

## New Jersey Court of Errors and Appeals

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Between

HENRY W. DOREMUS, et als.,

*Respondents,*

and

THE MAYOR AND ALDERMEN OF

THE CITY OF PATERSON,

*Appellant.*

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*On Appeal.*

### **BRIEF OF GEORGE S. HILTON,**

#### **Of Counsel With Defendant.**

The bill in this case is in form, except as to the prayer, an ordinary bill based on the pollution of the river, and it is not until we come to the statement of the damages claimed to have been suffered by the complainants from such pollution that we find anything to indicate whether the damages so claimed are temporary damages, that is, damages that had been suffered prior to the filing of the bill, or permanent damages, that is, damages that might be suffered in the future as well as those that had been suffered in the past. The part of the bill referred to begins as follows: "And your orators further show that the damages which they have severally sus-

tained by the destruction of or interference with their said property rights through the said wrongful and illegal acts of the city of Paterson, as near as the same can be ascertained," etc. Case, p. 32. So far the claims are clearly for mere temporary damages. And it was a recollection of this part of the bill, without a reference to or examination of what follows, that led to the erroneous statement in one of the causes of demurrer assigned, "that the bill does not show whether the compensation therein demanded is for permanent injuries or for injuries suffered before the time of the filing of the bill." But the bill immediately adds "calculated upon the basis of said injuries being permanent." This makes the claims those for permanent damages, or for compensation for permanent injuries. And when we come to the prayer of the bill we find that it asks for compensation for permanent injuries; for the compensation it prays for is "such compensation to" the complainants "for the diminution in value of their said lands and property rights as shall be ascertained by this honorable court to be just." Case, p. 34. This suit, therefore must be considered as one for permanent damages or compensation for permanent injuries.

And it is the prayer of the bill alone that shows the origin of the suit and its real purpose. It prays for an injunction restraining the defendant from discharging its sewers into the Passaic river, unless and until the defendant makes compensation as aforesaid. This shows that the bill is intended to be based on the opinion of this court in the case of *Simmons v. Paterson*, reported in

15 Dick., 385. In that case the bill sought to restrain the defendant, being the same defendant as in this case, from discharging its sewers into said river, without condition or qualification. The defendant in defense set up that it had the legal right, under acts of the legislature of the State, to construct its sewers and empty them into the river, and could not therefore be restrained from using the river as a conduit for its sewage. The court admitted that the defendant had legislative authority so to do, but did not fully admit the conclusion the defendant deduced therefrom. The court held: (1) that the city, having such legislative authority, was not subject to the charge of maintaining a public nuisance; (2) that the riparian owners along the river, where the tide ebbs and flows, having no title to the bed of the stream, were not entitled to the injunction asked for; (3) that the riparian owners above the ebb and flow of the tide, having title to the middle of the stream, subject only to a servitude to the public for purposes of navigation, and consequently a property right in the water of the river flowing over and along their land, the pollution of the river by sewage constituted the taking of their property, which the legislature could not authorize except upon just compensation; (4) that by reason of the great injury which would fall upon the city by restraining the continuous use of its sewerage system, and the acquiescence of the riparian owners above where the tide flows, their injury being comparatively small, it would be inequitable to grant them an injunction; and (5) that those of the complainants who were riparian

owners above where the tide flows might obtain redress by amending their bill, or by filing a new bill, praying for an injunction, unless the city would consent to make such compensation for the diminution in value of their lands as should be ascertained to be just.

It is on the last part of this statement that the bill in this case is evidently intended to be based.

The complainants may be divided into three classes: (1) owners of lands on the river above the Dundee dam, which said lands are also above the ebb and flow of the tide in the river; (2) the owner of the Dundee dam and canal; and (3) the lessees of such owner, who take water from its canal.

The first class comprises the complainants, Henry W. Doremus, Peter Alyea, George G. Van Riper, John H. Merselis and Edwin Merselis, Edo V. Cadmus and Cornelius D. Cadmus, Richard Van Riper, Edo Van Riper, Frederick H. Gelderman, William P. Vreeland, Richard H. Hoitsman, Albert A. Outwater and Richard Outwater, Peter H. Doremus, Mary A. Van Saun, Paulina Wehnert, Margaret Kipp, Martha A. Phillips, Passaic Brick Company, Henry Kip, Euphemia Kip, Annie Mercelis, John E. Mercelis, Gertrude C. Winslow and John Kip, (the last six representing one tract of land), David Miller, Garret Terhune, William A. Hopson, Peter P. Van Bussum and Scatto C. Nash. Case. pp. 4-11. These complainants set up in the bill that they have a property right in the water of the river flowing along and over their respective lands (including as a part of their

said respective lands their respective shares, as riparian owners, of the bed of the river) and they complain that these property rights are injured by the said alleged pollution of the river.

The second class comprises, and, in fact, is made up of, the complainant, the Dundee Water Power and Land Company. P. 16, etc. This complainant is the proprietor of the Dundee dam and canal. The dam, according to the bill, is constructed across the river about sixteen hundred feet above the ebb and flow of the tide, and is fourteen feet high. The canal starts above the dam and then runs along below the dam about a mile and a half, and is eighty feet wide. From this canal this complainant lets out water to lessees. The leases are for one or more mill powers, each mill power being the right to draw from the canal eight and a half cubic feet of water per second. The bill sets up in behalf of this complainant certain "property rights", namely: its rights to the rents reserved in its leases, its reversionary rights in the leased mill powers, and its right to sell the surplus water not required to supply the mill powers, which said "property rights," the bill claims, have been greatly injured in value, and in part taken from this complainant by the said alleged pollution of said river.

The bill also sets up that this complainant owns three pieces of land on or about said river, one of which appears to be partly above and partly below the dam and above tidewater and another of which appears to be below the dam and above tidewater, and the other of which, so far as appears from the bill, may be located any-

where, on the west side of the river. from its source to its mouth. P. 20, l. 25, etc. The bill sets up that the value of these pieces of land has been greatly depreciated by the said alleged pollution of said river.

The third class comprises the Botany Worsted Mills, the Algonquin company, the Dundee Woolen company, the Andrew McLean company, the Worthen and Aldrich company, the United States Finishing company, and the Passaic Woolen company. Case, pp. 21-31. The bill does not allege that either of these are riparian owners above tidewater, or even that they are located above tidewater. So far as appears or is to be inferred from the bill they are all located below the point where tidewater in the river ends. They are therefore merely the users, below the tidewater point, of water taken from the river above the tidewater point. The right of these complainants to take water from the canal under their respective leases is expressly described in the bill in all the cases but two as "a valuable property right" in so much of the water of the river as they have such right to take. In the cases of the two exceptions, namely, the Dundee Woolen company and the Andrew McLean company, the "rights and privileges" in the one case, and the "rights" in the other case, of these complainants under their leases, are described as "valuable property rights" without express mention of the water, but it is manifest that their rights to take water from the canal under their leases constitute the principal part of these said "valuable property rights."

In the cases in the second and third classes, except so far as relates to the pieces of land mentioned in the solitary case in the second class, the injuries from the alleged pollution of the river is stated to be done to these alleged "property rights." Thus: "Such property rights" of the Dundee Water Power and Land company—the solitary case in the second class—have been greatly impaired in value, and in part taken from the company (p. 20); "this property right" of the Botany Worsted Mills "has been greatly diminished and impaired" (p. 22); "the said valuable property right" of the Algonquin company "has been greatly impaired in value" (p. 21), the Dundee Woolen company "has suffered great loss, damage and inconvenience to and in the use of" its said "valuable property rights" (p. 25); the said "property rights" of the Andrew McLean company "have been in part taken and greatly impaired in value" (p. 26); the "value of the said water and property rights" of the Worthen and Aldrich company "has been greatly diminished and impaired" (pp. 27 and 28); the said "valuable property right" of the United States Finishing company "has been in part taken and greatly impaired in value" (p. 29), and the said "property rights" of the Passaic Woolen company "have been in part taken and greatly impaired in value" (p. 30). And all these parties express their fears that their said "property rights" will be entirely destroyed if the said alleged pollution of said river is allowed to continue.

And when all of these complainants, included in all these classes, come to set out their alleged

damages from the said alleged pollution of said river, they say: "that the damages which they have severally sustained by the destruction of or interference with their said property rights," &c. Then the amount of the said damages to each of the complainants' said "property rights," is stated. Damages to nothing else besides these alleged "property rights" are here set up. Pp. 32 and 33.

The manifest object of such use of the terms "property right" and "property rights" is to attempt to bring the case within the legal principles laid down in the case on which this suit is pretended to be based as above stated, to wit, *Simmons v. Paterson*, 15 Dick., 385. In that case Justice Van Syckel in delivering the opinion of the court said:

"Riparian owners above tide own *ad medium filum aque*, and have a property right in the water flowing along and over their land. This property right cannot be impaired except by the lawful use of the waters by riparian owners higher up the stream." Page 391. And the court held, in substance, that the impairing of these property rights by making the river a conduit for sewage constitutes a taking of private property for which compensation must be made. Hence the use of the terms "property rights" and "property right" in the bill.

#### THE SITUATION.

In 1865, according to the State's census of that year, Paterson had a population of 24,893. See the abstract of that census appended to

Laws of 1866. It was getting to be a large city for those times. That the welfare of the city required that it should be provided with sewers is obvious. If its citizens, or at least those entrusted with the management of its affairs, had failed to take necessary steps to meet this requirement, they would have been guilty of gross negligence, the consequence of which can be easily imagined. Well, if the city was to have sewers their contents must be discharged somewhere. At that time and for some years afterwards, "the only system for constructing sewers which had been adopted in this country was by building them underground with the outlet into the natural watercourse on the bank of which the city was built." *Simmons v. Paterson*, 15 Dick., 385, 388. Authority, therefore, for the construction of such a system of sewerage with its outlets into the Passaic river was obtained from the legislature. The acts conferring such authority were passed in 1867 and 1868. Laws of 1867, p. 653, sec. 17; Laws of 1868, p. 126. Both of these acts are declared therein to be public acts, so that this court will take judicial notice of them even on the the argument of a demurrer. *Rader v. Township of Union*, 10 Vr., 509, 521 and 522; *Newark v. Stout*, 23 Vr., 35, 39.

It can safely be presumed that at that time it was not supposed that the discharges of the sewers that might be constructed would so defile the water of the river as to occasion any damages or give rise to any complaint. For, as Chancellor McGill said in the case of *Attorney General v. Paterson*, which was the case of *Simmons v.*

Paterson, *supra*, in the court below, "the Passaic River, at Paterson, is a stream of considerable size, capable of receiving comparatively large quantities of refuse matter without being contaminated." 13 Dick., 11. Such being the case there was no intention at the time those acts were passed and Paterson's sewerage system was adopted, of taking or impairing any property or "property rights" by means of the operation of that system, or any expectation that any property or "property rights" would be taken or impaired thereby.

It does not appear from the bill when the city began to use its sewerage system; the first use of it mentioned in the bill being in or about the year 1890. In or about that year, the bill says, the city "began to unlawfully cause to be discharged from its sewers and to flow into said river large quantities of acids, impure substances, waste matter, sewage, contents of privies, cess-pools and sewers." Page 13. No one of the complainants complains of any injury from the pollution of the river prior to that date.

Although the complainants in the first class mentioned, describe the condition of the river at the time of the filing of the bill, no one of them tells when his "property rights" were first injured by its pollution. The sole complainant in the second class does not state when the river was first polluted, or when such pollution first injured its "property rights." Some of the complainants in the third class are a little more explicit on this point. Thus, the Botany Worsted Mills commenced its business (worsted and woolen goods) in the early part of 1890, using the

water for scouring, washing, condensing and dyeing raw material and fabrics ; at first it was pure enough for all these purposes without filtering, but soon began to show evidences of pollution, and by 1892 became unfit for scouring, rinsing and dyeing. P. 21, etc. The term of the lease of the Algonquin company commenced January 1, 1892 ; it used the water for scouring and dyeing wool, and in its fulling mills and presses ; at the time of the making of the lease (January 1, 1892) the water was sufficiently pure to be available to this complainant for these purposes, but "for some time past," in the language of the bill, no particular time being stated, it has been unable to use the water for at least some of those purposes. P. 22, etc. The Dundee Woolen company commenced its business in or about the year 1884, using the water for power and for dyeing and scouring in the manufacture of woolen goods. It does not say anything about the condition of the water until 1892 ; but it says that in that year the water became noticeably bad and has since grown rapidly worse. P. 24, etc. The Worthen and Aldrich company was not organized until December, 1892. It used the water for dyeing and washing woolen and cotton fabrics. It says that during the first few years its plant was operated the water was sufficiently pure for these purposes ; but that it afterwards became so bad that it was compelled in 1895 to sink wells and use filters. P. 27, etc. The Passaic Woolen company says that of late years the water has become unfit for dyeing and scouring but makes no other specification as to time. P. 30, etc. The An-

drew McLean company was organized in 1897 (p. 25), and the United States Finishing company in 1899. P. 28. The use the former intended to make of the water was for bleaching, dyeing and finishing purposes; the use the latter intended to make of it was for scouring, boiling, bleaching, dyeing and finishing purposes. The former acquired one mill power and the latter seven mill powers of water for these purposes. How it was that they were wheedled into doing so when the water, according to the statements of the others of the same class, had become unfit for these purposes, they do not explain. These two complete the list of the complainants in the third class. These are all the statements contained in the bill as to the time when the water of the river became so polluted as to be injurious to the "property rights" of the complainants. And it appears from these statements that that time was no earlier than 1890, by which time the population of the city had increased from a little less than 25,000 in 1865 to nearly 80,000.

It is true that these statements come from the third class of complainants. But if in 1890 the water of the river was pure enough for scouring, washing, condensing and dyeing raw material and fabrics, according to the statement of the Botany Worsted Mills, and did not become noticeably bad until 1892, according to the statement of the Dundee Woolen company, and was sufficiently pure to be available for scouring and dyeing wool and for use in fulling mills and presses in 1892, according to the statement of Algonquin company, and even for the first few

years after 1892, was sufficiently pure for dyeing and washing wool and cotton fabrics according to the statement of the Worthen and Aldrich company, it could not have become so polluted before 1890 as to cause any injury to the first or second classes of complainants.

As already stated, the first use of the Paterson sewerage system mentioned in the bill is in 1890. It is not to be supposed, however, that the use of that system was first commenced at that time. The bill states that there are already twenty-two sewer outlets from the city into the river, eight on the left bank and fourteen on the right of the river. How many of these had been built before 1890 the bill does not say ; but the probability is that the greater part of them were built before that time ; and it cannot be supposed that those of them that were had been plugged up until 1890, when, as the bill says, the city began to cause its sewage to be discharged into the river. It must be presumed that before that time the city had been discharging its sewage into the river for a number of years, a little at first and the amount increasing as the population of the city grew and new sewers were constructed and additional sewer connections made. There must have been, therefore, a number of years during which the city used the river as a conduit for its sewage without injuring the property rights of these defendants or of any one else. And it may in the latter part of that period have poured a considerable quantity of sewage into the river daily. During that period, however, no matter what quantity of sewage the city discharged into the river, it did

not, by so doing, take or impair any property or "property rights," and was, therefore, not liable to pay any damages to any one for the use it so made of the river.

But, now, according to the allegations of the bill, which, so far as relates to matters of fact well pleaded, must be taken as true on this argument, the river and its banks in front of and upon the respective properties of the complainants embraced in said first class have been partly filled and covered with filth and sewage matter, and the discharges from the sewers are sufficient in quantity and of such a character as to discolor and impregnate the whole of the river and the water thereof, and to make the water of a dark color and of an offensive smell and unfit to drink or use for domestic or manufacturing purposes ; and the air upon the lands of the complainants in the neighborhood of the river has been polluted, corrupted and poisoned by the sewage, and the said complainants, their families and employees have been injuriously exposed to noxious and unhealthful odors arising from the impure condition of the water of the river, and thereby the health of the complainants, their families, servants and employees has been injured. P. 15.

If this be true, the health of the public is in danger ; and as a large part of this public is in the city of Paterson, the city is bound in order to protect and preserve the health of its citizens to find some other means of disposing of its sewage.

Then, taking the allegation of the bill upon the subject to be true, the damages the complain-

ants have sustained from this pollution of the river, in case these injuries therefrom shall be permanent, that is to say, in case such pollution of the river shall continue, amount to the enormous sum of \$2,402,300. Pp. 32 and 33. It is certain that the city cannot run the risk of being required to pay such a sum as that to these complainants, and most likely a great deal more to persons not complainants in the case who may have been injured in the same way. Such a drain as that would render the city bankrupt, or very near it, and not only stop its growth but reduce its existing population by unendurable taxation. This consideration alone is sufficient to compel the city to seek other means of disposing of its sewage.

Then the legislature itself, that authorized the doing of what is here complained of, is seeking a way out of these difficulties. In 1896 it passed "an act for the consideration of a general system of sewage disposal for the valley of the Passaic river and the prevention of the pollution thereof." Laws of 1896, page 20. This act is not declared therein to be a public act, but it is sufficiently public in its nature to make it a public act. *Enleigh on the Interpretation of Statutes*, Sec. 501, etc. In 1899, the legislature passed "an act to prevent the pollution of the waters of this state by the establishment of a state sewerage commission and authorizing the creation of sewerage districts and district sewerage boards and prescribing, defining and regulating the powers and duties of such commission and said boards. Laws of 1899, pages 336, etc. In 1900, the leg-

islature passed an act to amend said last before-mentioned act. Laws of 1900, page 113. In 1902 (Laws of 1892, p. 1907), the legislature passed "an act to create a sewerage district to be called 'The Passaic Valley Sewerage District,'" and also, "an act authorizing the appointment and defining the powers and duties of commissioners in sewage and drainage districts created for the purpose of relieving the streams and rivers therein from pollution, and to provide a plan for the prevention thereof, and providing for the raising, expenditure and payment of moneys necessary for this purpose. Laws of 1902, p. 185. 9

FROM THIS STATEMENT IT APPEARS :

1. That the defendant does not appear in this case as a wilful wrong-doer, as set out in the complainant's bill, but as having been engaged in a laudable and necessary business under authority of the legislature of the State.

2. That there is no reason to suppose that when the legislature gave the city authority to build its sewers and discharge them into the Passaic river, and the city began the construction of its sewerage system, or for a long time afterwards, it was anticipated or apprehended that any property or "property rights" would be thereby taken, injured or impaired. 30

3. That for a long time, probably ~~twenty~~ <sup>30</sup> years, after the construction of the city's sewerage system was begun, no property or "property rights" appears to have been taken or impaired by such use of the river, during which period the city grew rapidly in population and the num-

ber of its sewers were consequently largely increased.

4. That now, however, according to the allegations of the bill, the river has become so polluted by the city's sewage and so much damage has resulted therefrom, calculated upon the basis of the injury being permanent, that the city is threatened with pestilence, financial ruin and general adversity, which can be obviated only by the adoption of some other method of sewage disposal.

5. That the legislature has taken the matter in hand and proposes to contrive some means by which these calamities can be averted and the property and property rights of the complainants and others injured in the same way may be relieved from such injuries.

We maintain :

FIRST.

That as the case thus appears before the court, it does not show that the complainants are entitled to what they ask for or to any other equitable relief or remedy.

The case as it thus appears before the court shows that the city of Paterson is making only a temporary use of the river as a conduit for its sewage to the ocean. When its sewerage system was first adopted and for some time afterwards it was doubtless expected and intended that the sewers would always discharge themselves into the river. But for reasons already stated, such a use of the river has become necessarily a temporary one. It will cease as soon as some other

means of disposing of the city's sewage shall be carried into effect. The safety and financial solvency of the city imperatively requires that some other method should be adopted. But whether it shall adopt some other method or not is not left to its option. The legislature of the state has taken the matter in hand and will compel the substitution of another method for this one, even if the city should not desire it. Now, in this state of affairs the complainants ask that the city shall be enjoined from any further use of its sewerage system, unless and until it makes such compensation to them for the diminution in value of their lands and property rights by the alleged pollution of the river through the operation of that system, as shall be ascertained by the Court of Chancery to be just. The compensation here asked for is the compensation that would be allowed if the pollution of the river was to be permanent. Of course, if such pollution is to be temporary, as is clearly the case, the complainants are not entitled to any such compensation. To give them the full amount of the diminution in value of their property and "property rights" when the alleged cause of such diminution must before long be removed, and their property and "property rights" in consequence restored to their full value, would be the rankest injustice. All they can be entitled to is the damages they have suffered from such pollution since 1890 and may suffer from it before it is abated. The case, therefore, does not come within the purview of the opinion in *Simmons v. Paterson*. That opinion had in contemplation a permanent con-

tinuance of the pollution of the river by the city's sewage, or, in other words, a permanent appropriation or taking of the property rights of the riparian owners in the water of the river by means of the operation of the city's sewerage system. As the case now stands, therefore, the complainants' bill has no countenance or support in that opinion.

Upon this temporary character of the use of the river as a conduit for the city's sewage being brought up on the hearing before the learned Vice Chancellor who decided this case in the court below, it was said by the complainant's counsel in reply, that a temporary use of as well as a permanent interest in lands could be condemned, and the case of *State v. Jersey City*, 50 *Atlantic Reporter*, 598, was referred to; and it was further said that we might set out in our answer to the bill, that we only want a temporary use of the river, stating for how long a time we wanted it, and ask for a condemnation for that period; and if that period should turn out to be too short a one, we could then ask for a condemnation for another period, and so on, and the court could proceed to condemn accordingly. Now we are not seeking to condemn either land or water in this case; we are not seeking to condemn anything but this bill, which seems to us more like a bill of iniquity than a bill in equity. But if we should ask what the complainant's counsel suggested we should, there would be very great doubt as to the courts granting our request. The case would be more like that of *Railroad Co. v. De Camp*, 47 *Vr.*, 518, in which the condemnation of a temporary use was re-

fused, than the one referred to by the counsel.

But it is the complainants and not we who are doing the asking ; and, considering this as a case of temporary damages, it would seem from the remarks of the complainants <sup>concerning</sup> that the complainants would have the Court of Chancery go on and assess these temporary damages, without the city's consent and even against its protest, if it should make any, and then, if the city should refuse to pay such damages so assessed, take away from the city the use of its sewerage system, leaving it to become immersed in its own filth, afflicted with divers diseases resulting therefrom and perhaps devastated by pestilence. It is safe to say the court would not pursue such a course as that.

It would be going a great way, to say the least, to force the city to submit to the assessment of permanent damages by a court of equity instead of a court of law, against its will, under threat of an injunction if it should refuse so to do. But whatever justification there might be for such a course if the injuries complained of were to be permanent, there is no justification for it when such injuries are but temporary. The complainants' remedy at law is ample and adequate and is its only proper remedy. There is, so far as I can ascertain, no precedent or authority for such intervention by a court of equity in a matter of mere temporary damages.

#### SECOND.

The Dundee dam and not the Paterson sewers is the cause of the injuries complained of.

This is the substance of the 4th and 5th causes of demurrer assigned. The 4th states that the bill does not show that the injurious condition of the river therein alleged is a necessary or natural result of the discharge of the city's sewage into the river. The 5th begins by stating that it is apparent from the allegations of, and the statements in, the bill that the said alleged injurious condition of the river is the inevitable result of the maintenance of this dam.

It is true that there are allegations in the bill sufficiently direct and strong to put the blame on the Paterson sewers; but there are other statements in the bill that offset all those allegations and show that the blame must rest on the dam. Thus the bill says:

“The said company shortly after its incorporation as aforesaid, erected a dam across the Passaic river at and opposite a point in what is now the city of Passaic, in the said county of Passaic, and above the point at which the tide in the said Passaic river ebbs and flows; that afterwards, and in the year eighteen hundred and fifty-eight, the said dam was raised by the said company to a height of fourteen feet above the bed of the said river, at which height it has ever since been maintained; that the said dam has backed up the waters of the said river so as to make an artificial pond or lake, commonly known as Dundee Lake, about four miles in length and with an average width of about five hundred feet; that the said company at or about the time of the erection of the said dam, dug a canal or artificial water way about eighty feet in

width, and commonly known as the Dundee Canal, through land then owned by said company, from a point above the said dam for a distance of about a mile and a half, having outlets or overflows into the Passaic river at various points below said dam ; that the said company has also erected and has since maintained a gate house at the head or inlet of said canal on lands then and still owned by the said company ; that the said canal is supplied wholly with water drawn from the Passaic river above the said dam and above the point in the said river at which the tide ebbs and flows." P. 19.

The word "company" here used means, as appears for the bill, the old Dundee Manufacturing Company down to sometime in 1868, a new company of the same name from that time until 1872, and after that the complainant, the Dundee Water Power and Land company. The latter is simply the former organized into a new company in that year. P. 18. The bill treats them both as one company ; for it says that the said Dundee Water Power and Land company was incorporated under the name of the Dundee Manufacturing company in 1832. P. 16. It appears from subsequent statements in the bill that the said gate house is located on a tract of land on the west bank of the river containing about one and a half acres of land. P. 20. How far it is above the dam that the canal cuts into the river does not appear ; but as the purpose of the canal was and is to take water from the river above the dam and carry it below the dam it is probable that the cut into the river is not very far above the dam. It also appears from the bill that it is

about 1,600 feet from the dam to tidewater. P. 20.

