), which by rule 51 thereto annexed, provided that any pleading may be objected to by motion on the ground that it discloses no cause of action, defense or counterclaim, this motion would not have lain. The rule (51) is now 67 of the rules of this court which took effect January 1, 1917. Before the passage of the chancery act (1915), a motion to strike out an answer on the ground that it disclosed no defense to the relief sought, did not lie. The then rule 213 of this court allowed objections to pleadings to be made by motion, and this has been held to be the equivalent of a demurrer to a bill, *Shultz v. Ziegler*, 80 *N. J. Eq.*, 199, 202, and of exceptions to an answer, *Condict v. Erie R. Co.*, 77 *N. J. Eq.*, 282. Prior to the passage of the chancery act (1915), a demurrer to an answer did not lie in any form. See *Condict v. Erie R. Co.*, *supra*.

The language of the present rule 67 is a clear departure from that of the former rule 213. It is that any pleading may be objected to by motion on the ground that it discloses no cause of action, defense or counterclaim. By its very terms it extends the motion to strike out to answers, for they are defensive pleadings, and the rule says that a pleading may be objected to because it discloses no defense. It must be apparent that the reason that demurrers did not spring into use contemporaneously with the institution of answers in chancery is, that originally the complainant in the bill called upon the defendant to answer his allegations and make discovery on oath, and, what the defendant set forth was therefore evidence in the cause.

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As the answer was formerly regarded as evidence (and still is, if the bill prays for answer upon oath), there sprung up a method of objecting to defective answers, known as exceptions; and exceptions lay for scandal, impertinence and insufficiency. While a demurrer to an answer (whether or not under oath), insufficient because it disclosed
10 no defense, might with propriety have long ago been substituted for an exception, the fact is that this departure from precedent was not inaugurated in our state until two years ago.

The motion to strike out the answer is rested upon two grounds: (1) that the matters pleaded constitute no defense; and (2) that if the answer is not wholly bad then certain specific parts should be struck out because irrelevant, immaterial and impertinent, and certain other parts because eva-
20 sive, contradictory and repugnant to certain admissions made in the answer.

Although a demurrer to an answer would not formerly lie, courts of equity have always had the power to strike out pleadings (including answers) as sham and frivolous, the same as courts of common law. *Stanbery v. Baker*, 55 *N. J. Eq.*, 270, 271, and rule 53 of the present edition (chancery rules, 1917), recognizes this power.

The defendants contend that the answer presents
30 a valid defense, but if not plainly so, that it is at least arguable that it does in whole or in part, and that, therefore, the motion should be denied, or be put over until the hearing, because rule 67 further provides that on the hearing of a motion to strike out, the court, in its discretion, may order the application to stand over until hearing. It is further provided that if the objection be to a bill or counterclaim, the court may require the same to be answered on such terms and conditions as may
40 be ordered. This is significant, because, if an an-

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swer should not be struck out or should be struck out only in part, the Court could not order the complainant to reply to the answer, for this would deprive him of his election to go to hearing on bill and answer, and therefore the rule properly and purposely leaves it to the complainant's discretion whether to reply or go to hearing on bill and answer. Of course, if the answer be struck out in its entirety the complainant would be entitled to a decree either as on confession or on proofs taken *ex parte*, unless leave were given to answer over. 10

While the Lord Chancellor in ancient times performed strictly legal functions and held an ordinary legal court, yet the extraordinary court or court of equity, that is, chancery, had become a court of greatest consequence in Blackstone's day (3 *Bl. Com.*, 48, 50). And suits in equity in our state are probably now as numerous as those at law; and the parties litigate here at arm's length upon principles governing their rights residing in the great body of equity jurisprudence which has been evolved in England and this country, and particularly in this state. There is, therefore, now as much reason that the defendant, being subpoenaed to answer a bill in chancery, shall set up in his answer a lawful defense to the complainant's claim, if any he have, as that a defendant in a suit at law, summoned to answer the plaintiff's demand, shall set up a valid defense in law. In other words, there is no longer any reason residing in archaic notions of difference in procedure between courts of equity and of law that renders a demurrer to an answer in chancery inappropriate. 20 30

A view of the allegations of the bill and averments in the answer are necessary to an understanding of the motion *sub judice*. 40

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10 The bill alleges that from the year 1887 continuously until the present time the complainant has been seized in fee, and has been in the possession and occupation of, certain silk dyeing works and premises, situate in the city of Paterson, consisting of a united tract of land whereon are erected buildings and other property constituting the plant which during all that time has been used and now is used by the complainant in its business of dyeing goods, which premises are bounded on the northerly side thereof by and along the northerly line of the Passaic River as the same runs for a distance of about 1500 feet, and extend over the whole bed of the river along the distance of 1500 feet and contain about 15 acres of land, exclusive of the bed of the river. That the Passaic River is, and from time immemorial has been, a natural water course flowing from its source above and through the city of Paterson, and through and along the premises of the complainant ultimately to its outlet into Newark Bay in this state; the premises being situated on the Passaic River wholly above the point where the tide ebbs and flows, and that the river at and above the premises of the complainant is a private stream or water course. That before and at the time of the impounding, confining, interruption and diversion of the water in the bill set forth, the complainant of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the waters of the river, which during all that time of right ought to have run and flowed in its natural, usual and accustomed manner, and until the impounding, confining, interruption and diversion thereof thereafter mentioned, of right had run and flowed in its natural, usual and accustomed manner, and still of right ought to run and flow

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into the lands and premises and dye works of the complainant, whereby the complainant would be supplied with water sufficient and proper for the operation and use of its business in dyeing goods. That prior to the impounding, confining, interrupting and diversion of the water as thereafter mentioned and until the impounding, confining, interrupting and diversion thereof the complainant had used the water of the river for the purpose of dyeing goods in its business. That the defendant, The East Jersey Water Company, is a private corporation organized under the general corporation laws of this state. That from June, 1906, to June, 1912, the defendant, the East Jersey Water Company, at a dam, reservoir and works owned and operated by it at Little Falls, in the county of Passaic, on the Passaic River above the premises of the complainant, has impounded, held back and diverted from said Passaic River, during the last named six years, an average daily quantity of 16,000,000 gallons of water, and conveyed from the river to other places the last named water which was not returned to said river, and which otherwise would have flowed through the complainant's premises. That from June, 1912, continuously until the present time the defendants, the East Jersey Water Company, the Montclair Water Company, and the Acquackanonk Water Company, all corporations, by concert and agreement among themselves, have jointly owned and operated the works at Little Falls for their joint and common benefit, and by concert and agreement have jointly diverted from the Passaic River at Little Falls for their joint and common benefit, quantities of water averaging from about 21,000,000 gallons daily during the year 1912 to about 23,000,000 gallons daily during the year 1914, and that from the year 1914 until the present time, and at the present

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time the three defendants at the works at Little Falls, have constantly, jointly diverted, and are now jointly diverting, quantities of water from the Passaic River for their joint and common benefit, considerably in excess of 23,000,000 gallons daily, and during that time have, and now are, conveying the same from the said Passaic River to other
10 places and consuming the same for their joint and common use, so that the same has not been and is not returned to the river, and has not, and does not, flow through the complainant's premises as it otherwise would, and that the three defendants are still diverting the last named quantities of water from the Passaic River, and intend to do so hereafter in constantly increasing daily quantities. That the complainant has operated its plant and conducted its business therein continuously from
20 the year 1887 or thereabouts, until the present time; during which time the property of the complainant has been and now is of great value, as thereafter stated; and the complainant has employed and now employs several hundred employees daily, and has done and now does a large and profitable business. That the water which has been so impounded, confined, interrupted and diverted and prevented from flowing into the works of the complainant has been during all of such time neces
30 sary for the use of the complainant in supplying its works for the use and operation of its said business therein, and would have been used during all of the time by the complainant in its business, if the complainant had not been deprived of the use thereof by the defendants as aforesaid; and the complainant, for want of the water of which it was deprived by the defendants, could not use its works nor carry on its business therein as it otherwise would have done. That by reason of the impound

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ing, interruption, and diversions of the water by the defendant, the East Jersey Water Company, during the period from June, 1906, to June, 1912, the complainant was deprived of the use of the water in its business, for which deprivation the complainant recovered damages by judgment in an action at law in the supreme court of New Jersey, commenced on or about June 13th, 1912, against the defendant, the East Jersey Water Company, in the sum of \$22,212.00, together with costs, the amount of which judgment, together with costs and interest, the said defendant, the East Jersey Water Company, paid to the complainant on or about March 12th, 1914. That the legal right of the complainant to recover against the defendant, the East Jersey Water Company, for the impounding, interrupting and diversion of the water at the dam, reservoir and works, at Little Falls, was established at law in the action at law, and that the impounding, interruption and diversions of the said defendants, the Montclair Water Company and the Acquackanonk Water Company, jointly with said defendant, the East Jersey Water Company, were made at the dam, reservoir and works at Little Falls theretofore owned and operated by the defendant, the East Jersey Water Company, and that the establishment of the right in the action at law against the East Jersey Water Company for the diversions at the dam, reservoir and works at Little Falls, operated to establish and did establish, the right of the complainant to recover against the three defendants for the joint impounding, interruption and diversions at the works at Little Falls by them; and the right of the complainant is fully established by the action at law with respect to the water as against each and all of the three defendants for the purposes of the relief prayed. That the complainant's plant

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consists of the land and many buildings erected thereon exceeding in value the sum of one million dollars. That the plant may be used for dyeing purposes, and for many kinds of manufacturing and other purposes. That the right to the natural, undiminished and uninterrupted flow and use of the water of the river at the plant is a large element of value in it and for its use in the business of dyeing goods, or for any of the various uses to which the plant may be put. That the said impounding, interruption and diversions have greatly and materially reduced the quantity of water which would naturally flow to and past complainant's premises during the time of the diversions, and thereby have greatly diminished the value (of the use) of the plant. By reason of which impounding, interruption and diversions, the natural flow of the water of the river has been so diminished that its banks and bed at the complainant's premises are rendered bare, unsightly, noxious and unhealthy, due to the deposit of material which the natural flow of the river would have carried away, if the impounding, interruption and diversions had not been made, and that this condition will continue hereafter, if the impounding, interruption and diversions are continued, and the impounding, interruption and diversions, if continued, will greatly lessen the value of the complainant's premises for any use to which the same may be put, not only by reason of the deprivation of the use of the water which is and will hereafter be necessary and valuable for the premises, but the value of the premises now is, and will be hereafter, greatly impaired by reason of the bare, unsightly, noxious and unhealthy condition so caused. That all the impounding, interruption and diversions of the water heretofore and now made by the defendants were and are unlawful, and without the license, agree-

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ment or consent of the complainant, and against the right of the complainant. That the three defendants are impounding, interrupting and diverting and intend to impound, interrupt and divert, the water in gradually increasing quantities and thereby deprive the complainant of the use of the water to which it is entitled as riparian owner, without any right, agreement, leave or license from the complainant to do so. By reason of which impounding, interrupting and diversions of the water, the complainant, during all the time since the recovery of the judgment until the present time, has been, and now is, damaged, in the sum of about ten thousand dollars per year, and the complainant will hereafter be damaged in a larger yearly sum therefor, unless the defendants are enjoined by this court from further diversions, interruption and interference with the water. That the damages sustained, and which will be sustained, by the complainant by the acts of the defendants are permanent and irreparable.

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The bill prays that the defendants, the East Jersey Water Company, the Montclair Water Company and the Acquackanonk Water Company, and each of them, be enjoined from impounding, confining, retarding, diverting or in anywise interfering with, or hindering, or changing the natural flow of the waters of the Passaic River at the plant of the complainant at Little Falls, or at any other place, or any of the tributaries of the river above the said premises of the complainant, so as to in anywise hinder, interrupt, or change the natural flow of the waters of said river to and past the premises of the complainant.

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The three defendants, the East Jersey Water Company, the Montclair Water Company and the Acquackanonk Water Company joined in an an-

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swer. This pleading admits certain allegations in the bill, avers that the defendants have no knowledge or information sufficient to form a belief as to certain allegations, and deny certain other allegations.

10 It is with the allegations which they deny and matter which they set up by way of defense that we are concerned on this motion, in connection, however, with their admissions and protestation of want of knowledge.

20 They deny that at the time of the impounding, confining, interruption and diversion of the water complainant of right ought to have had and enjoyed and still of right ought to have and enjoy the benefit and advantage of the waters of the river which, during all that time of right ought to have run and flowed in its natural, usual and accustomed channel and which still of right ought to run and flow unto the premises and dye works of the complainant, whereby complainant would be supplied with water sufficient for the operation of the business of dyeing goods. They deny that the complainant for want of the water, of which it was deprived by them, could not use its works or carry on its business as it otherwise would have done, or that the legal right of the complainant to recover against the East Jersey Water Company for the impounding, interruption and diversion of the water at the dam, reservoir and works at Little Falls, was established at law in the action against the East Jersey Water Company, or that the establishment of the legal right of the complainant in that action for the diversion at the dam, reservoir and works, operated to establish or did establish the right of complainant to recover against the defendants for the alleged joint impounding, interruption and diversions by them, or that the right

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of the complainant is fully established by the action at law with respect to the water as against any or all of the defendants for the purpose of the relief prayed for. They deny that the undiminished flow of water in the river at the plant is a large, or anything but an insignificant element, of value in the plant of complainant for its use in the business of dyeing goods, which is the only business in which the complainant has ever used it, and the only business in which the complainant has been, and is now, engaged, and deny that the diminished flow of water in the river, due to this diversion has greatly or appreciably diminished the value of the complainant's plant, and deny that the natural flow of the river, if the impounding, interrupting and diversions had not been made, would have carried away the noxious material deposited in the river, or that the impounding, interruption and diversions if continued, would greatly lessen the value of the complainant's premises for any use to which the same might be put. But the defendants admit that the value of complainant's premises now is, and probably will be hereafter, largely impaired by reason of the noxious and unhealthy condition of the river due, not to the impounding, interruption and diversions of water by the defendants, but to the discharge of noxious sewage, chemicals and discolored and polluted matter into the river by the city of Paterson and by the complainant itself, and by various dyers who operate their works on the Passaic River above the works of the complainant. They deny that all of the said impounding, interruption and diversions of the water theretofore and then made by them are unlawful, and deny that they are impounding, interrupting and diverting the water in increasing quantities and thereby depriving the complainant of the use of the water to which it is entitled as riparian

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owner, without any right, agreement, leave or license from the complainant so to do; and deny that the complainant during the time since the recovery of said judgment has been and is damaged by the impounding, interruption and diversion of the water in the sum of about \$10,000 per year, and that the complainant will thereafter be damaged in a larger yearly sum therefor unless the defendants are enjoined from further diversions, interruption and interference with the water; and they deny that the damages sustained and which will be sustained by the complainant by the alleged illegal acts of the defendants are permanent and irreparable.

Aside from admissions, protestations of want of knowledge and denials, the defendants, by way of new matter, say, that notwithstanding their impounding of the water of the Passaic River and their diversions thereof, complained of in the bill, there has at all times remained in the Passaic River and flowed past the complainant's works, sufficient water available for reasonable riparian uses, and the fact that the complainant ceased to take its water supply from the Passaic River since about November, 1905, was not because of insufficient water available for its uses, but because the water in the Passaic River, though sufficient in quantity, had become unfit for the complainant's uses through pollution, not caused by them, but caused by the city of Paterson, and by the complainant itself, and by other dyers and manufacturers whose works were and are located above the complainant's works on the Passaic River. That ever since the complainant has occupied its works on the Passaic River, and during that period that it took its supply of water from that river opposite its works, and at times on either side of the river, and more recently during the whole period that it

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has taken its supply of water from wells and from the Passaic Water Company, through what is known as the dyers' pipe, through which the supply of water is taken from the Passaic River above the Great Falls in the city of Paterson, it has always used that water supply for the dyeing of fabrics, whereby the water has been discharged into the Passaic River by the complainant below its dye works in a polluted condition, and in such a condition as to constitute a public nuisance, and they aver that if they had not impounded or diverted any water from the Passaic River at any time, the use that the complainant would have made of the water of which it alleges the defendants deprived it, would have been in like manner for the dyeing of fabrics, whereby the water would have been discharged into the river by the complainant, below its dye works, in a polluted condition, and would have been a common nuisance, and at all events it would have been an unriparian use of the water.

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As to the judgment referred to in said bill, recovered in the supreme court, wherein the complainant was plaintiff and the East Jersey Water Company was defendant, and which is claimed by the bill to have established the complainant's right against the defendants to recover against them for the alleged joint impounding, interruption and diversion of the waters of the Passaic River at the works at Little Falls by the defendants, they say that subsequently, and on or about July 27th, 1914, the complainant (as plaintiff) brought another suit against them (as defendants) in the supreme court to recover damages for an alleged impounding and diversion of the waters of the Passaic River by them at Little Falls from June 13th, 1912, to the date of the trial of the action, and that such proceedings were had that judgment was recovered

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therein on February 18th, 1915, in favor of the plaintiff and against the defendants for the sum of \$8,849.59, including costs. That in that action one of the issues as between the complainant, as plaintiff, and the East Jersey Water Company, as defendant, was whether the judgment referred to in the bill as having been previously recovered by the complainant, as plaintiff, against the East Jersey Water Company, as defendant, concluded the East Jersey Water Company (as was claimed by the complainant as plaintiff) and prevented and estopped it from alleging or setting up certain matters and defenses which had been adjudged and decided against it, the East Jersey Water Company, as defendant, and in favor of the complainant, as plaintiff, by the judgment in said former action; the East Jersey Water Company, as defendant, claiming in the second action that the first action in which judgment was recovered by the complainant against the East Jersey Water Company was brought to recover (as the fact was) damages for a diversion of water by the East Jersey Water Company, during a period different and distinct from that in respect of which the East Jersey Water Company, as defendant, was charged with diverting water in the second action, and that there was no identity between the second action and the first action either in the thing sued for, the cause of action, or the persons and parties to the respective actions. That the second judgment against the defendants was afterwards reversed by the court or errors and appeals, and the record remitted to the supreme court for retrial, and that case is now pending in the said supreme court, and may be noticed for trial at any time by the complainant. That, in reversing the second judgment, the court or errors and appeals necessarily held that the East Jersey Water Company

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was not concluded in the second action by the judgment in the first action; and as to the defendants the Montclair Water Company and the Acquackanonk Water Company, they were not parties to the first action and were not bound by the judgment therein.

That although complainant was well aware on June 13th, 1912, when it commenced its first action against the East Jersey Water Company, and for many years previous thereto, that that company was impounding and diverting the waters of the Passaic River at Little Falls for the use of the inhabitants of the cities of Paterson and Passaic and other municipalities and for the municipal uses of those cities and municipalities, and that the supply of water for the uses of those cities and municipalities was essential to the health, comfort and lives of their inhabitants, no injunction was sought by complainant at that time, or at any previous time, to enjoin the East Jersey Water Company from impounding and diverting the waters of the Passaic River, nor at any time subsequently thereto to enjoin the defendants the Montclair Water Company and the Acquackanonk Water Company, until on or about May 9th, 1917, when the present suit was instituted; that the complainant during all that time acquiesced in the impounding and diversion of the waters by the defendants for said municipal purposes and contented itself with experimenting in law suits, seeking to recover from the defendants damages claimed to have been sustained by it as a result of the impounding and diversions of the waters, and that it was only when the complainant's judgment in the supreme court against the defendants in the second suit was set aside (as it was) by the court of errors and appeals on the ground that the trial judge had erred in refusing

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to charge, as requested by counsel for the defendants, as defendants in that action, as follows: "(1) If they (the jury) should find that the plaintiff would use the diverted water, if it were not diverted, for the purpose of further polluting the river, then the plaintiff cannot claim more than nominal damages from the defendants, who stand
10 in the shoes of the municipalities whom they are supplying with the water, for depriving the plaintiff of that water. (2) That the plaintiff had no right to complain of the diversion by the defendants if you (the jury) find that the only damages suffered was being thereby prevented from committing a nuisance."—that the complainant filed its present bill of complainant, praying for an injunction, and the defendants submit that the complainant has acquiesced in the impounding and diversion
20 of the water by them for an unreasonable length of time, and that it would now be inequitable to the defendants, and to the inhabitants of the cities and municipalities whom they supply with water, at this late day, to enforce an injunction against them, but that the complainant should be left to its legal remedy against the defendants, if it has any under the circumstances.

That the complainant has been operating its dye
30 works at their present site on the Passaic River in the city of Paterson since in or about the year 1887, and that in or about the summer of ¹⁸⁹⁷~~1917~~ the East Jersey Water Company commenced to erect its reservoir and works, now owned and operated by it at Little Falls, and that it completed them in or about the month of November, 1899, at an expense of some \$3,400,000. That it was a matter of common knowledge throughout the community of Paterson and elsewhere prior to the erection of those works,

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and during their construction, that they were being erected for the purpose of enabling the East Jersey Water Company to furnish water supplies therefrom to the cities of Paterson and Passaic and various other municipalities, and that the result of their operations would necessarily be to substantially diminish the flow of water in the Passaic River below the point of diversion; that the complainant was well aware and had full knowledge of these facts, but took no proceedings at that time to enjoin the East Jersey Water Company from erecting the works, but stood mutely by, permitting the said East Jersey Water Company to expend the sum of nearly \$3,500,000, in the erection of its works; and defendants submit that for this reason the complainant should now be held estopped from obtaining an injunction against them, but that it should be left to its legal remedy against these defendants, if it has any under the circumstances. 10
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That complainant is one of a number of dyeing concerns in the city of Paterson who carry on their business below the Great Falls and above East 12th street in the city of Paterson, all of whom, including the complainant, are jointly polluting the Passaic River by casting their sewage and discharged chemical waste water into it, and, were it not for that pollution, the cities of Newark, Jersey City, Paterson and Passaic, and the various other municipalities, which use up the water which is derived from the Passaic River by the defendants, and by the Passaic Water Company and by the cities of Newark and Jersey City, could take and use that water, and yet leave sufficient in the river for all legitimate uses of the dye houses and other riparian owners below the points of diversion, including the complainant, and that there would be plenty of water left in the river for their uses, if there were 30
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no pollution in it; and the defendants submit that in these circumstances the complainant does not come into this court seeking an injunction, with clean hands, and should be denied any equitable relief on that account.

10 The defendants further aver that the Passaic River and its tributaries above Little Falls, constitute the only available source from which water in sufficient quantities can be provided for the cities and towns of northern New Jersey, and that the supply is more than adequate, not only for the present, but for all future needs within the bounds of reasonable forecast, if the waters are properly impounded and protected from pollution; that all the water now taken by the defendants is taken under legislative authority for public uses of an imperative character, and, apart from the reason given
20 above why the complainant is not entitled to the relief sought for, that the injury, if any, to the complainant, from the impounding and diversion of the waters, is nominal and inconsequential; that, if, however, the complainant should be entitled to any relief in this court (which the defendants deny), then they offer to pay to the complainant the damages, if any, resulting from the taking by them of the water of the Passaic River, or which may result therefrom up to the full capacity of their
30 mains; such damages to be ascertained by this court, pursuant to its practice in like cases.