There are certain things to be here observed :

1. That this dam is fourteen feet high and throws the water of the river back about four miles. Were it not for this dam, therefore, the water of the river would naturally flow over these four miles with sufficient force to carry along with it and cast into tidewater about 1,600 feet below the dam, any sewage that might be left in it at that point. But there would not be much, if any, sewage left to be cast into tidewater, for the free, flowing river, with its natural process of purification unchecked, would nearly, if not quite, purify itself before reaching that point. See *Newark Aqueduct Board v. Passaic*, 18 Stew. 393, 403-405, referred to by the Chancellor in his opinion in *Attorney General v. Paterson*, 13 Dick., 1. 11 & 12.

2. That the throwing back of the water of the river by this dam causes an artificial pond or lake commonly known as Dundee Lake, about four miles long and with an average width of about 500 feet. The water of this lake is, of course, still water ; there is no effectual movement in it ; there is no force to carry on the natural process purification or to convey the sewage to tidewater. It has no outlet except the canal leading out from one side of the lake above the dam and such overflow as there may be at the dam. That such overflow cannot be depended on to afford much relief appears from the 2d paragraph of the form of proposals for leases used by the company annexed to the bill. P. 36. The most of the refuse matter poured into the river by the

sewers that is not disposed of by the natural course of purification of the river before it reaches this lake stops in the lake, producing the condition of the water there described in the bill.

3. The bill alleges that the contents of these sewers is and has been discharged into the river above the respective lands of the said first class of the complainants. P. 14, l. 3, etc. The bill also mentions a sewer that has its outlet into the river at Market street and under the Market street bridge. P. 14, l. 25, etc. Dundee Lake and Market street and Market street bridge having been mentioned in the bill, the court will, no doubt, take judicial notice of the fact that this bridge crosses this lake, and that the lake extends a considerable distance above the bridge. According to the allegations of the bill, therefore, the respective lands mentioned in the bill of all these complainants included in the first class, and comprising all the complainants owning land above the dam, excepting the Dundee Water Power and Land Company, which owns some land at and just above the dam, are, together with the said land of said company, below this bridge. Consequently these complainants and their lands are merely suffering from the condition of this lake brought about by this dam.

4. According to the allegations of the bill, no riparian proprietor above this bridge is a complainant in this cause. The natural inference is that no such proprietor has anything to complain of on account of the pollution of the river.

We now come to the question of the right of

the complainant, the Dundee Water Power and Land Company, to erect and maintain this dam, and thereby stop the natural flow of the river, throw back its waters and divert them into another channel. It does not appear from the bill how much land or what water rights, if any, this complainant owned at or about the place where this dam was erected and this canal dug, at the time of the erection of the dam and the digging of the canal, or at the time of the raising of the dam in 1858. The bill says that "the said company purchased and acquired a large quantity of land and extensive water rights along and upon the banks of the said Passaic river above the point at which the tide ebbs and flows in the said river, which said land and water rights were situated in the said county of Bergen and in that part of the county of Essex which is now part of the county of Passaic." P. 19. But the bill does not describe these lands and water rights so that they can be located and identified; it does not state which company—the original company or the new company—purchased and acquired them or when they were purchased and acquired. The bill states that the canal was dug "through lands then owned by the said company," and that the gate house stands "on lands then and still owned by the company." P. 19. It also mentions three small strips of land which this company owns and has owned "for many years last past," but for how many years the bill does not state. It states, however, that the gate house is located on one of the strips on the west side of the river containing about one and a half acres of land (p. 20); so that, at least,

a part of that strip must have been owned by the company when the dam was built and canal dug. The bill, therefore, does not state or show that this company owned any water rights at this point when the dam was erected and canal dug or when the dam was raised ; and it does not state or show that it owned the lands on which the dam was built, when it was built or when it was raised ; and it does not appear from the bill that at either of those times the company owned any land whatever on the east side of the river or any on the west side of the river except that on which the gate house was built and through which the canal was dug ; or whether the last mentioned land joined the river or not. In short, it not only does not appear that this company was such an extensive owner of water rights and lands in that locality that it could do what it did there as stated in the bill without interference with the rights of other riparian proprietors, but it is very clear that it was no such extensive owner. Then as the canal is about one and one half miles long and appears to run in the same general direction that the river runs, and the point to which the tide in the river ebbs and flows comes within about 1600 feet of the dam, this dam and canal take the water out of the river for about one and one quarter miles below the point where the tide in the river ebbs and flows.

This complainant could not lawfully thus stop the flow and back up the water of the river and divert it above the point where the tide in the river ebbs and flows, without first acquiring the right so to do, from the other riparian owners

affected thereby, or from the legislature upon payment of just compensation to such owners ; and it could not lawfully thus divert the water in the river below the tidewater point without authority so to do from the legislature. No argument or citation of authorities is required to support these propositions. No such right or authority appears from the bill. Even the act of 1872, referred to in the bill on page 18, which provides that it should be lawful for the company to establish an office in the city of New York for the letting of its powers or the disposal of its lands, cannot be construed into an affirmation or recognition of the lawfulness of such powers ; it must be understood as referring solely to such powers, if any, as the company might lawfully have to let, as the Vice Chancellor appears to admit in his opinion. P. 52, l. 35, etc. And certainly no grant from the state of the right to divert the water from the river so as to keep it out of the river below the tidewater point can be inferred therefrom. *Newark Aqueduct Board v. Passaic*, 18 Stew., 393, 398 and 399. And the bill does not even allege that it acquired the right to build or raise this dam and dig this canal from any source whatever, or that those things were done by virtue of, or even in pursuance of, any act of the legislature. All it says on this point is, that it erected a dam "for the purposes specified in its charter." P. 19. The purposes specified in its charter are manufacturing iron, cotton, wool and other articles, the manufacture of which was not prohibited by the laws of this state. P. 16. It is clear that authority to manufacture these things did not carry

with it authority to build and afterwards raise this dam and dig this canal.

The Vice Chancellor, in referring to this dam, says there is nothing in the bill from which it can be inferred that it was built upon lands which did not belong to the company. P. 49. However that may be, there is certainly nothing in the bill to show that it was built upon lands which did belong to the company, as clearly appears from what I have already said, and will more fully appear from an examination of the bill itself. That such is the case the Vice Chancellor does not appear to deny ; but he goes on to say that, "it (the dam) has stood at its present height for over forty years—a period of time more than sufficient to legalize it as against adverse claimants." He thus sets up a prescriptive right for the maintenance of this dam, and does not even hint that any answer to such a claim was made in the argument before him. And he says nothing about the diversion of the water of the river by means of the dam and canal, or about its being kept out of the river for a mile and a quarter below the point where the tide ebbs and flows. The position I took and now take is that the right of the company in respect to this dam and canal has nothing but prescription to support it, and in this the vice chancellor evidently agrees with me as to the dam, and he would doubtless have agreed with me as to the canal if he had seen fit to express himself upon that point. The only allegation in the bill that tends to show a prescriptive right is where it says that in 1858 the dam was raised by the company to a height of fourteen

feet above the bed of the river, at which height it has since been maintained. It does not, however, state that the water has been continuously drawn and diverted from the river by means of the canal for as much as twenty years before the filing of the bill. Our answer to this prescriptive claim is as follows :

1. In this state, all rivers that are navigable in fact, whether their waters are public waters, that is, waters in which the tide ebbs and flows, or private waters, that is, waters in which the tide does not ebb and flow, are included in the term "navigable rivers," and are subject to the public right of navigation. *Cobb v. Davenport*, 3 Vr., 369, 378 and 379. The bill admits that the Passaic river is navigable, for it says, speaking of the first class of complainants, "that such complainants as riparian owners were and are entitled to the right of navigating said river." Now there can certainly be no right to navigate a river which is not navigable, and when one sets up a right to navigate a river he thereby admits, and not only admits, but virtually avers, that the river is navigable. This admission or averment does not lose any of its force on this argument in respect to the other classes of complainants because they say nothing about the matter. The principal part of the facts upon which all of the complainants rely for compensation are set up in the bill by the first-class of complainants alone. Eliminate what they say from the bill and the second and third classes would not have any ground to stand on in the case. And if they are to have the benefit of those facts so alleged that will help them, they

cannot escape the effect of such of those facts as may hurt them. The Vice Chancellor says in his opinion that "the bill, though a new one, is practically a continuation of the case of *Simmons v. Paterson*." P. 48. If that be so, which I neither admit nor deny now, I suppose the court will have the right to look at the bill in that case. Paragraph 1 of that bill begins as follows: "That at and during all the time hereinafter referred to, and from time immemorial, the Passaic river has been and now is a natural stream of water, *navigable* river and watercourse, flowing from its source above the city of Paterson, a municipal corporation located in the county of Passaic and state of New Jersey, through the city of Paterson and other portions of Passaic, Bergen, Essex and Hudson counties \* \* \* to its outlet in Newark Bay." Of course, below the point at which the tide ebbs and flows the river is presumed to be navigable without any allegations to that effect in the bill.

This right of navigation does not belong exclusively to riparian owners even in private waters; the public at large share equally with them in this right. *Cobb v. Davenport*, *supra*; *Gould on Waters*, §§ 54 & 86. The purpose of the navigation is immaterial, and those who pass upon the waters for purpose of pleasure, fishing or fowling have equal rights with those who navigate for business, trade or agriculture. *Gould on Waters*, § 86.

This dam obstructs the navigation of the river in two ways. Its presence stops all boats from going any further either above or below it; and its turning the water of the river down the

canal takes and keeps that water out of the river for a distance of about one and a half miles. One and a quarter miles of this distance is below the tidewater point, below which point the river is presumed to be navigable. The dam is fourteen feet high and the canal eighty feet wide. The canal, therefore, takes away a very large part of the water of the river. It probably takes the most if not of the whole of it in dry seasons. The result must be to make the river very low and sometimes even dry for a considerable distance below the tidewater point when the tide is down. Depriving a river of water is just as much an obstruction to navigation as the building of a dam across it. Gould on Waters, § 92. All such obstructions to navigation are public nuisances. Gould on Waters, § 92; 1 Wood on Nuisances, p. 92; Newark plank road company v. Elmer, 1 Stockton, 754. Whether they are above or below tide water does not make any difference. Gould on Waters, § 93-A. The penning back of the waters of a stream so as to render it stagnant or prejudicial to the health of the neighborhood is a public nuisance. 1 Wood on Nuisances, p. 94. No one can acquire the right to maintain a public nuisance by prescription. Gould on Waters, § 121 and 532; 2 Wood on Nuisances, pp. 936, etc., (some dam cases mentioned); Cross v. Mayor of Morristown, 3 C. E. Gr., 305, 311 and 313. This rule applies to streams which are merely floatable as well as to those which are navigable in a larger sense. Gould on Waters, § 121. This dam and its accompaniments, therefore, constitute a public

nuisance, the right to maintain which cannot be acquired by prescription.

2. The legislature, by the acts of 1877 and 1878, under the authority of which the city's sewers were built, gave the city the absolute and unqualified right to use the river as a means of conveying its sewage to the ocean, so far as it could do so without impairing the rights of riparian owners above tidewater. That this is so is settled by the case of *Simmons v. Paterson*, 15 Dick., 385. This right is so absolute in respect to the part of the river below the tidewater point that the granting of it would have repealed by implication a prior grant to Jersey City in respect to its water supply, if there had been any. *Ibid.* 392. And this right above tidewater must be such as to entitle the city to so much of the natural, free, full and uninterrupted flow of the river as may be required to carry its sewage down to tidewater, subject to the proper use of the water of the river by riparian owners. The dam was raised to its present height in 1858, and the acts mentioned were passed only about ten years afterwards. At the time, therefore, that the city acquired the right to use the river for the disposal of its sewage, no prescriptive right to maintain the dam at that height could have accrued.

And the time necessary to give a prescriptive right against the city did not begin to run until an actual injury was done the city by the dam. 2 Wood on Nuisances, § 719 and 723; *Holsman v. Bleaching Co.*, 1 McC., 335, 345. And no such injury was done until the water of the river became so polluted by the interference of

the dam with the flow of the water as to render it harmful and detrimental to property and persons on or about the river ; and that did not occur, as appears from the bill, until about twelve years ago ; and it requires nearly double that length of time to give a prescriptive right. The case is even stronger than this ; for no prescriptive right can be acquired against a municipal corporation in respect to public rights. 2 Dillon on M. C., 4th Ed., §675 (533) ; Jersey City v. Morris C. and B. Co., 1 Beas., 545,561 ; Cross v. Morristown, 3 C. E. Gr., 305, 311 ; Price v. Plainfield, 11 Vr., 608,614 ; Tainter v. Morristown, 4 C. E. Gr., 46, 59.

#### THIRD.

The rights of the complainants of the third class to take water from the canal are not such rights in and to the water of the river as entitles them to compensation for any injuries thereto from the alleged pollution of the river.

By this is meant, of course, that such complainants are not entitled to such compensation from these defendants in this suit.

These complainants are lessees of "mill powers" from the Dundee Water Power and Land Company. Each "mill power" is the right to draw from the nearest raceway or canal of the lessors eight and one half cubic feet of water per second, so long as the water in the main reservoir at the dam shall remain at a certain height. P. 36, l. 9, etc. Certain leases, called perpetually renewable leases, the form of which is appended to the bill, have been used in the cases of some of these complainants. These

leases, according to that form, are made for the term of twenty-one years, "to be renewable at or before the expiration of said term of twenty-one years, at the request and at the cost and charges of the lessees or their assigns, and at or before the expiration of every succeeding term of twenty-one years, at the same yearly rent," etc., provided, of course, that the rents, etc., due and to become due during the current term shall have been first paid and satisfied, and that "all the conditions, agreements, matters and things" therein "contained on the part of the lessees shall have been kept, observed and fulfilled." Pp. 35 and 36.

The company says it has from time to time made and executed, to a great number of persons, leases of the kind here described, for one or more mill powers (p. 19, l. 35, etc.); but it does not say that all the leases it has made have been in that form; and I find that four of the seven lessees state that they hold such leases; that two of the other three, namely, the Worthen and Aldrich company (p. 27) and the Passaic Woolen company (p. 30) do not state the character of their leases; and that the other, the Algonquin company (p. 22), says its lease, the term of which commenced January 1st, 1892, was for five years, with the option of five years more, which option it availed itself of. This renewed term, therefore, expired January 1st, 1902, which was two days after the filing of the bill, the bill having been filed December 30th, 1901.

The bill does not allege or show that these lessees are located or take their water from the

canal above the point in the river to which the tide flows. The bill is very careful to state that the respective lands of the complainants of the first class are all wholly above that point (p. 11), that the dam is above that point (p. 19), and that the canal is supplied with water drawn from the river above that point. P. 19. If these lessees take their water from the canal above that point the bill would doubtless so allege; I shall, therefore, take it for granted, and do not understand there is any dispute about the fact, that they take their water from the canal below that point.

The reasons for the view above expressed under this head as to the rights of these complainants in the water of the river, are as follows :

1. According to the case of *Simmons v. Paterson*, riparian proprietors above tidewater have a property right in the water flowing along and over their land for the taking of which they are entitled to compensation. No other persons are there mentioned as having such property rights. Such property rights can extend no further than the riparian proprietor has a right as such proprietor to use the water. And such proprietor has no right to divert and detain the water from the river when such diversion and detention interfere with the rights of other proprietors. See views of Lord Kingsdon quoted by the Vice Chancellor in his opinion on page 52 of the case. Now as soon as such diversion and detention pass a point corresponding with the point of the river to which the tide flows, the water is diverted and detained from the tidal part of the river which belongs to the state. This, of course, is an interference with the rights of

the state. It follows, that this right to divert and detain must stop at the tidal point; and if that right must stop at that point, this property right in the water, which depends upon that right, must stop at the same point. The state is not the only party that can take advantage of this. Mills on Eminent Domain, § 160. And the city, as the grantee of the state of the right to use the river for sewage purposes, can certainly take advantage of it. The company, therefore, has no property right in the water in the part of this canal that is below the tide-water point for the taking of which in this matter it is entitled to compensation. And if the company has no such right, its lessees have no such right, whether they otherwise would or not.

No original authority to detain this water from the river appears from the bill and no right to detain it could be acquired against the state by prescription. 2 Wood on Limitations, p. 109; Cross v. Morristown, *supra*: State v. Morristown, *supra*. Nor against the city as already shown.

2. It is clear that it would be unlawful to divert water from the river below the tidewater point and keep it out of the river for any distance whatever, without authority from the legislature. The water after having been so diverted would still belong to the state and neither an individual or a corporation diverting it would have any title to it. Wainwright v. McCulloch, 66 Penn St., 66. Nor, of course, would any lessees of such individual or corporation have any title thereto or "property right" therein. I

do not see how the fact that the water is first taken out of the river a short distance above the tidewater point can make any difference. The water, as soon as it passes the tidewater point is unlawfully and wrongfully diverted and must thenceforward belong to the state, and those diverting it or their lessees can thereafter have no more title to it than if it had been taken from the river just below that point.

Suppose the state had undertaken to establish and operate the city's sewerage system instead of leaving it to the city, and should refuse to pay compensation to these lessees on the ground that the water they were using belonged to it and not to them, would any court hold that the state was thereby taking private property for public use without compensation?

Well, the city, under the acts of 1867 and 1868, stands in the place of the state so far as relates to the use of the river for sewage purposes. Whatever rights the state would have in this water if it were operating this sewerage system, the city has under the authority of the state. If the state would not be taking private property for public use in this water the city is not doing it. The company and its lessees are merely using this water under the sufferance or toleration of the state, and that sufferance or toleration is subject to the grant to the city by the acts referred to. The city, therefore, has the same right to pour its sewage through this water as it would have if the water had not been diverted but took its natural course through the river.

3. The right, if any, to such compensation is

confined to the lessor and does not extend to its lessees. *Stockport Water Works Co. v. Potter*, 3 Hurlst & C., 300; *Ormerod v. Todmorden*, L. R., 11, Q. B. D., 155; *Kensit v. G. E. R. Co.*, 27 Ch. Div., 122. The Vice Chancellor thus states the *Stockport Water* case: "It was held by a divided court that where a riparian proprietor conveys land not abutting on a stream and gives water rights to use thereon, the grant of water rights though valid as against the grantor creates no right for the interruption of which the grantee can sue a third party." P. 50. As this decision does not appear to have been overruled I do not think the fact that it was made by a divided court can detract from its force as an exposition of the common law of England, on the subject. Very much of the well established law of this state has come from the decisions of divided courts.

In order that it may be seen just what was decided in these cases, I will give brief extracts from the opinions in two of them. In the *Stockport Water* case the court said: "There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river, the possession of which gives him his water rights, and at the same time transfer those rights or any of them, and thus create a right in gross by assigning a portion of his rights appurtenant." In the case of *Ormerod v. Todmorden* the court said: "The grant of a right to flowing water by a riparian owner is valid only against himself and cannot confer rights as against others. The law as to flowing water is a part of the common law of England and it only

exists as between riparian owners. It does not extend to those whose lands do not abut on streams and rivers." The Vice Chancellor does not seem to deny that this is the common law of England, or even that it is the law of this state ; but he contends that the case of these lessees is taken out of the operation of that law by the act or acts of the legislature, giving the company the right to let its powers. This right so given he magnifies into such an unlimited right as to carry with it the power to assign the water rights in gross even though an individual owner would not have any such power. It seems to me, however, that the legislature thus conferred on the company merely the same right in regard to the letting of the powers that an individual owner would have had.

The Vice Chancellor refers to the case of *Butler Rubber Company v. Newark*, 32 Vr., 32, as adjudicating that a right in gross to water is a property right for which, if taken for municipal uses, compensation must be made. I do not find any such adjudication in that case. The court did decide, according to the opinion delivered by Justice Dupue, that the right to water in question in that case was such a property right. But what was the right to water in question in that case ? Justice Dupue, in his opinion said : "In *Kensit v. Great Eastern Railway Company* the action was brought by a riparian owner further down the stream against the defendant for polluting and diminishing the flow of water by diverting it to premises of his own, which were not riparian lands. The defendant's rights were acquired under an agreement with the ri-

parian owner (not, of course, the one before mentioned). The water was to be diverted by the aid of a three inch pipe from the stream to the defendant's premises. The defendant's right is called in the opinion a license, or grant to take water." Page 42. This exactly describes the rights of these lessees; they are mere licenses, or grants to take water. Afterwards the justice gives this description of the rights of the owners of the water rights in question in the Rubber Company's case he was then dealing with: "The grant in the deed from the Newbrough Company to Rosenthal and Strauss, under whom the plaintiff (the owner of the water rights in question) acquired title, conveyed the mill and premises, together with all the rights of the dam and of all the flowage possessed by the Newbrough Company, and in the deed the premises conveyed included the fee of the raceway to within seven and five-tenths feet from the southwest corner of the stone abutment of the gate house at the upper end of the raceway. The water rights passed, *not as a license, or as an easement but as appurtenant to the mill premises.*" And then it appears from page 48, that the plaintiff in that case—the Butler Rubber Co.—was the owner of the title of Rosenthal and Strauss which was acquired by this deed. It appears, therefore, that the right of the owner of the water rights in that case was a right appurtenant to the mill premises, and not a right in gross. And it was this right appurtenant that the court held to be a property right for the taking of which by the city of Newark compensation must be made. It is evident that the justice first stated that in the

Kensit case the defendant's right was called in the opinion a license, or a grant to take water, and then proceeded to show that in the Rubber Co. case the water rights passed not as a license or as an easement but as appurtenant to the mill premises, for the purpose of showing the difference between the two cases, and that the doctrine of the former case did not apply to the latter case. It is clear, therefore, that the Vice Chancellor is greatly mistaken when he speaks of an adjudication in this Rubber Co. case that the right in gross to water is a property right for which, if taken for municipal uses, compensation must be made.

It is true that the justice expresses the opinion in that case that the English cases I have cited were not applicable to that case, where the defendant was taking property under the power of eminent domain. But the question whether or not those cases are applicable to cases where the taking of property under that power is sought was not involved in that case; for the justice proceeded to demonstrate, as I have shown, that the water rights in question, in the case he had in hand, were not the kind of water rights to which the doctrine of those cases applied. The expression of this opinion, therefore, was mere *dictum*, and not an adjudication. And yet the Vice Chancellor may have based his view of what was adjudicated in that case upon what the justice said upon this point. He could not have based it on anything else in the case.

4. Even if the law of these English cases should be held to be inapplicable to condemnation cases, and even if these lessees shall be held to have

the property rights claimed by them, compensation for injuries to these property rights could not be separately estimated or be obtained in this suit, especially as it now stands. This water power, so far as the company can have property in it, including the mill powers let to these lessees and others, is the property of this company. It is subject to taxation and assessments for local improvements and, with the exception of such water as may pass into the possession of the lessees, is liable to be treated in all other respects as their property. These lessees do not occupy any higher position than that of tenants of this company; and in case of the condemnation of the company's property, including its water power or any part thereof, their rights in respect to compensation would not be any higher than that of ordinary tenants. Assuming, therefore, for present purposes, that this company and its lessees are entitled to compensation for injuries to this water power or these water rights, the compensation to which it and its lessees are entitled all together is the amount of the diminution in value of the company's property, including the rights therein of these lessees; and the amount of that compensation would be apportioned among the company and its lessees; for all the compensation a tenant is entitled to is his proportional share of the entire compensation allowed for his landlord's property, of which, or any part of which, he may be a tenant. *Mills on Eminent Domain*, §§65 and 68. The company and these lessees have made a fanciful division in the bill of their property rights, assigning to the lessees their

rights under their leases, and to the company its reversionary rights in the mill powers included in those leases, etc. No such division as that can be made in ascertaining the compensation to be allowed. There is no authority for pursuing any other course than the one I have described and that is the only course that accords with reason, justice and common sense.

But even such compensation, ascertained in this way, could not be recoverable in this suit. In the first place, there would be a misjoinder of parties as between the company and its lessees, for they would have conflicting interests in the suit, the interest of each party, that of the company on the one hand, and that of the lessees on the other hand, being to obtain as much of the compensation as it could. In the second place, there would be a want of necessary parties. In order to make the assessment and distribute the same among the company and its lessees all of its lessees would have to be before the court. The company does not state in the bill whether or not all its lessees are among the complainants in this case ; but it does say that it has, from time to time, made and executed to a great number of persons the perpetually renewable leases described in the bill (p. 19) ; and such being the case it is hardly supposable that the only persons who hold such leases now are included among these seven lessees. In the third place, these lessees, instead of setting up in the bill such a claim as I have mentioned, set up claims entirely distinct from and independent of that of the company, and the company recognizes and affirms

the claims set up by them and itself presents claims entirely distinct from theirs ; so that, to bring about such a settlement of the matter as I have suggested would require a complete change in the frame and allegations of the bill so far as relates to the matter of compensation. The defendant, would, of course, be entitled to know just what the company and its lessees claim and want, and it could not do that unless what they claim and want is set up in the bill.