Counsel for complainant on the oral argument, and in their brief, asserted that the complainant is seeking the protection of its rights as riparian owner by injunction upon equitable terms, namely, that an injunction issue unless the defendants shall cause complainant's rights to be condemned at law. This condition is not tendered in the bill, as well
40 it might have been, but, for that matter, even though

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it were not conceded by complainant, the court would have the right to impose it.

The defendants, in their answer, as already noticed, submit that if the complainant shall be entitled to relief they offer to pay the complainant damages, if any, resulting from the taking by them of the waters in question, such damages to be ascertained by this court pursuant to its practice.

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It is claimed on behalf of the complainant that its rights to this relief under the facts submitted by the answers, is settled by this court in *Paterson v. East Jersey Water Co.*, 74 *N. J. Eq.*, 49; affirmed, for the reasons stated by Vice-Chancellor Emery, 77 *N. J. Eq.*, 588. I shall, for brevity, call this the *Paterson* case.

An examination of this case makes it apparent that the defendants' admitted diversion of the waters in the case at bar is substantially the same as in the one adjudicated. The defendants here as there claim that the diversion caused no appreciable injury to the complainant, a lower riparian owner, and that the maxim *de minimus non curat lex*, applies. But that question was decided adversely to the defendant in the *Paterson* case, the defendant being one of the defendants here, and that in the *Paterson* case the diversion was less than in the case before me. On this question Vice-Chancellor Emery said in the *Paterson* case, at page 86:

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"On this branch of the case, therefore, I reached the conclusion that the diversion of the water by the defendant for purposes of sale is an infringement of the complainant's right as a lower riparian owner to the continued flow of the stream, and that without proof of any actual or perceptible damage, so far as the

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10 establishment of its legal right is concerned, if the diversion is of such a perceptible and sensible amount as not to be excluded under the maxim '*de minimus*,' complainant is entitled to resort to this court for protection, in view of the fact, against defendant's claim of the right to divert and to continue the diversion. If this view be correct, the examination in detail of the evidence bearing upon the matter of actual damage, and the extent to which the diversion has so far affected the use and enjoyment of complainant's riparian lands, becomes unnecessary for the purpose of settling the complainant's right; but it is of importance in other aspects of the case, viz., as affecting either the right to an injunction or the terms and conditions upon which an injunction should be issued,"

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and at page 98, he said:

30 "Assuming complainant's right to the protection of this court to be established, the question of greatest difficulty in the case relates to the manner in which the protection shall be given, and the terms and conditions, if any, which should be imposed. Relief in equity should certainly extend, I think, to a declaration of complainant's right, but under the general practice of the court, and independent of statute, such declaration can be made only as incidental to and the basis of some equitable relief. 5 *Dan. Ch. Pr.* (6th Am. ed.) *2181, note. This power has been given to the court of chancery by statute in England, and in a leading case (*Swindon Water Company v. Wilts & Berks Canal Co.*, *supra*) was followed

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in directing the injunction. See 1 *Seton Dec.*, p. 214.”

The defendants lay stress upon Vice-Chancellor Emery's observation that in his view the maxim *de minimus* in the *Paterson* case made examination of the evidence bearing upon the actual damage unnecessary, but that such examination became of importance as affecting the right to an injunction or the terms and conditions upon which it ~~is~~ might issue, and they claim that in this last aspect the answer should stand and evidence be taken thereunder to be considered on the question of the issuance of an injunction, and terms, if for no other purpose. But it is to be borne in mind that the *Paterson* case was prosecuted, heard and determined before the chancery act of 1915, and at a time when an answer could not be objected to as raising no defense, that is demurred to, practically. And these observations of the vice-chancellor were made in his opinion after the case had been heard and the evidence was all in. There ~~has~~^{had} been no preliminary question about it.

Upon the state of pleadings which, to my mind, admittedly show that the diversion of the water is sensible and appreciable, it is unnecessary and undesirable to send a complainant to a final hearing and permit of the taking of voluminous testimony in order that a merely incidental matter may be determined, that is, the terms upon which an injunction should issue, when, in fact, that determination can readily be made by the court upon mere motion, with leave to take affidavits if necessary. If it be determined, as it must in this case, on the pleadings, I think, that the answer does not set up a valid defense to the complainant's right to an injunction, and the question of the issuance

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of an injunction is necessarily decided against the defendant as matter of law, the question as to the terms upon which it should issue is a collateral matter, quite easily disposed of in the manner which I have indicated. In proceedings by condemnation or otherwise, to ascertain the extent of the complainant's injury, opportunity would, of course, be afforded the defendants to go into the question of the *quantum* of damages there, and the injury might prove to be great or little; but, on this question of injunction, it is only necessary to ascertain that there is injury for the purpose of awarding relief, without examining into the extent of that injury.

The defendant, the East Jersey Water Company, in the case before me as in the *Paterson* case, appears to be a private corporation, not possessing the power of eminent domain; and this, too, would appear to be the case with the other defendants, the Montclair Water Company and the Acquackanonk Water Company, so far as any allegation in the bill is concerned. And there is no direct averment in the answer to the effect that these other defendants, the Montclair Water Company and the Acquackanonk Water Company, possess the power of eminent domain. It is, however, stated in the answer that although the complainant for a long time has been aware that the defendant the East Jersey Water Company was impounding and diverting the waters of the Passaic River at Little Falls for the use of the inhabitants of the cities of Paterson and Passaic and other municipalities, that the complainant during all that time acquiesced in the impounding and diversion of the waters by "these defendants" for such municipal purposes, making it thereby appear that the defendants the Montclair Water Company and the Acquackanonk Water Company, as well as the East Jersey Water Com-

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pany, were supplying the diverted water to municipalities for municipal uses and purposes, and the allegation is, that the complainant, during all the time mentioned, acquiesced in the impounding and diversion of the waters, and instead of seeking injunctive relief experimented in law suits, seeking to recover from the defendants damages claimed to have been sustained by it as a result of the impounding and diversion of the waters. Proper pleading required that the averment should be that the complainant "brought certain suits at law," or words to that effect, rather than accusing the complainant "with experimenting in law suits," which, if not scandalous, is the employment of non-judicial language—certainly so in a pleading. However, no point is made of this. The answer also further avers that it would be inequitable to the defendants and to the inhabitants of the cities and municipalities whom they supply with water to enforce an injunction against them, but that the complainant should be left to its legal remedy against them, if any it has. Here again is what amounts to an averment that the defendants are impounding the water and actually diverting it to municipalities, for municipal use. The defense thus sought to be raised is that an injunction should not issue, because it will ultimately affect the municipalities who receive a water supply from the defendants.

On the question as to the condition upon which an injunction in this class of cases may issue unless compensation be made, Vice-Chancellor Emery said in the *Paterson* case, at page 98:

"Complainant, having established its right, is entitled, if the general course of practice be

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10 followed, to the equitable relief by which alone
the right can be protected, an injunction
against its violation. The defendant, however,
contends that the case comes within an ex-
ception to this general rule protecting prop-
erty rights by injunction, and under which
courts of equity, where the property in ques-
tion is actually taken for a public use, and
serious injury would result from the injunc-
tion, without corresponding benefit or advan-
20 tage to the public, will decline to issue an in-
junction, if it is a case where compensation
can reasonably be made and defendant is will-
ing to make it. And the defendant here, by its
answer, offers to make compensation, under
the direction of the court, for damages result-
ing from the taking of the water 'up to the
full capacity of its mains.' This course of di-
recting an injunction only in case defendant
fails to make compensation in damages has
been taken in several cases in this state re-
ferred to by defendant's counsel, but, with one
exception, has only been taken against com-
plainant's consent in cases where the defend-
ant had the statutory right to appropriate on
making compensation, but had taken posses-
sion without proceedings for compensation."

30 In this case, as already pointed out, complainant
seeks an injunction upon the equitable condition
that it shall issue only upon defendants' refusing
to make compensation, and defendants, by their
answer, offer to make compensation if complain-
ant's right be established.

In *Sparks Mfg. Co. v. Town of Newton*, 57 N. J.
Eq., 367, 392-393, Vice-Chancellor Pitney held upon

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the authorities in our state, which he cites, that where a riparian owner seeks an injunction to restrain a corporation from diverting water for public purposes which it has power to condemn, and the corporation offers to pay such compensation as the court shall deem just, and the complainant consents, the court has jurisdiction to ascertain the amount of compensation. This case was cited by Vice-Chancellor Emery in the *Paterson* case (74 *N. J. Eq.*, at p. 99), with approval, and his decision, as stated, was affirmed on his opinion. *Sparks Mfg. Co. v. Newton* was affirmed by the court of errors and appeals *sub. nom. Ingersoll v. Newton*, 60 *N. J. Eq.*, 399, wherein Mr. Justice Dixon, writing the opinion for the court of errors and appeals, said that the conclusions expressed by Vice-Chancellor Pitney as to the power and duty of the court of chancery, on the pleadings and evidence, to fix the compensation that the defendant ought to pay to the complainant as a condition to withhold the injunction to which it would otherwise be entitled, the court of errors and appeals agreed, and dissented only with respect to the amounts awarded. See also *Speer v. Erie R. R. Co.*, 68 *N. J.*, 615, wherein Mr. Justice Swayze, writing the opinion for the court of errors and appeals, observed, at page 221, that the power of the court of chancery to award damages where both parties submit themselves to the jurisdiction of the court is established, citing *Sparks Mfg. Co. v. Newton* and *Ingersoll v. Newton*, *supra*.

In the brief submitted for the defense it is asserted that although it does not appear in the pleadings, yet the defendants the Montclair Water Company and the Acquackanonk Water Company are both public service corporations enjoying powers of eminent domain under their charters,

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and are obligated to furnish the waters which they divert, to the public, composing the municipalities whom they supply with such water; and that the defendant the East Jersey Water Company (as appears in the answer), though organized under the general corporation act, is under contract with Bayonne, Kearney, Harrison, East Newark, Little Falls and Nutley to supply all of the requirements of those municipalities during the life of "the contract," and that those municipalities possess full rights of eminent domain for the purpose of appropriating water from streams for their lawful purposes.

Defendants in their briefs also assert that it would be an extraordinary exercise of the right of injunction to cut off the water supplies of these municipalities without giving them an opportunity to condemn and to pay compensation and without any of the municipalities who would be affected by the injunction being made parties to the suit, and assert that such municipalities were held to be necessary parties in *Wilson, Atty. Gen., v. East Jersey Water Co.*, 78 N. J. Eq., 330. The decision in that case was that the court would not determine the validity of contracts between municipalities and a corporation for water supplies from the streams of this state unless the parties interested in the contracts were parties to the suit. It is a sufficient answer to say that there is no question of the validity of contracts before the court in the case at bar, and, as remarked by Vice-Chancellor Stevens in the *Wilson* case, at page 345, no objection is made in the answer to the absence of parties.

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Vice-Chancellor Emery in the *Paterson* case, at page 103, observed that:

“If any of the water companies or municipalities supplied by defendant have the ultimate power of condemning the water rights in question, there would seem to be no reason why they should not be allowed to do so upon compensation in aid of the defendant’s diversion, making it to that extent strictly a diversion for public use; for while such water company or municipality cannot, by contract or otherwise, delegate to the defendant its power of condemnation, it may itself exercise its own rights of condemnation in connection with a contract with the defendant company. The decision in *Slingerland v. Newark*, 54 *N. J. Law* (25 *Vr.*), 62 (Supreme Court, 1891), seems to cover this point.”

Upon this branch of the case I conclude that the law arising upon the admitted facts is that the defendants the Montclair Water Company and the Acquackanonk Water Company may condemn, and the East Jersey Water Company may make compensation to be ascertained in and by this court, unless all of the municipalities which take from it will condemn in aid of its diversion.

The equitable defenses of estoppel asserted in the answer, namely, that the complainant has acquiesced in the impounding and diversion by the defendants for an unreasonable length of time and that it would be inequitable to the defendants to now enjoin them, and that the defendant the East Jersey Water Company long since commenced to erect and completed its water works on the Passaic River at great expense, is answered by Vice-Chan-

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Opinion.

cellor Emery in the *Paterson* case, at page 96, where he said:

10 “But whether served (with notice) or not, there is, in my judgment, no estoppel against the complainant’s protection of its rights as riparian owner by mere silence or failure either to give notice or to bring suit immediately. In *Simmon v. Paterson*, 60 *N. J. Eq.* (15 *Dick.*), 385, 392 (Court of Errors and Appeals, 1899), it was held that the acquiescence of the riparian owners, continued for years, did not deprive them of their right of property in the stream, although it might affect the right to injunction. This legal right of the riparian owner is barred only by an actual grant or uninterrupted enjoyment for twenty years. (*Hutchinson v. Coleman*, 10 *N. J. Law* [5 *Halst.*], 74, 78 [1828]; *Campbell v. Smith*, 8 *N. J. Law* [3 *Halst.*], 140; 14 *Am. Dec.*, 400.)

20 And an equitable remedy in aid of the legal right is not ordinarily barred by mere acquiescence in a less period, independent of any circumstances raising special equities. None such appear in this case. The complainant here did not by any act or conduct on its part induce the expenditures of defendant on its own land and for its own purposes, and defendant proceeded with them at its own risk.

30 Complainant, having given notice, was not bound to proceed at once, either at law or in equity, in order to preserve its rights, but was at liberty to delay such proceedings until the extent of diversion was apparent, if defendant chose to proceed. This claim of estoppel, so far as it is set up as a bar to equity relief by way of injunction against any part of the diversion, must therefore be overruled.”

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Opinion.

As to the equitable defense that the complainant does not come into court with clean hands because, with others, it is polluting the Passaic River, and that were it not for that pollution, Newark, Jersey City, Paterson, Passaic and the various other municipalities which use up the water which is diverted by the defendants could take and use that water and yet leave sufficient in the river for all legitimate uses of the dye houses and other riparian owners, including the complainant, below the point of diversion, and that there would be plenty of water left in the river for their uses were it not so polluted, it would seem to be sufficient to say that as the defendants admittedly divert the water above and not below the riparian lands of the complainant, it is not available to the defendants to assert that if things were not as they are but as they might possibly otherwise be that the complainant is not entitled to relief, especially as the thing complained of in the bill, namely, the palpable and appreciable diversion is caused by the defendants, who, as a fact, are in no wise injured by the conduct of the complainant. In *Pom. Eq. Jur.* (3d ed.), Vol. 1, Sec. 399, it is laid down •

“Broad as the principle is in its operation, it must still be taken with reasonable limitations; it does not apply to every unconscientious act or inequitable conduct on the part of a plaintiff. The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however

Opinion.

gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern. When a court of equity is appealed to for relief it will not go outside of the subject-matter of the controversy and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands.”

In *Wilson v. Bird*, 28 N. J. Eq., 352, it was held that one who comes into a court of conscience to enforce a forfeiture must come with skirts free from blame.

In *Lewis' Appeal*, 67 Pa. St., 166, the court said :

“The rule that he who comes into equity must come with clean hands must be understood to refer to wilful misconduct in regard to the matter in litigation: *Snell's Equity*, 25. All the illustrations given in *Francis' Maxims of Equity*, 5, under the maxim, as he states it, ‘He that hath committed iniquity shall not have equity,’ show this.”

It is alleged and admitted that in an action at law in the supreme court in 1912 complainant, as plaintiff, recovered against the East Jersey Water Company, as defendant, final judgment for damages sustained by the complainant for deprivation of water of the Passaic River of which the complainant had been deprived during the six years before action was brought, which judgment was paid by the defendant in 1914; and the complainant alleges that its legal right to recover against the East Jersey Water Company for the diversion of the water at its works at Little Falls was estab-

Opinion.

lished in that action, and that the diversions of the defendants the Montclair Water Company and the Acquackanonk Water Company, jointly with the defendant the East Jersey Water Company, were made at the works at Little Falls theretofore owned and operated by the defendant the East Jersey Water Company, and that the establishment of that right in the action at law against the last-named company operated to establish, and did establish, the right of the complainant to recover against the three defendants for jointly interrupting and diverting the waters at Little Falls, and that the right of the complainant is fully established by that action at law with respect to the diversion, as against all of the three defendants named, for the purpose of the relief prayed in the bill. 10

The defendants aver that in 1914 the complainant, as plaintiff, brought another suit against the three defendants, the East Jersey Water Company, the Montclair Water Company and the Acquackanonk Water Company, as defendants, in the supreme court, to recover damages for an alleged impounding and diversion of the waters of the Passaic River by them at Little Falls from the date of the first suit (which was against the East Jersey Water Company only) and the date of the trial of the action against the three defendants; and that judgment was recovered therein by the plaintiff against them in 1915; that one of the issues as between the complainant and the three defendants was whether the judgment previously recovered by the complainant against the defendant the East Jersey Water Company concluded that company and the other two defendants in the second action, which was commenced and prosecuted to judgment against all three. This averment leads necessarily to the conclusion that that issue in the second case 20 30 40

Opinion.

was decided against the defendants. It is, however, averred by the defendants that the second judgment, the one against the three defendants, was reversed by the court of errors and appeals, and that that suit awaits retrial. It is also averred that in reversing the second judgment the court of errors and appeals "necessarily held" that the
10 East Jersey Water Company was not concluded in the second action by the judgment in the first one, nor were the defendants the Montclair Water Company and the Acquackanonk Water Company, because they were not parties to the first action and were not bound by the judgment therein.

It would seem to be quite beside the mark for the defendants to aver that the court of errors and appeals in reversing the second judgment "necessarily" held any particular thing, when they proceed themselves in their answer to set forth exactly
20 what the court of errors and appeals did hold in setting aside the judgment and granting a new trial. It was that the trial judge erred in refusing to charge the jury that if they found that the plaintiff would have used the diverted water, if it had not been diverted, for the purpose of further polluting the river, then the plaintiff could not claim more than nominal damages from the defendants, and that the plaintiff had no right to complain of
30 the diversion by the defendants if the jury found that the only damage the plaintiff suffered was being prevented from committing a nuisance. So it comes to this: The defendants aver that one of the issues in the trial at law between the complainant, as plaintiff, and them, as defendants, was as to whether they were all of them concluded with respect to the plaintiff's right to recover damages by the judgment in the first suit, in which second suit, the one in which that issue was raised, judg-
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Opinion.

ment was recovered by the complainant; and then they aver that a new trial was granted upon grounds which they state, neither of which touch the question of the complainant's right to recover, which, I take it, is therefore no longer open. This appears to be borne out by the opinion of the court of errors and appeals in setting aside the verdict (*Weidmann S. D. Co. v. E. Jersey Water Co.*, 88 N. J. L., 400). It is there stated that the defendants requested the court to instruct the jury on the question of damages, under the same state of facts as in two other cases mentioned, and that the views expressed in those cases were applicable to the one then at bar; that the court there held the refusal to be erroneous, and, for the reasons given, the judgment in favor of the plaintiff was reversed and a new trial awarded. The opinion of the court of errors and appeals setting aside the second judgment referred to, namely, the one by the complainant herein, as plaintiff, against the three defendants herein, as defendants, was written in three cases (including the one mentioned) which were tried together before the same jury and were submitted to the court of errors and appeals in like manner upon the same exceptions, without stating what the exceptions were, except, necessarily, that one was an exception to the charge in the two respects in which the charge was held to be erroneous in the two cases mentioned, which were *Augur & Simon Silk Dyeing Co. v. East Jersey Water Co.* and *Jersey City Water Supply Co.*, defendants, the opinion in which is reported in 88 N. J. L., 273.

The averment in the answer as to the suit in which the issue as to liability was presented is that which was commenced in 1914. This is a suit in which the new trial has been granted on the question of damages. Rule 72 under the practice

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Opinion.

act, provides that in case a new trial is granted it shall be only of the question or questions with respect to which the verdict is found to be wrong, if separable, applies. The pleadings before me do not show what other issues were involved in the exceptions taken and brought before the court for review, but as the only question with respect to which the decision of the trial court was found to be wrong, is in respect to the refusal to charge two requests on the question of damages, it appears that no other questions are open for litigation upon a retrial. This provision of the practice act applies to new trials granted by the court of errors and appeals, for that act, where applicable, extends to the court of errors and appeals. See *American Life Ins. Co. v. Day*, 39 N. J. L., 89. Rule 72 under the practice act (1912) is now rule 131 of those promulgated by the supreme court, June term 1913, and by this rule the provision as to limited retrials, is expressly made applicable to appeals.

These views make it unnecessary to consider whether, as a principle of substantive law, the judgment in the former suit operates to estop the defendants on the question of liability—the East Jersey Water Company as a party to that action and the Montclair Water Company and the Acquackanonk Water Company as successors in interest of, and as parties in privity with the East Jersey Water Company, because they are concluded by the practice act and rules mentioned.

One other matter remains to be considered, and that is, are the averments in the answer which contradict and are repugnant to the admissions made in the pleading, capable of saving the case of the defendants on their answer? For instance, the bill alleges and the answer admits that prior to the impounding and diversion of the waters the complainant had used them for the purpose of dyeing

Opinion.

goods, and that from 1906 to 1912, the defendant, the East Jersey Water Company, at a dam, reservoir and works owned and operated by it at Little Falls on the Passaic River above the complainant's premises, impounded and diverted the water of the river during these years by an average quantity of 16,000,000 gallons per day. And that from 1912 to the present time the three defendants by concert and agreement among themselves have jointly owned and operated the works at Little Falls and diverted from the Passaic River at that place for their joint and common benefit quantities of water averaging from 21,000,000 gallons per day during 1912 to about 23,000,000 gallons daily during 1914, and that from then until the present time have constantly diverted and are continuing to divert quantities in excess of 23,000,000 gallons daily; also that the water which has been so impounded and diverted and thus prevented from flowing into the works of the complainant has been during all of that time necessary for the use of the complainant in supplying its works and for the operation of its business therein and which would have been so used during all of that time by the complainant in its business if it had not been deprived of the use thereof by the defendants. And further, that by reason of this impounding and diversion by the defendant, the East Jersey Water Company, from 1906 to 1912 the complainant was deprived of the use of the water in its business for which deprivation the complainant recovered damages by judgment in the action at law already referred to, and that the amount of the judgment was \$22,212.00, together with costs, and that the amount of the judgment, with costs and interest, was paid by the defendant the East Jersey Water Company in 1914. It is alleged in the bill, and not denied in the answer, that by reason of the

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Opinion.

diversion of the waters mentioned the natural flow of water has been so diminished that the banks and bed of the river are rendered bare.