5. According to the opinion of this court upon which this suit is intended to be based, it is compensation only for the diminution in value of the lands of riparian owners that is to be allowed. It is true that the property rights of riparian owners in the water flowing along and over their lands is what is injured and is considered as taken, but the compensation to be allowed is measured by the diminution in value of their adjoining land. *Simmons v. Paterson*, 15 Dick., 385, 390-397.

#### FOURTH.

There are in the bill misjoinders of complainants and causes of action.

The claims set up by the several complainants are not only separate and distinct, (except in a few cases in the first class where two or more are joint owners of land), but some of them at least are very dissimilar. Thus, some of the complainants of the first class complain of injuries to land without buildings, and some to land with buildings ; the buildings are of different kinds ; and one, Mary A. Van Saun (p. 8) has ice houses, and will doubtless claim compensation

for injury to the ice. And then these different properties are located in different cities and townships in the counties of Passaic and Bergen. The injury these complainants suffer is to land and buildings, and in one case apparently to ice crop. The sole complainant in the second class sets up injury to its rents under its leases, to its reversionary rights in its leased mill powers, to its right to sell surplus water and to its land. P. 20. And the complainants of the third class claim injuries to their rights to take water from the canal, and two of them—the Dundee Woolen company (p. 24) and the Andrew McLean company (p. 25)—seem to claim injuries to some other rights under their leases.

Before the adoption of the rule of this court now numbered 132, no two of the complainants having any two of these separate and distinct claims could have joined even in a pure injunction suit. *Hinchman v. Paterson Horse Railroad Company*. 2 C. E. Gr., 75; *Morris and Essex Railroad Company v. Prudden*, 5 C. E. Gr., 330. This rule is as follows: "Any number of persons severally owning or possessing distinct tenements, injuriously affected by a common nuisance or other common grievance, may join in a bill for injunction or relief; provided, that it shall be in the discretion of the chancellor to strike out of the bill any of such complainants, when, in his opinion, the justice of the case or convenience of proceeding shall require it." The word "tenements" here used cannot include the rights to take water from a canal. Such a right is a mere incorporeal hereditament, or easement. Mr. Washburn, in speaking, in his work on real

estate, of incorporeal hereditaments, says : "Property like this is not, properly speaking, regarded as a tenement." Vol. 2, P. 284. It is not to be supposed that the learned chancellor who first promulgated that rule used the word "tenement" in any other than its proper sense.

Who and what can be joined under this rule is shown by *Demarest v. Hardham*, 7 Stew., 469, and *Ferry v. Liable*, 12 C. E. Gr., 146, cases decided since the rule was adopted. In the case of *Demarest v. Hardham*, which was an injunction case, Vice Chancellor Van Fleet said, "several persons may join in a suit to restrain a nuisance which is common to all and affects each in the same way." In that case two distinct injuries were alleged ; one affecting the building alone, and the other the business carried on in the building. One complainant owned the building in which the other complainant had no interest except as lessee. "He certainly," the Vice Chancellor, speaking of this last complainant, said, "can have no relief for any injury which may have been done, or which it may be apprehended will be done, to the reversion." Both of the complainants, however, were interested in the business carried on in the building, being co-partners therein. The cause of both of these distinct injuries was the same, namely, operation of machinery in an adjoining building. The Vice Chancellor held that the complainants were misjoined. The reason must have been that each was not affected "in the same way." The injuries to the building as to the reversion thereof at least, affected only one of them. The other was affected as lessee ; and

both were affected in the business ; but each was not affected in the same way. Applying that case to this case, there is a clear misjoinder of complainants in this case. In this case, as in that case, the injuries complained of resulted from the same cause ; in that case it was the operation of machinery ; in this case the pollution of the water of the river ; but such pollution does not affect each of the complainants "in the same way." For instance, in the cases of the riparian owners above the dam, their alleged injuries are, mainly, at least, to their lands and buildings ; and in the cases of the third classes of complainants, their alleged injuries are to their rights under their leases which in most of the cases consist merely of the right to take water from the canal. But the fact is, as will be seen by reference to paragraph 31 to 37 of the bill, that the real injuries of these complainants is to their business.

The object of the rule in question is clear. In the Hinchman case the complainants were owners of lots abutting upon two streets through which the defendant was about to construct a horse railroad. In the Prudden case the relators were the owners of lots fronting on one side of a street through which it was proposed to lay a railroad track. The nuisance or grievance complained of in each of these cases was common to all the complainants, and, no doubt, affected each in the same way. But as the grounds of relief were a special injury to the lands of each of the complainants it was held in each of the cases that there was a misjoinder of complainants. I think it is generally understood that the purpose

of the rule was to enable parties so situated to join as complainants in a bill. It would seem to be clear that a rule adopted for such a purpose cannot be construed to cover a case like this, which involve the ascertainment of the compensation to be paid for the taking of property for public use. And it is especially so when, as in this case, the thing to be so done is entirely outside of the ordinary functions of the court. The "relief" mentioned in the rule was, no doubt, intended to be confined to the relief ordinarily granted by courts of equity, and the rule evidently had special reference to injunction cases. It seems very clear that Chancellor McGill would not have over-ruled the demurrer in the case of Attorney General v. Paterson (13 Dick., 1), if any such matter had been involved therein. He says, on page 8 near bottom: "can they (the complainants) not join, as may those affected by the common air defiled by the smell of a slaughter house, in an appeal to this court, *not to award each his damages*, but to stop the defilement." It will be seen from this that his overruling the demurrer was placed especially on the ground that the bill was merely to stop the defilement of the water, and not to award each his damages. That case, therefore, is no authority for the complainants in this case. Besides, the fact is that when that case got to this court, the court reversed the order of the Chancellor over-ruling the demurrer, in which the question of mis-joinder was raised. That fact does not appear in the opinion of the Court of Errors and Appeals, but it does appear from the papers filed in the case in the office of the Secretary of State.

In cases of this kind, the party asking the action of the court is not entitled to a jury trial, but the other party is so entitled. *Coster v. Monroe Manufacturing company*. 1 C. E. Gr., 467. In this case, therefore, the defendant is so entitled while the complainants are not. But no jury would be able to try and render a verdict upon all the dissimilar issues involved in this suit as it now stands. I do not find any authority to the effect that the provision of the constitution of this state respecting the right of trial by jury does not apply to municipal corporations, and the putting of so many dissimilar issues in the suit that a jury cannot try it, is in effect a deprivation of such right in violation of the constitution.

The Vice Chancellor says upon this subject that "it seems clear that the present case comes within the reason of the late Chancellor's opinion with the decisions cited and commented on by him in the *Simmons* case," P. 54. But that was an injunction case, and not a case in which damages to each complainant's property, or any damages whatever, were to be assessed. And I have already shown that the late Chancellor placed great stress on that fact in his opinion. The Vice Chancellor also says: "No disapproval of his (the late Chancellor's) views in that respect is to be found in the opinion delivered on behalf of the Court of Review." That is true; and it is also true that that opinion did not touch upon the subject of misjoinder at all; but the court did, as I have shown, reverse the order of the said Chancellor overruling the demurrer in which this question of misjoinder was raised. This would

seem to be a pretty emphatic disapproval of the said Chancellor's views on the subject. If it is true, as the Vice Chancellor claims, which I do not admit, "that there is to a certain extent a community of interest or obligation among the several lessees, when the water is low, which makes it at least desirable that both lessees and lessors should participate in an assessment of damages," there certainly is no reason why the other complainants, being those of the first class, should also participate therein. This "community of interest or obligation" certainly does not extend to them, and its exclusive existence, if it does exist, among the lessees, would seem to afford a good reason why they and the complainants of the first class should not be mixed up together in the suit, "This objection," the Vice Chancellor says, "seems to be without substance." The substance is, that it will be impossible to try so many issues—and each piece of land and "property right" presents a separate issue—some of them differing widely from others, without confusion, not to mention other difficulties, especially on the part of the defendant, that readily suggest themselves.

It may be urged that the fact that Justice Van Syckel, in the opinion in the Simmons case, suggested that the complainants might amend their bill or file a new bill, etc., shows that he approved of such "omnibus bills," or at least did not consider them objectionable. I will only say upon that point that the Dundee Water Power and Land company and its lessees, the investigation of

whose claims will be attended with the most difficulty, were not complainants in that case.

#### FIFTH.

The bill does not allege or set forth that the discharge by this defendant of its sewage into the Passaic river is designed to be permanently continued.

Damages or compensation for permanent injuries cannot in any case be awarded unless the injuries are actually permanent. Nothing can be clearer than that. In this case the injuries complained of result from the pollution of the river. If, therefore, such pollution should at any time cease, injuries therefrom and the right to compensation for such injuries would also cease. It follows that the complainants cannot be entitled to damages or compensation for permanent injuries arising from such pollution unless the pollution is to be permanent. Permanent pollution, therefore, is the very gist and essence of the suit. It follows that such permanent pollution must be alleged in the bill and established by the proofs. There is no such allegation in the bill.

It is true the bill states that the damages therein mentioned as sustained by the complainants are calculated upon the basis of such injuries being permanent; but this does not amount to an allegation that such injuries are to be permanent. And the bill does not even ask for the payment of these specified damages for these permanent injuries. What it asks for is compensation for the diminution in value of the

complainant's lands and property rights, and there is nothing in the bill to show or indicate that the complainants consider the amount of these damages so stated as representing such diminution in value. It is also true that the bill alleges that this defendant "threatens to continue to discharge such foul and noxious matter into said river in increasing quantities," but for how long a time the bill does not say. The city may threaten to continue to discharge its sewage into the river until it secures some other means to dispose of it; and in that case, as the city is growing in population and will doubtless find it necessary to construct new sewers and make additional sewer connections before such other means of disposing of its sewage are secured, the amount of its sewage discharged into the river will doubtless increase in quantity until such other means are found. Such a threat if made does not necessarily or probably mean anything more than this.

It may be urged in reply to this, that the elaborate sewer system of the city, described in the bill, and the fact that this system has been and is still used in discharging sewage of the city into the river, as stated in the bill, shows, without any direct allegation of the fact, that the system and its use is designed to be permanent. But I maintain that those facts, when taken in connection with other facts alleged in the bill, and facts of which this court will take judicial notice, hereinbefore mentioned, do not show any such design; but that, on the contrary, all the facts and circumstances of the case, as thus exhibited, clearly indicate that no such design exists, as

already stated; and that, consequently, the only thing that can save the bill under this demurrer is a direct and positive averment therein of the existence of such design.

#### SIXTH.

The bill does not state or show the amount of compensation demanded by the complainants, or any or either of them.

It is true that the bill gives the damages which the complainants "have severally sustained by the destruction of or interference with their said property rights," as near as can be ascertained. But the bill does not pray for the payment of these damages. What it prays for is compensation for the diminution in value of the complainants' lands and "property rights." Now damages sustained by the destruction of or interference with property by the pollution of a river, and the diminution in value of property by such pollution are two different things. The former may include loss of profits, cost of erecting and maintaining filters, cost of digging wells, etc., but none of these things can be embraced in the latter, although they or some of them may, perhaps, be taken into consideration in determining the amount of the diminution in value. Then the bill does not state whether the future injuries embraced in these permanent injuries are confined to such injuries as will result from the pollution of the river to the same extent to which it is already polluted, or includes also such injuries as may result from the pollution of the river to the extent that it may

hereafter be polluted. Nor does the prayer of the bill state whether the diminution in value of the complainants' land and "property rights" mentioned has reference to such diminution at the present time, or in the future, when the pollution of the river may be much greater than it is now, in case such pollution shall continue. The language used seems to indicate present diminution, but the rule of law that in case of compensation for property taken the compensation awarded must be for all time, raises a doubt on the subject. Besides, according to the opinion of Justice Van Syckel in the case of *Simmons v. Paterson, supra*, the plaintiff can be entitled only to compensation for the "diminution in the value of their lands"; while in the prayer of the bill the complainants ask for compensation for the diminution in value of their said lands and "property rights". Does this term "property rights" refer only to the alleged "property rights" of the lessees in the water they are entitled to take from the canal under their leases, or does it include also the "property rights" of the riparian proprietors in the water of the river flowing over and along their lands? And if it includes the latter, is it claimed that these proprietors are entitled to compensation for the diminution in value of both their said "property rights" and their said lands? And does the term "lands" refer only to the lands of the first and second class of complainants, or does it include also the lands owned or occupied by the lessees? In this matter of compensation we are left entirely in the dark. We are entitled to know just what

compensation each of these complainants claims, and for what it is claimed. In no other way can we be enabled to judge whether the compensation claimed is just or not, and be prepared to resist the claim if unjust.

I respectfully submit that the order overruling this demurrer in this case should be reversed.

GEO. S. HILTON,  
*Of Counsel with Defendant.*



## New Jersey Court of Errors and Appeals

Between

HENRY W. DOREMUS, et als.,

*Respondents,*

and

THE MAYOR AND ALDERMEN OF

THE CITY OF PATERSON,

*Appellant.*

*On Appeal.*

**APPENDIX TO  
Brief of Geo. S. Hilton  
Of Counsel with Appellant.**

I.

ADDITIONAL OBSERVATIONS IN BUTLER RUBBER  
Co. CASE.

The remarks made in the brief upon the Butler Rubber Company case are based upon the view that it was held in that case that the company was in fact a riparian owner. This view seems to be justified by the remarks of Justice Depue, in delivering the opinion of the Court, near the top of page 44. 32 Vr. He there says :

“Under these circumstances it would be a refinement of construction to hold that, as between the parties to this deed [from the Newbrough Company to Rosenthal and Strauss] Rosenthal and Strauss did not acquire a title that made them riparian owners.” As the Butler Rubber Company was the successor in title of Rosenthal and Strauss, it, of course, stood in their place in this respect under the deed. But from the use of the words “as between the parties to this deed” there may be some doubt whether the court considered the grantees as riparian owners absolutely under the deed or only as between them and the grantor. And some other remarks in the opinion lead to some doubt whether the court adhered to and acted on the view that the said grantees were even such qualified riparian owners. Thus, the Justice had previously stated that in each of the English cases mentioned in the brief “a property right was recognized in the licenses, at least against the grantor.” Page 42. And immediately after his remarks first above quoted he says: “But it is unnecessary to discuss this subject further. The right the plaintiffs obtained to the use of the water of the stream in virtue of the grant from the Newbrough Company was undeniably property.”

If this “property” in this water did not have for its basis the fact that the Rubber Company was an absolute riparian owner, as is taken in the brief as the Justice’s view of the matter, then it must rest on the view that, as the successor of Rosenthal and Strauss, it was such riparian owner to the same extent as they were,

that is, as between the parties to the deed, or on the view that when an attempt is made to convey water rights detached from the riparian land through the ownership of which such rights arise, the grantee obtains a certain limited kind of "property" or "property right" in such water, according to those English cases, as stated by the Justice, although he fails to obtain the absolute right in gross so attempted to be conveyed. In either of these cases this "property" in the water, though a qualified one, on account of their having been created or passed in the manner described by the Justice, was held to constitute an appurtenance to the mill premises, and not merely a license, as in those English cases, or even an easement. And it was further held that as the city of Newark was proceeding to condemn such "property" for its use, it must pay for the same, such as it was.

The cases of the lessees in this suit are very different from the case of the Rubber Company in that suit. In the first place, the Rubber Company held its water rights under a deed of conveyance, and under a deed of such a character as to elevate such rights above a mere license, or even an easement, while these lessees hold their water rights under leases which are of such a character as to leave the lessees in the position of mere licensees, according to those English cases. In fact their position is not as strong as were those of the parties holding the water rights in question in those cases; for in all of those cases the water was taken directly from the stream, and in two of them the water rights

were held under grants and in neither case were they held under a lease, while in this case all the parties in question take the water under mere leases from the canal. In the second place the water rights of the Rubber Company, or a portion of them, were being condemned for the use of the city of Newark, while in this case the complainants are seeking compensation in a matter where compensation for property rights in the river are alone recoverable. These lessees have no property rights in the river. They have not even a license to take water from the river; their license is merely to take water from the canal. Compensation to them is a matter entirely between them and their lessor. As between them and the city their cases are *damnum absque injuria*, like the cases of Jersey City and Newark, who can get nothing for their water works on the river, which have become useless through the pollution of the river, or like one who might have built a residence near the river without owning any land adjoining the river, and whose residence might have become valueless from unsavory and unwholesome odors arising from the river in consequence of its pollution. *Beseman v. Pennsylvania R. R. Co.*, 21 Vr., 235; 23 Vr., 221; *Marcus Sayre Co. v. Newark*, 15 Dick., 361, 367.

## II.

### ASSIGNMENT OF RIPARIAN RIGHTS.

“The rights of the owners of land along which water flows is not in any measure dependent upon prescription or presumed grant. It is a

purely natural right incident to the land and growing out of the ownership and possession thereof. As such owner of the land he becomes vested with all the rights of a riparian owner, and, although he may, by virtue of such ownership, grant to others the right to use the water as he might use it, yet he cannot confer upon another the rights of a riparian owner, without a conveyance of the soil upon the margin of the stream. The distinction between the rights of the owner of the soil and one who holds a simple water right by grant from the landowner, is broad and important, and cannot be ignored. Thus while one riparian owner may maintain an action against another owner above or below him on the stream for an interference therewith that is prejudicial to him and in violation of his rights, yet one who derives from one riparian owner a right to take water from the stream, but has no right or title to the banks thereof, cannot maintain an action against another riparian owner for any interference therewith. He may maintain an action against his grantor for any interference by him with the rights that were given by the grant, but the right of action grows out of the contract between them, and extends no farther; and the reason is, that the rights of a riparian owner cannot be detached from the soil out of which they arise, and to which they are incident, and therefore cannot be transferred without an actual conveyance of the soil itself." 1 Wood on Nuisances, 3d Ed. § 343.

## III.

## PUBLIC GRANTS.

“It is a well settled rule of construction that public grants are to be construed strictly ; and in all cases of grants of franchises by the public to a private corporation, the established rule of construction is, that any ambiguity in the terms of the contract must operate against the corporation and in favor of the public. The corporation takes nothing that is not clearly given by the act.” *Delaware and Raritan &c. Co. v. Camden and Atlantic R. R. Co.*, 1 C. E. Gr., 321, 372 ; *Pennsylvania R. R. Co. v. National Ry. Co.*, 8 C. E. Gr., 441, 455 ; *Lehigh Valley R. R. Co. v. Orange Water Co.*, 15 Stew., 205, 208.

“Grants and charters to corporations are to be construed favorably to the rights of the public, and most strongly against those claiming under them.” *Camden & Amboy &c. Co. v. Briggs*, 2 Zab., 623. From syllabus.

“No public right can be taken away by mere inference or legal construction. It can only be by express grant.” *Jersey City v. City of Hoboken*, 2 Beas., 420, 425.

“A grant of special powers to a corporation will not be enlarged by intendment to include a power not expressly conferred.” *Weil v. Ricord*, 9 C. E. Gr., 169. From syllabus.

## IV.

## STATUTES AND THE COMMON LAW.

“It is a rule of exposition that statutes are to be construed in reference to the principles of the

common law, for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced, for if the parliament had had that design, it is naturally said they would have expressed it." *State v. Norton*, 3 Zab., 33, 40 and 41.

## V.

## CORPORATION AND CITIZEN.

"In the case of the *Boston Beer Co. v. Massachusetts*, 97 U. S., 25, the franchise of the company to manufacture and incidentally to sell malt liquors was set up as a protection against a prohibitory liquor law passed by the legislature providing for the seizure of such liquors. Justice Bradley, in delivering the opinion of the Supreme Court of the United States observed: 'Although this right or capacity [to manufacture and sell] was granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than a citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject if the interest of the community would require it.'" *Trenton Horse Railroad Co. v. Trenton*, 24 Vr., 132, 137.

Corporations have power to "purchase and convey" real estate. 1 Gen. Stat., 909. Does such power enable them to purchase and convey water rights in gross while private persons can-

not do so? If not, how can the authority to let its powers enable the Dundee Water Power and Land Improvement Company to let or assign river rights in gross while private persons cannot do so? If the word "let" carries such a broad power with it, the word "convey" must do the same, and Justice Depue expended a great deal of useless labor in reaching a solution of the water rights question in the Butler Rubber case. He need only to have said that the Newbrough Company, being a corporation and not a mere private person, its power to convey real estate embraced the power to convey water rights in gross, and thus settled the whole difficulty without a labored discussion of the subject, with a conclusion, the grounds of which it is not easy to discern.

## VI.

### DIVERSION OF WATER.

"A riparian proprietor may divert the water from the stream, as it passes through his own land, without license from the proprietor above him, if he does not obstruct the water from flowing as freely as it was wont, and without license from the lower proprietors if he restores the water to its natural channel before it enters their land and does not materially diminish its flow. The distinction is to be observed between the right to divert or change the course of the stream itself so as to turn it away from a lower proprietor and the right to take water from the stream. The first is wholly unlawful, the second may be exercised to a reasonable extent." Gould on Waters, § 213.

## VII.

RIGHTS OF RIPARIAN PROPRIETORS IN FLOWING  
WATER.

“None can have property in the water itself except in the particular portion which he may abstract from the stream and take into his possession, and that during the term of his possession only.” 1 Wood on Nuisances, 3d. Ed., § 373.

## VIII.

## TITLE TO TIDAL STREAMS.

“All navigable waters within the territorial limits of the State and the soil under such waters belong in actual propriety to the public.” *Stevenson v. Newark and Paterson R. R. Co.*, 5 Vr., 532, 549.

“The title to a tidal stream below ordinary high tide is in the State as absolute owner.” *Justice Dupue in Marcus Sayre Co. v. Newark*, 15 Dick., 361.

## XIX.

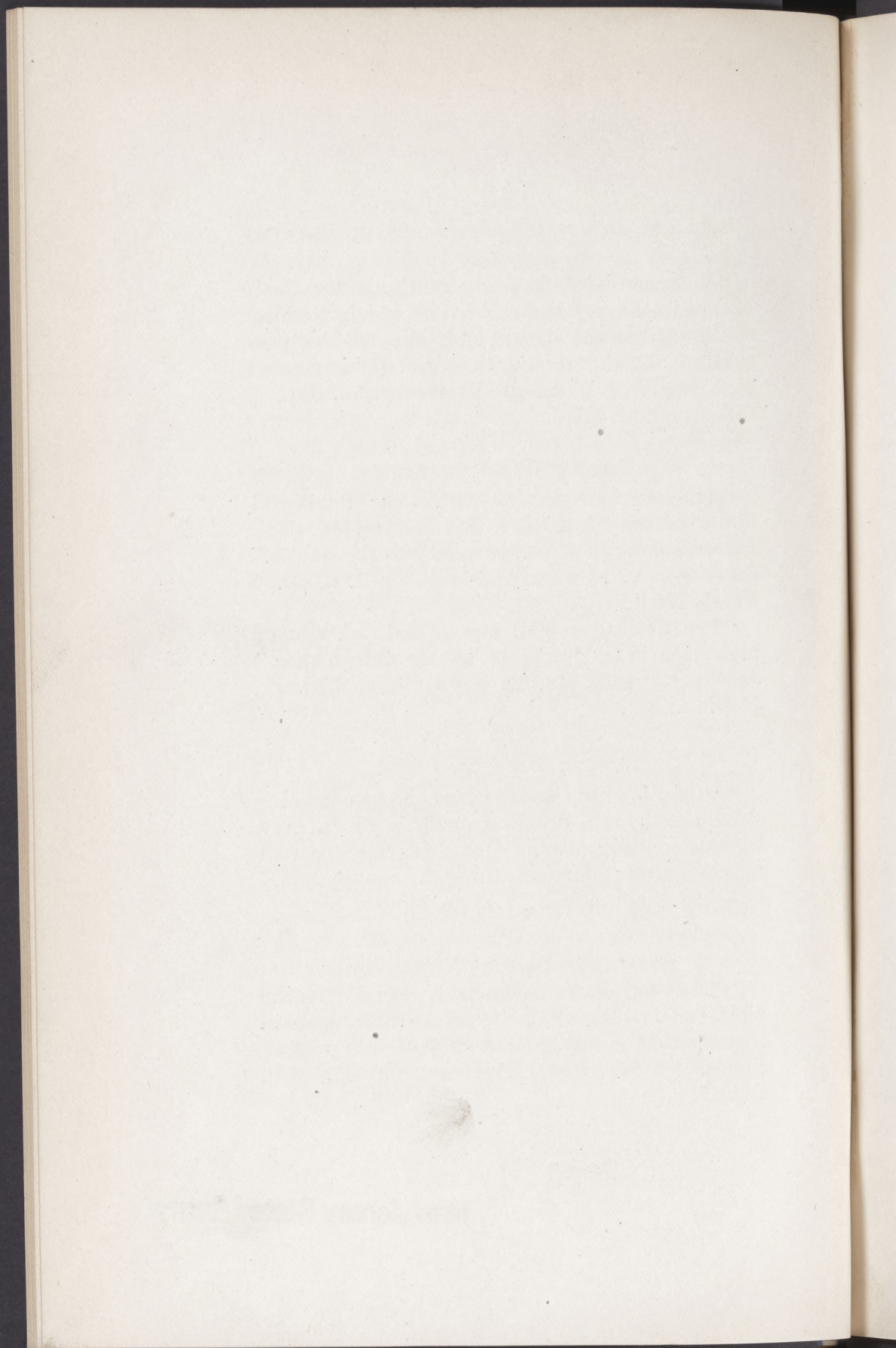
## LAWFUL DAM A NUISANCE.

“A dam lawfully constructed across a running stream, although standing for fifty years, may become a public nuisance by its interference with refuse matter flowing through the stream.” *People v. Pelton*, 59 N. Y. Supplement, 851.

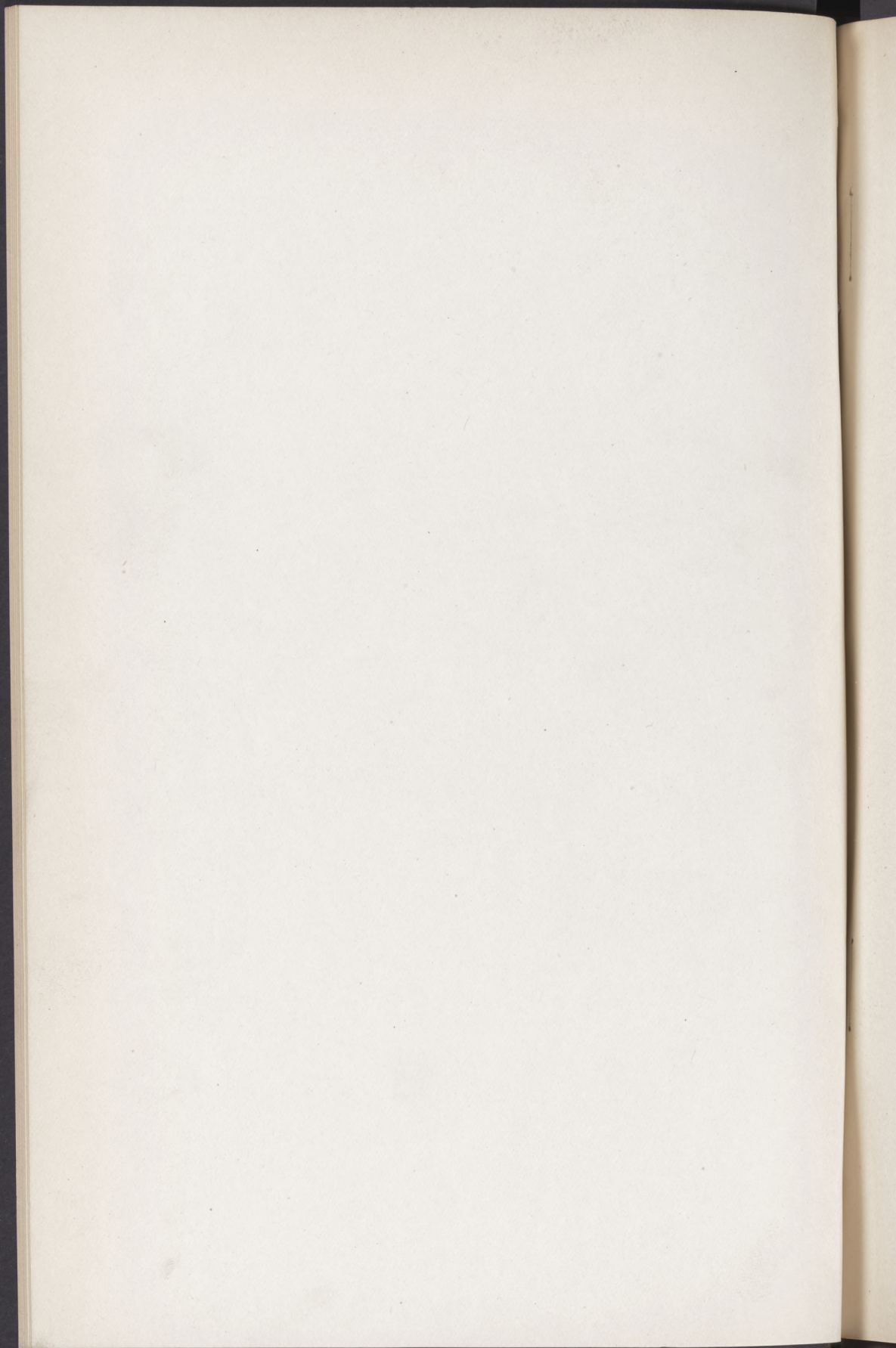
## XX.

## PUBLIC AND PRIVATE NUISANCES.

“Public nuisances are such as result from the violation of public rights;” “private nuisances are injuries that result from the violation of private rights.” 1 Wood on Nuisances, 3d. Ed., §§ 14 and 15.







# New Jersey Court of Errors and Appeals.

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HENRY W. DOREMUS, et als.

*Complainants*

vs.

THE MAYOR AND ALDERMEN  
OF THE CITY OF PATERSON

*Defendant*

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*On Bill, etc.*

*On Appeal.*

Brief of Michael Dunn of Counsel with the Defendant.

The bill filed in this case is in some respects a renewal of the suit of Simmons et als. vs. The City of Paterson, but in other respects it is materially different from that case.

In the former case the complainants were all riparian owners above tide-water and below the City of Paterson and prayed for an injunction to restrain the city from discharging its sewage into the Passaic River.

In the present case a large number of the complainants are not riparian owners at all. Some of them are riparian owners on tide water, others are mere lessees of the complainant the Dundee Water Power and Land Company. The Dundee Company and its lessees were not parties to the former suit.

In the present case the prayer is to restrain the city from discharging its sewage into the river "unless and until the said defendant makes such compensation to your orators for the diminution in value to their said lands and property rights as shall be ascertained by this honorable court to be just."

## I

I contend that the demurrer should be sustained because the complainants are not entitled to the relief prayed for in the bill.

(1) *Because the questions in this case are <sup>not</sup> ~~not~~ <sup>judi-</sup> ~~judi-~~ <sup>ca-</sup> ~~ca-~~ <sup>ta</sup> in this court.*

The complainants in framing their bill have evidently drawn an unwarranted inference from the opinion of Justice Van Syckel in the Simmons case, 15 Dick. 385.

There it was stated, page 393, "The granting or refusing of an injunction, is a matter resting in the sound discretion of the court. Where it would cause great injury to the defendants and might be of serious detriment to the public, without corresponding advantage to the complainant, it wil not be granted."

"In the case before us the injury to the defendants would be so great that the injunction should not be granted to these complainants whose injury is incidental and comparatively small." He cites in support of this doctrine the authorities collected in Stewart's Dig. 620, Sec. 7, 10; and the opinion of Justice Depue, *Morris and Essex R. R. Co., vs. Prudden* 5 C. E. Gr. 531.

To the same effect was the decision of the court in the case of *Lillywhite vs Trimmer*, 36 L. J. Chancery, 30. In that case the bill was filed in 1866 by Lillywhite a riparian owner on the River Wey, which was a non tidal stream, near the town of Alton, in Hampshire. Alton had a population of about four thousand. Under the act of parliament passed in 1862, a sewer system was built, by the local board of health, for the town of Alton, and the sewage was discharged into the river below the town at a point about one and a half miles above plaintiff's premises. The sewage polluted the stream and the complainant applied for an injunction which was refused. On page 529 the court in delivering the opinion says, "I have however, always understood it to be the doctrine of this court that you must in all these matters have some regard to the balance of inconvenience; and if the extent of the inconvenience sustained by the plaintiffs is of a trifling nature such as may be readily compensated in money, you cannot and ought not interfere with the right of others in a matter of so much importance as this which I now have before me, namely, the drainage of a not inconsiderable town."

In *Wood vs Sutcliff*, 2 Sim. N. S. 163, the same doctrine was held.

The Court of Errors in overruling the Chancellor and denying the injunction in the *Simmons* case, as stated

by Justice Van Syckel in the opinion, very properly took into consideration the situation of the parties complainant and the defendant and the facts and circumstances of the case and the terrible effects and consequences that would ensue if the court granted the injunction.

The sewerage system in Paterson was built under legislative enactments passed in 1867, 1868 and 1871. Thousands of dollars had been expended in constructing the system. Some of it paid by the city at large and much of it by property owners by assessments for special benefits against the lots bordering on the streets where the sewers were laid.

From 1868 when the sewer system was started many changes had taken place which the court undoubtedly took into consideration in rendering its decision.

1. *There was a great increase in population as will be seen by the following statement taken from the official census:*

#### POPULATION OF PATERSON.

|              |         |
|--------------|---------|
| In 1865..... | 24,893  |
| 1870.....    | 33,581  |
| 1875.....    | 38,824  |
| 1880.....    | 57,131  |
| 1885.....    | 63,273  |
| 1890.....    | 78,105  |
| 1895.....    | 97,344  |
| 1900.....    | 105,171 |

2. *In consequence of this rapid growth and development of the City, the quantity of sewage discharged into the river naturally increased.*

But the fact must not be overlooked that from the time of the building of our sewerage system down to

the time of filing the bill in the Simmons case, in 1899, the right to continue discharging the sewage into the river had never been attacked or questioned.

The Court of Errors in the Simmons case had in view the laches and the long acquiescence of the riparian owners, who were complainants in the case, for over thirty years, and the large amount of money which during that time and before the filing of the bill had been expended, under legislative authority, by the city and its inhabitants in building the sewerage system; and the great inconvenience and injury to health that would ensue, if the injunction was granted. Then there was the further fact that the injury to the complainants was not irreparable but was one that could be compensated for with money, and they were forced to the conclusion that, under the peculiar circumstances of the case and the authorities, they ought not to grant an injunction.

The remedy would do more harm than the disease. In *Fisk vs. City of Hartford* 40 Atl. Rep. 906 the court refused an injunction on the same ground as stated by Justice Van Syckle.

In starting this new suit, the complainants have ignored these important facts and have willingly construed a mere dictum of Justice Van Syckel, in the opinion, as a statement of an equitable doctrine on which the injunction was withheld in the Simmons Case.

In this they are mistaken. The learned justice first states the grounds and reasons upon which the injunction was refused by the court; later on p. 393, he makes a suggestion which is purely *obiter* and has nothing whatever to do with the reason on which the

decision is based, as follows : "If these complainants amend their bill, or file a new bill asking for an injunction unless the city will consent to make such compensation for the diminution in the value of their lands as shall be ascertained to be just, such equitable relief can be given to them." But he don't say that it will be given to them.

The complainants were so much pleased with this language that they have made use of it in the prayer of their bill. But I contend that in using this language the learned justice simply voluntered a suggestion as to the course of practice that was sometimes pursued by complainants in case of irreparable injury and where the remedy at law would be wholly inadequate to afford relief.

I further contend that this suggestion was never intended to stand as authority for the doctrine that several distinct complainants having different causes of action can unite in a suit in equity praying for an injunction unless and until the defendant makes compensation in damages. The ground upon which equity interposes and gives relief in such cases is that the complainants are suffering from irreparable injury and cannot obtain adequate relief at law.

This principle was settled in *Zabriskie vs. Jersey City and Bergen R. R. Co.*, 13 N. J. Eq. 318, in the following language:

"The mere diminution of the value of property by the nuisance without irreparable mischief will not furnish any foundation for equitable relief."

See also, *Attorney Genl. vs. Nichol*, 16 Vesey 347.

*Story Eq.*, sec. 925.

In paragraph 40 of the bill (case p. 32) the amount of damages which the respective complainants claim calculated upon the basis of their alleged injuries being permanent are stated.

The case of *Fisk et. als. vs. The City of Hartford*, 40 Atl. Rep. 706, is identical with the case at bar. There several riparian owners were complainants and filed a bill for an injunction to restrain the city from diverting the water from a stream above the complainants property until the damages accruing and hereafter to accrue to the complainants from the diversion complained of shall have been ascertained and paid in accordance with law.

The complaint was demurred to and the substance of it is set forth in the report of the case.

It was certified to the Supreme court of Errors of Connecticut for its advice on the questions involved.

At p. 910 the court says, "When the city first began to divert this water to the detriment of the mill owners and without their consent and without making compensation it was an invasion of their rights. This invasion and violation of the rights of the mill owners has been continued since 1867 and it has grown in extent with the growth of the city and the use of each new reservoir. So far, then, as the right to an injunction is concerned the mill owners have slept upon their rights during all these years with full knowledge of the facts. They now ask a court of equity to cut off the entire water supply of a great city until it pays them the damages to which they shall prove themselves entitled."

"The city is, and will continue to be, abundantly able to pay all such damages and the remedy of the plaintiffs at law to recover such damages is adequate and

complete. To cut off the entire water supply of this city for any considerable length of time would cause great public inconvenience and suffering and would greatly endanger the lives and property of its inhabitants in case of fire or from disease."

Torrance J., rendering the opinion of the Court says, "The granting or refusal of an injunction rests in each particular case in the sound discretion of the court, exercised according to the recognized principles of equity. It ought not to be granted where it would be productive of great hardship or oppression, or great public or private mischief, *Hawley vs. Beardsley*, 47 Conn 571; *City of Logansport vs Uhl*, 99 Ind. 531. It is a well established rule in equity that, if a party is guilty of laches or unreasonable delay in applying for an injunction he may thereby forfeit his claim to that special form of remedy; and where, in such case, by his laches, he has made it impossible or very difficult for the court to enjoin his adversary without inflicting great injury thereby, an injunction should be refused, and the party left to his remedy at law.

*Traphegan vs Mayor etc.* 29 N. J. Eq. 206; *State vs. Mayor etc. of Paterson*, 40 N. J. Law, 244; *City of Logansport vs Uhl*, (*supra*); *Tash vs Adams*, 10 Cush. 252. Applying these principles to the facts in this case, we think an injunction should not be granted. Great harm would, or may result to the city and its inhabitants if an injunction should be granted, and little or none can result to the plaintiffs if it is refused. The superior court is advised that the demurrer upon this point should be sustained, and that an injunction should be refused." The other judges concurred.

See also to the same effect, 2 Pom. Eq. Jur. (Sec. 816, 817 and 818.)

In *Cornelius V. Traphagen et al., vs The Mayor and Aldermen of Jersey City* (2 Stewart, 206) it is held that

“A suitor who by laches has made it impossible for the court to enjoin his adversary without inflicting great injury upon him, will be refused the aid he asks and left to pursue his ordinary legal remedy.”

I therefore submit that the riparian complainants in this case being mostly those who were parties in the *Simmons* case, do not stand in any better light now than they did then when equitable relief was denied to them.

That the mere fact that the Dundee Company as a riparian owner, is a new complainant and the mere fact that several of its lessees who are not riparian owners are joined in the bill does not give to this case any greater merit for equitable interference by injunction than it possessed when the *Simmons* case was decided.

The same reasons which the Court then gave for withholding an injunction exist today. The laches and long acquiescence of the Dundee Company and its lessees in prosecuting this suit and complaining of injury should be invoked just as strongly as an estoppel against them as it was in the former case against the other riparian owners.

The City is financially responsible and able to pay any losses that they are entitled to compensation for. The same disposition should be made of this case as was made of the *Simmons* case and as was made by the Court of Appeals of Connecticut in *Fiske vs City of Hartford*.

To grant the injunction would be ruinous to the City, to refuse it does the Complainants little harm.

I therefore contend that the complainants by their own admission show that it would be inequitable to grant the injunction in this case as the injury is not irreparable and there is an adequate remedy at law to determine in money the compensation they are entitled to.

**The relief prayed for cannot therefore be granted.**

(1) *Because the question as to the right of this court to grant an injunction against the city in behalf of the complainants is res adjudicata.*

Simmons vs. Paterson, 15 Dick. 385.

(2) *Because a court of equity has no power to settle unliquidated damages without the consent of the parties.*

If the dictum uttered by Justice Van Syckel in the Simmons case was the law, then a defendant could be deprived of a trial by jury without his consent. The court could say to a defendant unless you are willing to make such compensation as this court shall determine to be just to these complainants we will grant an injunction restraining you from carrying on your business, or, as in this case depriving over one hundred thousand people of a right to discharge their sewage from their houses into the river regardless of the pestilence which might follow such action.

Justice Van Syckel in the Simmons case states that to effectuate justice the court of equity will settle unliquidated damages and cites the Coster case and the Ingersoll case. He also states that the complainants have a remedy at law by instituting suits for damages,

A careful examination and review of these cases shows that in every instance where a court of equity has undertaken to settle unliquidated damages it has been done with the consent of both parties to the suit.

In *Coster vs Manufacturing Company*, 2 N. J. Eq. 467: It was held that the Court of Equity will to effectuate justice, settle unliquidated damages. The bill in this case was filed to foreclose a mortgage given by the defendant's grantor to complainant. The complainant had signed a covenant of warranty of title to the defendant's grantors and his assigns. That afterwards the Monroe Manufacturing Company became purchasers from the mortgagors and thereby succeeded to other rights under the deed. Shortly afterward an action of ejectment was begun and sustained against them for a portion of the land and they were obliged to pay out \$5,000.00 to get their title perfected.

Shortly after that Coster the mortgagee and the person who had made the covenant as to title, began the foreclosure of the mortgage against the Monroe Manufacturing Company. A breach of the covenant of the deed was set up as a defence and claim was made that the value of the land which they had been deprived of should be deducted from the amount of the mortgage.

This being a question of unliquidated damage, the Chancellor in rendering the opinion of the court states; "that he was unable to find the point considered in the cases, and that it was very difficult for the court to undertake to settle unliquidated damages," and states, that the court might restrain the complainant from proceeding further for the foreclosure of his mortgage, until the defendant ascertained his damages at law, and then allow the amount to be off-set, or the matter might be referred to a Master, *unless the complainant requires*

*a trial at law.* He further states that the defendant having claimed the allowance in its answer should be content with the forms of proceeding in the Court of Chancery.

It will be seen from this language that the learned Chancellor recognized even in a foreclosure case the right of a complainant to a trial at law, and that the consent of the parties was necessary for a court of equity to make the award.

The next case in which this question was considered was: *Trenton Water Power Company vs Chambers* (9 N. J. Eq. 476.)

The bill in this case was filed to restrain the defendant, Chambers from the prosecution of two trespass suits and an ejectment suit, which he had instituted against the company to recover damages and also to recover possession of the land, which was then occupied by its race way. The land *was* taken possession of by the original company and these improvements made with the permission of the said defendant, and he agreed to wait until a future day for compensation. The suits were restrained by injunction. The rights and equities of the company could only be protected in equity, the injury was permanent and irreparable. The company had no legal right to the land. The court under the peculiar circumstances in that case decided that the only way it could relieve the parties was to give the defendant compensation for his land and remuneration for all damages. In ascertaining the compensation the court states that it would give the defendant a jury if he desired it, as the amount he is entitled to, are questions peculiarly proper for that tribunal.

NOTE.—This was clearly a case for a court of equity, but the Chancellor did not deny to the defendant the right of trial by jury.

The Chambers case was again before the court, 13 N. J. Eq. 199, and from the decision it appears that the assessment of damages had been originally referred to a master by consent of the parties (p. 201.) The result was unsatisfactory to the chancellor and the report set aside and he suggests that he would refer it to a jury as the proper tribunal to determine such a matter if either party desires it.

Then we have *Carpenter vs. Easton and Amboy Railroad Company*, 24 N. J. Eq. 249; in this case the bill was filed for an injunction restraining the defendant from taking possession of a lane with a high embankment for their railroad without first making compensation for the damages the complainant would suffer thereby, misrepresentations having been made to the commissioners at the time the award was made as to the location of the road. The injury would be irreparable and the complainant has no adequate remedy at law. The defendant company in answer to the rule to show cause tendered themselves ready to make increased compensation to the complainant in such manner as the court might direct. The court held that under the peculiar circumstances of this case, that this offer was equitable and the company should be restrained from taking possession of the lane until the compensation was made. The parties *consented* to let the court settle the damages

The report of the commissioners was made to the court, 24 N. J. Eq. 408, and it was set aside. The chan-

cellor concluded that the inquiry was eminently proper for a jury and directed that an issue be framed to that end.

In *New York and Greenwood Lake R. R. vs Stanley*, 34 N. J. Eq. p. 58. In this case the bill was filed to restrain an ejectment suit to recover possession of property which for many years had been occupied by the railroad company under an agreement between the company and the heirs of Henry Stanley; the railroad company had failed to perform some of the conditions in its agreement and suit was brought for possession of the lands taken. *Both parties consented* that the court should determine the compensation.

In the case of *Paterson, New York and Newark Railroad, et als. vs Kamlah*, 42 N. J. Eq. 93, the bill was filed to restrain an ejectment suit instituted by Kamlah to recover possession of a strip of land occupied by the complainant railroad for upward of twenty years with defendant's consent, and during which time negotiations had been pending concerning compensation. This was a case of irreparable injury and great public inconvenience, and the railroad company was without any adequate remedy at law to protect itself if compelled to remove its track from these lands. The opinion was rendered on motion to dissolve the injunction. The court refused the motion. The court properly said that the company could condemn if it had the power and if it did not and equity demanded that the railroad company should make compensation, the court itself would ascertain the compensation by means of an issue or a reference. What was finally done does not appear.

The next case in which the question was considered was *Ingersoll vs the town of Newton*, 57 N. J. Eq. 392. The bill filed in this case prayed for an injunction against the Town of Newton for diverting a portion of the waters of the Wallkill River in which they were riparian owners and had mills below on the stream with water power which would be impaired by the diminution in the flow. This diverted water was being used to supply the inhabitants of Newton with water for domestic and other purposes.

Vice Chancellor Pitney there states in respect to compensation the following: "*Both parties submitted themselves to the jurisdiction of the court in this respect and requested that it should determine the amount of compensation, and I feel constrained by the state of the authorities to assume that jurisdiction.*"

The cases cited by Vice Chancellor Pitney are those mentioned above.

It will be noted that these are all cases of permanent and irreparable injury, and without an adequate remedy at law, but even in them the court, before undertaking to ascertain the compensation to be awarded, have required the consent of both parties as a jurisdictional fact for its action.

In the present case it is conceded that the injuries of which the parties complain are only temporary and can be relieved and satisfied by a money compensation and that the remedy at law is adequate for the purpose.

I further contend that the court cannot determine the unliquidated damages without the consent of both parties,

Under the authorities and the facts in this case I contend that the Court of Equity would not be justified in assuming jurisdiction to settle unliquidated damages.

## II.

### The bill is bad because of misjoinder of parties and different causes of action.

One of the grounds of demurrer to the former bill was the misjoinder of parties complainant and different causes of action. The same reason is assigned in this case as the seventh cause for demurrer (p. 45, l. 15) "said bill improperly joins together different causes of action and different legal and equitable claims which are held by the complainants in severalty and which cannot be properly tried and heard together."

In the discussion of this question before Vice-Chancellor Stevens the complainants relied largely upon the decision of the late Chancellor McGill in the case of the Attorney-General vs. Paterson, 13 Dick. p. 1, and the cases cited in that opinion, and upon the fact that Justice Van Syckel in rendering the opinion in the Court of Errors in the same case, 15 Dick. p. 385, makes no mention of the point. The records of the Court of Errors however in that case show that the Chancellor was reversed as to his decree overruling the demurrer as well as the decree granting the injunction.

It also appears (p. 48) that Vice-Chancellor Stevens in his opinion passed by this point and gave it no consideration because of the two opinions above referred to. In doing so he seems to have wholly ignored the fact that while Chancellor McGill himself, after a most careful study and review of the authorities in this State and in England, reached the conclusion that under those decisions and the rule of the Court, numbered 132, persons injuriously affected by a common nuisance would be permitted to join as complainants in a bill to stop a defilement, yet he does not decide that where such a bill is filed praying for an injunction "*unless and until the said defendant makes such compensation to the complainants for the diminution in value of their lands and property rights as shall be ascertained by the Court to be just,*" that it would be proper to have several distinct complainants with different causes of action, as in this case, joined in a common suit against a defendant.

In 13 Dick. p. 8, the Chancellor concludes his discussion of this point with the following significant language, "Can they not join, as may those affected by the common air defiled by the smells of a slaughter house, in an appeal to this Court *not to award each his damages*, but to stop the defilement."

This language indicates very clearly that in his mind there would be a marked distinction between the Simmons case and this Doremus case.

The one was an application for an injunction, the other an application for an injunction "*unless and until compensation is made.*"

The Learned Chancellor in his study of the cases became impressed with this distinction.

Vice-Chancellor Stevens divides the complainants into three classes, but his classification is misleading. A better classification is that suggested on page 4 of the brief of my learned associate. A brief review will serve to illustrate the impropriety of allowing this omnibus bill to stand as at present framed.

The first riparian owner complainant is William A. Hopson, page 9, section 21, his premises are located in the City of Paterson at the corner of Water Street and Hamburgh Avenue and at the foot of the West Street bridge. The property is occupied by buildings. The bill shows (p. 14, l. 15) that above this property there is one sewer outlet, and later on it charges that all the sewer outlets are discharged above the property of the complainants.

There is no specific allegation as to the grievances of Mr. Hopson that distinguishes his case from the other complainants of the first class.