10 It must be perfectly apparent upon these admitted facts that the impounding and diverting of this water and the consequent deprivation of its use by the complainant, a lower riparian owner, was palpable and appreciable. And yet the defendants in answer say that the injury, if any, to the complainant from this impounding and diversion of the waters is nominal and inconsequential. This last averment of fact is entirely inconsistent with their previous admission of facts to the contrary. An answer in chancery must be consistent, and a defendant may not insist upon a defense based on the truth of an allegation in a bill which he denies in his answer. 16 *Cyc.*, 308. What is
20 more he cannot be permitted to insist upon a defense residing in an averment in his answer which is inconsistent and repugnant to an admission made by him in the very same pleading.

Equitable defenses must be consistent. *Gilbert v. Gilpin*, 11 *N. J. Eq.*, 445. An answer may contain within itself such circumstances as will suffice to deprive it of all efficacy. Per Green, *C. J.*, in *Plume v. Small*, 5 *N. J. Eq.*, 650. These decisions in *Gilbert v. Gilpin* and *Plume v. Small*
30 were made upon final hearing. But now by the chancery act (1915) and rule 67 of this court demurrer to an answer, in effect, will lie. And in this situation the power with reference to overruling defective pleas on demurrer in actions at law, is applicable, that is, the answer will be overruled if its averments do not constitute a defense. And the substantive law on this question is the same as that concerning declarations in suits at law which do not state a cause for action.

Opinion.

In *Pope v. Skinkle*, 45 N. J. L., 39, it was held that if a pleading appear on its face to be untrue in one of its essential allegations it is bad on demurrer. Now, having admitted in their answer that the complainant is appreciably injured by the diversion of the waters of the Passaic River, the rule that a pleading is to be construed against the pleader, requires that the subsequent averment in their answer that the diversion of the waters is nominal and inconsequential, is to be taken as an untrue statement of an essential averment, and must be held to be bad. 10

The averment in the answer that notwithstanding the impounding and diversion of the water by the defendants there has at all times remained in the river and flowed past the complainant's works, sufficient water available for reasonable riparian uses, cannot avail the defendant to overcome the admission that the quantity impounded and diverted has been appreciable and damaging to the complainant. This may well be a defense on the question of damages, as may also be the question of polluting the river by the use made of its waters by the complainant, but it is not a valid answer to the claim of the complainant that it is entitled to an injunction against the defendants for depriving the complainant of the quantity of water which it is entitled to have in the flow of the river. 20 30

A defendant may not make disserving admissions in an answer responsive to the bill, and then, by way of new matter, plead facts inconsistent with those admissions. In other words, a defendant may not by self-serving statements avoid the effect of disserving ones—at least not unless they amount to confession and avoidance, and they do not in this case.

Finding that the answer as a whole does not constitute a valid defense against the complainant's 40

Opinion.

right to an injunction upon equitable terms, it becomes unnecessary to consider the specific objections to certain parts of the pleading. The answer must, therefore, be struck out. The terms of the order to be made will be settled on motion and on notice.

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(Filed March 15, 1918.)

Notice of Settlement of Decree.

IN CHANCERY OF NEW JERSEY.

Between:

20 WEIDMANN SILK DYEING COM-
PANY, a corporation,
Complainant,

and

THE EAST JERSEY WATER COM-
PANY, THE MONTCLAIR WATER
COMPANY, and THE ACQUACK-
ANONK WATER COMPANY,
30 Defendants.

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To Humphreys & Sumner, Solicitors of Defendants:

TAKE NOTICE, that on Tuesday the 26th day of February, 1918, at 10.30 o'clock in the forenoon or as soon thereafter as counsel can be heard, we shall apply to the Chancellor, at the Chancery Chambers in the State House in Trenton, N. J., for settlement and signature of the decree in the above-

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Notice of Settlement of Decree.

stated cause pursuant to the opinion filed herein; and that the annexed is a copy of the draft of the proposed decree which we will present for signature.

Further take notice that we shall at the same time and place apply for an allowance of counsel fee for complainant in the above cause.

Dated, February 18, 1918.

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Truly yours,

GRIGGS & HARDING,
Sols. of Complt.

The copy of the draft of the proposed decree annexed to said notice was in the form of the decree adopted and signed by the Chancellor, a copy of which hereinafter appears.

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Service of the within Notice is hereby acknowledged and copy received this 18th day of February, 1918.

HUMPHREYS & SUMNER,
Solicitors of Defendants.

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(Filed March 15, 1918.)

**Supplemental Memorandum on Motion
to Settle Decree.**

IN CHANCERY OF NEW JERSEY.

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Between :
WEIDMANN SILK DYEING COM-
PANY,
Complainant,

and

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EAST JERSEY WATER COMPANY,
MONTCLAIR WATER COMPANY,
and ACQUACKANONK WATER
COMPANY,

Defendants.

43-379.
On Bill, etc.

On motion to settle decree.

WALKER, *Chancellor.*

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The complainant moves for decree and submits a form thereof. The defendants, who have had notice of the motion, also submit a form. The complainant's draft of decree provides for an injunction, but stays its issue during a period to be determined by the court, and provides that if before that time proceedings at law for condemnation of complainant's rights be commenced by the defendants, then that an injunction shall not issue, etc.

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The defendants contend that as to the East Jersey Water Company, which does not possess the power of condemnation, damages should be ascer-

Supplemental Memorandum.

tained in this court instead of allowing the companies and municipalities which derive a supply from it, and which have the ultimate power of condemnation, to condemn in aid of that company's diversion.

It is true that defendants in their answer submit that if the complainant shall be entitled to relief, they offer to pay damages to be ascertained by this court. There is no like offer in the bill, nor proffered submission to any terms in it, but, in their oral argument and in their brief, counsel for complainant stated that it was seeking protection upon equitable terms, namely, that an injunction shall issue only in case the defendants shall not cause complainant's right to be condemned at law. There is no offer by the complainant to have damages settled in this court as to the East Jersey Water Company, although defendants desire it. Doubtless this court has a right to impose that as a term, but as the Montclair Water Company and the Acquackanonk Water Company possess the power of condemnation, and may condemn, it will be more congruous to require condemnation also in the case of the East Jersey Water Company, that is, condemnation by the corporations deriving their supply from it, which corporations themselves have the power to condemn. The right to require the defendant the East Jersey Water Company to make compensation ascertained by this court, led me to make observations in the opinion vindicating that power.

The defendants in the form of decree submitted provide for an amendment to the bill so that the complainant shall be made to pray that unless and until the defendant the East Jersey Water Company makes such compensation to the complainant, as shall be ascertained by this court to be just, it be enjoined, etc. Of course this relief cannot

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Supplemental Memorandum.

be granted. A defendant cannot amend a complainant's bill without notice of motion therefor, and none has been given, and not even then, as I view it, without complainant's consent. This is quite different from the court giving complainant leave to amend a bill in a given case because of valid objection to the bill by defendant.

10 In the opinion I made no allusion to the fact that so far as anything was disclosed in the pleadings it did not appear that the judgments granting new trials in the cases mentioned were by express terms limited to the question of damages. Assuming that these judgments, which were not before me, reversed the verdicts and granted new trials without more, still, I take it that rule 131 of the supreme court operates upon the situation by its own inherent force. It is, I think, to be assumed
20 that the judgments ordering new trials limit them to the question of damages only, but, if not, then I think the rule operates upon the situation, and, in either event, the estoppel on the question of liability is complete.

The decree submitted by the complainant will be signed. The time limit within which condemnation proceedings must be commenced to the end that an injunction may be stayed, will be set for May 1st, 1918. That will give the defendants over
30 six weeks in which to commence proceedings, which is ample for the purpose. An appeal, if taken, will stay proceedings, and if there should be an affirmance on appeal the defendants will have the same time left in which to commence condemnation proceedings, after remittitur filed in this court, as it had under the terms of the order at the time the appeal was taken.

The drafts of decrees submitted by the complainant in the cases of *Weidmann Silk Dyeing Com-*
40 *pany v. The Mayor and Common Council of New-*

Supplemental Memorandum.

ark (43-380) and *Weidmann Silk Dyeing Company v. The Mayor and Common Council of Jersey City* (43-381), will also be signed, with the same time limit set in which condemnation proceedings must be commenced to stay the issuance of injunctions.

(Filed March 15, 1918.)

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Decree.

IN CHANCERY OF NEW JERSEY.

Between:

WEIDMANN SILK DYEING COMPANY, a corporation,
Complainant,

and

THE EAST JERSEY WATER COMPANY, THE MONTCLAIR WATER COMPANY and THE ACQUACKANONK WATER COMPANY,
Defendants.

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On Bill, etc.

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This cause coming on to be heard upon an objection on motion of the complainant to the answer filed herein, whereby the complainant moved that said answer be stricken out on the ground that the said answer disclosed no defence to the relief prayed for by the complainant in its bill of complaint filed herein, and notice of said motion having been duly given and said motion having been heard in the presence of Griggs and Harding of

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Decree.

counsel with complainant, and Humphreys and Sumner and Gilbert Collins of counsel with the defendants, and the said bill of complaint, answer and grounds of objection to said answer having been read, and the arguments of the respective counsel having been heard and considered, and the court having duly considered the said bill of complaint, answer and said grounds of objection to said answer, and it appearing to the court that said answer discloses no defence to the relief prayed for by the complainant in its said bill of complaint;

It is on this fifteenth day of March, 1918, ordered, adjudged and decreed that the said answer be and hereby is stricken out and made null and void, and that said bill of complaint be and hereby is taken as confessed against the defendants.

And it is further ordered, adjudged and decreed that the complainant is entitled to a perpetual injunction henceforth and forever absolutely restraining the defendant, its officers, agents and servants and each and every of them from em-
pounding, confining, retarding, diverting or interfering with, or hindering or changing the natural flow of the waters of the Passaic River, at Little Falls in said bill of complaint mentioned or at any other place or places above the premises of the complainant in said bill of complaint mentioned, so as to hinder, interrupt or change the natural flow of the waters of the Passaic River to and past the premises of the complainant mentioned in the said bill of complaint, but that no writ of injunction issue until the first day of May, 1918, and that, if before that time proceedings at law for condemnation of the complainant's rights be commenced by or in aid of the defendants, then said writ of injunction shall not issue until the further order of this court; but that, if such condemnation pro-

Decree.

ceedings shall not have been commenced at the expiration of said time, then said injunction shall issue without further order of this court.

And it is further ordered, adjudged and decreed, that the complainant is entitled to the costs of this suit to be taxed.

E. R. WALKER, 10
C.

A True Copy,

ROBERT H. MCADAMS,
Clerk.

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(Filed March 19, 1918.)

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

10 Between:
 WEIDMANN SILK DYEING COM-
 PANY, a corporation,
 Complainant,

and

EAST JERSEY WATER COMPANY,
 MONTCLAIR WATER COMPANY
 and ACQUACKANONK WATER
 COMPANY,
 Defendants.

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The defendants hereby appeal from the decree made in this court in the above stated cause on the fifteenth day of March, Nineteen Hundred and Eighteen, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

Dated, March 18th, 1918.

30 HUMPHREYS & SUMNER,
 Solicitors and of Counsel
 with the Defendants.

We conceive there is good cause for the appeal in the above stated cause.

HUMPHREYS & SUMNER,
 Counsel with the Defendants.

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(Filed April 3, 1918.)

Petition on Appeal.NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between:

WEIDMANN SILK DYEING COM-
PANY, a corporation,
Respondent,

and

THE EAST JERSEY WATER COM-
PANY, THE MONTCLAIR WATER
COMPANY and THE ACQUACK-
ANONK WATER COMPANY,
Appellants.

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*To the Honorable The Court of Errors and Ap-
peals in the last resort in all causes:*

The petition of The East Jersey Water Company, The Montclair Water Company and The Acquackanonk Water Company, the appellants in the above stated cause respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the fifteenth day of March, Nineteen Hundred and Eighteen, wherein Weidmann Silk Dyeing Company, a corporation, was complainant, and the said The East Jersey Water Company, The Montclair Water Company and The Acquackanonk Water Company were defendants, in these respects, to wit:

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Petition on Appeal.

That the said decree adjudged that the answer filed herein by the defendants disclosed no defense to the relief prayed for by the complainant in its bill of complaint filed herein, and in that the said decree adjudged that the said answer should be stricken out and made null and void, and in fact struck out and made null and void the same, and
10 in that said decree adjudged that said bill of complaint should be taken as confessed against the defendants, and in fact took the same as confessed against the defendants and in that the said decree adjudged that the complainant was entitled to a perpetual injunction thenceforth and forever, absolutely restraining the defendants, their officers, agents and servants, and each and every of them from empounding, retarding, diverting or interfering with or hindering or changing the natural flow
20 of the waters of the Passaic River at Little Falls in said bill of complaint mentioned, or at any other place or places above the premises of the complainant in said bill of complaint mentioned so as to hinder, interrupt or change the natural flow of the waters of the Passaic River to and past the premises of the complainant mentioned in the said bill of complaint, unless before the 1st day of May, 1918, proceedings at law for condemnation of the complainant's rights should be commenced by or
30 in aid of the defendants, and in that said decree adjudged that the complainant was entitled to the costs of said suit to be taxed.

And your petitioner humbly appeals from said decree of the Chancellor upon the ground that the same is erroneous for that said answer filed by the defendants did disclose a defense or defenses to said bill of complaint, and should not have been stricken out and said bill of complaint should not have been taken as confessed against the defendants, and for that the complainant was not entitled
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Petition on Appeal.

to the injunction adjudged by said decree or to any injunction, and the issuance of said injunction should not have been thereby ordered, and for that the complainant was not entitled to its costs of said suit.

Your petitioners therefore pray that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet. 10

HUMPHREYS & SUMNER,
Solicitors of Appellant.

Endorsed :

“Filed Apr. 3, 1918,

THOMAS F. MARTIN,
Clerk.” 20

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(Filed April 6, 1918.)

Answer to Petition of Appeal.NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between :

WEIDMANN SILK DYEING COM-
PANY, a corporation,
Respondent,

and

THE EAST JERSEY WATER COM-
PANY, THE MONTCLAIR WATER
COMPANY and THE ACQUACK-
ANONK WATER COMPANY,
Appellants.

On Appeal.

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The answer of the above named respondent to the petition of appeal of the above named appellants.

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This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a decree was, on the fifteenth day of March, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said decree is agreeable to equity, and it prays that the same may be affirmed, with costs to be adjudged to this respondent.

Dated, April 6th, 1918.

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GRIGGS & HARDING,
Solicitors of Respondent.

New Jersey Court of Errors and Appeals

Between
WEIDMANN SILK DYEING COMPANY, a corporation,
Complainant-Respondent,
and
THE EAST JERSEY WATER Co.,
THE MONTCLAIR WATER Co. and
THE ACQUACKANONK WATER Co.,
Defendants-Appellants.

On
Appeal from
Chancery.

BRIEF FOR APPELLANTS.

This appeal brings up for review a decree of the Court of Chancery striking out the answer filed by the defendants as disclosing no defense to the relief prayed for by the complainant in its bill of complaint—taking the bill as confessed against the defendants and directing the issuance on May 1st, 1918, of an injunction against the defendants restraining them from diverting the natural flow of the waters of the Passaic River at Little Falls, or at any other place or places above the premises of the complainant in the bill of complaint described, unless before that date proceedings at law for condemnation of the complainant's rights should be commenced by, or in aid of, the defendants. The

operation of the decree was suspended by the present appeal, notice of which was filed in the Court of Chancery on March 19th, 1918 (p. 86).

The matter came up before the Chancellor on a motion to strike out the answer, the exact equivalent of a demurrer to the answer.

On the argument of that motion we contended as forcibly as we could that the motion should stand over until the hearing—upon the following grounds:

Previous to the abrogation of former Rule 213 of the rules of the Court of Chancery and the adoption by the Legislature of Rule 51 of the rules under the "Chancery Act (1915)" (*P. L.*, 1915, p. 195) and the promulgation of Rule 67 of the present rules of the Court of Chancery a motion to strike out an answer was merely equivalent to exceptions thereto, and could be sustained only on the ground that the matters set forth in said answer were so totally unrelated to complainant's claim as to be altogether unworthy of any consideration as a defense.

Commonwealth Title Insurance & Trust Co. v. New Jersey Lime Co., 100 *Atl. Rep.*, p. 52.

Haberman v. Kaufer, 60 *N. J. Eq.*, 271.

Leslie v. Leslie, 50 *N. J. Eq.*, 155.

Doane & Jones Lumber Co. v. Essex Building & Land Co., 59 *N. J. Eq.*, 142.

As to the effect of Section 51 of the "Chancery Act (1915)" and Rule 67 of the present rules of the Court of Chancery, we referred to a memorandum opinion rendered by Stevenson, *V.-C.*, in the case of *Simmons v. Weidmann Silk Dyeing Co.*, but

by the directions of the Vice-Chancellor not filed or printed. We quoted from that opinion as follows :

“Under the former practice the defendants had the right to challenge the sufficiency of the complainant’s bill by a demurrer or by its exact equivalent, provided for by Chancellor Runyon in 1881 (Rule 213 of Rules of 1910), a motion to strike out, or, to speak more accurately, to dismiss the bill. More recently the opinion began to prevail among equity judges and practitioners in New Jersey that demurrers and motions to strike out pleadings, all of which lead to appealable orders, are productive of expense and delay and should be abolished or restricted within narrow limits. In very many opinions, some of which have been published, I have expressed the opinion that no demurrer to a bill should be allowed unless it was filed by leave of the Court. No doubt there is a small class of cases where great expense in taking testimony, perhaps in foreign countries, and other hardship and inconvenience can wisely be avoided by allowing a law point presented on the face of the bill to be determined first, even though the determination of the Court of Chancery may be carried to the Court of Errors and Appeals for review. In some cases it is necessary to the preservation of the defendant’s rights that he should *in limine* challenge the sufficiency of the case presented by the bill. In the great majority of cases, however, demurrers are an evil. They frequently present a mere academic case first to the Court of Chancery and then to the Court of Errors and Appeals. *The authoritative opinion de-*

livered in the Court of Appeals is sometimes difficult of application to the actual case subsequently presented to the Court of Chancery by the proofs, and hence such opinion becomes embarrassing." (Italics ours.) "For illustration of these observations see the reports in both courts of the cases of *Peterson v. Reid*, 76 N. J. Eq., 378, and 80 N. J. Eq., 450, and *Beam v. Paterson Safe Deposit & Trust Co.*, 81 N. J. Eq., 38 and 195; *Id.*, 82 N. J. Eq., 518; *Id.*, 83 N. J. Eq., 628.

"The Chancery Act of 1915 in one sweeping proposition undertook to abolish demurrers, pleas and exceptions to answers, and this provision was retained in the rules of the Chancellor promulgated December 1st, 1916 (Rule 67). The rule, however, provides that 'any pleading may be objected to on motion on the ground that it discloses no cause of action, defense, or counterclaim respectively.'

"So far, the rule apparently would merely change names without altering things. There is little use in abolishing a demurrer if you retain its exact equivalent, a motion to dismiss a bill, which leads to an appealable order. *It may be noted also, that, so far, the rule actually extends the opportunity for dilatory proceedings because it allows an objection to an answer on the ground that it discloses no defense. This is the exact equivalent to a demurrer to an answer, a thing unknown in equity pleading. It is plain that it was not the intention of the Legislature and the Chancellor to increase the facilities for dilatory proceedings and appealable orders.*" (Italics ours.)

"At the end of the rule we find the provision that on the hearing of the motion 'the

Court in its discretion may order the application to stand over until the hearing.'

"In a series of cases not reported I have held that *under this new rule the party objecting to a pleading has no absolute right to call for the judgment of the Court upon the sufficiency of such pleading.*" (Italics ours.) "It is discretionary with the Court whether to allow a preliminary argument and adjudication, which of course is appealable, or to leave the defendant to his answer so that all the questions of law and fact may be determined first in the Court of Chancery and then, in case of an appeal, by the Court of Last Resort. If this view be not correct the so-called abolition of the demurrer would have little reformatory effect upon our procedure. Demurrers to bills would not be abolished but merely changed in form and name, *while demurrers to answers would be established with their potent effect as instruments of delay for the first time in the history of our equity practice.*" (Italics ours.)

"No doubt a number of important questions are raised by these motions. Several of the defendants have not regarded them as of such a character that they could not be determined upon final hearing, and have accordingly filed answers. I am unable to see any reason why what amounts to demurrers to the bill of complaint on the part of two defendants should be considered by this Court in advance of the final hearing.

"The motion, therefore, will stand over until the hearing."

Taking this opinion as a correct exposition of the present practice, we argued that it would seem to

follow that in any case where the allegations contained in the answer were not palpably frivolous, the Chancellor should exercise the discretion reposed in him by Rule 67, and order the application to stand over until the hearing.

The argument of counsel for the respondent was that the express provision made in Rule 67, that the Court in its discretion might order the application to strike out to stand over until the hearing, applied only to objections to the bill or counterclaim. Counsel said:

“With respect to objection to the bill or counterclaim, when objection is made to them, express provision is made in Rule 67 that the Court in its discretion may order the application to strike out to stand over until the hearing, and require the same to be answered.

“No discretion is given to the Court to require any *reply* to the answer. The right of the complainant to have the defense in the answer determined before issue, is given absolutely and without discretion. The distinction is presumably due to the fact that the party who resists the bill and counterclaim has a motive to delay the relief asked by the bill or counterclaim, but such motive does not apply to the complainant who attacks the answer, since his motive is to hasten his suit and acquire his relief.”

Counsel's argument was that the maxim “*expressio unius*” applied, and that as the rule did not also say that if the objection were to the answer the Court might require the same to be *replied to* on such terms and conditions as might be ordered;

that, therefore, the Court had no power to order a replication to be filed, or a hearing to be had on bill and answer. Obviously there could be no "hearing" except either on bill and answer, or on bill, answer, replication and proofs.

We submitted that the true construction of Rule 67, in its application to a motion to strike out an answer, was as follows:

It was true that the rule did not permit the Court, where the Court ordered the application to stand over until the *hearing*, to require the answer to be *replied to*, for the very obvious reason that to so require would be to deprive the complainant of the right to a *hearing* on bill and answer. The intention of this part of the rule was to permit the Court to lay over the argument of the motion until the *hearing*, which might either be (at the option of the complainant) on bill and answer, or on bill, answer, replication and proofs. The complainant might elect whether he would have a hearing on bill and answer, or on bill, answer, replication and proofs, and his motion to strike out (equivalent to a demurrer to the answer) was (within the discretion of the Court) to be held over until such hearing. If the complainant declined to make any election, and refused to set down the case for a hearing, the argument of his motion would necessarily be laid over indefinitely.