The situation of his property shows that his injuries must be of a very different character than those located further down the stream and nearer to the Dundee dam. He fixes his damage at eighteen thousand five hundred dollars, but does not indicate how it is made up. It does not appear that he occupies the property and with the volume of water in the river as mentioned in the bill and the fact that this property is located near the falls and there being no specific allegation that the water is stagnant at his property the Court has the right to consider the geography of the place and conclude as to the probability of his injuries being anything like those affecting some of the other complainants.

Again his property being in the heart of the city will undoubtedly continue to be used in the future for the same purposes as at present.

It should further be noticed that these buildings are situated on the banks of the river and that this property in the exercise of its natural riparian rights with all its tenants may be discharging pollution directly into the river.

Mr. Hopson would thereby be just as much a proper party defendant as the city so far as he contributed directly to the pollution of the stream.

In trying to ascertain the damages in his case it is manifest that the evidence and the witnesses would be altogether different from those in the cases of the other complainants who own dwelling houses and farm lands and are located below the point of discharge of the sewers.

The case of George G. Van Riper presents an entirely different element of damages from most of the other riparian complainants. (Par. 3, p. 5.) (Par. 24-25-26, pp. 11-13.)

He has a farm of fifty acres at Dundee Lake and fronts on the river. He has a dwelling house, other buildings and ice houses where he has been carrying on an *ice business*. He claims damages to an amount of seventy-eight thousand two hundred dollars for discomfort from noisome smells and also for diminution in the value of his property and property rights in the waters and in being deprived of obtaining *ice* therefrom. The amount claimed by this complainant is very large and to properly try the case it is necessary to have witnesses who are acquainted with the value of farm lands such as these, and with the value

of property rights in the water, and other witnesses who have some knowledge and experience in the ice business, and the case with respect to him would have to be specially prepared and an entirely different lot of witnesses employed to those that would be required in the other cases.

The amount involved is so great that it would be prejudicial and ruinous to the city to be compelled to try these different causes together.

In addition to this we have the case of Edo Van Riper. (Par. 7, p. 6.)

He also has a farm, dwelling houses and *ice houses* which he claims is damaged to the extent of twenty-nine thousand dollars.

We also have the case of Mary A. Van Saun (p. 8) who also owns a farm and ice houses and which she claims is damaged to the extent of thirty-two thousand seven hundred dollars.

Then we have the case of Peter H. Doremus (p. 8); he owns a farm on which there is a dwelling house where he resides and he fixes his damages at thirty-eight thousand five hundred dollars.

And so with the other riparian complainants of the first class. In nearly every case there will be different witnesses and different elements of damages to be investigated and considered.

Then again take the second class of complainants, the Dundee Land and Water Power Company, the damages fixed here are fifty thousand dollars, and it is based upon the diminution in value of their lands and their property rights in the water; here again the elements to be considered in estimating damages are altogether

different from those in the first class of complainants. The amount involved is so great that the case will require special preparation, care and study to present. The questions involved are altogether different from those concerning the owners of *farm lands* and *ice houses*.

Again, take the third class of complainants, the lessees of the Dundee Land and Water Power Company.

The injuries complained of by some of them is that they are unable to use the water for washing and dyeing; by others that they are unable to use it in their boilers.

Four of them, The Algonquin Company, The Andrew McLean Company, The United States Finishing Company and The Passaic Woolen Company, have taken leases since eighteen hundred and ninety-five. In the bill it is charged that pollution was noticeable in eighteen hundred and ninety, in other paragraphs that the water was unfit for use since eighteen hundred and ninety-two, and has been wholly defiled since eighteen hundred and ninety-five.

If this water was unfit for use when these leases were taken by these complainants and they had knowledge of the fact before, or if by the exercise of ordinary care, with their factories located along the river and canal, they could have ascertained the fact, then the elements of their damage would be altogether different from the elements constituting the damage of the other lessees.

Again, the fact that these lessees are not riparian owners above tide water, a question of law would be involved in their case that is not involved in the case of

the complainants who are riparian owners above tide-water.

Again, some of the lessees have property bordering on the river below tide-water.

How far and to what extent the city could be held liable to them for the pollution of the river is a question of law distinct in their case from some of the other lessees.

A careful consideration of the cases of these different classes of complainants, and of the different individuals composing each class, must convince the mind of the court how embarrassing and confusing it would be to compel the city, against its will, to try these cases together. That the result would not effectuate the ends of justice under the existing circumstances must be apparent.

It may be well to note that I find no cases on record where such a complicated and important suit has been tried in that way.

The rules of the supreme court provide (rule 59) that in matters of taxation not more than four prosecutors shall be joined in one writ of certiorari. The court in adopting this rule undoubtedly had in mind the embarrassment and confusion that might arise in case a greater number of prosecutors were allowed to come into a single writ.

In the cases of *Ingersoll vs Newton*, and *Sparks Manufacturing Company vs Newton* to prevent the town from diverting water separate bills were filed, and while the parties afterwards by consent arranged to have the trial and the argument of the cases together, yet it was left optional with them as to whether they

should be tried separately or together. So it should be in this case. The defendant might in some instances deem it advisable to consent to allow the court of equity to assess the damages while in other cases it might be wholly inadvisable to pursue such a course.

Under the constitutional safe guard that the right of trial by jury shall remain inviolate the city should not be coerced to surrender this sacred right against her will.

I find also that in a majority of the cases cited above where the Court of Chancery has attempted to settle unliquidated damages, they have either sent them finally to a jury or else the Court of Errors has been obliged to fix the proper allowance.

### III.

**I further contend that the lessees, the third class of complainants, have no right of action against the city.**

The charge made in the bill on their behalf is that they are lessees of the Dundee Water Power and Land Company, under a lease of the general form, Schedule "A" p. 35 to 43.

It will be seen from an inspection of that lease, that there is demised by it one or more *mill powers*, sometimes with land and sometimes without, but there is no covenant in the lease between the parties as to the quality or condition of the water. The mill power leased is

to be taken from the canal at the point corresponding to the number of the mill power leased. This means that the respective lessees had agreed to take their water in whatever condition it might be when it reached that point. If the lessees were concerned in respect to the quality of the water they could have protected themselves by the terms of their lease with the Dundee Company.

The bill charges that the pollution became noticeable in 1890 and that in 1895 the water was wholly unfit for domestic or manufacturing purposes; but for *power* no objection is made to it.

Page 23, The term of the Algonquin Company lease began in January 1st, 1892, for five years, it was renewed in 1897 for five years more, and was again renewed in 1902 for five years more. They leased 75 horse power and in addition to this, the lessor was to furnish the necessary water *for scouring and dyeing wool*, but the bill does not charge as to where the water for that purpose was to be obtained by the Dundee Company.

The bill states, p. 23, l. 15, that the water was furnished from the canal, and that at first it was suitable, but afterwards was not, and by reason thereof, they claim special injury to this as a property right.

In view of the fact that in 1895 the water in the canal is alleged to be unfit for *dyeing, scouring and washing*, and in view of the covenants in their lease, that they can compel the Dundee Company to furnish them water suitable for this special purpose, I cannot discover any right that would enable the Algonquin Company to hold the City of Paterson responsible for this injury, there being no complaint that the water is

unsuitable for power purposes. If the Algonquin Company can make a claim against the City because of leasing water from the Dundee Company for special purposes, then this case must be different from that of all other lessees, who simply lease for *mill power*.

The Andrew McLean Company, par. 34, took their lease in September, 1897, for mill power. The United States Finishing Company was not incorporated until June 30th, 1899, and whatever rights they acquired were subsequent to that date.

The Passaic Woolen Mill lease was renewed, one lease in August 1897, another in August, 1898, par. 37 of the bill p. 30.

The leases of the other lessees were made or renewed prior to 1895.

Two questions are suggested by these facts:

FIRST. *Do these lessees have the same rights as a riparian owner against the proprietor of the stream above, in respect to injuries affecting the purity of the water?*

SECOND. *Do those who have taken or renewed leases since 1895, have the same rights to claim damages as those holding leases prior to the date when the river is alleged to be unfit for use?*

The learned Vice Chancellor in discussing this question holds that these lessees resembled each other in that they all leased mill power, but he does not note the distinction between them, which is that some use it for power while others do not, and that there is no assurance in their lease as to what condition the water in the canal shall be in, when it is tapped by their flume.

I have carefully examined the authorities cited and commented upon by him to support his conclusion,

that these lessees are properly joined, and note that all the cases which he cites to overthrow the doctrine of the Stockport Water Company vs. Potter, 3 Hurl. 300, etc., have been decided upon the ground that the plaintiff had by grant acquired a right in the banks of the river, and in all the cases plaintiffs have been in a position to exercise control over the flume or conduit that conveyed the water to their mill from the banks of the river. These lessees have no such right and it is expressly stipulated in their lease that the water is to be taken from the canal at the point nearest the location of the designated mill power mentioned therein. The lessees do not rise under their lease to the dignity of riparian owners.

The learned Vice-Chancellor in deciding the case seemed to be controlled, in his judgment, with the idea that the defendant was in effect taking action to condemn property and on this theory he allowed the lessees to stand as proper complainants in this bill. But the object of the suit is not to condemn but to restrain the City, *unless and until it makes compensation to the Complainants for the diminution in value of their lands and property rights.* This suit as to damages can only apply as to injuries past. It may be, if affirmative proceedings were being taken to permanently condemn the property rights of the Dundee Company in the stream, that as an element of their damage the value of their leases would be considered, but whatever compensation would be awarded would be in one sum for the diminution in value of the company's property including the rights of the tenants, and the portion, to which any of the tenants might be entitled, would be a matter to be determined out of the total sum, that was awarded for the whole property taken,

But why should the defendant be compelled in this suit to litigate with the landlord and with the tenants in reference to the different questions that is certain to arise if the suit should be continued.

The decision in the Butler Rubber Company's case does not control this case, as to the rights of these tenants, there the authority of the Rubber Company was created by deed and extended to the banks of the stream, and the right to the stream was appurtenant to the conveyance of the land and the mill, but here these complainants are mere tenants or licensees and in no sense riparian owners.

The case of Nuttall vs. Bracewell, L. R. 2 Exchequer L., was strongly relied upon by the complainants to support their contention as to the right of the lessees to join in this suit as riparian owners. But this case is no authority for that position, there the goit, which conveyed the water for the plaintiff's mill, was placed in the bank of the stream under the agreement with the riparian owner.

The mill was located upon riparian land, here these lessee complainants have not their mills located on riparian lands above tide water, and have no rights and do not have any interest or control over the stream or its banks above tide water.

To possess the rights of a riparian owner the party complainant must have some estate in the banks of the stream above tide water. These lessees do not possess that qualification and are misjoined in this suit.

As to the four complainants who renewed their leases since 1895 the City cannot be held liable. When they were taken they knew that the water was unfit for the use of washing, dyeing and boilers.

They had no property value such as the Vice-Chancellor attributed to them; and in this respect they differ from all the other lessees.

The old lessees knew of the conditions and acquiesced in the continuation and creation of what they now complain of as a nuisance.

The new lessees knew when they took their leases that the water was polluted; and are chargeable with knowledge as to the cause, circumstances and conditions under which the City was discharging its sewage therein and of the danger to health and life if it was compelled to stop before another method was devised and built.

They must know that such a change would take some time to complete.

*Under these circumstances how do they merit equitable relief?*

All of these lessees are chargeable with knowledge of the condition of the water and the fact that Paterson was discharging her sewage therein. They also know that the population was rapidly increasing and that the sewer system, at great expense, was continually being enlarged.

They slept and acquiesced for all these years, from 1868 until 1902, and then they come into equity and ask for an injunction.

They know that the City has now no other method of disposing of its sewage; and they know that their laches and long silence has placed the City and its inhabitants in a very inequitable position; and that to grant them the relief asked, would seriously endanger the public health of one hundred and ten thousand inhabitants.

If they are entitled to damages the City is able to pay them.

By their conduct they have forfeited their right to equitable relief.

Under the authorities cited above and the decision in the Simmons case the relief should be denied.

Let them seek their redress at law.

#### IV.

### The Dundee Land and Water Power Company is not entitled to any relief.

The Dundee Company was incorporated in 1832 and located its dam across the Passaic River just below the City of Paterson. At that time and for many years before the decisions of this court show that The Society For Establishing Useful Manufactures had located at the Great Falls in Paterson and was there building mills and factories along the river and its raceways, and the topography of the ground was such that the drainage would necessarily flow into the river.

In 1858 when the Dundee Company raised its dam to fourteen feet the official census shows that there was then in the City of Paterson about nineteen thousand inhabitants; this was ten years before the sewerage system was adopted.

The Dundee Company was chargeable with knowledge that on the banks of the stream above them was located this city which with its water facilities was was certain to become a populous and industrious center.

They were also chargeable with knowledge that as the population increased that the natural sewage and drainage, wash and waste water from these inhabitants was certain to find its way into the river, and that the waters thereof would become greatly polluted and unfit for certain uses ; and when in 1867 and 1868 Paterson began to build its sewerage system to carry this drainage underground to the river instead of having it discharged upon the surface and the houses become connected with the sewers, the improvements were allowed to go on, thousands of dollars to be expended by the city and the property owners, without any protest or complaint from this company.

The first time that they appear as complainants is when they join in this bill.

If the sewerage system had never been built the water would have been polluted at the Dundee Dam. This is due to the fact that the animal and vegetable matter, excrement and waste, which at certain seasons of the year is carried to the lake formed by this dam, and there being no current in the river because of the dam, this matter would be precipitated to the bottom and there decompose, and at high water would be washed upon the banks, and when the water recedes it would there decompose and become foul and cause a smell.

This company is also chargeable with the knowledge of the character of the factories, dye houses, gas

houses, slaughter houses which were erected on the banks of the stream, and in the ordinary use of their property, in conducting their business, discharge their waste water and dye stuffs directly into the river and not through the sewers. The discolored Condition of the water would show this.

From 1858 to 1902 a period of 44 years not one word of protest or complaint is made by this company against the city or any of its inhabitants.

If the flow of the river was not obstructed by the dam this drainage would reach tide-water in a harmless condition and there would be no cause of complaint as all the riparian complainants except one border upon Dundee Lake.

Under this long acquiescence and laches on the part of this Dundee Company while this large sum of money was being expended in making these improvements with no complaint or protest from this company I contend that it is estopped in equity from asking for relief.

Whatever injuries it is suffering it can obtain adequate relief in an action at law for damages.

What has been said as to the Dundee Company is equally applicable to its tenants, and also to the other Complainants.

I contend that none of them has any standing in the court of Equity to maintain this suit against the city.

## V.

Great injustice would result to the City if compelled to defend this case against a combination of complainants.

If these cases are tried together as contemplated by the bill you will have all these different complainants combining and confederating as one person for the purpose magnifying and exaggerating their injuries and of recovering through the instrumentality of the famous *expert witness*, excessive and unreasonable sums of money as damages for the diminution in value of their property.

If, on the other hand, this city is allowed to meet these complaints singly and alone, and to try one case at a time, before a disinterested and impartial jury the ends of justice will be better served and each case will be separately considered and decided on its merits.

The most that any of the complainants can expect to recover is reasonable compensation for their injuries, and I contend in this case that there is nothing in the bill to show that if the parties were obliged to pursue their remedies at law for their private wrongs, in individual suits, that their wrongs would not be amply redressed and their rights fully protected.

But to force the city to defend all these suits against all these complainants, representing a great aggregation of capital would certainly be taking an undue advantage of a municipality.

This is particularly so in view of the fact that the city is not a wilful wrongdoer but by lawful authority and with the consent and acquiescence of Complainants is and has been discharging its sewage into the river for the past 34 years.

## VI.

**It would not be equitable to grant the complainants the relief prayed for at this time.**

This bill was filed December 30, 1901. It was shortly after that the special commission to solve the problem of sewage disposal as to the Passaic River was appointed to recommend a plan that would be proper for the purpose. See P. L. 1902. Chapter 48, p. 190, and Chapter 49, p. 195.

Their report will be made to the next Legislature in January, 1903. The State Sewage Commission has been studying this question since 1896.

At this time in view of the work that is being done it is manifest that whatever injuries these complainants are suffering or will suffer will be only temporary and not permanent. The citizens of Paterson are just as anxious to have this problem solved as are any of the parties connected with this suit.

To-day it is impossible to tell just how long it will be before our sewage can be otherwise disposed of.

The most any court could do in the way of granting redress to these complainants would be to give compensation for the time passed ; the future is unsettled and uncertain ; but in view of the fact that the Legislature of the State has taken hold of the matter would it not be harsh and unjust to say to Paterson that unless you will now come into this court and make such compensation to those complainants as shall be just, an injunction will be granted that will prohibit you at once from continuing to discharge your sewage into the river.

Such a decree from a court of conscience in a case of this kind is hard to conceive possible.

The power of injunction in the court of last resort in this state has always been guardedly and judiciously exercised.

In view of the number of years that the waters of the river have been unfit for domestic and manufacturing purposes and to get ice from, it cannot be said that there is any necessity now for undue haste.

It is not a case of life or death.

It is not a bill to avert a pestilence on the part of the complainant but the injunction if granted would cause one to the defendant.

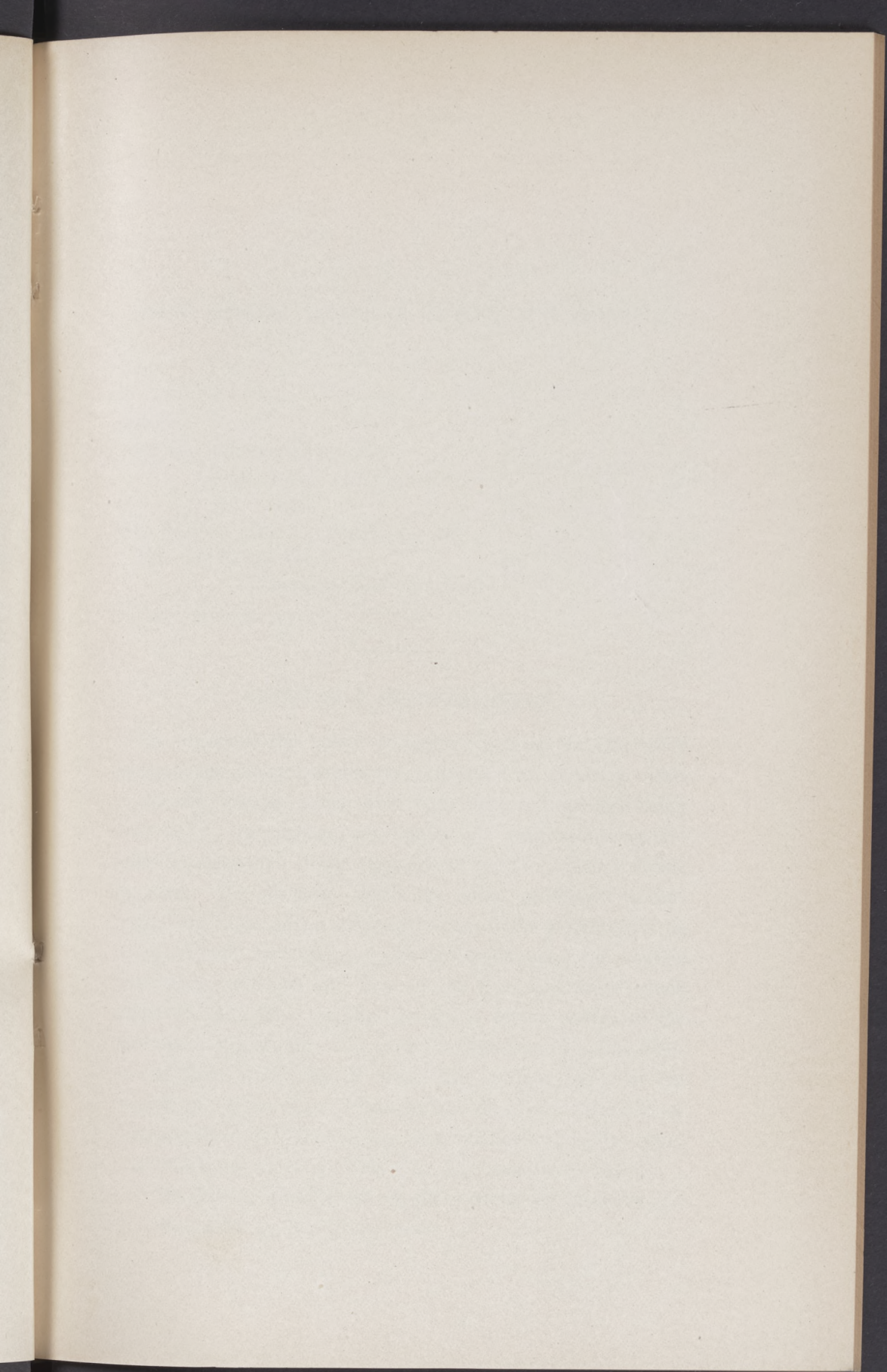
The complainants simply say, we are content to continue to suffer our grievances forever, if you will make us the compensation we demand.

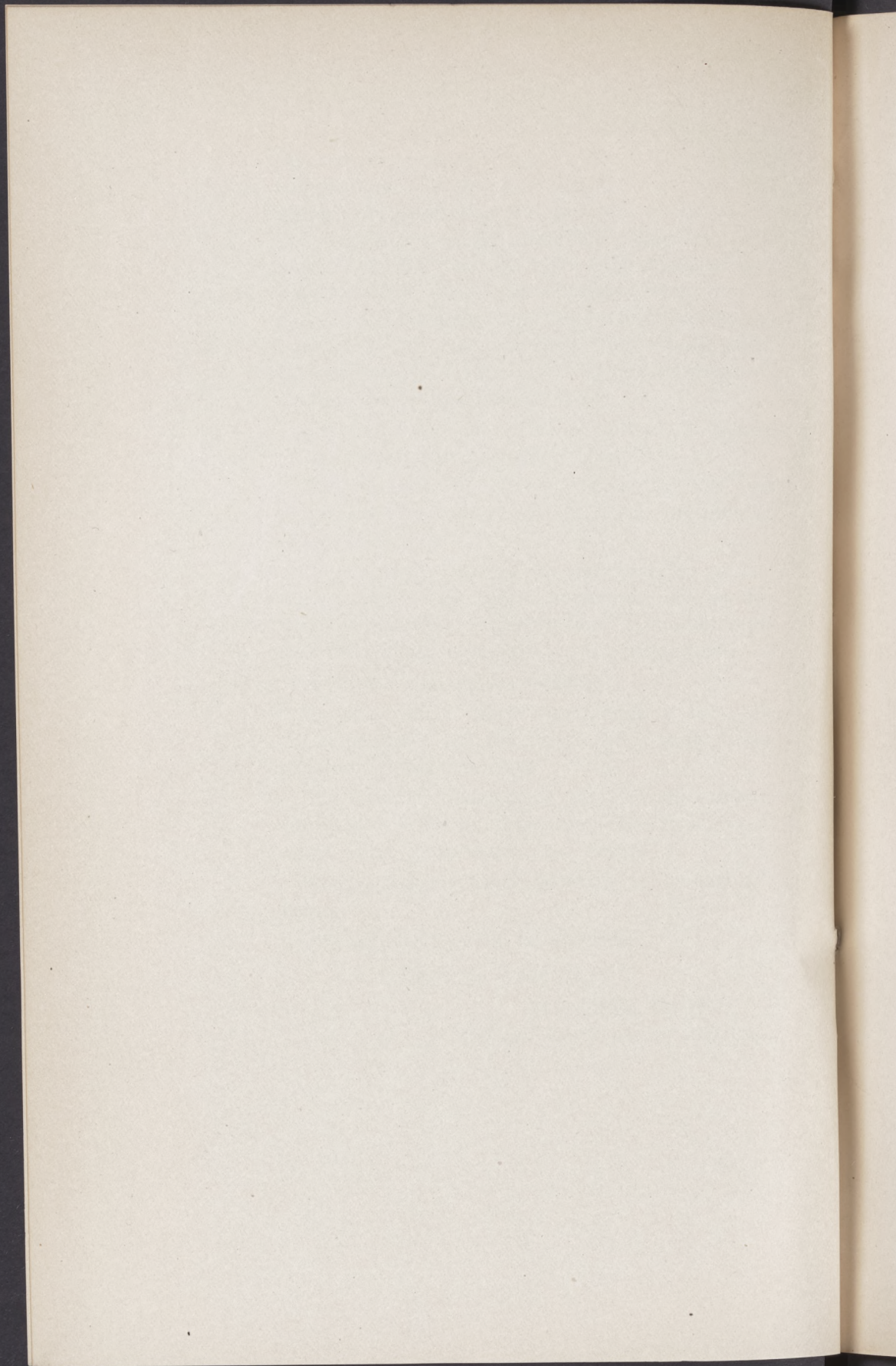
These questions should be settled at law and not in equity.

The demurrer should be sustained.

Respectfully submitted.

MICHAEL DUNN,  
*Counsel for the City of Paterson.*





## New Jersey Court of Errors and Appeals.

*Between*

HENRY W. DOREMUS, *et als.*,

*Complainants and Respondents,*

*and*

THE MAYOR AND ALDERMEN OF THE  
CITY OF PATERSON,

*Defendant and Appellant.*

*On  
Appeal from  
Order of Court of  
Chancery Over-  
ruling Demurrer  
to Bill of Com-  
plaint.*

### BRIEF FOR RESPONDENTS.

The object of this suit is to secure, through the injunctive power of the Court of Chancery, protection for property rights of the respondents, which have been impaired and are being destroyed by the appellant for a public use, without having first made compensation to the respondents for the property rights so taken. The property rights for which protection is thus sought are those which inhere in some of the respondents by virtue of their ownership of riparian lands along the Passaic River above the ebb and flow of the tide, and those which others of them have acquired by grant in the waters of the river above tide-water. The injury complained of is the pollution of these waters by the appellant, brought about by the pouring of a great mass of sewage into the river at the City of Paterson above the lands of the respondents or above the point from which the water in which they have property is taken.

To the bill of complaint the appellant demurred generally and specially (page 43, line 37, of case).

Before considering the demurrer in detail, brief reference should be made to a previous suit in the Court of Chancery against the same defendant by some of these complainants in the present bill of complaint.

In 1889 the Attorney General, at the relation of some of the present complainants, together with some of the present complainants and the corporation of Jersey City, as complainants, filed an information and bill to restrain the City of Paterson from discharging its sewage into the Passaic River. Upon that information and bill of complaint and the affidavits thereto annexed, application was made for a preliminary injunction. To this information and bill the defendant demurred. The demurrer was overruled and an injunction granted. The opinion of the then Chancellor is reported in 13 Dick. Ch., 1. The results of that opinion may be thus stated:

1. That the pollution of the Passaic River affected injuriously all the relators and complainants in depriving them of their respective lawful uses of it.
2. That the complainants and relators suffered a common injury and could join in such a bill as was there filed.
3. That the City of Paterson had no right to pollute the waters of the Passaic River by the discharge of its sewage into them.
4. That there was no laches in making the application for the injunction.
5. That it was not necessary that the owners and occupiers of houses in the City of Paterson connected with the sewers constructed should be made parties to that application.
6. That the remedy at law was not adequate and it was the duty of the court to take cognizance of the case and restrain the defendant from doing anything that would increase the quantity of its sewage, pending final hearing therein.

Accordingly the demurrer was overruled and an injunction ordered to the extent specified.

The defendant appealed to this court, where the decree of the Chancellor was reversed. The opinion of this court is reported in 15 Dick., 385, *sub nom*, *Simmons v. Paterson*, and establishes these propositions:

1. That the City of Paterson had legislative authority to construct its system of sewers, discharging their contents into the Passaic River, and is not therefore subject to the charge of maintaining a public nuisance.

2. That the riparian owners on the Passaic River above the point where the tide ebbs and flows have title to the bed of the stream to the middle thereof, subject only to the right of the State to regulate navigation so far as the waters may be navigable, and that such riparian owners have a property right in the water flowing along and over their land.

3. That this property right cannot be impaired except by lawful use of the waters by riparian owners higher up the stream.

4. That lower owners must submit to such pollution as results from the natural or reasonable use of the owners above, by the surface drainage or by the percolation of offensive matters through the soil, but the higher owners cannot lawfully combine and by constructing artificial conduits collect foul matter and pour it in mass into the stream.

5. That such a scheme, when put into operation, constitutes the taking of private property, which the Legislature cannot authorize, except upon just compensation to the party injured.

6. That ordinarily, where a riparian owner is injured by an unlawful diminution of the quantity of water or by its excessive pollution, when his legal right is established, he is en-

titled to the exercise of the injunction power of a court of equity.

7. That by reason of the great injury which would fall upon the city by restraining the continuous use of its sewerage system, and the acquiescence of these riparian owners above where the tide flows, their injury being comparatively small, it would be inequitable to grant them an injunction.

8. That they might obtain redress by amending their bill or by filing a new bill, praying for an injunction, unless the City of Paterson will consent to make such compensation to them as shall be ascertained to be just, or they may, if they elect, sue at law for their damages.

Instead of pursuing an inadequate legal remedy or amending the bill of complaint in that cause, the complainants filed the present bill.

The complainants in the present bill are of two classes:

(a) Owners of riparian lands on the Passaic River above the ebb and flow of the tide.

(b) Certain manufacturing corporations who have property rights in the waters of the river taken from a point above the ebb and flow of the tide and acquired by grants from the complainant The Dundee Water Power and Land Company.

As to the former of these classes of complainants, the allegations of the bill are in substance the same as that of the earlier bill, except that the present bill describes their riparian land with greater particularity and clearly shows that such lands are above the ebb and flow of the tide and sets out the amount of damages incurred by each as a result of the impairment or destruction of their property rights.

The grounds of this demurrer as stated by the defendant are now to be considered in order.

THE FIRST GROUND OF DEMURRER IS FOR WANT OF EQUITY  
IN THE BILL.

In view of the pronouncement of this court upon the earlier bill, this general ground of demurrer needs little consideration. Rule 209 of the Court of Chancery provides that "every demurrer, whether general or special, shall distinctly specify the ground, or several grounds, of demurrer." This rule was formerly Rule 226, and was construed in *Essex Paper Co. v. Greacen*, 18 Stew., 504; *Wilson v. Hill*, 1 Dick., 367; and *Van Houten v. Van Winkle*, 1 Dick., 380. The result of these cases is that under this rule, "a <sup>simple</sup> single statement of want of equity in the usual language of a general demurrer, will constitute a sufficient specification of the ground of the demurrer in cases where the court finds, on looking at the complainant's bill, that his right to relief is doubtful or uncertain, but where the defect is obscure or latent to such an extent that the court on inspecting the complainants' bill, cannot readily discern it, there the demurrant will be required to make a more explicit statement of the ground on which his demurrer is founded."

Certainly so far as the owners of riparian lands above tide-water are concerned, the present bill cannot be said, in view of the case of *Simmons v. Paterson*, *supra*, to bear on its face any such defect as is open to immediate discovery within the meaning of the rule thus construed. The demurrer being to the entire bill must fail upon this ground if any part of the bill can stand.

*Vail's Executors v. Central Railroad Co.*, 8 C. E. Green,  
466.

## II.

THE SECOND GROUND OF DEMURRER IS AS FOLLOWS: "THE SAID BILL DOES NOT SHOW WHETHER THE COMPENSATION THEREIN DEMANDED IS FOR PERMANENT INJURIES OR FOR INJURIES SUFFERED BEFORE THE TIME OF THE FILING OF SAID BILL. IF THE COMPENSATION SO DEMANDED IS FOR PERMANENT INJURIES, THEN THE SAID BILL DOES NOT ALLEGE OR SET FORTH, AS IT NECESSARILY SHOULD, THAT THE DISCHARGE BY THIS DEFENDANT OF ITS SEWAGE INTO THE PASSAIC RIVER, FOR THE ALLEGED INJURIOUS RESULTS OF WHICH SUCH COMPENSATION IS DEMANDED IS DESIGNED TO BE PERMANENTLY CONTINUED; AND IF THE COMPENSATION SO DEMANDED IS FOR INJURIES BEFORE THE TIME OF THE FILING OF SAID BILL, THEN THE COMPLAINANTS ARE NOT ENTITLED TO THE INTERPOSITION OF THIS COURT BUT MUST SEEK THEIR REMEDY IN A COURT OF LAW."

In reply to this specification, we submit:

(a) That the bill shows, so far as it can be expected to show, that the injury is a permanent one. The descriptions of the sewerage system of the City of Paterson contained in the twenty-eighth paragraph of the bill (page 14, line 10, of case), shows that the system is constructed in a permanent manner and apparently for the purpose of providing indefinitely for the discharge of the sewage of the city into the river. In paragraph 27 of the bill, it is alleged that the defendant not only has caused "the said foul and noxious matters to be discharged into the said river in considerably increasing quantities," but "still continues and threatens to continue to discharge such foul and noxious matters into the said river in increasing quantities" (page 13, line 7, of case). The damages to the property rights of the complainants as set out in the 40th paragraph of the bill, are "calculated upon the basis of said injuries being permanent" (page 32, line 28, of case). We submit that these allegations are clearly sufficient to charge the defendant

with intending to continue permanently to discharge its sewage into the river.

(b) That it is not necessary for the complainants to allege that the discharge of sewage into the river by the defendant will be permanent, or to specify more clearly than they have, the damages thus caused to their property rights. It is quite within the power of the defendant to condemn these property rights for a limited as for an unlimited period. It might with perfect propriety determine now that it would cease to empty its sewage into the river at the expiration of five or ten or fifteen or any number of years from this time. In that event, if condemnation proceedings were brought by it, the damages would be assessed upon the basis of the taking or impairment of these property rights for the period so limited, and if the defendant did not cease the pollution within such time, it would be obliged to again condemn these property rights for a new period. This matter is entirely within the power of the defendant, and is incumbent upon it to declare whether it intends to continue the practices complained of indefinitely or not, and in the latter event for what period. It must not be lost sight of at any point of this discussion that this bill of complaint is not primarily a bill to recover damages or to collect compensation from the defendant, but a bill to restrain the defendant from invading the rights of the complainants without making to them the compensation secured to them by the constitution. The denial of the injunction by this court was not based on any other theory than that as a matter of grace, in view of the expense to which the defendant had gone in the construction of its sewerage system, and the apparent acquiescence of the complainants therein, the defendant would not be compelled to suspend the use of such system, provided it was willing to do what it should have done in the first instance—make compensation to property owners for property taken. It is quite within the power and right of the defendant to refuse to make this

compensation at all, but in that event, it must submit to an injunction restraining it from continuing to pour its sewage into the river. It is not for the complainants to put forward any claim for damages in this suit. It is for the defendant to offer to make such compensation as may be determined by the Chancellor to be just. If it elects and offers to take this course, the compensation must be determined upon well settled principles of law and equity. The amount must depend upon the extent to which the defendant desires to take the property in question and the term for which it desires to take it. These factors in the element of damage must be declared by the defendant, for they are entirely within its own knowledge and control. If, on the other hand, the defendant does not elect to make compensation, it may so declare and must then cease the invasion of private property rights.

### III.

THE THIRD GROUND OF DEMURRER IS THAT THE BILL "DOES NOT STATE OR SHOW THE AMOUNT OF COMPENSATION DEMANDED BY THE COMPLAINANTS, OR ANY OR EITHER OF THEM."

The 40th paragraph of the bill (page 32, line 28, of case), avers that "the damages which they (the complainants) have severally sustained by the destruction or interference with their said property rights, through the wrongful and illegal acts of the City of Paterson, as near as the same can be ascertained, calculated upon the basis of said injuries being permanent, are as follows," setting out the name of each complainant and the amount of damages sustained by him. This certainly shows the amount of the damages sustained by each of the complainants, and that, of course, measures the compensation which each will be entitled to receive under the prayer of the bill in case the defendant elects to make compensation.

As already said, this bill is not a bill primarily for damages or compensation, but a bill for an injunction to secure constitutional protection for property rights. In such a bill it is not for the complainants to demand compensation. It is for the defendant to either cease its violation of such rights or to submit to make just compensation for its taking of them.

#### IV.

THE FOURTH GROUND OF DEMURRER IS THAT "THE SAID BILL DOES NOT SHOW THAT THE INJURIOUS CONDITION OF SAID RIVER THEREIN ALLEGED IS THE NECESSARY OR NATURAL RESULT OF THE DISCHARGE OF THIS DEFENDANT'S SEWAGE INTO SAID RIVER."

We submit that the allegations of the bill amply show that the injurious condition of the river is the result of the discharge of the defendant's sewage into the river and that under the conditions disclosed in the bill it is the natural and necessary result of such discharge.

Among the allegations of the bill pertinent to this question we may quote these:

"That ever since the year eighteen hundred and ninety-five, the said Passaic River for the whole course thereof, from the City of Paterson to and below the respective lands of your said orators, and the waters thereof, have been rendered foul, polluted and corrupt, and have become and remain noisome, noxious, impure, unwholesome, offensive and filthy, and wholly unfit for the use of your said orators, residents and also riparian owners along said river, and wholly unfit for drinking, bathing, fishing, the watering of stock, the gathering and use of the ice formed thereon, and other domestic purposes, and for manufacturing purposes, by the wrongs and injuries hereinafter set forth, and that such pollution is far greater than would result or has resulted from the natural or reasonable use of the said river and the waters thereof by the owners of

riparian lands along the said river above the lands of your said orators, or from surface drainage or the percolation of offensive matter through the soil into the said river." (Par. 26, page 13, line 7, of case.)

"That the said the Mayor and Aldermen of the City of Paterson in or about the year eighteen hundred and ninety began to unlawfully cause to be discharged from its sewers and to flow into said river above the respective properties of your said orators, large quantities of acids, impure substances, waste matter, sewage, contents of privies, cesspools and sewers; that the said city has since the year last aforesaid continued to unlawfully cause the said foul and noxious matters to be discharged into the said river in considerably increasing quantities, and still continues and threatens to continue to discharge such foul and noxious matters into the said river in increasing quantities; that the said matter is and has all been discharged by the said city into the said river above the respective lands of your said orators, and is carried by the flow of the said river upon, and over the lands of your said orators and thereby renders the water of said river at the properties of your said orators, noxious and unclean." (Par. 27, page 13, line 31, of case.)

"The said sewage so drained or caused to be drained by the City of Paterson into the Passaic River above the lands of your said orators, consists of great quantities of waste matter, contents of privies, cesspools, excrement and other noxious and corrupt material and substances, both solid and liquid, and the same is so discharged by the City of Paterson into the waters of the Passaic River without any effort on the part of the Mayor and Aldermen of the City of Paterson to prevent the injuries resulting to your said orators therefrom. The said river and the banks thereof in front of and upon the respective properties of your said orators have been partly filled and covered with filth and sewage matter, and the said lands, farms, residences, buildings, water supplies, plants, ice houses and appurtenances, have been thereby greatly impaired in value, and will be destroyed and become of no value if the said City of Paterson continues to discharge its said sewage into the said river as aforesaid. These discharges are wholly above the respective lands and properties of your said orators and are sufficient in quantity and of such a character as to discolor and impregnate the whole of said river and the water thereof and to make the said water of a dark color and of an offensive smell and unfit to drink or use for domestic or manufacturing purposes and to de-

prive your said orators of the use of the waters of the said river and of the enjoyment and exercise of their privileges and paramount rights therein as riparian owners. The air upon the lands of your said orators in the neighborhood of the said river has been polluted, corrupted and poisoned by the said sewage, and your said orators, their families, servants and employes have been injuriously exposed to noxious and unhealthy odors, arising from the said impure condition of the waters of said river, and thereby the health of your said orators, their families, servants and employes has been injured. Your said orators are also unable to use or enjoy their common law and paramount rights of fishing and bathing in the said river and navigating the same, and are unable to use the said waters for drinking, domestic, manufacturing and other usual and necessary purposes, and are unable to sell or use ice cut on the said river for any purpose, and are unable to use or dispose of their said residences and properties." (Par. 28, page 15, line 1, of case.)

## V.

THE FIFTH GROUND OF DEMURRER IS THAT "IT IS APPARENT FROM THE ALLEGATIONS OF AND STATEMENTS IN SAID BILL THAT THE SAID ALLEGED INJURIOUS CONDITION OF SAID RIVER IS THE INEVITABLE RESULT OF THE MAINTENANCE OF THE DAM ACROSS SAID RIVER IN SAID BILL MENTIONED. SO FAR AS APPEARS FROM SAID BILL, SAID DAM WAS ERECTED AND HAS BEEN AND STILL IS MAINTAINED WITHOUT ANY LAWFUL AUTHORITY OR LEGAL RIGHT, AND, AS APPEARS FROM SAID BILL, NOT ONLY PREVENTS THE NATURAL FLOW AND IMPEDES THE NATURAL COURSE OF PURIFICATION OF SAID RIVER, TO THE BENEFIT OF WHICH THIS DEFENDANT IS ENTITLED IN THE CARRYING AWAY AND DISPOSAL OF ITS SAID SEWAGE, BUT CONSTITUTES AN OBSTRUCTION TO THE NAVIGATION OF SAID RIVER."

So far as this ground of demurrer questions the right of the Dundee Water Power and Land Company to maintain the dam in question, it will be considered later.

As to the rest of the ground of demurrer, we submit that

there is no allegation of the bill from which it can be inferred in any way that the foul condition of the Passaic River is due to the existence of this dam, either in whole or part. The dam, of course, does not itself pollute the waters of the stream, nor is there anything in the bill to show that it retards the natural course of purification of the river. The dam is situated at Passaic, which is below the City of Paterson. It does not appear that the back-water reaches the city limits of Paterson. Accordingly, the dam in nowise interferes with the natural flow of water at or near the point where the sewers enter the river. It nowhere appears, and cannot be assumed, that if the dam had not been erected, the waters of the river, polluted by the City of Paterson, would be entirely purified before they reached the lands of the complainants, and unless this would have taken place, if the dam were not there, the defendant cannot exonerate itself from liability, even if the presence of the dam causes a greater amount of filth to be deposited on the complainants' lands than otherwise would be cast there.

## VI.

THE SIXTH GROUND OF DEMURRER IS THAT "THE SAID BILL DOES NOT PRESENT A CASE ON THE PART OF THE COMPLAINANTS OR ANY OF THEM, WHICH GIVES A COURT OF EQUITY JURISDICTION, OR IN WHICH ANY EQUITABLE REMEDY IS PROPER, OR IN WHICH THE REMEDIES SUPPLIED BY COURTS OF LAW ARE NOT AMPLE AND ADEQUATE."

It is entirely settled that the diversion of a water course from its accustomed channel is an irreparable mischief which may and should be restrained by injunction.

*Shields v. Arndt*, 3 Gr. Ch., 234.

*Shreve v. Voorhees*, 2 Gr. Ch., 25.

*Acquackanock Water Co. v. Watson*, 2 Stew. Eq., 366.

*Higgins v. Flemington Water Co.*, 9 Stew. Eq., 538.

A deprivation of the use of a stream, by corrupting it so as to render it unfit for use, is an equally irreparable injury, entitling the party injured to the like preventive remedy.

*Holsman v. Boiling Spring Bleaching Co.*, 1 McCarter, 335.

*Attorney General v. Steward & Taylor*, 5 C. E. Green, 415.

*Simmons v. Paterson*, 15 Dick. Ch., 385.

*Beach v. Sterling Iron and Zinc Company*, 9 Dick. Ch., 65; affirmed on Appeal, 10 *Id.*, 824.

## VII.

THE SEVENTH GROUND OF DEMURRER IS THAT "THE SAID BILL IMPROPERLY JOINS TOGETHER THE DIFFERENT CAUSES OF ACTION AND DIFFERENT LEGAL AND EQUITABLE CLAIMS WHICH ARE HELD BY THE COMPLAINANTS IN SEVERALTY AND WHICH CANNOT BE PROPERLY TRIED AND HEARD TOGETHER."

This same objection was taken by this defendant in *Attorney General v. Paterson*, 13 Dick. Ch., 1, and was expressly overruled, so far as related to the owners of riparian lands above tide-water. The decision of the Chancellor went so far as to hold that the municipality of Jersey City was properly joined with the complainants, who were riparian owners above tide-water, although the city owned no lands above that point, and had merely a right to take water from the river for the purpose of supplying its inhabitants. The decision of the Chancellor upon this point was approved by this court. No mention of this aspect of the case was made in the opinion in the Court of Errors. An examination of the records in the office of the Secretary of State shows these facts:

There were two orders made by the Chancellor; one was an order for an injunction and the other an order overruling the defendants' demurrer. Separate appeals were taken. The ap-

peal from the order for an injunction is that in which the opinion of this court was written. (Cause No. 1, File No. 196). The check list unanimously reversing this order, was filed March 19, 1900, and the decree for reversal was filed June 19, 1900. Cause No. 2, (File No. 197), was the appeal from the order overruling the demurrer, which alone presented the question of misjoinder of parties. On March 19, 1900, a check list was filed showing the unanimous affirmance of this order. On March 23, 1900, application was made for a new hearing in this appeal, and an order was made for the retention of the record. A petition for rehearing was filed on April 2, 1900, and on June 19, 1900, an order was entered reversing the order overruling the demurrer. The petition for a rehearing clearly showed that the affirmance of the order overruling the demurrer was because this court approved the decision of the Chancellor on the question of misjoinder, and owing to the manner in which the appeals were presented, assumed that that question alone was involved in Cause No. 2. A rehearing was asked for, and presumably the order overruling the demurrer was reversed because the demurrer presented not only the misjoinder of parties, but as well the merits of the controversy upon the bill as filed. A copy of this petition is printed as an appendix to this brief.

The principle of the decision in *Attorney General v. Paterson* upon the right of the complainants to join in a single bill, applies as well to the complainants who have grants from the Dundee Water Power and Land Company as to those owning lands on the banks of the river itself. The subject is exhaustively considered by the late Chancellor, who, after discussing the cases of *Rozbotham v. Jones*, 2 Dick. Ch. Rep., 337; *S. C. on Appeal*, 3 Dick. Ch. Rep., 311; *Reid v. Gifford*, Hopk. Ch., 416; *Ballou v. Inhabitants of Hopkinton*, 4 Gray, 324; *Cadigan v. Brown*, 120 Mass., 493, continues:

“The case considered is stronger in justification of joinder of the complainants than any of these. Each has

the right to have the identical water reach him in its pure, natural condition, except as the proper domestic and reasonable uses of the riparian owners above him may affect it. Above them all a riparian owner, for his own advantage, deliberately defiles, pollutes and corrupts that water, so that when it passes to those below it is burdened with noisome stench and is utterly corrupted and unfit for the uses they each had the right to make of it. Can they not join, as may those affected by the common air defiled by the smells of a slaughter house, in an appeal to this court not to award each his damages but to stop the defilement? The rule governing the joinder of complainants in a suit like the present is one of good order and convenience to prevent confusion and the evils attendant upon it. I perceive no reason founded either upon danger of confusion or danger of injustice, which should induce me to hold that the complainants or relators are misjoined in this case. It is true that the information and bill emphasized the magnitude of the injury to Henry P. Simmons and to the Mayor and Aldermen of Jersey City, but nevertheless the injury to them is the common injury to the common right to pure and unpolluted water, differing only in degree from the injury to others according to the uses made of the right, but if administration of justice or if convenience shall hereafter so require, they, or either of them, may be stricken from the bill and information under Rule 132."

Each of the complainants in the present case has the same right, that is, to have the water of the Passaic River, or some part of it, reach him in its pure, natural condition, except as the proper domestic and reasonable uses of the riparian owners above him may affect it. The right is the same although acquired perhaps in a different manner. The injury is a common injury, and no reason can be suggested why the acquisition by some of the complainants of a similar right in a different manner should, within the principle of this case and the authorities cited, prevent the complainants, under the rule, from joining to prevent a common injury.

*See v. Heppenheimer*, 10 Dick. Ch., 240; *Affirmed on Appeal*, 11 Dick. Ch., 453.

## VIII.

THE REMAINING GROUNDS OF DEMURRER ARE APPARENTLY  
DESIGNED TO PRESENT TWO QUESTIONS—

First. The right of the complainant The Dundee Water Power and Land Company to erect and maintain the dam described in the bill of complaint and to make the leases for mill powers therein referred to; and

Second. The right of their lessees to obtain from this court protection against an impairment or destruction of the value of the rights created by those leases.

We submit that so far as the defendant is concerned, at least, The Dundee Water Power and Land Company had the right to erect and has the right to maintain the dam in question, and to make the leases or grants set out in the bill of complaint.

1. The Dundee Water Power and Land Company has this right by express legislative authority. The company was incorporated under the name of The Dundee Manufacturing Company by an act passed March 15th, 1832, (P. L., 1832, p. 181). The second section of this act provided "that the said company may, for the purpose of manufacturing iron, cotton, wool and other articles, the manufacture of which shall not be prohibited by the laws of this State, buy, rent and hold such lands, tenements and water power, in the said county of Bergen, or otherwise to seize or become possessed of, and hold or convey, any real or personal estate, as may be necessary and useful for the purposes aforesaid, and the same may sell, let, or otherwise dispose of, as they shall deem proper." (p. 16, l. 1 of case). By a supplement to this act, passed February 3, 1833, (P. L., 1833, p. 117), it was provided that the said company, for the purposes mentioned in the second section of the act to which it was a supplement, might buy, rent, take or hold, or otherwise seize and become possessed of and hold all such lands, tenements and water power, and other real and

personal estate, in the county of Essex, as might be necessary and useful for the purposes aforesaid, and the same might convey, sell, let or otherwise dispose of as they should deem proper (p. 17, l. 4 of case).

By a further supplement approved February 14, 1872 (P. L., 1872, p. 204), the name of the company was changed to The Dundee Water Power and Land Company, and it was enacted that it should be lawful for said company to establish an office in the City of New York, if the same should be to its advantage, for the letting of its powers or the disposal of its lands, or for any other purpose (p. 18, l. 33 of case). The dam was originally erected shortly after the incorporation of the company, and in the year 1858 was raised to the height at which it is now maintained (p. 19, l. 10, of case).

The form of proposal for leases of mill powers and land now used by the company was adopted by its directors July 6th, 1865, (p. 35, l. 14, of case).