We further pointed out that the difference between a hearing on bill and answer and a hearing on a motion equivalent to a demurrer was a very material difference to the defendant. If the defendant succeeded on the hearing on bill and answer, or on bill, answer, replication and proofs, the bill would be dismissed. But if the motion in the nature of a demurrer was disposed of without any

prior hearing of the cause, and the defendant succeeded on the argument of the motion which was, therefore, dismissed, the complainant would then be permitted to file a replication and have a hearing on the proofs. We submitted that it was neither the purpose of the rule to deprive the complainant of his election to have the case disposed of on bill and answer, or on bill, answer, replication and proofs, nor was it the purpose of the rule to establish demurrers to answers, *so as to permit the complainant to arbitrarily, and independently of any discretionary control by the Court*, experiment with a demurrer to the answer, without first having the case heard on the merits. We argued that the result of such a practice would be to give the complainant in the litigation a distinct advantage over the defendant. A defendant who moved to strike out a bill could be compelled, first, to answer, and a hearing might be had on the merits before his motion to strike out would be heard, but a complainant who moved to strike out an answer could not (if counsel's argument were sound) be compelled, before his motion was passed upon, to have the case first heard on the merits. We argued that *such a construction would be altogether at variance with Vice-Chancellor Stevenson's opinion as rendered in Simmons v. Weidmann Silk Dyeing Co.*, from which we have above quoted at length.

In *Commonwealth Title Insurance Co. v. New Jersey Lime Co.*, *supra*, which was a case decided before the passage of the present Chancery Act, and before the promulgation of the present rules of the Court of Chancery, Stevenson, V.-C., said:

“The motion to strike out an answer, or a portion of an answer which is appealable under our practice, is less worthy of favor than

a demurrer to a bill. This motion is a proceeding often involving only expense and delay * * *."

In *Doane & Jones Lumber Co. v. Essex Building & Land Co.*, *supra*, which was also decided before our new Chancery Act and rules, Stevens, V.-C., said :

"The notice in question states first that the matter set up in the amended answer does not disclose any equitable defense. This is mere demurrer. *If complainant is willing to take the somewhat hazardous course of conceding all that defendant avers in the answer, he should set the case down for hearing on bill and answer.*"

While the learned Chancellor did not follow the argument of counsel for the respondent above referred to, he nevertheless used this significant language :

"Upon the state of pleadings which, to my mind, admittedly show that the diversion of the water is sensible and appreciable, it is unnecessary and undesirable to send a complainant to a final hearing and permit of the taking of voluminous testimony in order that a merely incidental matter may be determined, that is, the terms upon which an injunction should issue, when, in fact, that determination can readily be made by the court upon mere motion, with leave to take affidavits if necessary. If it be determined, as it must in this case, on the pleadings, I think that the answer does not set up a valid defense to the complainant's right to an in-

junction, and the question of the issuance of an injunction is necessarily decided against the defendant as matter of law, the question as to the terms upon which it should issue is a collateral matter, quite easily disposed of in the manner which I have indicated" (pp. 61-62).

While the answer filed by the defendants may have had some defects in it, we respectfully submit that it contained matter concerning which the defendants should have been permitted to offer proofs, and as to which the defendants should have had their day in court, and that they should not have been deprived of the privilege of offering proofs as to many of the matters contained in their answer. The result of the Chancellor's ruling was that though an answer had been filed by the defendants denying (as we shall later point out) many of the material allegations of the bill, a decree was entered against the defendants without the complainant offering any evidence whatsoever.

Before attempting to review the contents of the answer to the complainant's bill, there is one passage in the Chancellor's opinion to which we wish to draw attention as bearing generally on the subject above discussed:

"As the answer was formerly regarded as evidence (and still is, if the bill prays for answer upon oath), there sprung up a method of objecting to defective answers, known as exceptions; and exceptions lay for scandal, impertinence and *insufficiency*. (Italics ours.) "While a demurrer to an answer (whether or not under oath), insufficient because it disclosed no defense, might

with propriety have long ago been substituted for an exception, the fact is that this departure from precedent was not inaugurated in our state until two years ago" (p. 42, lines 1-13).

We submit that there is inaccuracy here in saying or implying that an answer could formerly have been excepted to for insufficiency because it *disclosed no defense*. The insufficiency of an answer which was formerly the subject for an exception was insufficiency in answering the whole of the bill. As stated by Reed, V.-C., in *Steepy v. The Public Service Corporation of New Jersey*, 65 N. J. Eq., 529 :

"Insufficiency means that a portion of the bill has not been answered, to which portion the complainant is entitled to an answer. It does not mean that it is insufficient in the sense that it presents no equitable defense."

The headnote in that case reads as follows :

"An answer is only insufficient when a portion of the bill, to which the complainant is entitled to an answer, has not been answered, and is not insufficient merely because it does not present an equitable defense."

Contents of the Bill of Complaint.

*Matters Admitted by the
Answer.*

1. Seizin by the complainant of its dye works since 1887, extending over the whole bed of Passaic River a distance of 1,500 feet.

2. Passaic River is, and from time immemorial has been, a natural water course flowing from its source above the said City of Paterson, through and along the premises of the complainant. Said premises of complainant are situated on the Passaic River wholly above the point where the tide ebbs and flows in said river, and said river at and above said premises of the complainant is a private stream or water course.

3. Prior to said diversion complainant had used the water of said river for the purpose of dyeing goods in its business.

4. Defendant East Jersey Water Company is a private corporation, organized under the General Corporation Law of the State of

*Matters Denied by the
Answer.*

3. The right of the complainant under the circumstances set forth in the bill to enjoy the use of the diverted water for the operation and use of the complainant in dyeing goods.

New Jersey. From June, 1906, to June, 1912, defendant East Jersey Water Company, at its works owned and operated by it at Little Falls on said river above the premises of the complainant, diverted from said Passaic River, during said last named six years, an average daily quantity of sixteen million gallons of water, and conveyed from said Passaic River to other places said last named water, which was not returned to said river, and which otherwise would have flowed through the complainant's premises. From June, 1912, continuously until the present time the defendants, the East Jersey Water Company, the Montclair Water Company and the Acquackanonk Water Company, by agreement among themselves, have jointly owned and operated said works at Little Falls for their joint and common benefit, and have jointly diverted quantities of water averaging from about twenty-one million gallons daily during the year 1912 to about twenty-three million gallons daily during the year 1914.

That from the year 1914 until the present time, and

at the present time, the said three defendants at Little Falls have constantly jointly diverted, and are now diverting, quantities of water from said river for their joint and common benefit considerably in excess of twenty-three million gallons daily, and are conveying the same from the Passaic River to other places, so that the same has not been and is not returned to said river, and does not flow through the complainant's premises, as it otherwise would, and that said three defendants are still diverting said quantities of water from the river and intend to do so hereafter in constantly increasing daily quantities.

5. The complainant has operated its plant continuously from the year 1887 until the present time and employs several hundred employees. The water which has been so diverted would have been used during all of said time by the complainant in its said business if the complainant had not been deprived of the use thereof by said defendants as aforesaid. By reason of said empounding and

5. That the complainant, for want of said water of which it was deprived by these defendants, could not use said works nor carry on its business therein, as it otherwise would have done. That the legal right of the complainant to recover against the East Jersey Water Company for the diversion of said water at said works at Little Falls was established at law in the action at law referred

diversion of said water by said defendant, the East Jersey Water Company, during the period from June, 1906, to June, 1912, the complainant was deprived of the use of said water in its business, for which deprivation the complainant recovered damages by the judgment set forth in the fifth paragraph of the bill. The amount of said judgment, etc., the said defendant, the East Jersey Water Company, paid to the complainant on or about March 12, 1914.

6. The sixth paragraph of the bill alleges that by reason of the said diversions the natural flow of the water of said river has been so diminished that the banks and bed of the said river at said complainant's premises are rendered bare, unsightly, noxious and unhealthy. While this allegation is not expressly denied by the answer, it will be seen *per contra* that the defendants denied that the

to in the fifth paragraph of the bill, and that the establishment of the legal right of the complainant in the action at law referred to in said paragraph against the East Jersey Water Company for said diversions at said works operated to establish and did establish said right of the complainant to recover against defendants for said alleged joint empounding and diversions at said works at Little Falls by the defendants, and that the right of the complainant is fully established by said action at law with respect to said water as against each and all of the defendants for the purpose of the relief asked for by said bill, or for any other purpose.

6. That said undiminished flow of water in said river at said plant is a large or anything but an insignificant element of value in said plant for its use in the business of dyeing goods, which is the only business in which the complainant has ever used it, and the only business in which the complainant has been and is now engaged, and that the diminished flow of water in the river

noxious and unhealthy condition of the river was due to the diversion alleging that it was solely due to the pollution.

due to the defendants' diversions has greatly or appreciably diminished the value of the complainant's plant, and that the natural flow of said river, if said empounding, interrupting and diversions had not been made, would have carried away the noxious material deposited in the river, and that the empounding, interruption and diversions, if continued, would greatly lessen the value of the complainant's premises for any use to which the same might be put, but the defendants admit that the value of said premises now is and probably will be hereafter largely impaired by reason of the noxious and unhealthy condition of the river due, however, not to the empounding, interruption and diversions of water by the defendants, but to the discharge of noxious sewage, chemicals and polluted matter into the river by the City of Paterson and by the complainant itself, and by various dyers who operate their works on the Passaic River above the works of the complainant.

7. All the said empounding, interruption and diversions of said water were

7. That the diversions were unlawful. That the said three defendants are

and are without the license, agreement or consent of the complainant.

empounding, interrupting and diverting said water in gradually increasing quantities, thereby depriving the complainant of the use of said water to which it was entitled as riparian owner. That during all the time since the recovery of said judgment until the present time the complainant has been damaged in the sum of about \$10,000 per year, and will hereafter be damaged in a larger yearly sum unless the defendants are enjoined from making further diversions.

In addition to the above admissions and denials the defendants' answer further sets forth that notwithstanding the diversion of the water complained of in the complainant's bill there has at all times remained in the Passaic River and flowed past the complainant's works sufficient water available for reasonable riparian uses, and the fact that the complainant ceased to take its water supply from the Passaic River since about November, 1905, was not because of insufficient water available for its uses, but because the water in the Passaic River, though sufficient in quantity, had become unfit for the complainant's uses through pollution not caused by the defendants, but caused by the City of Paterson and by the complainant itself and by other dyers and manufacturers whose works were and are located above the complainant's work on the Passaic River.

That ever since the complainant has occupied its works on the Passaic River, and during the period

that it took its supply of water from the Passaic River opposite its works, and more recently during the whole period that it has taken its supply of water from wells and from the Passaic Water Co., it has always used said water supply for the dyeing of fabrics, whereby the water has been discharged into the Passaic River by the complainant below its dye works in a polluted condition, and in such a condition as to constitute a public nuisance, and the defendants aver that if they had not empounded or diverted any water from the Passaic River at any time the use that the complainant would have made of the water of which it alleges the defendants deprived it, would have been in like manner for the dyeing of fabrics, whereby the water would have been discharged into the river by the complainant below its dye works in a polluted condition, and would have been a common nuisance, and at all events would have been an unriparian use of said water.

As to the judgment referred to in said bill recovered in the Supreme Court of New Jersey by the complainant as plaintiff against the East Jersey Water Company as defendant, and which is claimed by said bill, established the complainant's right against the defendants to recover against them for said alleged joint diversion of the waters of the Passaic River at Little Falls, the defendants say that subsequently, to wit, on or about July 27th, 1914, the complainant as plaintiff brought another suit against defendants as defendants in the New Jersey Supreme Court to recover damages for an alleged empounding and diversion of the waters of the Passaic River at Little Falls from June 13, 1912, to the date of the trial of said action; that judgment was recovered in said action February 18th, 1915, in favor of the plaintiff and against the defendant for the sum of \$8,849.59.

In said action one of the issues between the complainant, as plaintiff, and the East Jersey Water Co., as defendant, was whether the judgment referred to in the bill as having been previously recovered by the complainant, as plaintiff, against the East Jersey Water Co., as defendant, concluded the East Jersey Water Co. and prevented and estopped it from alleging or setting up certain matters and defenses which had been adjudged and decided against it, the East Jersey Water Co., as defendant, and in favor of the complainant, as plaintiff, by said judgment in said former action; the East Jersey Water Co., as defendant, claiming in said second action that the first action in which judgment was recovered by the complainant as plaintiff against the East Jersey Water Co. as defendant was brought to recover (as the fact was) damages for a diversion of water by said East Jersey Water Co. during a period different and distinct from that in respect of which the East Jersey Water Co., as defendant, was charged with diverting water in the second action, and that there was no identity between the second action and the first action, either in the thing sued for, the cause of action or the persons and parties to said respective actions.

Said second judgment against the defendants was afterwards reversed by the New Jersey Court of Errors and Appeals and the record remitted to the Supreme Court for retrial, and that case is now pending in the said Supreme Court, and may be noticed for trial at any time by the complainant.

In reversing said second judgment the New Jersey Court of Errors and Appeals necessarily held that the East Jersey Water Co. was not concluded in said second action by the judgment in

the first action, and as to the defendants, the Montclair Water Co. and the Acquackanonk Water Co., they were not parties to said first action, and were not bound by the judgment therein.

The answer alleges that the complainant is one of a number of dyeing concerns in the City of Paterson who carry on their businesses below the Great Falls and above East Twelfth Street in the City of Paterson, all of whom, including the complainant, are jointly polluting the Passaic River by casting their sewage and discharged chemical waste water into the river; that if it were not for that pollution the Cities of Newark and Jersey City, and the Cities of Paterson and Passaic and the other municipalities which use up the water which is diverted from the Passaic River by the defendants and by the Passaic Water Co., and by the City of Newark and the City of Jersey City, could take and use that water and yet leave sufficient water in the river for all the legitimate uses of said dye houses and other lower riparian owners below the points of diversion, including the complainant, and that there would be plenty of water left in the river for their uses if there were no pollution in it; and the defendant submitted that under those circumstances the complainant did not come into the Court of Chancery seeking an injunction with clean hands, and should be denied any equitable relief on that account; that the Passaic River and its tributaries above Little Falls constitute the only available source from which water in sufficient quantities can be provided for the cities and towns of northern New Jersey, and that the supply is more than adequate, not only for the present, but for all future needs within the bounds of reasonable forecast if said waters are properly empounded and protected from pollution; that all

the water now taken by the defendant is taken under legislative authority for public uses of an imperative character, and apart from the reasons above given why the complainant is not entitled to the relief sought for, that the injury, if any, to the complainant for the empounding and diversion of said waters is nominal and inconsequential. The answer contained other allegations to which, for the purposes of this appeal, it is not deemed necessary to refer.

THE ARGUMENT.

The answer filed by the three defendants, taken as a whole, cannot be said to disclose no defense to the cause of action set forth in the bill, and the motion to strike out should, therefore, either have been dismissed or have been directed to stand over until the hearing.

It is true that the answer filed by the defendants contained some inaccuracies due to inadvertent admissions of portions of the complainant's bill (which it was intended to deny) and which were in other parts of the bill expressly and distinctly denied; nevertheless it should be borne in mind that it is a well-settled rule of equity pleading *that there is not required the same degree of accuracy in an answer as is required in a bill.*

King v. King, 9 N. J. Eq., 44-53, and authorities there cited.

It is also a well-settled rule of equity "*that the fact that an answer is insufficient in some particu-*

lars does not destroy its effect upon the points upon which it answers directly."

Whitney v. Robbins, 17 N. J. Eq., 360.

And in *McMahon v. O'Donnell*, 20 N. J. Eq., 306, the third headnote reads:

"If some of the denials in an answer, though direct, are, by reason of the manner in which they are made, evasive, and would not be sustained on exceptions, yet if other parts of the answer allege facts responsive to the bill, and which are inconsistent with, and thus deny the material allegations of the bill, such parts may be taken in connection with the evasive denials and form a sufficient denial to entitle the defendant to a dissolution of the injunction."

It is submitted that every reason exists why an answer should not be too critically considered, but should be liberally construed on a motion to strike out an answer, which is the same thing as demurring to the answer where the striking out of the answer on account of some inconsistencies contained therein may deprive altogether a deserving defendant of an existing meritorious defense.

If the answer in the case at bar be thus favorably construed the following matters therein set forth may be taken as conceded in the case, because in demurring to an answer or any other pleading the allegations of fact therein contained must be conceded to be true:

1. Notwithstanding the defendants' diversions, there has at all times remained in the Passaic River

and flowed past the complainant's works sufficient water available for reasonable riparian uses.

2. The fact that the complainant ceased to take its water supply from the Passaic River since about November, 1905, was not because of insufficient water available for its uses, but because the water in the Passaic River, though sufficient in quantity, had become unfit for the complainant's uses through pollution, not caused by the defendants, but caused by the City of Paterson and by the complainant itself and other dyers and manufacturers.

3. Ever since the complainant has occupied its works on the Passaic River it has always used its water supply for the dyeing of fabrics, whereby the water has been discharged into the Passaic River by the complainant opposite its dye works in a polluted condition and in such a condition as to constitute a public nuisance.

4. If the defendants had not empounded or diverted any water from the Passaic River at any time the use the complainant would have made of the water, of which it alleges the defendant deprived it, would have been in like manner for the dyeing of fabrics, whereby the water would have been discharged into the river by the complainant opposite its dye works in a polluted condition and would have been a common nuisance and would have been an unriparian use of said water.

The complainant's counsel in support of their motion particularly relied upon the propositions of law expounded by Emery, V.-C., in *Paterson v. East Jersey Water Co.*, 74 N. J. Eq., 49, affirmed on the Vice-Chancellor's opinion by this Court in 77 N. J. Eq., 588.

Some of the principles laid down by that decision may be enumerated as follows:

1. A lower riparian owner is entitled to restrain an unlawful diversion of the water of a stream by a water company, though he fails to show actual perceptible injury from diminution of the quantity of the water, where a continuance of the diversion may ripen into a right of appropriation by prescription, and the water company has made contracts with various persons and municipalities to supply water for long terms of years, with right of renewal (Headnote 12).

2. The uses of water of a flowing stream must, in order to be reasonable, be consistent with the occupation and enjoyment of the riparian lands; and where a water company diverts such a perceptible quantity of the water as to exclude the application of the maxim, "*De minimis non curat lex*," and such water is used to supply its customers, some of whom are located in a different watershed, such use is unreasonable and entitles a lower riparian owner to relief by injunction (Headnote 14).

3. In determining whether the maxim, "*De minimis non curat lex*," shall be applied to prevent injunctive relief against the diversion of the water of a stream, the condition of the stream at the time of its lowest stage must be considered, and not the average flow, arrived at by taking all the stages of the water (Headnote 16).

4. Where a municipal corporation claims the right by statute to pollute the water of a river by the discharge of its sewage, equity will deny it relief by injunction against the diversion of the water of the river by a water company for the purpose of

supplying pure water to municipalities and private companies, and will remit complainant to any remedy it may have at law (Headnote 19).

5. That while the diversion of the water by the defendant for purposes of sale is an infringement of the complainant's right as a lower riparian owner to the continued flow of the stream, and while without proof of any actual or perceptible damage so far as the establishment of its legal right is concerned, if the diversion is of such a perceptible and sensible amount as not to be excluded under the maxim "*De minimis*," complainant is entitled to resort to the Court of Chancery for protection against defendant's claim of the right to divert and to continue the diversion, and while if that view be correct, the examination in detail of the evidence bearing upon the matter of actual damage, and the extent to which the diversion has so far affected the use and enjoyment of the complainant's riparian lands, becomes unnecessary for the purpose of settling the complainant's right; *nevertheless the examination of that evidence is of importance in other aspects of the case, viz., as affecting either the right to an injunction, or the terms and conditions upon which any injunction should be issued* (74 N. J. Eq., p. 86, line 25, to p. 87, line 5).

We submit that Vice-Chancellor Emery's decision in *Paterson v. East Jersey Water Company*, *supra*, cannot be construed as laying down any rule inconsistent with the elementary rule that the granting or withholding of an injunction under any state of facts is a matter within the discretion of the Court of Chancery.

As stated in *Wood v. Sutcliff*, 2 *Sim. (N. S.)*, 163:

“Whenever a court of equity is asked for an injunction in cases of such a nature as this, it must have regard not only to the dry, strict rights of the plaintiff and defendant, but also to the surrounding circumstances; to the rights or interests of other persons which may be more or less involved; it must have regard to those circumstances before it exercises its jurisdiction of granting an injunction.”

See also:

Torrey v. C. & A. R. Co. et al., 18 *N. J. Eq.*, 293.

We submit that the right of the complainant to an injunction under all the circumstances of this case cannot solely depend upon the question whether the defendants are unlawfully diverting water which would otherwise flow by the complainant's dye works, but must also depend upon the attitude in which the complainant stands before the Court seeking this relief, and upon the consideration that there is to-day plenty of water available for the complainant's use.

We draw the Court's attention to the following authorities:

Per Lord Camden in *Smith v. Cly*, 3 *Bro. Ch.*, 629, note:

“A court of equity is never active in relief against public convenience.”

“The mere fact of a partial wrongful diversion of a water course does not entitle

the land owner to an injunction as of right. The granting of the injunction must rest in the sound discretion of the court governed by the nature of the case."

Watson v. New Milford Water Co., 71
Cont., 442.

Terrell v. Marietta Paper Mfg. Co., 99
Georgia, 206.

Hough v. Doyleston, 4 *Brews., Pa.*, 333.

POINT I.

The first question would, therefore, seem to be whether the amount of diversion of twenty-three million gallons daily (p. 3, line 27; admitted by the Fourth Paragraph of the Answer) was of such a perceptible and sensible amount as not to be excluded under the maxim "*de minimis*" (74 *N. J. Eq.*, p. 86) —and our contention is that that was a question not properly determinable upon a motion to strike out the answer, but one concerning which the defendants should have been permitted to offer proofs. The thing to be ascertained was whether or not the daily extraction of twenty-three million gallons of water from the river would appreciably diminish the total flow of the stream in times of low flow.

Although in the *Paterson* case (74 *N. J. Eq.*, p. 90), Stevens, *V.-C.*, after examining the evidence, found that a diversion of about 22,000,000 gallons daily was a "material and sensible diminution of the entire flow," nevertheless, unless the determina-

tion in that case can be said to be *res judicata* as to the parties in the case at bar (which cannot be so, the parties in the two cases being different parties) there is nothing in the pleadings from which it can, in the case at bar, be determined as a matter of law that defendants are materially diminishing the total flow of the stream, except the allegation in the sixth paragraph of the bill (p. 6, line 33 *et seq.*), that "the natural flow of the water of said river has been so diminished that the banks and bed of the said river at said complainant's premises are rendered bare, unsightly, noxious and unhealthy," which allegation seems to have been inadvertently admitted by the sixth paragraph of the answer, although the answer denies any damage thereby, but alleges that the damage is caused solely by the noxious material deposited in the river.

We submit that the answer sufficiently raised this question as a question of fact, and that the complainant should have been permitted to offer proofs in support thereof.