It thus appears that the company had express authority from the Legislature to acquire water powers, and to let the same. There is no more common or proper method of acquiring water power than by the erection of a dam across a non-tidal stream. If the company was not authorized by its charter to erect such a dam, the right conferred upon it to acquire water power was practically nugatory. Some kind of dam was necessary to enable it to acquire and make available any water power. It must, therefore, be taken that the Legislature expressly authorized the company to build a dam.

If such power was not originally conferred upon the company, the exercise of it was ratified by the supplement to its charter passed in 1872, above referred to, for, at that time, the company had erected its dam, had adopted proposals for letting its mill powers, and had actually made some of the leases set out in the bill of complaint. The authority conferred by the supplement last mentioned to establish an office in the City of

New York "for the letting of its powers" must be taken as a legislative recognition and ratification of the open and notorious acts of the company.

2. The company has acquired, by adverse user, the right to maintain this dam as against every one except the State, even if it be conceded that it has not express authority for that purpose.

Any particular user of water for twenty years undisturbed and uninterrupted will raise the presumption of a grant.

*Shields v. Arndt*, 3 Gr. Ch., 234.

*Shreve v. Voorhees*, 2 Gr. Ch., 25.

*Campbell v. Smith*, 3 Hal., 139.

The dam in question has stood for more than twenty years. Its erection and maintenance were, of course, open and notorious acts, and the existence of the dam during all these years has conferred upon the company a right to maintain it, unless the State can successfully intervene. Neither the defendant nor any one else can successfully question the right of the company to maintain this dam at this time.

3. Even if it be assumed that the dam in question was unlawfully erected and is unlawfully maintained, it will not avail the defendant, for it has no right, by its own act and without direct judicial determination, to undertake to settle this question. The defendant owns no riparian land below the dam, nor does it own any lands which are flooded by the back water from the dam. It sustains no injury from the existence of the dam. Independent of this erection, The Dundee Water Power and Land Company, as riparian owner, has the right to use the water of the river for the purposes of its charter, subject only to the regulation of the right of navigation and the protection of the rights of riparian owners lower down the stream. This right, assuredly, the defendant cannot impair without making compensation. If the damages of this company have

been increased by an unlawful erection of the dam, it may affect the amount of compensation which the defendant must make to it as a riparian owner, but it does not excuse the defendant for a violation of those rights. The demurrer confesses the defendant to be a wrongdoer, and it cannot shield itself from the consequences of its act by the fact that a wrong is also done by another. Nor can the alleged fact that The Dundee Water Power and Land Company has itself obstructed the stream authorize the City of Paterson to deprive it, without compensation, of the rights which it lawfully possesses.

This brings us to a consideration of the rights of the companies leasing lands and water power from The Dundee Water Power and Land Company.

The rights of these corporations, called, for convenience, "the manufacturers," arise in this way: As already seen, The Dundee Water Power and Land Company is a riparian owner on the Passaic River above tide-water. Pursuant to legislative authority, it has established and for many years maintained a dam across the river above tide-water. It has constructed a canal for the purpose of drawing water from the river, and the tailrace of this canal discharges into the river at a point below the dam. So far as appears from the pleadings, all of the water drawn from the river through this canal is returned to the river through the tailrace. If, however, any of this water is in fact diverted from the river, and not restored to it, and an injury is thereby done to riparian owners lower down on the stream, that is a matter of which they alone can complain and of which the defendant and riparian owners above the Dundee dam cannot complain. Still acting under legislative authority, The Dundee Water Power and Land Company has leased to the manufacturers one or more mill-powers of water. A mill-power, as defined in the lease, is the right to draw from the canal "eight and one-half cubic feet of water per second, so long as the water in the main reservoir at the dam shall stand within twelve inches below the level of the top

of said dam, with a free flow therefrom into the main canal or raceway, all the inlet gates to the same being open, with a fall not exceeding a point twenty-three feet below the level of the top of said dam" (page 36, line 12, of case). These leases are all made for the term of twenty-one years, "said lease to be renewable at or before the expiration of said term of twenty-one years, at the request and at the cost and charges of the lessees or their assigns, and at or before the expiration of every succeeding term of twenty-one years thereafter forever" (page 35, line 34, of case). The lease accordingly is a perpetual lease at the option of the lessee and becomes in effect a grant of the right to take the stipulated amount of water from the Passaic River. In addition to the mill-powers, the leases to some of the manufacturers, namely,—Dundee Woolen Company, Andrew McLean Company, United States Finishing Company and Passaic Woolen Company, include also certain lands owned by The Dundee Water Power and Land Company and fronting on the Dundee Canal. These lands, as will be seen hereafter, are in effect riparian lands.

We submit that rights thus acquired by the manufacturers are entitled to protection against a taking for a public use until just compensation has been made therefor.

This question has been practically decided against the defendant by the Supreme Court in *Butler Rubber Co. v. Newark*, 32 Vroom, 32. In that case the Newbrough Company was the owner of a tract of land on both sides of the Pequannock River, including the bed of the stream. In 1869 the company built a mill, called the Tyndall Mill, and erected a dam and constructed a raceway for the purpose of diverting the waters of the river as a water-power for the use of their mill. Subsequently the company constructed another mill, now owned by the Butler Hard Rubber Company, higher up on the raceway. The waters from the stream were first used through the raceway for driving the last mentioned mill, and after they were discharged into the tail race were carried down to the Tyn-

dall Mill. By a deed dated February 12th, 1873, the Newbrough Company conveyed to Richard B. Tyndall the premises at the lower end of the raceway. The deed, after the description of the premises granted, contained the provision that the party of the first part "doth hereby grant, assign and convey to the party of the second part, his heirs and assigns, the joint right with the party of the first part to all the water of the Pequannock River at the dam of the said party of the first part;" also, the joint right to take said water from said dam through the canal or raceway running from said dam to the raceway or mill of the party of the first part, and thence through the tailrace of the said mill to the premises therein conveyed, with a covenant that each of the parties should have the right to repair or rebuild the said dam or to repair or enlarge said canal at the costs of the party repairing, enlarging or rebuilding. By a deed dated July 24th, 1873, the Newbrough Company conveyed to Rosenthal and Strauss, under whom the plaintiff's took title, the tract of land on which the upper mill had been erected, with the strip of land on which the raceway was situate, extending up the river to a point distant seven and five-tenths feet from the southeast corner of the stone abutment at the gate-house at the upper end of the canal, together with all the rights of the dam and of the flowage possessed by the said party of the first part, subject in all respects to the joint rights, privileges and easements affecting the dam and the water in the Pequannock expressed and contained in the deed to Tyndall. The plaintiff's did not own any land on the Pequannock River. The City of Newark, under the Act of April 21st, 1876, (Rev., p. 721, G. S., 646, l. 902 *et seq.*) instituted proceedings to condemn the plaintiff's right to the waters of the stream. It was held that the grant to Rosenthal and Strauss conveyed the right to the waters of the stream as appurtenant to the conveyance of the land, and that they were entitled to compensation for the damages sustained by the taking of the waters for the purposes mentioned in said act.

It was contended by the defendants in that case that as against the company diverting the waters of the stream above the dam, the Butler Company had not such property in the stream as would enable it to have compensation for such diversion, and that the damages recoverable in that case should be merely nominal. To maintain this contention the defendant relied on several cases in the English Courts, of which *Stockport Water Works Co. v. Potter*, 3 Hurlst. & C., 300; *Ormerod v. Todmorden*, L. R., 11 Q. B. D., 155, and *Kensit v. G. E. R. Co.*, L. R., 27 Ch. Div., 122, are types. The Supreme Court distinguished those cases from the one then in hand, and referred to *Nuttall v. Bracewell*, L. R., 2 Exch., 1, and *Holker v. Porritt*, L. R., 10 Exch., 59, as more nearly applicable to the case,

and proceeded: "But it is unnecessary to discuss this subject further. The right the plaintiff's obtained to the use of the waters of the stream in virtue of the grant from the Newbrough Company is undeniably property. As such, under our constitution, they cannot be deprived of it except on compensation made. This principle applies whether the water taken or the injury done to the mill property by diverting the waters from the mill be considered. The destruction of private property, either total or partial, or the diminution of its value, by the act of the government directly and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking, within the constitutional provision, which can be effected only under the right of eminent domain, subject to the constitutional limitation of making just compensation. *Trenton Water Power Co. v. Raff*, 7 Vroom, 335, 343."

In *Nuttall v. Bracewell*, L. R., 2 Exch., 1, it appeared that the plaintiff was the lessee of a mill situated on riparian land. A., through whom he derived title, had, in 1804, under a written agreement with the adjoining higher riparian owner, and subject to an annual payment, constructed a goit on the higher owner's land, intercepting the water of the stream at a weir in that land, and bringing it thence to his mill. The flow of the water through this goit had ever since been enjoyed by the mill owner, and used for the purpose of working the mill; and

the annual acknowledgment had been paid. The defendant, a riparian owner above the weir, and also a mill owner, intercepted the water of the stream for the purpose of his mill; and the plaintiff sued for damages. It was held that he was entitled to recover. Pollock, *C. B.*, and Channell, *B.*, put their decision upon the ground that what was done amounted to a division of the stream into two courses, and that the plaintiff was a riparian proprietor in respect of the goit. Bramwell, *B.*, held that a riparian land owner can grant to a non-riparian land owner the flow of water from the stream to his premises for the use of the premises, and that the grantee might sue for a disturbance of his enjoyment by a higher riparian owner.

In pronouncing judgment, Bramwell, *B.*, said: "The principle on which it seems to me the plaintiff is entitled to recover is this: As a general rule, when a man has a property he may grant to others estates in and rights of enjoyment of it, and the grantees may maintain actions against those who disturb them. I do not say that there is no exception; there may be for aught I know. A man entitled to land may grant leases, may grant the exclusive herbage, a right of depasturing, a right of way, a right to game. He may grant the mines underneath, or the right to get minerals, and other rights in or over the property, or of enjoyment of it. So, if the land is covered with water, he may grant rights of fishing. So the grantees of mines may regrant. So of chattels. The owner may let them to hire. And in all these cases the grantee may maintain actions in respect of the rights granted. Now what is the case here? Mr. Bagshaw is a riparian proprietor. Subject to the rights of those opposite and those lower down the stream, he may divert the water where it flows by his land. Why may he not grant this right or mode of enjoyment? I say the burthen of proof is on those who say he may not. This right of his, this mode of enjoying his property, is presumably grantable like others. Those who deny this must give a reason for it, and I have heard of none. It seems to me that all reasons of public convenience, and all other reasons, make this right grantable as much as any other right."

In *Holker v. Porritt*, L. R., 10 Exch., 59, a natural stream was divided immemorially, but by artificial means, into two branches; one branch ran down to the river Irwell; the other

passed into a farm yard, where it supplied a watering trough, and the overflow from the trough was formerly diffused over the surface, and discharged itself by percolation. In 1847, W., the owner of the land on which the watering trough stood, and thence down to the Irwell, connected the watering trough with reservoirs which he constructed adjacent to, and for the use of, a mill on the Irwell. In 1865, W. became the owner of all the rest of the land through which this branch flowed. In 1867 he conveyed the mill, with all water rights, to the plaintiff. In an action brought by the plaintiff against a riparian owner on the stream above the point of division, for obstructing the flow of the water, it was held (affirming the judgment of the court below, 8 Exch., 107), that the plaintiff was entitled to maintain the action.

In *Laing v. Whaley*, 3 Exch., 675, the declaration alleged that the plaintiff was possessed of steam engines and boilers, and used, had and enjoyed the benefit and advantage of the waters of a certain branch canal to supply the same, and which waters *ought* to have flowed, and been without the fouling or pollution thereafter mentioned; yet the defendant wrongfully discharged into the water of the canal foul materials, and thereby rendered the waters foul, whereby the plaintiff's engines and boilers were injured. The defendant pleaded: First, not guilty; secondly, that the waters of the canal ought not to have flowed and been without the fouling mentioned. An arbitrator, to whom the cause was referred, found that the plaintiff, by permission of a canal company, made a cut from the canal to his own premises, by which water got to those premises, and with which he fed the boilers of his engines. The defendant, without any right or permission from the company, fouled the water in the canal, whereby the water as it came into the plaintiff's premises was fouled, and by the use of it the plaintiff's boilers were injured. Judgment was given for the plaintiff, and this judgment was on error affirmed by a divided court. Willes, J., was of the opinion that the judgment

of the court below ought to be affirmed on the ground that the plaintiff was in possession of the water and the defendant was a wrong-doer. Crowder, *J.*, said: "I think the facts found by the arbitrator show that the plaintiffs below, by permission of those who had the right, were in the enjoyment of clean water coming from the canal for the purpose of their engine. The act done by the defendant below was an injury to that enjoyment by the substitution of foul for clean water. The injurious effect upon the water used by the plaintiffs resulted immediately from the act of the defendant. The plaintiff's use of the water was rightful, viz., by permission of those who had the right, and might grant or withhold such permission at their pleasure, so long as that permission continued. I think 'the waters of the branch canal ought to have run and flowed without the fouling and pollution of the defendant,' and that consequently the issue on the second plea ought to be found for the plaintiffs. It is further contended that no right of action is shown in the declaration, and that the judgment ought to be arrested. But I think it sufficiently appears that the plaintiffs were in the lawful enjoyment of a beneficial flow of clear water from the branch canal, and that the defendant wrongfully polluted the stream, and thereby damaged the plaintiffs, which appears to me a sufficient statement of a good cause of action. I think therefore the judgment ought to be affirmed."

Crompton, *J.*, said: "I think that the declaration in this case can only be supported on the ground of its claiming a right to the water for the supply of, or by reason of the possession of, the works in question. It states the possession of the mines and works and the use of the water for the supply of the works; and then avers that the water ought to flow unpolluted, and that the defendant polluted it near to the place from which the supply was drawn. The word ought seems to me to import an allegation of right; and I think that the allegation that the water ought to flow unpolluted, in order to support the declaration after verdict, must be taken as meaning that the water ought to flow to the place in question, and ought to flow there unpolluted. I think that if a judgment were to pass for the plaintiffs, founded on a declaration like the present, it would be evidence for them and their privies in estate, as against the defendant, of the existence of the right to the flow of the unpolluted water. If this be so, the plea seems properly to negative the existence of any such right as that on which the plaintiffs' right of action is founded. I do not say that an action might not under some circumstances

lie in such a case as that referred to by Baron Martin in the court below. Where a man has the permission of the owner of a pond to get water from it for his cattle, and a defendant knowing of such permission and knowing the probable and natural effect and consequence of his act, poisons the water of such pond so as that the cattle are injured, probably an action would lie. Such an action is founded, not on the title or right to the water, but on the injury to the property of the plaintiff." He was, however, of the opinion that the declaration

was for an injury to a right of water connected with a mill or other works, that is to say, that the plaintiff founded his action upon alleged rights as a riparian owner, and not upon a right of property acquired from the canal company.

The case below is reported in 2 H. & N., 476.

In *Stockport Water Works Co. v. Potter*, 3 Exch., 300, it was held that a riparian proprietor derives his rights in respect of the water from possession of land abutting on the stream, and if, by a deed which conveys only land not abutting on the stream he affects to grant water rights, the grant though valid as against the grantor, can create no rights for an interruption of which the grantee can sue a third party in his own name. The decision in this case was reached over a vigorous dissent by Bramwell, B., whose reasoning is so cogent as to deserve reproduction here. He says: "The case then is reduced to this. Can a grantee from a riparian proprietor of land, part of the former riparian estate, but separated from the stream by land of the grantor not included in the grant, with a grant from the grantor of a right to lay pipes from the stream to the granted land and take water by means of them from the stream to such granted land, maintain an action against a person who fouls the stream? It is strange that this question should arise for the first time. There can be no doubt that the grant as between the riparian grantor and the grantee is good. And there is this to be said in favor of supporting the present claim, that we must suppose that the grantor and grantee have found the arrangement to be to their mutual advantage, that the stream can be more beneficially used this way than otherwise. Consequently that such an arrangement is for the public good. Why, then, should it not be effectual against a person, who as against the riparian proprietor is a wrongdoer?"

It imposes no additional burden on the riparians or others above. If they are wrongdoers by fouling now, so were they before. They could be restrained by injunction before if they can now. No doubt they might be made liable to larger damages than they would have been before, but their rights are not altered. It was said that innumerable actions might be brought if the law were as the plaintiff's contend. But there are two answers to this, one practical, viz., that they would not be brought, the other that the same might happen now if the smallest portion of the bank was granted with the right. A similar answer may be given to the supposed difficulty of the riparian proprietors above desiring to buy up rights below. The power to make such a grant then is for the benefit of the grantor and grantee, and the public; and the only prejudice by it to the riparian or wrongdoer above is the liability to greater damages and to an action and injunction at the suit of persons additional to the riparians below. But this consideration could not preclude a covenant by the grantor that the grantee might apply in his name for an injunction or sue in his name, nor would it preclude a grant of the part of the bank where the water was taken, in which case it is clear the grantee might maintain an action or obtain an injunction. And this suggests to me the remark that what may be done indirectly may be directly. Further, it does seem strange that if a man has an estate on the bank of a stream extending a mile from it, he may build houses on the land, conduct water from the stream to them, and maintain an action and recover substantial damages for the injury to each house; that his tenants of each, if he let them, might do the same even though he demised them for 1,000 years at a peppercorn rent, but that if he grants away the house in fee with the right of water, such grantee can maintain no action. What is to happen if he does so and repurchases? What would be the case if a riparian proprietor added to his estate another, to which water had been so conducted? Suppose a riparian proprietor on both sides for a great length wholly alters the course of the stream, could he not effectually complain of a fouling of the water in the new course? Suppose besides the new course he allowed the old one to continue, the stream running in both, could he not then maintain actions for the damage done to either? If he could, could not his grantee of lands on the new stream, and if such grantee could, why cannot the plaintiffs?

"If the defendant's argument is well founded, it will follow that where the owner of land on a stream had built a mill alongside the stream with a cut or lead to it, and sells the mill, but not the natural watercourse, the owner of the mill can maintain no action against a riparian owner above who abstracts the

water. I cannot think this is so. Further, suppose the person fouling the water was not a riparian proprietor but a mere wrongdoer, why should not an action lie against him? I can see no reason, nor can I see that his being such proprietor makes any difference. Upon these various considerations it seems to me this action is maintainable. I think it may fairly be asked to what extent I would carry the principle upon which I decide this? My answer is, to the extent to which the analogous case extends of a grantee of a right of way. Where a grantee of a right of way could maintain an action for disturbance of his way, so do I think the grantee of a right of water might. This case of the right of way, and cases of right of common, seem to me analogous to this case and authorities for my opinion. I am of course aware of the case of *Keppell v. Bailey*, 2 Myl. & K., 516, and agree that new rights of property cannot be created, but I think that rule does not interfere with the present case. There, an owner of land was resisting a burden put on it by a former owner, and it was held that burden could not be attached to the land in the hands of the assignee. Here, no doubt, it can be, that is to say, on the lands of the riparian proprietors, the Marsdens. The question is not with them, but with one who would be a wrong doer if he had no riparian estate or occupation, and is not the less so because he has. Nor is *Hill v. Tupper*, 2 H. & C., 121, any authority against the maintenance of this action. That case decided that in respect of what was no estate, and which gave no possession, but merely a right of action, against a covenantor, that right could not be enforced against a third party. On the other hand, *Whaley v. Laing*, 3 H. & N., 675, 901, seems a strong authority in favor of the plaintiff; for all the judges seem to have considered that had the water been taken as of right the action would have been maintainable. I have only to add that, to my mind, this is not a question of easement or dominant and servient tenement. The plaintiffs rely on the possession and enjoyment as of right, and charge the defendant as a wrongdoer, not the less because he is a riparian owner. I think the plaintiffs are entitled to judgment."

Pollock, C. B., speaking for himself and Channell, B., delivered the opinion of the majority of the court. An examination of this opinion shows that there was some doubt in the minds of the judge whether the deed in question granted any right to take the water at the point at which it was taken. The decision seems to turn upon the lack of authority "for contending that a riparian proprietor can keep the land abutting on the

river the possession of which gives him his water rights or any of them, and thus create a right in gross by assigning a portion of his rights appurtenant." If the Legislature has authorized the Dundee Water Power and Land Company to make a conveyance of this kind, the Legislature has supplied the authority which the Chief Baron thought to be lacking at common law. The Legislature has, as already seen, authorized the Dundee Water Power and Land Company to make the leases already considered. The making of these leases must not only confer upon the company, a right to the rentals reserved, but must also secure to the lessees the benefits which the leases purport to confer upon them. The Legislature therefore has authorized the lessor to grant and the lessee to take a property right essentially valuable by whatever name it may be called. Surely this property right or interest in the lessee, created under authority of law, must be entitled to the protection of the law. So far as the manufacturers are lessees of lands bounded on the Dundee Canal the opinions of all the judges in the case last cited support their position, for the Chief Baron himself says: "The case where a riparian proprietor makes two streams instead of one and grants land on the new stream seems to us analogous to a grant of a portion of the river bank, but not analogous to a grant of a portion of the riparian estate not abutting on the river. In the case of a grant of land on a new stream, the grantee obtains a right of access to the river, and it is by virtue of that right of access that he obtains his water rights."

In *The Bristol Hydraulic Co. v. Boyer*, 67 Ind., 236, it was held that a non-riparian proprietor of a mill situated near a water-course, and propelled by water drawn from and returned to such water-course by means of races constructed through the intervening land, under grants authorizing the same, may maintain an action against a riparian proprietor below the tail-race, who so obstructs the flow of the water-course as to back water upon the water wheels of the plaintiff's mill; and this regard-

less of whether or not the plaintiff has a grant from the riparian proprietors between the points where such races severally connect with the water-course. In its opinion the court said

“the plaintiff had an easement in the land occupied by his dam, head-race and tail-race, granted for the purpose of authorizing the diversion and flow of water, but he may not have shown that he had acquired the right from all the riparian owners between his dam and the mouth of his tail-race, to divert the water from its natural flow in the bed of the river for the use of his mills. \* \* \* The plaintiff had a right to construct and use his dam, his mills and his head and tail races. He also had the legal right to have the water flow from the mouth of his tail-race in the channel of the river, without obstruction from below backing the water upon his premises. And we think clearly he could maintain the action without showing that he had acquired the right from the riparian owners of the land intermediate the point at which the water was taken from, and that at which it was returned to, the river, to divert the water from its natural channel and apply it to the purpose of propelling his mills. If the plaintiff wrongfully diverted the water from the river, to the injury of such riparian owners, it was for them and no one else to complain of the injury. The plaintiff may have been a wrong-doer in respect to the riparian owners mentioned, but that is no defense to an action for the wrong done by the defendants, who are not such intermediate riparian owners, in erecting their dam, and thereby backing the water upon his premises, to his injury. \* \* \* The principle settled by these and other decisions is, that one having the possession of property may maintain an action against a wrong-doer for an injury thereto, which cannot be defeated by showing the title to be in some one else than the plaintiff. We see no good reason why the principle should not be applicable to such a case as the present. The plaintiff’s action ought not to be barred, as we think, on the ground that he had not acquired the right from the riparian owners mentioned, to divert the water from its natural channel. He may be called upon by such owners to respond in damages for doing so. But, whether he shall be or not, it is a matter that does not in the least concern the defendants.”

The court also referred to the case of *Nuttall v. Bracewell*, *supra*, and says that though not exactly in point, it strongly favors the view taken of the question.

In *Watuppa Reservoir Co. v. Fall River*, 134 Mass., 267,

it was held that a corporation whose lands did not border on the stream, but to whose mill water was conveyed by a canal running through the land of a riparian owner under a deed giving the right to the flow of water from the stream had the same rights as the riparian owners, against the city taking water from the stream for the purpose of supplying its inhabitants with pure water.

We submit, however, that the question in this case is not the narrow one whether the manufacturers are or are not riparian owners, or whether or not they have acquired the rights of riparian owners as against other riparian owners along the stream. The defendant is situated upon the river above the Dundee Dam and beyond the reach of any effects from the erection or maintenance of the dam. The flow of the river at Paterson is the same as it has always been, except for the pollution admitted to have been caused by the city. The existence of the Dundee Dam affects neither the quantity nor the quality of the water at the City of Paterson. The broad question in the case is whether the property rights existing by virtue of the grants from the Dundee Water Power and Land Company to the several manufacturers can be destroyed or impaired in value by a wrong-doer, without making just compensation therefor, and we submit that upon this question the decision of the Supreme Court in *Butler Rubber Co. v. Newark, supra*, is complete and conclusive.

Dated November 18, 1902.