Whether the natural flow of the waters of a river has been so diminished as to exclude the maxim "*de minimis*" must necessarily depend upon the volume of water flowing down the river in times of low flow, and as the pleadings contained no allegations on that subject, it would seem that proof should be admitted to show whether the proportion which the amount of water diverted bore to the total flow of the water in times of low flow was or was not large enough to exclude the maxim "*de minimis*."

The criticism that the denials in the answer which are objected to are repugnant to other parts of the answer which admit that large quantities of water have been diverted, is unfair because it dis-

regards the statements which permeate the answer that notwithstanding all actual diversions, there was always plenty of water left in the river for complainant's uses. There is nothing in the pleadings to indicate what the normal flow of the Passaic River is, or would be, were there no diversions, nor is there anything to show what the low flow of the Passaic River would be were there no diversions, so that no conclusions can be arbitrarily drawn that the admitted diversions of so many million gallons daily are sufficiently large to exclude the "*de minimis*" rule, or to necessarily, or even probably, contradict the allegation in the answer that notwithstanding the diversion there was always plenty of water in the river.

Perhaps the answer might have been a little more specific and denied that the banks and bed of said river at complainant's premises were rendered bare, unsightly and unhealthy as well as noxious. We thought that in denying that the natural flow of the river (had there been no diversion) would have carried away the noxious substance, and in denying any diminution in value of the complainant's plant as a result of the diversion we were being sufficiently specific without categorically denying every evidential fact alleged in the bill to support that claim.

POINT II.

In reversing the second judgment referred to in the tenth paragraph of the answer (pp. 13-14) this Court necessarily held that the East Jersey Water Company was not concluded in said second action by the judgment in the first action; and as to the Montclair Water Company and the Acquackanonk Water Company, they were not parties to said first action, and were not bound by the judgment therein.

The reason the answer alleges that this Court necessarily held that the defendants were not estopped by the former judgment when it reversed the second judgment and remitted the record to the Supreme Court for retrial was this. This Court held on review of the second judgment that the Trial Court had erred in refusing to charge, as requested by counsel for the defendants, "*that the plaintiff had no right to complain of the diversion by the defendants if you (the jury) find that the only damage the plaintiff suffered was being thereby prevented from committing a nuisance,*" and this Court, in *Auger & Simon Silk Dyeing Co. v. East Jersey Water Company* (88 N. J. L., 273-276), which was the foundation for the reversal of the judgment in *Weidmann Silk Dyeing Co. v. East Jersey Water Co.* (88 N. J. L., 400), held that:

"When the riparian owner abstracts water from a running stream for the purpose of so using it that it will be returned to the stream, in such a polluted condition as to appreciably deprive it of its natural qualities and render it unfit for the use of the public, thereby committing a nuisance, he is not

making the reasonable use thereof to which he is entitled as such owner, and that any damage he may suffer because he is not able to do this because of the act of the defendant, is not more than nominal, *if any*, and therefore it was error to refuse the requests above stated."

Note that while one of the requests stated was that "if they (the jury) should find that the plaintiff would use the diverted water if it were not diverted for the purpose of further polluting the river, then the plaintiff cannot claim more than nominal damages from the defendants, who stand in the shoes of the municipalities whom they are supplying with the water for depriving the plaintiff of the water," the other request was "that the plaintiff had *no right to complain* of the diversion by the defendants if you find that the only damage the plaintiff suffered was being thereby prevented from committing a nuisance." *So that under the opinion it would be competent for the jury to find on the retrial that the plaintiff had suffered no damage at all, not even nominal damage, and that could not have been the case if this Court had held that the defendants were estopped by the first judgment.*

This point, however, is not of much importance in the case, inasmuch as the Chancellor struck the answer out as disclosing no defense independently of the question whether as a principle of substantive law the judgment in the former suit operated to estop the defendants on the question of liability—the Chancellor holding that all the defendants were concluded as to all matters of defense not passed upon by this Court in the *Auger* and *Simon* cases.

We quote the following excerpt from the Chancellor's opinion (102 *Atl. Rep.*, p. 869) on this subject:

“Rule 72 under the practice act, providing that in case a new trial is granted it shall be only of the question or questions with respect to which the verdict is found to be wrong, if separable, applies. The pleadings before me do not show what other issues were involved in the exceptions taken and brought before the court for review; but, as the only question with respect to which the decision of the trial court was found to be wrong is in respect to the refusal to charge two requests on the question of damages, *it appears that no other questions are open for litigation upon a retrial.* (Italics ours.) This provision of the practice act applies to new trials granted by the Court of Errors and Appeals, for that act, where applicable, extends to the Court of Errors and Appeals. See *American Life Ins. Co. v. Day*, 39 *N. J. Law*, 89. Rule 72 under the practice act (P. L. 1912, p. 397) is now rule 131 of those promulgated by the Supreme Court, June term, 1913, and by this rule the provision as to limited retrials is expressly made applicable to appeals.

These views make it unnecessary to consider whether, as a principle of substantive law, the judgment in the former suit operates to estop the defendants on the question of liability—the East Jersey Water Company as a party to that action and the Montclair Water Co. and the Acquackanonk Water Co. as successors in interest of, and as parties in privity with the East Jersey

Water Co. because they are concluded by the practice act and rules mentioned" (p. 73, line 40; p. 74).

If the above excerpt from the Chancellor's ruling is correct, it would seem that the defendants would lose their right at the next trial of the law actions to present defenses concerning the validity of which this Court has not passed, although those questions were properly presented to it for determination. Of course we cannot claim that if this ruling on the part of the Chancellor is erroneous, that error should be ground for reversal, if his decision is right for other reasons. We desire, however, to protect the defendants against this Court's "affirming on the opinion," and thereby giving its approval to the Chancellor's error, if it be an error.

The point we make is that either the effect of the Supreme Court rule, as interpreted by the Chancellor, is to render it obligatory upon this Court in every case to pass on all exceptions properly presented by grounds of appeal, or else that the rule in question is unconstitutional as impairing the appellate jurisdiction of this Court and depriving the defendants of their property without due process of law. The defendants do not want to be foreclosed from defending on the whole case if any or either of the actions at law in which a new trial was ordered should be brought to trial again

Furthermore, the grounds of the decision in *Weidmann Silk Dyeing Co. v. East Jersey Water Co.* (88 N. J. L., 400) were expressly stated by this Court to be the same as those in the *Auger & Simon* cases (88 N. J. L., p. 273).

The grounds of the decision in those cases were, that if it should appear that the riparian owners,

who were the plaintiffs, were themselves using the water so as to appreciably impair its quality, and were thereby committing a nuisance, they were not making the reasonable use thereof to which they were entitled, and that any damages they might suffer because they were not able to do this because of the act of the defendant was not more than nominal, *if any*, and therefore it was error on the part of the Trial Court to refuse the requests to charge the jury accordingly, one of those being "that the plaintiff had no right to complain of the diversion by the defendants if you (the jury) find that the only damage the plaintiff suffered was being thereby prevented from committing a nuisance." The effect of this decision was to set aside entirely the judgment below, and to require a new trial, at which the jury should be properly instructed, and which might accordingly result in a verdict in favor of the defendant as upon such retrial the jury might find, in accordance with such instructions, that the plaintiff had suffered *no* damages and could not therefore recover. It would seem, therefore, that it was erroneous to suppose that the effect of the decision of this Court was simply to confine the retrial to the question of the amount of damages.

That this Court did not intend to confine the retrial to the single question of damages, but intended that such retrial should be of the entire case, is further evident from the fact that it held that having decided this one point in favor of the defendant, it was unnecessary to consider the other grounds of appeal which were offered, fifty in number (88 *N. J. L.*, p. 276). The Court said:

"The result which we have reached on this branch of the case makes it unnecessary to consider the other exceptions sealed in these

cases. The judgment in each case will be reversed and a new trial awarded."

The clear intent of that language would seem to be that the Court, having found an error in one particular which required a retrial of the entire case, it was unnecessary to inquire whether the other grounds of appeal, or any of them, also set forth matters of error upon which the judgment might have been reversed and a new trial granted.

Of course, if this Honorable Court finds that the answer of the defendants, assuming all the allegations therein contained to be true, presents no defense to the complainant's bill, then any discussion as to the effect of the former judgment in the Supreme Court is irrelevant. But if this Court should hold that any of the defenses set up in the answer are valid, then it is essentially material that this Court should determine whether or not the defendants are excluded by the former judgment from presenting such defenses.

POINT III.

The complainant's suit is one brought in violation of the maxim "*He who comes into equity must come with clean hands.*" At all events, the conduct of the complainant is such as to disentitle it to demand from the State of New Jersey the aid of its extraordinary writ of injunction.

We submit that it is one thing to say that a riparian owner can obtain an injunction against unlawful diversion without proving any pecuniary damage, and quite another and different thing to

say that a riparian owner using the water for un-riparian purposes and in such a way as to be guilty of committing a common nuisance (and for purposes of the present motion it must be taken as conceded that the complainant so used the water) can obtain an injunction to prevent the use of water for municipal purposes involving public interests and necessities, so as to add to the volume of the water which the complainant is polluting and contemplates to continue to pollute in the future. If for such a use of water the plaintiff cannot recover at law, *a fortiori* can he receive no relief in equity. If by reason of the extension of the time for the building of the trunk sewer the complainant is entitled to immunity temporarily from criminal prosecution, this Court has practically held in the *Weidmann* and *Auger & Simon* cases that the Legislature did not thereby intend to give to these polluters a right to make money by bringing a civil suit for damages, and we submit that it would be an abuse of the administration of justice to say that while that remedy was not open to them at law the Chancellor would, nevertheless, for the benefit of these polluters, cut off the water supply essential to the health and lives of many municipalities.

Of course we recognize the limitation on the practical application of the maxim (he who comes into equity must come with clean hands), namely, that when a court of equity is appealed to for relief it will not go outside of the subject-matter of the controversy and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant or the relief which he demands (*Pomeroy's Equity Jurisprudence*, Vol. 1, paragraph 399). But here the very conduct of

the complainant in polluting the river under this Honorable Court's decisions does directly affect the legal right of the complainant first attempted to be asserted against these defendants in an action at law, and to the same extent must necessarily affect its equitable rights now sought to be asserted against them in this suit. Reading the bill and answer together, the complainant and the defendants are *in pari delicto*. They are both supposed to be engaged in polluting the Passaic River to the damage of lower riparian owners and the State of New Jersey, the defendants by diverting water which would otherwise have tended to dissolve the pollution, and the complainant by adding pollution to the water. Nothing is better settled than that whenever a transaction is illegal, and the parties thereto are in contemplation of law *in pari delicto*, a court of equity will not aid a *particeps criminis*, and this principle is applied in the same manner when the illegality is merely a *malum prohibitum*, being in controversion to some positive statute, and when it is a *malum in se*, as being contrary to public policy or to good morals (*Pomeroy's Equity Jurisprudence*, Vol. 1, Sec. 402).

“It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct connected with the controversy to which he is a party will repel him from the forum, *whose very foundation is good conscience*” (*Pomeroy's Eq. Jurisprudence*, Vol. 1, Sec. 404).

It has been held in accordance with the maxim (relating to clean hands) that a plaintiff who main-

tains a nuisance *has no standing in equity to enjoin its unauthorized abatement.*

*Pittsburg C. C. & St. Louis Railway Co.
v. Town of Crothersville, 159 Ind., 330.*

But, says the Chancellor, in the opinion now under review referring to the defense that the complainant does not come into Court with clean hands:

“As to the equitable defense that the complainant does not come into court with clean hands because, with others, it is polluting the Passaic River, and that were it not for that pollution, Newark, Jersey City, Paterson, Passaic, and the various other municipalities which use up the water which is diverted by the defendants could take and use that water and yet leave sufficient in the river for all legitimate uses of the dye houses and other riparian owners, including the complainant, below the point of diversion, and that there would be plenty of water left in the river for their uses were it not so polluted, it would seem to be sufficient to say that as the defendants admittedly divert the water above and not below the riparian lands of the complainant, it is not available to the defendants to assert that if things were not as they are but as they might possibly otherwise be that the complainant is not entitled to relief, especially as the thing complained of in the bill, namely, the palpable and appreciable diversion is caused by the defendants, who, as a fact, are in no wise injured by the conduct of the complainant” (p. 69).

We submit that the question is not as to whether the defendants were in anywise injured by the conduct of the complainant in polluting the river. The

real question presented is two fold; (1) whether a suitor who is committing a common nuisance to the injury of the State of New Jersey's water rights in the stream can ask the State of New Jersey to grant its extraordinary writ of injunction restraining an upper riparian owner from diverting water which, if not diverted, would be used for the very purpose of committing the nuisance, and (2) whether a riparian owner who is using the water for an illegal purpose, enjoys any of the rights of a riparian owner so as to entitle him to enjoin an upper riparian owner from diverting water from the stream for municipal purposes.

As to the first question, it is well settled that an action for damages is a matter of right, *but that an injunction is of grace.*

Hilliard on Injunctions, page 20.

In *Pittsburg C. C. & St. Louis Railway Co. v. Town of Crothersville*, 159 Ind., 330, *supra*, the headnote reads:

"On the ground that he who comes into a Court of equity must come with clean hands, the plaintiff in a suit to enjoin the abatement of stock pens as a public nuisance must allege and prove that the stock pens were not a public nuisance, although the defendants were without authority to abate such nuisance.

It is a well settled maxim that he who comes into equity must come with clean hands. Here appellant, under the facts found, seeks the aid of equity to enjoin the appellees from abating a public nuisance maintained by it on the ground that they have no right to abate it. To grant such re-

relief to appellant, who is maintaining the public nuisance, would be contrary to the well settled principles of equity.

To grant appellant the relief prayed for under the facts found would be *to aid it in maintaining a public nuisance, a crime under the laws of this State.*" (Italics ours.)

In *Cassady v. Cavenor*, 37 Iowa, 300, it was held that

"One cannot successfully claim that a structure standing on his neighbor's premises is a nuisance and procure an abatement of the same when he maintains one equally offensive on his own premises."

And in *Fairfield Co. v. Bradbury*, 89 Federal, 393, it was held that:

"A corporation complainant has no standing in a Court of Equity to obtain an injunction restraining a Post Master from enforcing a fraud order issued against it by the Post Master General, where the grounds alleged in its bill are that it is extensively engaged in a business which it conducts largely through the mails, and for which purpose it desires their use, and where, by the proofs, such business is shown to be one for which the postal system cannot be lawfully used under the laws of Congress."

See also *Board of Trade of City of Chicago v. O'Dell Co.*, 115 Fed., 574, and cases collected in Vol. 8, *American Digest* (Decennial Edition) under "Equity," §65 (1).

We respectfully submit that if a complainant who maintains a nuisance has no standing in equity to enjoin its unauthorized abatement, as was held in *Pittsburg C. C. & St. Louis Railway Co. v. Town of Crothersville*, 159 Ind., 330, *supra*, neither has a complainant who maintains a nuisance any standing in equity to ask the State of New Jersey, against which it is thus offending, to issue as a matter of grace its extraordinary writ of injunction to enjoin water companies who are upper riparian owners from diverting water for municipal purposes, which water (if not diverted) would be used by the complainant for the purpose of polluting it, and after polluting it restoring it to the river in a polluted condition to the injury of the State.

If the complainant was, in precise language, seeking an injunction to prevent the defendants from interfering with their dyeing business (admitted by the pleadings to be a nuisance), then the application of the above authorities would be complete, and complainant would be clearly entitled to no relief. We submit that that being really the aim and object of the complainant's bill the complainant cannot obtain relief by sheltering itself under the subtly evasive claim that it seeks an injunction not to prevent the defendants from interfering with its dyeing business, but to prevent them from changing the natural flow of the river.

Secondly, we submit that a riparian owner who is unlawfully using the water of a river for unriparian purposes and would use the diverted water if not diverted for unriparian purposes, has none of the rights of a riparian owner, and (if such term may be used) has disfranchised himself as such and

estopped himself from claiming any such rights while such unlawful use of the water continues or until it can be shown by him that he intends in the future to use the water solely for riparian and not unriparian purposes.

In conclusion we submit that the motion to strike out the answer should have been dismissed or laid over until the hearing, but if this Honorable Court should think otherwise, then we submit that as the effect of said motion was exactly that of a demurrer to an answer, this Court, under the familiar common law rule, should examine all the pleadings and give judgment against the party whose first pleading is found to be bad in substance. We submit that under the application of that rule the bill in this case, which seeks an injunction which would operate to cut off the water supplies of several municipalities, should be held defective because it has not brought in said municipalities as parties defendant thereto.

Wilson, Attorney-General, v. East Jersey Water Co., 78 N. J. Eq., p. 329.

If the decree in this case should be affirmed, and the defendants should submit to the issuance of the injunction thereby granted, would it be exactly fair that the water supplies of the numerous municipalities supplied by the defendants should be suddenly cut off without their being afforded an opportunity of even expressing an opinion on the subject?

Respectfully submitted,

JOHN B. HUMPHREYS,

GILBERT COLLINS,

Of Counsel with the Defendants.

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New Jersey Court of Errors and Appeals

Between
WEIDMANN SILK DYEING Co.,
a corporation,
Complainant-Respondent,

and

THE EAST JERSEY WATER Co.,
THE MONTCLAIR WATER Co.,
and THE ACQUACKANONK
WATER Co.,
Defendants-Appellants.

On Appeal
From
Chancery.

BRIEF FOR RESPONDENTS.

I.

The answer was properly stricken out on the ground that it disclosed no defense to the relief that the complainant asked for.

The complainant, in recognition of the quasi public character of the ultimate use of the water by the consumers, asked the Chancellor for an injunction upon the equitable terms that the injunction should be granted only in case the defendants should refuse to condemn the complainant's rights by condemnation proceedings at law, and the decree

of the Chancellor appealed from grants such limited relief.

We contend that upon the facts alleged in the bill and admitted by the answer the complainant's right to the relief so granted is settled in the case of Paterson v. East Jersey Water Company, 4 Buch., 49, which was affirmed by this Court for the reasons stated in the opinion filed by Vice-Chancellor Emery (7 Buch., 588).

In our view substantially every question involved in the case *sub judice* was involved and decided in that suit.

In that suit the defendant was the East Jersey Water Company, the same defendant as in this suit, and the water was diverted at the same place and taken for the use of the East Jersey Water Company, the Acquackanonk Water Company and the Montclair Water Company, the three defendants in this suit.

In that case, as in this, the location of the complainant's land affected by the diversions was in the City of Paterson. In each case the character of the diversion is the same; in each case defendant was upper riparian owner of land where the water was taken and diverted; in each case the defendant did not use the water upon its riparian land and return it to the river after ordinary uses upon the land, but permanently abstracted it from the river for the purpose of consumption elsewhere.

In *Paterson v. East Jersey Water Co., supra*, although the defendant permanently abstracted and sold the water for consumption by distant municipalities, it took the position that, since it was an upper riparian owner, it had the right as *such riparian owner to sell and permanently divert*, as against a low riparian owner, in the same manner

as if the water were used for the riparian land, and the defendant further argued that, if the diversion caused no perceptible injury to the lower owner, the *maxim de minimis* applied.

The Vice-Chancellor decided:

FIRST: *That the maxim de minimis did not apply to such cases because such abstraction was not the reasonable use which an upper riparian owner was entitled to make against the lower owners.*

After a full discussion of the subject and citation of the authorities supporting that view, the Vice-Chancellor, at page 86, says:

“On this branch of the case, therefore, I reached the conclusion that the diversion of the water by the defendant for purposes of sale is an infringement of the complainant’s right as a lower riparian owner to the continued flow of the stream, and that without proof of any actual or perceptible damage, so far as the establishment of its legal right is concerned, if the diversion is of such perceptible and sensible amount as not to be excluded under the *maxim de minimis*, complainant is entitled to resort to this court for protection, in view of the fact, against defendants’ claim of the right to divert and continue the diversion.”

Again, the Vice-Chancellor, as to the application of the maxim, at page 73, says:

“In view of these denials of right by defendant and its contracts for long continued and necessarily increasing future diversion, the maxim, *de minimis non curat lex*, can

have no application to complainant's suit for *present declaration and protection* of its right, even if it should be concluded that up to this time the diversion, compared with the flow of the river, has been so slight as to bring the case *within the maxim.*"

Again, the Vice-Chancellor says that the "protection" of this right by the Court is by means of the injunction which under certain circumstances will be given upon equitable terms and conditions. Upon this point, at page 98, he says:

"Assuming complainant's right to the protection of this court to be established, the question of greatest difficulty in the case relates to the manner in which the protection shall be given, and the terms and conditions, if any, which should be imposed. Relief in equity should certainly extend, I think, to a declaration of complainant's right; but under the general practice of the court, and independent of statute, such declaration can be made only as incidental to and the basis of some equitable relief. 3 *Dan. Ch. Pr.* (6th Am. ed.), *2181, note. This power has been given to the court of chancery by statute in England, and in a leading case (*Swindon Water Company v. Wilts & Berks Canal Co., supra*) was followed in directing the injunction. See 1 *Seton Dec.*, p. 214.

Complainant, having established its right, is entitled, if the general course of practice be followed, to the equitable relief by which alone the right can be protected, an injunction against its violation."

SECOND: *The Vice-Chancellor decided that the maxim was material or applicable only for the purpose of determining on what terms and condition the injunction should issue.*

At page 87 he says:

“And while this maxim may, in view of the defendants’ claim of right to divert, and in increasing quantity, be inapplicable, so far as it is relied on to deprive complainant of a right to present protection *by injunction or otherwise*, it may be applicable when we come to consider the terms and conditions upon which any injunction should issue.”

THIRD: *The Vice-Chancellor decided that the terms and conditions which would be imposed in case the maxim should be applied where the defendant had the power to condemn at law or could invoke such power would be that the injunction should issue, unless such power to condemn at law should be exercised within a reasonable time to be limited by the Court.*

In that case the defendant offered to make compensation for the damages in the Court of Chancery, and vigorously contended that, in view of the great public interest involved, the failure to make compensation to be determined by the Court of Chancery as tendered should be made the condition upon which the injunction should issue.

The Vice-Chancellor, after a review of the decisions on this question (pp. 98-100), at page 100, said:

“But it is clear, I think, that the circumstances must be exceptional, that the public

injury must be great and manifest and that *there must be no other method of preventing a great public injury while protecting the individual property right by the ordinary lawful process.*"

The result of the Vice-Chancellor's decision on this question is:

(1) That the Court will not out of consideration of any public interest, however great, order the failure of compensation to be made *in the Court of Chancery* as the condition upon which an injunction will issue where the defendants or the public body whose interest is involved have the right to condemn *at law*.

(2) Where there has been long acquiescence by the complainant and great public injury will be done by an injunction and *the public interests cannot be acquired by condemnation at law*, payment by compensation in the Court of Chancery may be ordered as a condition to the injunction.

According to these principles, decided in Paterson v. East Jersey Water Co., supra, the answer disclosed no defense to the limited relief asked for and granted.

We purpose to show, first, that the answer expressly admits facts alleged in the bill which entitles the complainant to such relief, and, secondly, that the facts alleged in the answer by way of new matter do not affect complainant's right to relief under the facts so expressly admitted.

FIRST: *From the facts alleged in the bill and admitted by the answer the complainant is entitled to the relief granted.*

The facts alleged in the several paragraphs of the bill and admitted in the answer are as follows:

(Par. 1) That the complainant since the year 1887 continuously until the filing of the bill has owned in fee and occupied a united tract of land at Paterson, running along the Passaic River a distance of about 1,500 feet, covering the bed of the river for that distance, and consisting of about fifteen acres, exclusive of the bed of the river, and that on said land are erected the buildings and machinery constituting the complainant's silk plant.

(Par. 2) That the Passaic River is a natural water course, flowing through complainant's premises above tidewater, and a private stream at complainant's premises.

(Par. 3) That prior to and until the impounding and diversion of the water in said bill mentioned the complainant had used the water in its business.

The defendant the East Jersey Water Company is a private corporation organized under the General Corporation Laws of the State of New Jersey.

From June, 1906, to June, 1912, the defendant the East Jersey Water Company, at a dam, reservoir and works owned and operated by it at Little Falls, in the County of Passaic and State of New Jersey, on said Passaic River, above the said premises of the complainant, has impounded, held back and diverted from said Passaic River, during said last-named six years, an average daily quantity of 16,000,000 gallons of water and conveyed from said Passaic River to other places said last-named water, which was not returned to said river and which otherwise would have flowed through the complainant's said premises.

From June, 1912, continuously until the present time the said defendants, the East Jersey Water Company, the Montclair Water Company, a corporation, and the Acquackanonk Water Company, a corporation, by concert and agreement among themselves, have jointly owned and operated said works at Little Falls for their joint and common benefit, and by concert and agreement have jointly diverted from said Passaic River at Little Falls, for their joint and common benefit, quantities of water, averaging from about 21,000,000 gallons daily during the year 1912 to about 23,000,000 gallons daily during the year 1914, and that from the year 1914 until the present time, and at the present time, the said three defendants, at said works at Little Falls aforesaid, have constantly, jointly diverted and are now so jointly diverting quantities of water from said Passaic River for their joint and common benefit considerably in excess of 23,000,000 gallons daily, and during said time have and now are conveying the same from said Passaic River to other places and consuming the same for their joint and common use, so that the same has not been and is not returned to said river and has not and does not flow through the complainant's said premises as it otherwise would, and that said three defendants are still diverting said last-named quantities of water from said Passaic River as aforesaid, and intend to do so hereafter in constantly increasing daily quantities.

(Par. 5) That the complainant has operated its plant and conducted its business therein continuously from the year 1887 or thereabouts until the time of filing the bill, during which time the property has been and was at the time of filing the bill of great value, and that the complainant had em-

ployed and was employing at the time of filing the bill several hundred employees, and had and was then doing a large and profitable business; that the said water which had been so impounded and diverted and prevented from flowing into the said works of complainant during all of the said time of said impounding and diverting has been necessary for the use of the complainant in supplying its said works for the use and operation of its said business therein, and would have been used during all of said time by the complainant in its said business if the complainant had not been deprived of the use thereof by said defendants as aforesaid; that in an action at law in the Supreme Court of New Jersey, commenced on or about June 13th, 1912, complainant obtained a judgment final against the East Jersey Water Company on or about March 6th, 1914, for \$22,212 and costs for said damages sustained by the complainant for said deprivation of said water by said East Jersey Water Company of which complainant had been deprived as aforesaid during the six years from June 13th, 1906, until June 13th, 1912, as aforesaid; that the amount of said judgment and costs and interest thereon were paid to the complainant by the East Jersey Water Company on or about March 12th, 1914; that the said impounding and diversions of said defendants the Montclair Water Company and the Acquackanonk Water Company jointly with the defendant the East Jersey Water Company as aforesaid were made at the said dam, reservoir and works at Little Falls theretofore owned and operated by the East Jersey Water Company.

(Par. 6) That complainant's said plant consists of said land and many buildings thereon; the allegations of the bills that the same exceeds in value the sum of \$1,000,000, and that said plant may be

used for dyeing purposes and for many kinds of manufacturing and other purposes, is not denied in the answers, which state that defendants have no knowledge or information sufficient to form a belief with respect thereto. The answers deny that the undiminished flow of water in said river at said plant is a large or anything but an insignificant element of value in said plant for its use in the business of dyeing goods, and deny that the diminished flow due to defendants has greatly or appreciably diminished the value of complainant's plant, but do not deny that the same *appreciably* diminished the value of the *use* of the complainant's plant for any use to which the same may be put. The answers admit the allegations of the bills that said impoundings, interruptions and diversions have greatly and materially reduced the quantity of water which would naturally flow past complainant's premises during the time of said diversions. The answers also allege in paragraph 12 thereof that the result of the operation of the works of the defendants where they diverted said water necessarily substantially diminished the flow of water in said river below said points of diversion and at complainant's works. The answers deny that the natural flow of said river, if said impounding, interrupting and diversions had not been made, would have carried away the material deposited in the river which was noxious merely, but the answers do not deny, and, therefore, admit, the allegations in the bills that by reason of said impounding, interruption and diversions the natural flow of the water of said river has been so diminished that the banks and bed of the river at complainant's premises are rendered bare and unsightly, due to the deposit of material which the natural flow of said river would have carried away, and which bareness of banks and bed the water would presumably have covered if

said impounding, interruption and diversions had not been made, and said portions of said answers admit that said condition will so continue thereafter if said impoundings, interruptions and diversions are continued.

(Par. 7) The answers admit the allegations of the bills that all said impoundings, interruptions and diversions made by the defendants were without the license, agreement or consent of the complainant.

From the admitted facts the standing of the parties is clear.

Complainant stands as owner of riparian land entitled to the natural flow of the water as appurtenant to its land, and the defendants stand without right to disturb such natural flow, and stand for such disturbance as *tort feasors* against the complainant.

1. The diversion by the defendants of 23,000,000 gallons of water per day admitted by the answer, not for ordinary riparian uses and to be returned to the stream, but the permanent abstraction thereof from the stream for the purpose of consumption elsewhere, is a sufficient ground for the limited relief, actually granted, *even if the diversion does not perceptibly diminish the stream and cause the complainant actual damage*, where, as in this case, the defendants deny complainant's rights and intend to continue increasing future diversions, so that such continuance may ripen into a right by prescription. The right to such relief is clearly established in *Paterson v. East Jersey Water Co., supra*,

Vice-Chancellor Emery, in his opinion, at page 73, says:

“In view of these denials of right by defendant and its contracts for long-continued and necessarily increasing future diversion, the maxim, ‘*De minimis non curat lex*,’ can have no application to complainant’s suit for present declaration and protection of its right, even if it should be concluded that up to this time the diversion, compared with the flow of the river, has been so slight as to bring the case within the maxim.”

Again, on pages 85 and 86, he says:

“A rule declared in this later decision of the court of appeals, that the uses of the water of a flowing stream, both ordinary and extraordinary, by the riparian owner, must, in order to be reasonable, be connected with the occupation and enjoyment of the riparian lands themselves, and as an incident to such enjoyment, and that the permanent diversion of the waters for non-riparian user and for sale is an unlawful use, is the one now generally, if not universally, adopted; and the courts taking this view also agree that, in order to obtain relief against such unlawful or unreasonable use, *it is not necessary that the lower riparian owner show any actual damage. Where such diversion is not admitted to be unlawful, but is claimed as of right, and its continuance is threatened, the prevention of the acquisition of an adverse right to divert is of itself sufficient ground for protection by the court of chancery.* It was so finally settled by the house of lords in England in *Swindon Water Co.*

v. *Wilts & Berks Canal, L. R.*, 7 H. L. (*Eng. and Ir. App.*), 697. 'Such use (a diversion by a water company for purposes of sale) and a claim of a right to make it,' said Lord Chancellor Cairns, 'in this case, is a use which virtually amounts to a complete diversion of the stream, as great a diversion as if they had changed the watershed of the country, * * * and is not a use of the stream which could be called a reasonable use by the upper owner. It is a confiscation of the rights of the lower owner. It is an annihilation, so far as he is concerned, of that portion of the stream which is used for those purposes, and is done not for the sake of the tenement of the upper owner, but that the upper owner may make gains by alienating the water to other parties who have no connection with any part of the stream. *It is a matter quite immaterial whether any injury has now been sustained, or has not been sustained by the lower riparian owner.* If the appellants (the diverters of the water) are right, they would at the end of twenty years, by the exercise of this claim of diversion, entirely defeat the incident of property, the riparian right of the lower owner. That is a consequence which the owner has a right to come into the court of chancery to get restrained at once, by injunction or declaration, as the case may be.' And this right to protection by the court of chancery, in order to prevent the acquisition of an adverse right, is recognized, I think, by Chancellor Vroom in the *Soc. U. M. Case*, *supra*, and by Chief Justice Beasley in the *Higgins Case*, 36 N. J. Eq., 544. Among other leading authorities on this point, these may be added:

Webb v. Portland Manufacturing Co., 3 *Sumn. (U. S.)*, 189; 29 *Fed. Cas.*, 506 (Circuit Judge Story, 1838); *New York Rubber Co. v. Rothery*, 132 *N. Y.*, 293; 30 *N. E. Rep.*, 841; 28 *Am. St. Rep.*, 575 (1892)."

2. Although, as we have shown, the limited relief actually granted would be granted even if the injury were not perceptible, nevertheless the diversions must be deemed under the pleadings to be appreciable and to perceptibly injure the complainant, for the following reasons:

(a) The diversions of 23,000,000 gallons daily by the defendants admitted in their answer in this case must be deemed a perceptible diminution of the stream, causing actual damage, not only by depriving the complainant of the use of the water in its present business of dyeing, but also by depriving the complainant of any other use which the property can be put, and by *actually damaging the property itself*, irrespective of any particular business, in leaving the banks and bed bare and unsightly and by depositing offensive material thereon.

In the case of *Paterson v. East Jersey Water Co.* the Vice-Chancellor, after carefully considering whether or not the diversions in that case perceptibly affected the complainant's property, concluded that the daily diversion of 22,000,000 of gallons caused the exposure of the bed of the river, which became muddy and unsightly. "*This exposure of the bed of stream,*" says the Vice-Chancellor, at page 92, "with perhaps some slight effect the diversion of the defendant may have on the use of the river for boating, is a sensible or perceptible effect or damage, and in view of the claim of right to divert, and in increasing quantities made by de-

fendant, this actual sensible damage gives complainant as to the West Side Park additional grounds for equitable protection."

The property there referred to as sensibly injured by exposure of the bed of the stream was a public park used for recreation and pleasure. For the purposes of this motion the diversions in the present case, admitted by the answer to exceed the quantities diverted in the case of *Paterson v. East Jersey Water Company*, must be taken as a sensible and perceptible injury to the banks and bed of the stream of complainant's property either with respect to its present use or any other uses to which it may be put.

Although the pleadings do not disclose the daily quantity of water flowing in the stream, judicial notice may properly be taken generally of the size of the Passaic River and of the fact that the daily diversion of 23,000,000 gallons would perceptibly diminish the flow in times of low flow, and of the facts found in the reported decision of the Court of Chancery in the case of *Paterson v. The East Jersey Water Company, supra*, and of the facts found by this Court in affirming that case.

(b) The bill alleges that "the said impounding, interruption and diversions have greatly and materially reduced the quantity of water which would naturally flow to and past complainant's said premises during the time of said diversions, and thereby have greatly diminished the value of the use of said plant" (Bill, paragraph 6; Printed Case, p. 6, lines 27 to 33).

The only answer to this allegation is that the defendants "deny that the diminished flow of water in the river, due to these defendants' diversions, has greatly or appreciably diminished the value of the complainant's plant" (Answer, paragraph 6; Print-

Stary v. Ulman 41 A.H.R. 120
Chilende v. Miteck 50 Mich. 461
Palmer v. E.J. No 412
Crawford v. Duckworth
 3 Ind. Terr.
 53 S.W. 465

ed Case, line 40, p. 10, and line 3, p. 11), thereby not denying, and, therefore, admitting, the said allegation of the bill that the diversions have greatly and materially reduced the *quantity of water* which would naturally flow to and past said complainant's premises during the time of said diversion, and not denying that it has greatly diminished the value of the *use* of the plant.

Clearly, the mere value of the plant, apart from its use, might not be greatly injured by the daily diversion of 23,000,000 gallons, while such diversion might greatly diminish the value of its *use*. There is no denial, therefore, in the answer that the value of its use for dyeing or any other lawful purpose was not greatly and appreciably injured.

Moreover, the answer also alleges that certain works were erected at Little Falls which were erected and operated by the defendants, and "that the result of their operation would necessarily be to *substantially* diminish the flow of water in the Passaic River below said point of diversion" (Case, p. 16, lines 31-34).

(c) In considering whether the defendants in any of the present cases have diverted quantities which perceptibly diminished the stream and injured the complainant, consideration must be given to the *quantity taken by all wrongdoers*, with reference to complainant's *right to injunctive relief*, even if this case were to be governed by those cases where the defendants do not permanently abstract the water from the stream and consume it elsewhere, but use it for ordinary riparian purposes and return it to the stream, in which cases, unlike the present case, an injunction will not be granted unless there is an appreciable injury to the complainant. Even in such cases, although the quantity taken by one diverter alone might not so sensibly

injure the complainant as to afford him injunctive relief, nevertheless, if the combined diversions of all diverters cause perceptible injury, each diverter would be enjoined.

In *Thorpe v. Brumfelt* (8 L. R. Ch. Ap., 650), in which a bill for an injunction was filed to restrain defendants for obstructing a roadway, it was held that the acts of several persons may together constitute a nuisance which the Court will restrain, although the damage occasioned by the acts of any one, if taken alone, would be inappreciable.

In *Lambton v. Mellish* (1894), 3 Ch., 163, it was held that:

“The acts of two or more persons may, taken together, constitute such a nuisance that the court will restrain all from doing the acts constituting the nuisance, although, the annoyance occasioned by the act of any one of them, if taken alone, would not amount to a nuisance.”

The combined daily diversions of all the *tortfeasors* in the present suits, at the commencement of the suits, are admitted in their several answers to be: 23,000,000 gallons by the defendants in this suit, more than 50,000,000 gallons by Jersey City and more than 50,000,000 gallons by Newark, making altogether more than 123,000,000 gallons daily, and it is admitted that each defendant intends to continue such diversions in constantly increasing quantities. Certainly this daily abstraction of 123,000,000 gallons by all the wrongdoers, for which each will be enjoined, according to the cases last cited, must be deemed a perceptible injury to the complainant.

SECOND: *The allegations of the answer by way of new matter are not material to the relief granted.*

(1) As to the allegations in the answer by way of new matter that complainant polluted the river.

The substance of this allegation is contained in paragraph 9 of the answer (Case, p. 12), and is that "Ever since complainant has occupied its said works on the Passaic River and during the period that it took its supply of water from the Passaic River opposite its works, and at times on either side of said river, and more recently during the whole of the period that it has taken its supply of water from wells and from the Passaic Water Company through what is known as the dyer's pipe, through which the supply of water is taken from the Passaic River above the Great Falls in the City for the dyeing of fabrics, whereby the water has been discharged into the Passaic River by the complainant below the dye works in a polluted condition and in such a condition as to constitute a public nuisance," and that if the defendants had not impounded or diverted any water "the use that the complainant *would* have made of the water which it alleges these defendants deprived it *would* have been in like manner for the dyeing of fabrics, whereby the water would have been discharged into the river by the complainant, below its dye works, in a polluted condition, and *would* have been a common nuisance, and at all events *would* have been an unriparian use of said water."

The manner in which the complainant has used the water or would have used it in the past has no pertinency to the relief asked for and granted in this suit, which has no relation to damages for past injuries, but relates entirely to the prevention of future injuries; *and the future injuries enjoined in*

this suit are not confined to future injuries to the complainant's present business of dyeing upon the supposition that the complainant in the future will discharge polluted water into the river, but the injunction includes injuries to complainant's right to use the water in the future without polluting it either in its present dyeing business or any other business, and includes injuries to complainant's land and appurtenant water rights alone, irrespective of any particular business or use to which it may be put. The scope of the object of the bill is alleged in paragraph 6 (Case, pp. 6 and 7), as follows:

“The complainant's said plant consists of said land and many buildings erected thereon exceeding in value of the sum of one million dollars. The said plant may be used for dyeing purposes and for many kinds of manufacturing and other purposes.

The right to the natural, undiminished and uninterrupted flow and use of said water of said river at said plant is a large element of value in said plant for its use in the business of dyeing goods or for any of the various uses to which said plant may be put.

The said impounding, interruption and diversions have greatly and materially reduced the quantity of water which would naturally flow to and past complainant's said premises during the time of said diversions, and thereby have greatly diminished the value of the use of said plant. By reason of said impounding, interruption and diversions, the natural flow of the water of said river has been so diminished that the banks and bed of the said river at said complainant's premises are rendered bare, unsightly, noxious

and unhealthy, due to the deposit of material which the natural flow of said river would have carried away if said impounding, interruption and diversions had not been made; and said condition will so continue hereafter, if said impounding, interruption and diversions are continued; and the said impounding, interruption and diversions, if continued, will greatly lessen the value of the complainant's said premises for any use to which the same may be put, not only by reason of the deprivation of the use of said water which is and will hereafter be necessary and valuable for said premises, but the value of said premises now is and will be hereafter greatly impaired by reason of the said bare, unsightly, noxious and unhealthy condition caused as aforesaid."

The rule laid down by this Court in *Auger & Simon Silk Dyeing Co. v. East Jersey Water Co.*, 3 *Gummere*, 273, with respect to pollution, applies to damages in an action at law for past damages, but has no application to the relief by injunction respecting future injuries.

In that case this Court held that the refusal of the Trial Judge to charge that if the jury "should find that the plaintiff would use the diverted water, if it were not diverted, for the purpose of further polluting the river, then the plaintiff cannot claim more than nominal damages from the defendant," was erroneous.

In that action the plaintiff claimed damages for past injuries done to its business by deprivation of water for a certain period of time. The rule laid down by this Court was that if the plaintiff would, in fact, have used the water during that period so as to commit a public nuisance it could recover only

nominal damages therefor. It merely held that if the fact should be established that the plaintiff actually would have used the water of which it was deprived so as to commit a public nuisance nominal damages only could be recovered.

The reasoning of that ruling is that where the plaintiff was suing for *past damages* for *past deprivation* of water he could not recover substantial damages for deprivation of water which he could not have used without committing a public nuisance, and that if the fact appeared that he *could* not have used the water in his business during the past time sued for without committing a public nuisance he could recover only nominal damages, and that the refusal of the Trial Judge to so charge was erroneous; but, evidently, if the plaintiff *could*, in fact, by adopting any method, have used the water in his business during such time without committing a public nuisance he could recover the value of the use which he *could legally* have made of the water. Manifestly, the character of complainant's *past* use of the water in its business is not pertinent to his right to protect his property in this Court by injunction from *future* violation of any *legal* use of the water which the complainant may make of it as appurtenant to his property.

The defendants in their answer do not, and, of course, could not, reasonably claim that the complainant could not use the water in its present business without polluting it or committing a public nuisance, and they certainly could not claim that the complainant could not use the water *in connection with other business or for other lawful purposes* on the premises without polluting it.

So far as the relief by injunction is concerned, it must be assumed that the complainant may continue its dyeing business and use the water without returning it to the river in such polluted condi-

tion as has been referred to; but even if such an assumption is not made it must be admitted that complainant is entitled to the protection of this Court for the relief now sought against the defendants' torts with respect *to the property itself, irrespective of its present business or any other particular business, but for any use to which it may be put.*

The injury done to the property irrespective of any particular business is admitted by the answer. The answer denies that the diversions caused noxious materials to be deposited on the banks at complainant's property, but does not deny, and, therefore, admits, as we have shown, that the diversions have rendered the banks and bed of the river at complainant's works bare and unsightly, due to the fact that there is less water to cover the banks and bed and to take away the material deposited, which may be unsightly, but not noxious.

This admitted injury of plaintiff's property in itself, without regard to its present use or any other particular use, entitles the complainant to the relief sought, according to the case of Paterson v. East Jersey Water Co., supra, wherein, as we have already shown, substantially the same kind of injury was done in that case to the complainant's public park.

Moreover, the question here involved, namely, the effect of complainant's pollution upon complainant's right to such equitable relief in this Court as we are now asking, was expressly raised and considered in the case of Paterson v. East Jersey Water Co., supra.

That this question was expressly raised and decided appears from the following:

The Ninth ground of the decree appealed from in the respondent's notice of appeal in that case was as follows:

“The refusal, to adjudge that the respondents by their *unlawful conduct in polluting* the waters of the Passaic River, and thus rendering the same unfit for the potable and domestic uses of the municipalities supplied with water by your petitioner and forcing the taking of a supply above the City of Paterson, acted *inequitably and unconscionably, and are therefore not entitled to any relief in equity touching the matters complained of in the bill.*”

Vice-Chancellor Emery, in his opinion, denied that this alleged pollution was a bar to equitable relief, and likewise such contention was denied by this Court when it affirmed the decision for the reason given by the Vice-Chancellor, when that subject was expressly made a ground for appeal and urged on the hearing before this Court.

(2) As to the allegation in the answer by way of new matter, that by reason of the complainant's alleged pollution it does not come into court with clean hands. This allegation, contained in the 13th paragraph of the answer (Case, p. 17), is as follows:

“That complainant is one of a number of dyeing concerns in the City of Paterson who carry on their businesses below the Great Falls and above East 12th Street in the City of Paterson, all of whom, including the complainant, are jointly polluting the Passaic River by casting their sewage and discharged chemical waste water into the river; that if it were not for that pollution the cities of Newark and Jersey City and the cities of Paterson and Passaic and the other municipali-

ties which use up the water which is diverted from the Passaic River by these defendants, and by the Passaic Water Company, and by the City of Newark and the City of Jersey City, could take and use that water and yet leave sufficient water in the river for all the legitimate uses of said dye houses and other riparian owners below the points of diversion (including the complainant), and that there would be plenty of water left in the river for their uses if there were no pollution in it, and these defendants submit that under these circumstances the complainant does not come into this Honorable Court seeking an injunction with clean hands, and should be denied any equitable relief on that account."

(a) Substantially the same allegation and argument were made in *Paterson v. East Jersey Water Company, supra*, as appears from the following excerpt from the opinion of *Vice-Chancellor Emery*, at page 55, wherein he says:

"In addition to these grounds for estoppel or bar to injunction which concern or relate exclusively to the property rights or to the status of the defendant, the defendant, at the hearing and in the answer, as a reason for not granting an injunction, also sets up and relies on another aspect of the case, which affects public rights or uses of the river, considered as a source of potable water-supply. It is claimed that by reason of the *pollution* of the Passaic river below the city of Paterson, for which the city itself is mainly responsible, the use of the river as a source of potable water-supply to the in-

habitants of the watershed and its vicinity has been destroyed, and that the municipalities below the city of Paterson, which were formerly supplied either directly or indirectly from the lower Passaic, are now obliged to seek other sources, and that the only available source for all these municipalities now supplied by defendant is the upper Passaic."

And it should also be noticed that the Ninth ground of the decree appealed from in the respondent's notice of appeal in that case was, as we have shown, as follows:

"The refusal to adjudge that the respondents by their *unlawful conduct in polluting* the waters of the Passaic river, and thus rendering the same unfit for the potable and domestic uses of the municipalities supplied with water by your petitioner and forcing the taking of a supply above the City of Paterson, acted *inequitably and unconscionably*, and are therefore not entitled to any relief in equity touching the matters complained of in the bill."

It is evident that substantially the same question concerning pollution as is raised in this case was alleged in the answer and the same question was involved in the case of *Paterson v. East Jersey Water Co.*, *supra*, both in the Court of Chancery and in this Court; and, although the opinion of the Vice-Chancellor does not state that the defendant in that case expressly referred by name to the equitable maxim concerning clean hands, nevertheless the pollution by the City of Paterson which was referred to in that case was substantially the same

as the alleged pollution of the complainant in this case, so that if the City of Paterson came into court with clean hands in that case, the complainant comes likewise in this case; and the decision of this Court in that case must be deemed to be dispositive of the question where it arose from the same facts as exist in this case and was involved in the pleadings, grounds of appeal and arguments.

(b) *The alleged misconduct of the complainant consisted in its alleged pollution of the river, in which the defendants have no concern. In such case the alleged misconduct of the complainant, in which the defendants are not concerned, is no bar to complainant's right to relief.*

The rule is laid down in *Pomeroy's Equity Jurisprudence* (3d Ed.), Vol. 1, Sec. 399, as follows:

“Broad as the principle is in its operation, it must still be taken with reasonable limitations; it does not apply to every unconscientious act or inequitable conduct on the part of a plaintiff. The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events *connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction*; it does not extend to any misconduct, however gross, which is *unconnected with the matter in litigation, and with which the opposite party has no concern*. When a court of equity is appealed to for relief it will not go outside of the subject-matter of the controversy and make its

interference to depend upon the character and conduct of the moving party in no way affecting the *equitable right which he asserts against the defendant*, or the relief which he demands."

In *Lewis' Appeal*, 67 Pa. St., 166, the Court said :

"The rule that he who comes into equity must come with clean hands must be understood to refer to wilful misconduct in regard to the *matter in litigation*. *Snell's Equity*, 25. All the illustrations given in *Francis' Maxims of Equity*, 5, under the maxim, as he states it, 'He that hath committed iniquity shall not have equity,' show this."

It is apparent that the defendants had no concern in the sense stated in these authorities in the complainant's pollution of the river, which is the alleged misconduct. The defendants took the water at a place several miles distant above the discharge at complainant's works and the defendants in depriving the complainant of the water to which it was entitled stood as *tort feasers*.

The "matter in litigation," as above referred to in *Pomeroy's Equity Jurisprudence* and *Lewis' Appeal*, when applied to the case *sub judice*, is defendants' *diversion* of the water without right. Obviously the alleged pollution of the water by the complainant below the point of diversion, with which pollution defendants are not concerned, is not connected with the "matter in litigation" in this suit, *i. e.*, the diversions above complainant's property.

Unless the maxim were limited, as hereinbefore stated, it would lead to unjust and absurd results in

a variety of cases. For instance, the owner of land who in the past had maintained thereon a nuisance such as a slaughter house, or a mine, or a privy in a dwelling house, and the like, would be without remedy against trespassers who took his property appurtenant to such land, like timber, crops or other property thereon.

The limited application of the maxim is also shown in the following cases:

In *Woodward v. Woodward*, 14 *Stew.*, 225, it was held that a husband who had lured his wife to commit adultery on a certain occasion would not be barred by that act from relief for the commission of adultery on a former occasion committed without his consent or connivance.

To the same effect is

Wright v. Wright, 6 *Dick.*, 475.

In *Yale Gas Stove Co. v. Wilcox* (*Supreme Court of Connecticut*), 25 *L. R. A.*, 90, per *Fenn, J.*, at page 105:

“Though an obligation be indirectly connected with an illegal transaction, it will not thereby be barred from enforcement, if the plaintiff does not require the aid of the illegal transaction to make out his case.”

See also:

Armstrong v. American Exch. Natl. Bank,
133 *U. S.*, 433.

In the case of *Cassady v. Gavenor*, 37 *Iowa*, 300, cited in the defendant's brief, the plaintiff sought in equity to abate defendant's nuisance in keeping

a hog pen, which discharged *excrementa* in an alley near the plaintiff's house. The defendant denied the allegations of the plaintiff and by way of counterclaim alleged that the plaintiff maintained a nuisance by keeping hog pens, a stable and privy, and defendant sought to abate such nuisances. The Court held that the plaintiff himself contributed to cause the nuisance which he complained of and denied relief on that account.

Day, J., in his opinion in that case, says:

“The plaintiffs' hog pen stood just across the alley 16½ feet north and a little west of defendants', and the evidence shows that it furnishes no small amount of filth, and contributes in no small degree to the condition of the alley at that place. * * * The plaintiff cannot well insist that the hog pen is *per se* a nuisance while he maintains one himself almost in the same place, nor can he very well complain of that which he helps to create and maintain.”

In the case of *Pittsburgh C. C. & S. & L. Ry. Co. v. Crothersville*, 64 N. E. Rep., 914, cited in defendants' brief, the town, by its Board of Health and Marshal, threatened to abate a nuisance of the complainant at its stock pens. The complainant claimed that the proposed action of the defendant was unauthorized because there was a vacancy in the Board of Trustees of the town, and that the proposed acts of the two remaining trustees were unauthorized.

The Court refused relief to complainant on the ground that it would not aid complainant in maintaining the nuisance which the defendant was concerned in abating.

Manifestly, in these cases, the defendants were concerned in the "matter in litigation," and the complainant's conduct "affected the equitable relations *subsisting between the parties arising out of the transaction*" in the sense stated in *Pomeroy's Equity Jurisprudence and Lewis' Appeal*, so that the maxim applied under the rule referred to in those authorities, while in the present cases the defendants are not concerned in or endeavoring to stop the plaintiff's alleged pollution, but are simply taking his water rights without any right whatsoever to do so.

(3) As to the new matter alleged in paragraph 11 of the answer to the effect that complainant acquiesced in defendants' acts, and is estopped:

It is here alleged that complainant *acquiesced* in the defendants' wrongful acts, *because it brought successive actions at law and in fact recovered damages therein for the damages suffered instead of bringing an injunction in the first place.*

This notion of the term "acquiescence" seems to be novel. It seems rather a contradiction of terms to say that a person who bring successive actions at law and recovers damages for injuries done consents to or acquiesces in those injuries because he did not first bring a suit for injunction.

On the contrary, the procedure of complainant in first bringing its actions at law and establishing its legal rights is in consonance with the practice of establishing the right at law before bringing suit for injunction.

But even if the complainant had not brought its action at law, mere silence on its part would not have amounted to acquiescence.

In *Paterson v. East Jersey Water Co.*, *supra*, the Vice-Chancellor, at pages 96 and 97, disposes of this question as follows:

“There is, in my judgment, no estoppel against complainant’s protection of its rights as riparian owner by mere silence or failure to give notice or bring suit immediately.”

The Vice-Chancellor, after stating that acquiescence of the riparian owner continued for years does not deprive him of his right of property in the stream, says:

“This legal right of the riparian owner is barred only by an actual grant or uninterrupted enjoyment for twenty years. *Hutchinson v. Coleman*, 10 *N. J. Law* (5 *Halst.*), 74, 78 (1828); *Campbell v. Smith*, 8 *N. J. Law* (3 *Halst.*), 140; 14 *Am. Dec.*, 400. And an equitable remedy in aid of the legal right is not ordinarily barred by mere acquiescence in a less period, independent of any circumstances raising special equities. None such appear in this case. The complainant here did not by any act or conduct on its part induce the expenditures of defendant on its own land and for its own purposes, and defendant proceeded with them at its own risk.”

Moreover, the allegation of paragraph 11 of the answer, setting up acquiescence, is inconsistent and repugnant to the admission in paragraph 7 of the answer, which expressly admits the allegations of the bill that the empoundings and diversions of the defendants “were without the license, agreement or *consent* of the complainant.” Under

the rule of pleading that the construction shall be against the pleader, the allegation in paragraph 11 is repugnant to paragraph 7 and should be disregarded.

(4) As to the new matter alleged in paragraph 12 of the answer:

This allegation is to the effect that complainant is estopped because it took no proceedings against the defendants preventing them from completing their works.

That complainant's conduct in this respect does not stand in the way to the relief which it now seeks was decided, as we have shown, by the Vice-Chancellor in the case of *Paterson v. East Jersey Water Co.* in the language hereinbefore quoted which was affirmed by this Court.

(5) Defendants' counsel, in their brief at page 21, admit that the answer contains some "inaccuracies due to inadvertent admissions of portions of the bill which it was intended to deny," and they state, at page 29, that the answer might, perhaps, have been a little more specific with respect to the effect of the diversions on the river bank and bed, state, at page 28, that a direct denial of that fact seems to have been "inadvertently omitted," and, on page 22, argue that the answer "should not be too critically considered, but should be literally construed."

To this it is perhaps sufficient to say that the new practice permitting a motion to strike out an answer is designed to have the same effect as a demurrer to a plea at law. Its plain purpose is to determine *in limine* whether or not causes of action and defenses are disclosed upon the *pleadings* without going to the expense and delay of taking proof on final hearing.

The purpose of such practice can be accomplished only by holding the parties to their pleadings, and the settled rule of construction of the pleadings is that the pleadings shall be construed against the pleader, and that an answer in equity must not be repugnant or inconsistent.

16 *Cyc.*, 308.

Gilbert v. Galpin, 11 *N. J. Eq.*, 445.

Plume v. Small, 5 *N. J. Eq.*, 650.

Pope v. Skinkle, 45 *N. J. L.*, 39.

If an answer which fails to disclose a defense can be strained by construction to show such defense, the very purpose of testing the defense *in limine* by motion is destroyed.

If the defendants *inadvertently* omitted, as they suggest, to deny certain allegations of the bill, their remedy was clear. In such case they could have asked for an order amending their answer after the decision on the motion to strike out just as parties in actions at law could do when a demurrer to a pleading was sustained. The defendants, however, made no suggestion of inadvertence on the hearing and made no request for an amendment, but have stood upon their answer until the present time.

It is obvious, however, that the defendants could not truthfully allege in their answer that the diversions of water in this case did not appreciably diminish the stream and affect the banks of complainant's property, in face of the decision in *Paterson v. East Jersey Water Co.*, *supra*, where less diversion was held to do so.

II.**The judgment of March 6th, 1914, in the Supreme Court establishes the complainant's rights to the relief granted.**

The bill alleges, and the answer admits, that a final judgment for \$22,212 was entered in favor of complainant and against the East Jersey Water Company in the Supreme Court on March 6, 1914, in an action at law wherein the complainant was plaintiff and the East Jersey Water Company was defendant, for damages sustained by the complainant for deprivation of said water by defendant due to defendant's impounding and diverting the same during the six years from June 13, 1906, until June 13, 1912; and that the defendant, East Jersey Water Company, paid said judgment and costs on or about March 12, 1912.

We contend that this judgment of the Supreme Court established the right of the complainant to recover the damages and established complainant's rights for the purpose of the relief prayed for in this suit.

The second action for subsequent diversion was reversed merely on account of the error of the Trial Judge to charge on a matter relating to damages. Under Rule 72 of the Practice Act of 1912 and Rule 131 of the Supreme Court, the new trial shall only be a new trial of the question with respect to which the verdict or decision is found to be wrong. The defendant, therefore, now stands concluded by the *judgment which was reversed*, except as to the question decided.

But we contend that the complainant's rights were established by the judgment which was obtained March 12, 1914.

That judgment of March 12, 1914, was never reversed, but was paid, and complainant's rights to recover, which were established by that judgment, are not affected by the judgment of this Court in reversing the subsequent judgment on the incidental question of damages. The complainant's rights established by the judgment of March 24, 1914, stand for the purpose of the relief asked in this suit until this Court shall decide to the contrary.

The judgment of March 12, 1914, is an estoppel against the East Jersey Water Company as a party in common to both actions, and against the other defendants, Montclair Water Company and Acquackanonk Water Company, as privies in estate who took the water on the same lands.

Clark Thread Co. v. William Clark Co.,
10 *Dick.*, 658.

24 *Am. & Eng. Enc. Law*, 2nd Ed., pp. 780,
766.

Gallagher v. Kingson Water Co., 25 N. Y.
App. Div., 82.

Schroch v. Foreman, 3 *Brews. (Pa.)*, 157.

Long v. Trexler (Pa., 1887), 8 *Atl. Rep.*,
620.

Richardson v. Boston, 19 *How. (U. S.)*,
263.

Shepard v. Willis, 19 *Ohio*, 142.

Hartman v. Pittsburg Incline Plane Co.,
11 *Pa. Super. Ct.*, 438, which relate to
continuing nuisances generally.

III.

The order properly enjoined the defendants unless they should start condemnation proceedings at law.

This accords with the ruling in *Paterson v. East Jersey Water Co.*, *supra*, wherein it was held that compensation by payment in the Court of Chancery will not be ordered as a condition to the injunction where the defendants or the public body whose interest is involved can be acquired by condemnation at law.

All defendants have the power to condemn except the East Jersey Water Company (Case, p. 81).

As to the East Jersey Water Company, it is sufficient to say that it stands upon the same footing as it did in the case of *Paterson v. East Jersey Water Company*, where the Court held that its position as a private corporation merely appropriating the water for its own use and selling it to other municipalities, and without the power to condemn, did not involve such direct public interest as would induce the Court to make payment by condemnation in this Court as a condition to the injunction, but the Court decided that since the water companies or municipalities supplied by the East Jersey Water Company under contract had the ultimate power of condemnation of the water rights in question at law, they would be allowed to condemn at law only, and the refusal to so condemn at law was made the condition to the injunction. The decision of the Vice-Chancellor in *Paterson v. East Jersey Water Co.*, *supra*, refusing to allow the defendants to make compensation in this Court, and the refusal so to do as the condition to the injunction, was made a ground of appeal in that case, as

appears in respondent's 8th ground in its notice of appeal as follows:

"The refusal to adjudge that the defendant should be allowed to make compensation and pay damages to the complainants (if any should in equity be found to be due) for the taking of the waters of the Passaic River as in the defendant's answer tendered."

After the decision in the case of *Paterson v. East Jersey Water Company*, pursuant to the said provisions of the decree in that case, several municipalities and water companies for whose consumption the water was abstracted proceeded to condemn the rights of Paterson in the said water so taken by regular condemnation proceedings at law. Some of the proceedings were reviewed by the Supreme Court on writs of certiorari, and the judgments of the Supreme Court thereon were reviewed by writs of error.

Some of the cases are reported in the Supreme Court as follows:

Paterson v. Jersey City, 84 N. J. L., 454.

Paterson v. Town of Kearny, 84 N. J. L., 456.

Paterson v. West Orange Water Co., 84 N. J. L., 460.

In the Court of Errors the cases are reported as follows:

Paterson v. East Newark, 87 N. J. L., 324.

Paterson v. Glen Ridge, 87 N. J. L., 325.

Paterson v. Harrison, 87 N. J. L., 326.

Paterson v. Jersey City, 87 N. J. L., 163.

Paterson v. Kearny, 87 N. J. L., 327.

Paterson v. Montclair Water Co., 87 N. J. L., 533.

Paterson v. West Orange Water Co., 87 N. J. L., 538.

IV.

The effect of striking out the answer as disclosing no defense was that the final decree should be made upon the hearing settling the decree.

N. J. Building Loan & Ins. Co. v. Lord, 21 Dick., 344.

Davis v. Davis, 2 Atkyns, 21.

William v. Corwin Hopk. (N. Y.), 471.

Campbell v. Valentine New Jersey Law Journal, pp. 85-87.

Mutual Life Ins. v. Sturges, 5 Stew., 681.

1 *Daniels Ch. P. & P.*, 6th Am. Ed., p. 517, Note 3, pp. 525, 526.

The terms of the decree were settled at a hearing upon notice at which the parties were present by counsel and were heard upon all questions relating to the terms of the decree and were given opportunity to submit any proofs relating to the terms of the decree.

V.

Defendants' counsel at page 42 of their brief argue that even if the answer disclosed no defense and should be struck out by the Court of Chancery, "this Court, under the familiar common law rule, should examine all the pleadings and give judgment against the party whose first pleading is found to be bad in substance."

The defect which defendants' counsel then allege is that the bill seeks an injunction "which would operate to cut off the water supplies of several municipalities who are not made parties defendant thereto.

To this we reply:

(1) The common law rule of pleading here referred to, if applicable to this case, would give judgment against the first faulty pleading only in case the *pleading on its face showed lack of parties* so that a general demurrer to it would lie (*Salt Lake City Natl. Bank v. Hendrickson*, XI Vr., 52). The bill does not show on its face lack of parties so as to make it demurrable. Such lack of parties could appear only by answer.

(2) The defendants have made no objection to the bill for lack of parties either by motion in their answer or otherwise.

In *Wilson, Atty. Gen., v. East Jersey Water Co.*, 8 Buch., 330, referred to in defendants' brief, certain municipalities not parties to the suit were made parties where it appeared that their water supply would be cut by the injunction and timely

action was taken to make them parties. The rule in that case has no application to this case when no objection has been made to such lack of parties, and no application was ever made to add any other parties to this bill.

In *Paterson v. East Jersey Water Co.*, *supra*, after the opinion was rendered by the Vice-Chancellor, the defendant made application to open proofs in order to insist that no decree for injunction should be made unless three water companies not made defendants to the bill should be made defendants.

In a memorandum opinion on the settlement of the decree made December 28, 1909, which appears in the printed case of that appeal before this Court, Vice-Chancellor Emery said:

“The application to open the proofs for the purpose of proving the contracts for water supply between Paterson and the Passaic Water Co., Passaic and the Acquackanonk Water Co. and the defendant company with the Montclair Water Company is denied. It is stated by counsel that one object of this application to open the proofs is *in order to insist that no decree for injunction in the cause should be made unless the three Water companies be brought into court and made defendants in the suit.* This objection to any decree for injunction based on the absence of parties, *if valid, should have been made before the long and expensive hearing was begun, and when the Water Companies, if necessary parties, might have been brought in.* Such of the contracts as were in force at the beginning of the suit in 1905 may, how

ever, be proved on this application to settle the decree, for the purpose of showing the effect of any decree for injunction on the municipalities and fixing the time when it should be directed to issue."

VI.

The right of the Chancellor to strike out the answer is expressly given by Rule 51 of the Act of 1915 and Rule 67 of the present rules, and the Chancellor's refusal to order the motion to stand over until the hearing was a matter of discretion which is not appealable.

The defendants did not state this action of the Chancellor in refusing to order the motion to stand over to the hearing as a ground of appeal in their petition of appeal, but argue in their brief that the motion should have been ordered to stand over until final hearing.

To this we answer:

(1) *This action of the Chancellor is made discretionary by statute and, therefore, is not appealable. The language of rule 67 is that, "On the hearing of such motion the Court in its discretion may order the application to stand over until the hearing."*

Browning & Bros. case, 68 N. J. Eq., 751.

Read v. Huff, 13 Stew., 229.

In re Anderson, 2 C. E. G., 536.

Cronkright v. Haulenbeck, 35 N. J. Eq., 279.

Atty. Gen. v. Paterson, 9 N. J. Eq., 624.

(2) *The Chancellor in deciding the motion as he did carried out the design of the statute and in so doing exercised sound discretion.*

Since the right to object to an answer as disclosing no defense given by Rule 67 is clearly taken from the common law practice, the practice must be presumed to be taken for the same purpose and with the same effect as it has at law; and since its purpose at law is to avoid trial by proofs when the answer discloses no defense, and such purpose is effected only by judgment on the answer, the contention of the defendants' counsel that the answer should be struck out only in case it is "palpably frivolous" or "unworthy of any consideration whatever" would deprive the rule of effect.

By their contention the practice in this respect would stand substantially where it was before this right of objection, under Rule 67, was given.

Their contention is that the Court, in its discretion, should exercise the right to strike out the answer only in case it is "palpably frivolous" or the matters are "so totally unrelated to complainant's claim as to be altogether unworthy of any consideration as a defense."

An answer "palpably frivolous" in its entirety under the practice existing before the adoption of Rule 67 would have been stricken out or taken from the files. Thus, in *Travers v. Ross*, 1 *McCarter*, 254, motion was made to strike out the answer as "*frivolous* and impertinent." In that case Chancellor Green held that where the *whole answer* is frivolous it will be taken from the files. Likewise, it is the established practice of the Court to strike out *portions* of the answer for impertinence when the matters objected to are so unrelated to complainant's claim as to be altogether unworthy of any consideration as a defense.

This objection on the ground of impertinence is expressly retained and provided for in the new practice act in Rule 53. This objection applicable to *part* of the answer presupposes that the answer contains a defense, and, inasmuch as the case has to go to final hearing on proofs as to the part containing the defense in any event, the Court is reluctant to strike out the portions objected to unless they are clearly irrelevant. Now, in the face of this existing practice under which the whole answer, if frivolous, or portions, if impertinent (meaning so unrelated to the claim in the bill as to be unworthy of any consideration whatever) would be struck out, Rule 67 gave the right to object on the ground that the answer discloses *no cause of action*.

It must be admitted that frivolous answers or impertinent matters unworthy of any consideration whatever, as above defined, are conceptions entirely distinct from an answer disclosing no cause of action, and that the new objection given by Rule 67 meant something different from the objections under the existing practice. The new ground of objection plainly means the same as that to a plea which set up no defense at law. There the legal conception of "no defense" with the method of determining the question is clear. It means that the Court must pass beyond the question of mere frivolity in the pleading and must *actually construe* the pleading, and must determine whether or not a defense appears from the *facts pleaded*, and the question of frivolity in the pleading is of no more importance than it would be where the Judge in an action at law is required to construe the *facts in evidence* on a question of nonsuit or motion to direct a verdict on trial. We understand counsel for defendants to admit that the objection of no defense in an answer under Rule 67 was designed to introduce something new in our equity practice,

yet the effect of their argument is that nothing new was effected, because they contend that the Court, *in any case*, should strike out the answer only when the matter is frivolous, and since the Court could, under existing practice, strike out the answer on that ground, their argument involves the apparent absurdity that the Legislature and Court intended to adopt a new rule of procedure and then refuse to give it any effect.

The discretion expressly referred to in Rule 67, in our view, relates to the inherent discretion which the Court always had the power to exercise on demurrer to the bill, viz., to permit amendable defects to be amended and order the cause to stand over upon condition that the pleading be amended.

Instead of formally sustaining the demurrer and permitting a *new* bill to be filed, substantially the same result was reached by ordering the cause to stand over upon terms of payment of costs and upon condition that the bill be *amended*. This practice was a formal change from the original practice, where it is said, "Strictly speaking, upon demurrer to the whole bill being allowed, the bill is out of Court and no subsequent proceeding can be taken in the cause."

1 *Daniels*, 598 (6th Am. Ed.); and the only change in the practice is indicated by the *Lord Chancellor (Cottenham)* in *Wellesley v. Wellesley*, 4 *M. & C.*, 554, wherein, at page 560, he says:

"The sole question is whether the plaintiff is to amend his bill or file a new bill."

This practice in equity on demurrers to bills is stated in 6 *American Pleading and Practice*, page 427, as follows:

"Where the cause of demurrer can be removed by amendment, the court may, *with-*

out deciding the demurrer, permit an amendment to the bill."

In 1 *Daniels Chancery Precedents*, p. 598 (6th Am. Ed.), it is said:

"On hearing the demurrer, the court will, where it sees that the defect pointed out by the demurrer can be remedied by amendment, and substantial justice requires, it make a *special order at the hearing of the demurrer adapted to the circumstances of the case.*"

This discretionary power of permitting an amendment to the bill on hearing of the demurrer instead of sustaining the demurrer and permitting a new bill to be filed is characterized in *Tyler v. Bell*, 2 *M. & C.*, 89, by the Lord Chancellor, as ordering the cause "to *stand over* that the plaintiff may amend."

The same phrase is used in Rule 67, and the whole provision that the Court in its discretion may order the application to "stand over" until the hearing, and require the bill to be answered on such terms and conditions as may be ordered, is apt language to declare merely that the existing discretion of the Court to stand a motion on demurrer to a bill over and require an answer upon condition that the bill be amended and costs paid was not to be taken away by the rule.

Assuming that the Court had full power, on the one hand, to strike out the answer on this motion, and, on the other, has absolute discretion to stand the application over and require proofs to be taken on final hearing, the practical question is, how should the Court have dealt with this particular motion with due regard to principles of justice and policy?

If it had appeared on the motion that a real defense in fact existed, and that some *defect* in the

answer could be remedied *by amendment*, we would concede the justness and policy of standing the motion over upon condition that the bill be amended so as to make a defense, which procedure would be substantially the same as if the Court struck out the answer with privilege of amending or filing a new answer.

But where it appears, as it does in this case, that no omission or inadvertency in the answer has been suggested, or any amendment asked for, so that the only defense which defendants can be presumed to have was presented, it is just and politic that the question should be decided *in limine*.

The complainant's right to object to an answer showing no defense is by the rule plainly put upon an equal footing with defendants' right to object to a bill showing no cause of action and is in substitution of the hazardous practice of setting the cause down for hearing on bill and answer.

The justness and sound policy of so challenging the sufficiency of a pleading has been generally recognized in all procedures, and its evident purpose is to avoid the unnecessary expense and delay of going to trial upon proofs unless the pleadings show a reason for trial. The purpose and general tendency of such procedure to save costs and speed litigation is generally recognized. For example, in 6 *Am. Enc. P. & P.*, page 393, the procedure by demurrer is referred to as follows:

"Its object is to save costs and bring litigation to a speedy close by defeating the complainant on some legal grounds."

So far as we are aware, the justness and policy of such practice has not been criticized by judicial opinion generally or in this State until the opinion of Vice-Chancellor Stevenson referred to in defendant's brief.

The statement in that opinion that a pleading which upon a proper construction shows no cause of action or defense should not, under Rule 67, be construed and decided *in limine* unless some special or peculiar circumstance exists is, in our view, opposed to settled legal procedure generally and conducive to an unjust and impolitic practice.

So far as justice to litigants is concerned, it is just that a person should not be compelled to go to the expense and trouble of trial and submit to the delay incident thereto unless his adversary shall properly allege in his pleading facts making a trial necessary; and so far as policy involved in the expedition of litigation is concerned, the fundamental purpose and effect of the practice of determining legal questions raised in the pleadings *in limine* is in the generality of cases to hasten the end of litigation.

Indeed, the Court of Chancery not only recognizes the right, justness and policy of litigants to have legal questions decided *in limine* and thus avoid delay and expense, *but a penalty is put upon the litigant who does not do so.* Thus, as an example, in *Rednow v. Sparks*, 5 *Buch.*, 396, it is said, in the opinion, at page 398:

“When a bill is insufficient on its face to support equitable jurisdiction or relief, it *should be demurred to.* Defendant may in such case answer, but if on final hearing the bill is found insufficient, costs may be denied to defendant *by reason of his failure to demur, and in that manner avoid the necessity of a hearing.* *Dan. Ch. Pl. & Pr.*, 524.”

In the case referred to, Vice-Chancellor Stevenson condemns the established practice of deciding questions of law on pleadings unless special circumstances appear such as the necessity of taking

foreign testimony, and he condemns that practice just as much in the form of a motion to strike out under the new practice as he would on demurrer under the old practice. The vice which he finds in the practice is this: that the decision on such motion is appealable, and the *possibility that a reversal of a decision* might lead to delay. This possibility of delay always has existed in the common law practice, and on demurrer to bills, in equity practice. But such delay is a mere incident to a practice the main purpose and effect of which in the majority of cases is to expedite causes and prevent delay.

In the majority of cases the decisions below are not appealed, and, if appealed, they are affirmed; in all such cases the decision *in limine* saves and prevents delay by ending litigation without trial, trouble and expense, and this established procedure is based upon the supposition that the Court below will generally decide correctly, and that litigants will generally abide by the decision.

We think that the evil of delay due to reversal in a small number of cases necessarily incident to the procedure is magnified, while the whole purpose and effect of the procedure to prevent delay in the generality of cases is lost sight of.

The Vice-Chancellor does not give effect to the rule according to its plain meaning because, as he says: "There is little use in abolishing a demurrer if you retain the exact equivalent, a motion to dismiss a bill *which leads to an appealable order.*" But we suggest that the Legislature has heretofore considered there was use in making the change in the courts of law and in this Court, without any regard whatever to the appealable character of the order, but merely for the purpose of adopting a different form of practice; and, in our view, there is nothing in Rule 67 indicating a different design. "It may be noted, also," he says, "that so far the

rule *actually* extends the opportunity for dilatory proceedings, because it allows an objection to an answer on the ground that it discloses no defense. This is the exact equivalent to a demurrer to an answer, a thing unknown in equity pleading.”

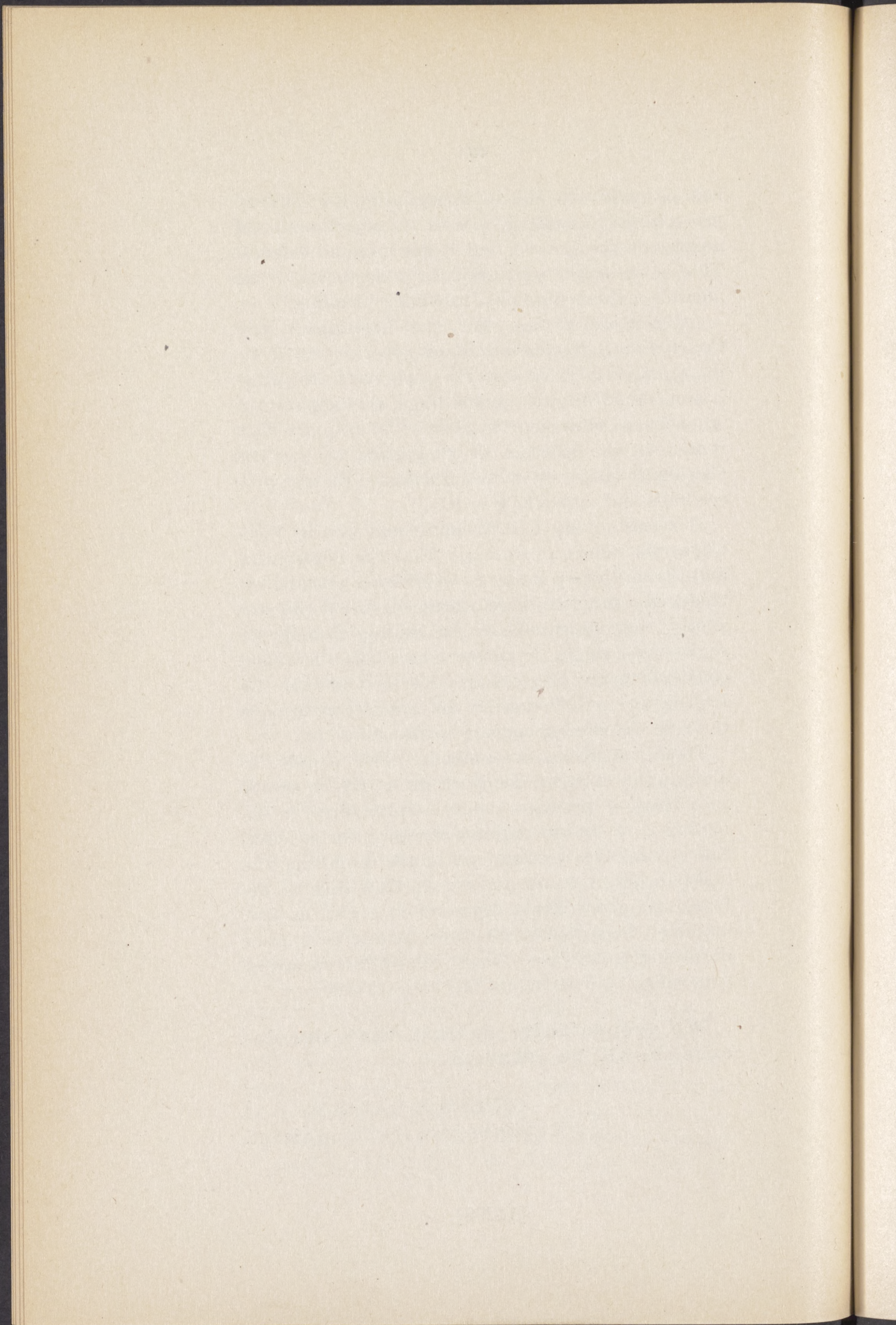
After thus stating that the Legislature and Court *actually introduced* a new practice, which, by its terms, *actually extends* the opportunity for what is considered dilatory proceedings, this apparently inconsistent statement is made: “It is plain that it was not the *intention* of the Legislature and the Chancellor to increase the facilities for dilatory proceedings and appealable orders.”

It seems to us that the statement of the Vice-Chancellor amounts to this: That the Legislature and Chancellor by its terms of Rule 67 actually introduced a practice therein prescribed, but the possibility that appealable orders leading to delay in some cases might be taken under that practice, constrained the Vice-Chancellor to hold that the Legislature and Chancellor did not intend to have the rule enforced according to its terms.

Their intention, we submit, was merely to abolish the existing demurrer to a bill in equity as a form of practice and substitute therefor the motion to strike out without changing the substantial ground of objection, and at the same time the right to object to an answer as disclosing no defense was given like a demurrer to a plea at law, whereby the complainant could attack an answer disclosing no defense without taking the hazard of proceeding by hearing on bill and answer.

We respectfully submit that the decree should be affirmed.

GRIGGS & HARDING,
Of Counsel with the Complainant.



New Jersey Court of Errors and Appeals

Between
WEIDMANN SILK DYEING Co., a
corporation,
Complainant-Respondent,

and

THE EAST JERSEY WATER Co.,
THE MONTCLAIR WATER Co.,
and THE ACQUACKANONK WA-
TER Co.,
Defendants-Appellants.

On Appeal
from Chancery.

Reply Brief for
Appellants.

POINT I.

Vice-Chancellor Emery did not decide in *Paterson v. East Jersey Water Co.*, 74 N. J. Equity, page 49, that the maxim "*de minimis*" did not apply to cases of the character of that before him because abstraction of water for sale was not a reasonable use which an upper riparian owner was entitled to make against the lower owners (see Respondent's Brief, p. 3). The Vice-Chancellor in one part of his opinion, at all events, held exactly the contrary of that proposition.

The Vice-Chancellor did hold in that case that the diversion of the water by the defendant for

purposes of sale was an infringement of the complainant's right as a lower riparian owner to the continued flow of the stream without need of proof of any actual or perceptible damage so far as the establishment of its legal right was concerned, and that the examination in detail, therefore, of the evidence bearing upon the matter of actual damage and the extent to which the diversion had so far affected the use and enjoyment of the complainant's riparian lands became unnecessary *for the purpose of settling the complainant's right*; but he took care to insert these qualifying words (which counsel disregard) "*if the diversion is of such a perceptible and sensible amount as not to be excluded under the maxim 'de minimis.'*"

Counsel are confusing the question of damage to the complainant with the question of the application of the maxim "*de minimis.*" Under the Vice-Chancellor's decision the diversion in proportion to the low flow of the river might be so insignificant as to call for the application of the maxim "*de minimis.*" It would be absurd to invoke the aid of a writ of injunction to restrain something too trivial to merit the Court's interference. On the other hand, the Vice-Chancellor clearly indicated that the diversion in proportion to the low flow of the river might be so sensible and perceptible as to exclude the application of the maxim "*de minimis,*" in which event he held that under the circumstances he was considering, the complainant's rights as riparian owner would be infringed upon, although he might have suffered no actual damage (see *Paterson v. East Jersey Water Co., supra*, 74 *N. J. Eq.*, 49, 86, line 13 from the bottom of the page to p. 87, line 5).

Furthermore, the Vice-Chancellor was there dealing only with the question of *settling the complainant's right*—but was not necessarily dealing with the right of the complainant to an injunction—because he took care to add these words: “But it (the examination in detail of the evidence bearing upon the matter of actual damage and the extent to which the diversion has so far affected the use and enjoyment of the complainant's riparian lands) *is of importance in other aspects of the case, viz., as affecting either the right to an injunction or the terms and conditions upon which any injunction should be issued.*”

POINT II.

The diversions admitted by the answer cannot be deemed to be necessarily such as to exclude the application of the maxim “*de minimis*” in the absence of proof offered in the case as to what the average low flow of the Passaic River was during the period covered by the suit.

What the facts were, and the conclusions drawn from those facts, in the case of *Paterson v. East Jersey Water Co., supra*, can have no relevancy to this case; the complainants in the two suits are different parties, and the periods covered by the two suits are not the same. There is no authority known to us that the Courts will take judicial notice of the size of the Passaic River or of the alleged fact that the diversion of 23,000,000 gallons of water per day would perceptibly diminish the flow in times of low flow so as to exclude the maxim “*de minimis*.”

We do not for present purposes controvert the argument that in considering whether the defendants in this case have diverted quantities of water which perceptibly diminished the stream and injured the complainant, consideration must be given to the *quantity taken by all wrongdoers* with reference to complainant's *right to injunctive relief*, but we contend that there must be evidence offered in this suit of the quantity taken by the other wrongdoers, and that the mere fact that the complainant has filed bills against other alleged wrongdoers alleging such other diversions—even though admitted by the defendants in those suits—is no evidence as against the defendants in this suit, and cannot be properly taken into consideration on this motion (in the nature of a demurrer) to strike out their answer. Each of the suits before the Court must be considered separately. There is no allegation in the respective bills of complaint of diversion other than by the defendants therein.

POINT III.

The reasoning upon which the decision in *Auger & Simon Silk Dyeing Co. v. East Jersey Water Co.* (88 N. J. L., p. 273) was based was not that where the plaintiff was suing for past damages for past deprivation of water he could not recover substantial damages for deprivation of water which he *could* not have used without committing a public nuisance, and that if the fact appeared that he *could* not have used the water in his business during the past time sued for without committing a public nuisance, he could recover only nominal damages,

but that if the plaintiff *could* in fact by adopting any method have used the water in his business during such time without committing a public nuisance, he could recover the value of the use which he *could legally* have made of the water (Respondent's Brief, p. 21, line 6 *et seq.*).

The question involved was not what use the plaintiff *could* have made of the water, but what use he *would* have made of it, and the jury could very well infer from the use the plaintiff *had* made of the water in the past what use he *would* make of it in the future. Furthermore, we pointed out in our original brief, which we have no desire to elaborate upon, that this Court held in the *Auger & Simon* case that the trial court had erred in refusing to charge, as requested by counsel for the defendants, "*that the plaintiff had no right to complain of the diversion by the defendants if you (the jury) find that the only damage the plaintiff suffered was being thereby prevented from committing a nuisance,*" and in that case this Court further said that "when the riparian owner abstracts water from a running stream for the purpose of so using it that it will be returned to the stream in such a polluted condition as to appreciably deprive it of its natural qualities and render it unfit for the use of the public, thereby committing a nuisance, he is not making the reasonable use thereof to which he is entitled as such owner, and that any damage he may suffer because he is not able to do this because of the act of the defendant is not more than nominal, *if any*, and therefore it was error to refuse the requests above stated."

We now respectfully repeat our contention that while the unlawful use of the water by the respondent continues, or until it can be shown by it that it intends in the future to use the water for a lawful purpose and to discontinue its present unlawful use, the complainant is in no better position asking for an injunction than it was in the common law suit where it was asking for damages for past deprivation of water.

We further submit that the claim that the effect of complainant's pollution upon complainant's right to equitable relief in this Court was expressly raised and considered in the case of *Paterson v. East Jersey Water Co., supra*, is untenable for the reason that no fair analogy can be drawn between the City of Paterson polluting the waters of the Passaic River for public purposes under legislative sanction, and the respondent in the case at bar polluting the waters of the river unlawfully for its own private ends.

There is this additional reason also why there is no analogy between the two cases. In the *Paterson* case it was held that the City of Paterson, by reason of the authority given it by statute to establish a sewer system and to use the river as an outlet thereof, was not placed in the position of a riparian owner entitled as such to restrain a diversion of the water of the stream by an upper riparian owner. The City of Paterson was not suing for being deprived of water, which if not deprived of it would have used for an illegal purpose. The City of Paterson got its water supply from the Passaic Water Company, and the diversion of the water by the East Jersey Water Company did not legally affect its *use* of any of the waters of the Passaic River. It had no usufructuary interest in the

waters of the Passaic River as a result of its sewage system. It was not a riparian owner as a result of that system. There can hardly be conceived two cases more widely distinct than that case and the case at bar, in which latter case the respondent is using the waters of the Passaic River so as to pollute them, and to restore them to the river in a polluted condition, and would so use the diverted water if not diverted. A large proportion of the sewage from Paterson which enters the river does not come from the river at all. Furthermore, in the *Paterson* case the Court held that the only perceptible effect of the diversion was confined to the West Side Park property, which is located above the Great Falls, and not a particle of pollution enters the river at or above that point. All the sewage from the City of Paterson enters the river below the Great Falls.

In the *Paterson* case injunctive relief was sought by the City in regard to three tracts of land, the West Side Park property above the Falls, the engine house lot, and the East Side Park property, the latter two being below the Falls. The Vice-Chancellor found (p. 93) that the use and enjoyment of the East Side Park did not appear to be in any way directly sensibly or perceptibly affected by the diversion, and that the same situation existed as to the engine house lot; that the evidence did not show that as to that lot its use or enjoyment had as yet been affected in any sensible or material way by the diversion. The only perceptible effect of the diversion was confined to the West Side Park property. It consisted in the fact that when the water was very low in the river the bed of the river at points along the park was exposed, and when exposed was muddy and unsightly. This exposure of the bed of the stream, with per-

haps some slight effect the diversion by the defendant might have had on the use of the river for boating, was the only sensible or perceptible circumstance which the Vice-Chancellor then found to exist affecting any of the three tracts belonging to the City (p. 92).

The distinction between the two cases consists, therefore, in the fact that the unsightly condition of the river caused by the exposure of its bed in the *Paterson* case related to a tract of land used by the City for park purposes where the beauty of the landscape was concerned, whereas in the present case the property is alleged in the bill of complaint to be used and intended for manufacturing purposes, and it would of course be ridiculous to assert that the value of the property for such purposes could be sensibly affected by the purely aesthetic consideration that the beauty of the landscape as seen from the dye shop windows was impaired by reason of the exposure of the bed of the river or the unsightliness of its banks.

It is the settled law of this State (*McCarter Attorney-General v. Hudson County Water Co.*, 70 *N. J. Eq.*, 695, 708) that the riparian owner's right in the stream "is limited to a *usufructuary* interest. * * * This right of user is limited to so much of the water as shall be reasonably necessary and is qualified by the obligation to leave the stream otherwise undiminished in quantity and unimpaired in quality."

This right of property therefore being strictly limited to a *use* of the water, it would seem that the only interference with such right of which the owner would have cause to complain would be an interference with his lawful use of the water, or

being prevented from some lawful use which he would actually have made of the water if not diverted. That is to say, the owner's property right in the water does not consist in having it idly flow past his lands, but consists in actually using the water for some lawful purpose as it does flow by.

Blackstone says:

“Water is a movable, wandering thing, and must, of necessity, continue common by the law of nature; so that I can have only a temporary, transient, usufructuary property therein.”

2 *Black. Com.*, 18.

If, therefore, the owner is making no actual lawful use of the water, or has not been prevented from making an actual lawful use thereof, and *a fortiori*, if he has been making an unlawful use of the water, or has only been prevented from making an unlawful use thereof, his legal rights have not been interfered with, and he is not, under those circumstances, we respectfully submit, entitled to an injunction.

We submit that the true meaning of the *Pater-son v. East Jersey Water Co.* case, read in the light of elementary principles of law applicable to property rights in the waters of fresh water streams or rivers, is that where a lower riparian owner possesses, as he ordinarily does, a usufructuary property right in the water, and that property right is diminished or interfered with by the diversion of water by an upper riparian owner, then, even though the lower riparian owner may have suffered no perceptible damage, he is nevertheless entitled to an injunction, otherwise the diversion by the upper riparian owner, if continued for twenty

years, might grow into a prescriptive right so to divert the water.

But if the lower riparian owner is in fact making an unriparian use of the water, and would make an unriparian use of the diverted water (if not diverted)—a question of fact to be determined upon proofs—then he is neither entitled to an injunction nor to damages if he sustained any. He cannot complain if the upper riparian owner gains a prescriptive right to divert the water as against his unriparian use of the water or as against the unriparian use which he would have made, or, in the future, would make, of the water, if not diverted.

Respectfully submitted,

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