Respectfully submitted,

SHERRERD DEPUE,  
RICHARD V. LINDABURY,

*Of Counsel with Respondents.*

## APPENDIX.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

|  |  |                            |
|--|--|----------------------------|
| <p><i>Between</i><br/>         SAMUEL H. GRAY, ATTORNEY GENERAL, <i>ex rel.</i>, HARRY P. SIMMONS,<br/> <i>et als.</i></p> |  | <p><i>Respondents,</i></p> |
| <i>and</i>   |  |                            |
| <p>THE MAYOR AND ALDERMEN OF THE<br/>         CITY OF PATERSON,</p>  |  | <p><i>Appellants.</i></p>  |

*On Appeal from  
 Order Overruling  
 Demurrer.*

## PETITION FOR REHEARING.

*To the Honorable Judges of the Court of Errors and Appeals  
 of the State of New Jersey:*

The petition of the Mayor and Aldermen of the City of Paterson, the above named appellants, respectfully shows unto your honors as follows:

1. Upon the filing of the information and bill in this cause and certain affidavits attached thereto, an order was made by the Court of Chancery requiring the defendants to show cause why an injunction should not issue pursuant to the prayer of the bill.

2. Your petitioners, the defendants below, upon the argument of the said order to show cause presented certain affidavits in answer to those presented by the complainants, and also

filed a demurrer to the information and bill specifying a large number of causes of demurrer, including distinctly the claim on behalf of the defendants that the defendants had a right to use the Passaic River in the manner complained of.

The defendants in manner aforesaid presented to the consideration of the Court of Chancery a considerable number of distinct separate defences. These defences consisted of three classes as follows :

First. Defences which were presented wholly by the allegations of the bill of complaint and the public statutes of the State, and certain facts of which the courts of New Jersey take judicial cognizance.

Second. Defences, or at least one defence, wholly presented by the answering affidavits and not apparent on the fact of the information and bill. The defence that the diversion of the water by the East Jersey Water Company was the cause of the injuries complained of was of this class.

Third. A defence or defences about which it might be questioned whether they were wholly presented by the bill of complaint and hence open for argument on demurrer, or whether they required for their complete presentation some of the allegations of the answering affidavits.

3. While the order to show cause and demurrer were by consent argued orally together before the Court of Chancery, the defendants' argument on the demurrer was submitted separately at a later day by a printed brief to which your petitioners beg leave now to refer. The said brief submits as a distinct defence arising upon the demurrer that "the City of Paterson has a statutory right to drain itself through sewers into the Passaic River," and cites in support of this claim of right the public laws of the State authorizing public sewers in Paterson, which are cited in the opinion of this honorable court in disposing of the appeal from the order for an injunction.

The question whether the City of Paterson had a statutory right as against the Attorney General to maintain its sewers as set forth in the information and bill, was distinctly raised upon the face of the demurrer and was at all times treated by the Court of Chancery and by counsel on both sides as being an issue to be disposed of upon the demurrer, and not an issue to be disposed of on the order to show cause.

This question was, in fact, distinctly presented by the demurrer and did not require any of the additional facts relating thereto set forth in the defendants' affidavits. It is true that the said affidavits set forth the actual proceedings of the City of Paterson and its governing body in pursuance of the public laws of the State under which the sewers of Paterson were constructed, but your petitioners submit that while these things are relevant and pertinent to the discussion of the subject and are treated as such in the opinion of this court upon the appeal from the order for an injunction, yet the whole substance of your petitioners aforesaid defence is fully presented upon the face of the bill without the aid of these allegations in said affidavits.

That the defence in question is wholly presented by the demurrer appears further from the opinion of the learned Chancellor who deals with said defence with the aid of the allegations of the bill and of the public statutes of the State only. The learned Chancellor distinctly finds that the statutes in question did not authorize the pollution complained of, and his whole discussion of this defence based upon the statutory authorization under which your petitioners acted, does not include any fact not presented by the bill and the public statutes of the State, and after discussing the said defence without the aid either of the complainants' affidavits or the answering affidavits, but strictly as a defence raised by the demurrer, the learned Chancellor concludes that he would "overrule the demurrer with costs."

4. Your petitioners, the defendants below, appealed from the order of the Court of Chancery directing the issuing of a preliminary injunction, and also appealed from the order of the Court of Chancery overruling the said demurrer and the two appeals came on for hearing together practically as one cause at the present term of this honorable court.

In addition to the defences on the merits your petitioners, both in the court below and in this honorable court, as a separate defence, presented solely by the said demurrer set up and insisted that the information and bill improperly misjoined separate causes of action. The learned Chancellor treated this defence of misjoinder in his opinion and held that there was no improper misjoinder and this honorable court manifestly concurred in the opinion of the learned Chancellor, and your petitioners have no intention of in any way endeavoring to re-argue this question of misjoinder, but are obliged to accept the opinion of the Court of Chancery and the unanimous opinion of the Court of Errors and Appeals as finally settling the law of the State on that subject.

5. While the appeal from the order to show cause and the appeal from the order overruling the said demurrer were argued together before this honorable court, they were nevertheless separate and distinct appeals and a separate opinion was filed in each case.

In the case of the appeal from the order for an injunction, this honorable court at the present term adjudged that the order for an injunction should be reversed upon the distinct ground that the City of Paterson had a statutory right as against the Attorney General to do the things complained of in the said information and bill. Having thus disposed of the merits of the whole case considered as one, upon the appeal from the order for an injunction, this honorable court seem to have regarded the appeal from the order overruling the demurrer as presenting for review before this honorable court

solely the one technical defence in respect of the alleged misjoinder, whereas, in fact, the said defence on the merits was presented to the court both by the motion papers on the application for an injunction and by the demurrer. The opinion of this court filed for the disposition of the order overruling the demurrer is in the following words, to wit:

*“Per Curiam:* For the reasons given by the Chancellor, the order overruling the demurrer filed in this cause is affirmed.”

Your petitions respectfully submit to your honors that it is manifest that this honorable court in dealing as aforesaid with your petitioners' demurrer supposed that the said demurrer presented only the question of misjoinder, and that by the said opinion it was intended only to affirm the views of the learned Chancellor in regard to this question of practice and pleading. That this is true is apparent from the unquestioned fact which appears from the learned Chancellor's opinion that he overruled your petitioners' demurrer not only because the objection of misjoinder was, in his judgment, not well taken, but because the defence presented by the demurrer as aforesaid to the effect that your petitioner had a statutory right to do the things complained of in the said information and bill was not sound in point of law, and that no such right could be derived from said statutes, whereas this honorable court in its opinion on the appeal from the order for an injunction expressly holds the contrary. Your petitioners beg leave to suggest that the inadvertence above pointed out was perhaps due to the fact that the appeal from the order for an injunction and the appeal from the order overruling the demurrer were argued as one cause and by the submission of a single printed brief. For the sake of convenience your petitioners' counsel in his brief discussed all the defences on the merits in dealing with the motion for an injunction, while some of these defences were presented by the demurrer, some of them were not and all of them were presented by the motion papers,

including the affidavits. One defence only, viz., the defence of misjoinder was presented only by the demurrer. Therefore, in the aforesaid brief the defence of misjoinder was presented separately as "the only cause of demurrer which seems to call for separate discussion" although said brief distinctly stated that many of the meritorious defences to the motion for an injunction, "might be considered raised by the demurrer" and that "the specification of causes of demurrer contained in the demurrer raises these questions."

6. Your petitioners further show that so far as the alleged rights of the Mayor and Aldermen of Jersey City require special consideration, that whole subject was also distinctly presented by the said demurrer and was argued before the Court of Chancery on such demurrer, and the disposition of all special claims of right which the said Mayor and Aldermen of Jersey City presented in this cause did not in the slightest degree depend upon any matter or thing contained in any of the affidavits, but depended wholly upon the allegations of the information and bill and the public statutes of the State.

7. Your petitioners further submit that so far as the private rights of riparian owners entered into the consideration of the court, such rights required for their disposition not a single allegation contained in any affidavit in this cause, but were wholly presented to the Court for consideration upon the allegations of the information and bill, the public statutes of the State and certain facts of which the courts of the State at all times take judicial cognizance. The laches of the private complainants, the grounds for an estoppel so far as a motion for an injunction is concerned, and the relative effects of an injunction upon such private complainant, and the defendants respectively, as well as all other matters relating to the right of such private riparian owners to the extraordinary remedy of an injunction, all distinctly appear and are presented by the allegations of the said information and bill.

8. Your petitioners further submit that they ought not to be obliged to file an answer in this case merely for the purpose of setting up or referring to the public statutes of the State, which at no time are required to be pleaded, and that the few additional matters set forth in the opinion of this honorable court, reversing the order of the Court of Chancery granting the injunction herein, which matters relate to the proceedings of your petitioners under the sewer legislation aforesaid, while the same are appertinent and relevant to this cause, are not an essential part of any defence which could be pleaded in such answer.

Your petitioners submit that as this cause now stands your petitioners should not be obliged to proceed further therein by way of defence, but that if the said complainants or any of them desire to amend their bill of complaint in accordance with certain suggestions made in the said opinion of this honorable court, they should be left to avail themselves of the opportunity to make such amendment which will be afforded to them in the Court of Chancery after your petitioners' demurrer to the said bill of complaint in its present form has been finally sustained.

9. Your petitioners, therefore, humbly pray that this honorable court will order a rehearing of the argument upon the appeal from the said order overruling said demurrer.

And your petitioners will ever pray, etc.

EUGENE STEVENSON,

*Of Counsel with the Mayor and Aldermen of the City of Paterson.*

STATE OF NEW JERSEY, }  
County of Passaic. } ss.

Thomas C. Simonton, of full age, being duly sworn according to law, on his oath saith that he is the City Counsel of the City of Paterson, and that he has read the foregoing petition and verily believes that the same is true.

THOMAS C. SIMONTON.

Sworn and subscribed before  
me this 29th day of March,  
A. D., 1900.

JOHN B. HUMPHREYS,  
*Master in Chancery of New Jersey.*

Endorsed: "Filed April 2, 1900.

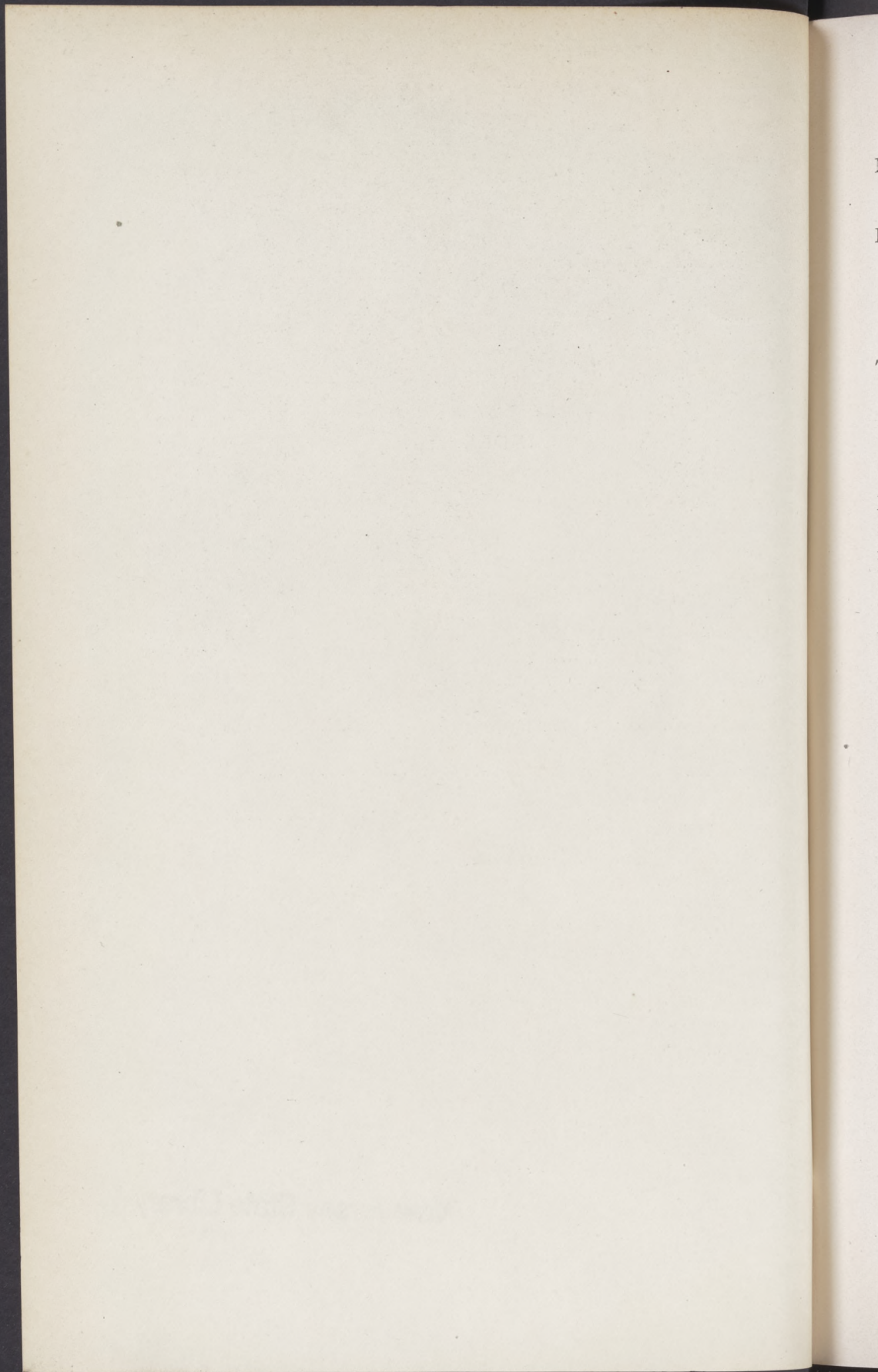
GEORGE WURTS,  
*Clerk.*"

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NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

HENRY W. DOREMUS, *et als.*,

*Respondents.*

and

THE MAYOR AND ALDERMEN  
OF THE CITY OF PATERSON,

*Appellant.*

*Petition of Appeal.*

10

The petition of the Mayor and Aldermen of the City of Paterson, the appellant in the above stated cause, respectfully shows, that your petitioner finds itself aggrieved by an order made in the Court of Chancery by his Honor, William J. Magie, Chancellor of New Jersey, bearing date the twentieth day of September, in the year nineteen hundred and two, wherein the said Henry W. Doremus and others were complainants and the said, the Mayor and Aldermen of the City of Paterson was defendant, in this respect, to wit, that the said order orders that the demurrer filed in the said cause by the said defendant be overruled with costs, and that the defendant answer the complainants' bill within twenty days, and that if the said defendant fails so to do the defendants' bill be taken as confessed against the said defendant. And your petitioner humbly appeals from the whole of the said order upon the ground that the same is erroneous, for that the said demurrer was good and sufficient and should have been allowed and ordered to stand, and that the complainants should have been ordered to pay to the said defendant its costs of the said demurrer to be taxed. Your petitioner therefore prays that the said order of the said Chancellor may be 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.

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MICHAEL DUNN,

*Solicitor for and of counsel with the appellant.*

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## IN CHANCERY OF NEW JERSEY.

Between

HENRY W. DOREMUS, *et als.*,  
*Complainants.**and*THE MAYOR AND ALDERMEN  
OF THE CITY OF PATERSON,  
*Defendant.**On Bill, etc.**Notice of Appeal.*

10

The defendant hereby appeals from an order made in the above stated cause on the twentieth day of September, nineteen hundred and two, overruling the demurrer filed therein by the said defendant, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

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Dated September 30th, 1902.

MICHAEL DUNN,  
*Solicitor of Defendant.*GEO. S. HILTON,  
*Of Counsel.*

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

GEO. S. HILTON,  
*Of Counsel with Defendants.*

## IN CHANCERY OF NEW JERSEY.

*To His Honor, William J. Magie, Chancellor of the State of New Jersey:*

Humbly complaining, show unto your Honor, your orators, Henry W. Doremus, Peter Alyea, George G. Van Riper, Edo V. Cadmus, Cornelius D. Cadmus, Richard Van Riper, Edo Van Riper, Frederick H. Gelderman, William P. Vreeland, Richard H. Hoitsman, Albert A. Outwater, Richard Outwater, Eliza Outwater, Peter H. Doremus, Mary A. Van Saun and Jacob H. Van Saun, her husband, Paulina Welmert, and Martha A. Phillips and Samuel Phillips, her husband, all of Dundee Lake, in the township of Saddle River, in the county of Bergen and State of New Jersey; Passaic Brick Company, a corporation created and existing under the laws of the State of New Jersey, 10  
 20 Henry Kip, Euphemia Kip, Annie Merselis and John E. Merselis, her husband, Gertrude C. Winslow, widow of Benjamin Stewart Winslow, deceased, John Kip, Garret Terhune and William A. Hopson, of the city of Paterson, in the county of Passaic, and State of New Jersey; David Miller of the city of Passaic, in the county of Passaic and State of New Jersey; Peter P. Van Bussum, a lunatic, by Peter J. Kipp, of Clifton, in the county of Passaic and State of New Jersey, his guardian; Margaret Kipp and Peter J. Kipp, her husband, John H. Merselis, Edwin Merselis and 30  
 Scatto C. Nash, of the township of Acquackanonk, in the county of Passaic and State of New Jersey; Dundee Land and Water Power Company, Botany Worsted Mills, The Algonquin Company, Dundee Woolen Company, Andrew McLean Company, Worthen & Aldrich Company, United States Finishing Company, and Passaic Woolen Company, corporations created and existing under the laws of the State of New Jersey.

1. That your orator, Henry W. Doremus, is and for many 40  
 years last past has been seized in fee of a tract of land at

Dundee Lake aforesaid, in the said township of Saddle River, in the county of Bergen and State of New Jersey, containing about seventy-five acres, having a frontage of about six hundred feet on the Passaic River, bounded on the west by the Passaic River, on the north by lands formerly of Joseph Burrows, deceased, on the east by lands of Samuel Van Delinda, and on the south by lands of Richard Van Riper, together with the dwelling house, barn, carriage house and outbuildings standing thereon.

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2. That your orator, Peter Alyea, is and since the year eighteen hundred and eighty-eight has been seized in fee of a tract of land at Dundee Lake aforesaid, situate on the east side of the Passaic River, having a frontage of three hundred feet on the said river and bounded on the north by lands of George G. Van Riper and others, on the east by lands of Henry Leswing, on the south by lands of the estate of Joseph Burrows, deceased, and on the west by the Passaic River, together with the dwelling house, barn, wagon house, sheds and other buildings situated thereon.

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3. That your orator, George C. Van Riper, is and for many years last past has been seized in fee of a tract of land, containing about fifty acres, on the east side of the Passaic River at Dundee Lake aforesaid, having a frontage of about seven hundred feet on the said river and bounded on the north by lands of Hartman Van Riper and others, on the east by lands of David Watson and others, on the south by lands of Peter Alyea, and on the west by the Passaic River, together with the dwelling house, barn, hay house, carriage house, wind-mill, tank, ice houses and outbuildings standing thereon.

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4. That your orators, John H. Merselis and Edwin Merselis, are and for many years last past have been seized in fee, as tenants in common, of a tract of land containing about twenty-six acres, situate on the west side of the Passaic River in the said township of Acquackanonk, having a frontage of about six hundred and thirty feet on the said river and bounded on the north by lands of Charles Currie, on the east

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by the Passaic River, on the south by lands of William B. Merselis and Stephen Merselis, and on the west by Lakeview avenue, together with the dwelling house, barns and other buildings situated thereon.

5. That your orators, Edo V. Cadmus and Cornelius D. Cadmus, are and for many years last past have been seized in fee, as tenants in common, of a tract of land containing one hundred acres, situate on the east side of the Passaic River at  
 10 Dundee Lake aforesaid, having a frontage of five hundred feet on the east side of the said river, and bounded on the north by lands of Richard Van Riper, on the east by lands of John Schroeder and George Hubschmidt, on the south by lands of Matthias Walker and Herman Hillman and on the west by the Passaic River, together with the dwelling house, barn and outbuildings standing thereon.

6. That your orator, Richard Van Riper, is and for about twenty-five years last past has been seized in fee of a tract of  
 20 land situate on the east side of the Passaic River at Dundee Lake aforesaid, containing about sixty-five acres of land and having a frontage of about seven hundred feet on said river, which said lands are bounded on the north by lands of Henry W. Doremus and Alonzo Miller, on the east by other lands of the said Henry W. Doremus, on the south by lands of Cornelius Cadmus and Edo V. Cadmus, and on the west by the Passaic River, together with the dwelling house, barn and other outbuildings thereon.

7. That your orator, Edo Van Riper, is and for many years last past has been seized in fee of a tract of land containing about twenty-five acres, situate on the east side of the Passaic River at Dundee Lake aforesaid, which said lands are bounded on the west by the Passaic River, on the north by lands of Leonard Van Derbeck, the Market street road and lands of Henry Docherty, on the east by lands of George G. Van Riper and Jacob Cooper, and on the south by lands of George G. Van Riper and the said Passaic River, together  
 30 with the dwelling house, barn, carriage houses, ice houses  
 40 and outbuildings situated thereon.

8. That your orator, Frederick H. Gelderman, is and for over sixteen years last past has been seized in fee of a tract of land on the east side of the Passaic River at Dundee Lake aforesaid, containing twenty acres of land, having a frontage of four hundred feet on the said river and bounded on the north by lands of William H. Doremus, on the east and south by lands of William Barbour and on the west by the Passaic River, together with the dwelling house, barn, out-houses, ice houses and other buildings thereon.

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9.—That your orator, William P. Vreeland, is and for seven years last past has been seized in fee of a tract of land on the east side of the Passaic River at Dundee Lake aforesaid, containing about seventy-five acres, having a frontage of about six hundred feet on the said river, and bounded on the north by lands of Peter H. Doremus, on the east by lands of Frances Somers, on the south by lands of Mary A. Van Saun and on the west by the Passaic River, together with the dwelling house, barn, carriage house and other buildings thereon.

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10. That your orator, Richard H. Hoitsman, is and for over ten years last past has been seized in fee of a tract of land on the east side of the Passaic River, at Dundee Lake aforesaid, containing about thirty-eight acres of land, having a frontage of about eight hundred feet on the said river and bounded on the north by lands of Paulina Wehnert, on the east by lands of Hartman Van Riper, on the south by lands of John R. See and others, and on the west by the Passaic River, together with the dwelling house, barn, carriage house and other buildings thereon.

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11. That your orators, Albert A. Outwater and Richard Outwater, are and for thirty years last past have been seized in fee as tenants in common of a tract of land at Columbus Heights, in Saddle River Township, Bergen County, New Jersey, containing about seventy acres of land, having a frontage of about six hundred feet on the Passaic River, and bounded on the north by lands formerly of John I. Berdan, deceased, on the east by lands of John E. Manson

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and by Bass Brook, on the west by lands of John Sikkema and others and on the south by the Passaic River, together with the two dwelling houses, barn, carriage house, cow shed and other buildings thereon, subject to a life estate therein in your oratrix, Eliza Outwater, who is possessed of such life estate.

10 12. That your orator, Peter H. Doremus, is and for many years last past has been seized in fee of a tract of land situate on the east side of the Passaic River at Dundee Lake aforesaid, containing seventy-five acres, having a frontage of about six hundred feet on the said river, and bounded on the north by lands of William Barbour, on the east by lands of Frances Sommers, on the south by lands of William P. Vreeland and on the west by the Passaic River, together with the dwelling house, barn, carriage houses, corn cribs, chicken house and other buildings situated thereon.

20 13. That your oratrix, Mary A. Van Saun, wife of your orator, Jacob H. Van Saun, is and for more than sixteen years last past has been seized in fee of a tract of land containing about seventy-three acres, situate on the east side of the Passaic River at Spring Valley, in the Township of Saddle River and County of Bergen aforesaid, having a frontage of about six hundred feet on the said river and bounded on the north by lands of William P. Vreeland, on the east by lands of Frances Sommers and others, on the south by lands of Paulina Wehnert, and on the west by the Passaic River, together with the dwelling house, barn, ice houses, corn cribs and other buildings situated thereon.

30 14. That your oratrix, Paulina Wehnert, is and for about six years last past has been seized in fee of a tract of land containing about fifty acres, situate on the east side of the Passaic River, in the said Township of Saddle River, having a frontage of about fifty feet on the said Passaic River and bounded on the north by lands of Mary A. Van Saun, on the east by the Erie Short Cut, on the south by Hirschman's farm and on the west by the Passaic River, together with the dwelling house, barn, carriage house and  
40 outbuildings located thereon.

15. That your oratrix, Margaret Kipp, wife of your orator, Peter J. Kipp, is and for many years last past has been seized in fee of a tract of land, containing about three acres, on the east side of the Passaic River, in the said Township of Saddle River, fronting on the said Passaic River and bounded on the north and east by lands of the Van Bussum estate, on the south by lands of the National Brick & Terra Cotta Company, and on the west by the Passaic River.

16. That your oratrix, Martha A. Phillips, wife of your orator, Samuel Phillips, is and for about ten years last past has been seized in fee of a tract of land containing about thirty-three acres, on the east side of the Passaic River at Dundeed Lake aforesaid, having a frontage of about six hundred and fifty feet on the said river, bounded on then orth by lands of Henry Hillman, on the east by lands of the Passaic Brick Company, on the south by lands of Peter Van Bussum, and on the west by the Passaic River, together with the farm house, barn and outbuildings thereon.

17. That your orator, Passaic Brick Company, is and for several years last past has been seized in fee of a tract of land containing about sixty-five acres, situate on the east side of the Passaic River at Dundee Lake aforesaid, having a frontage of about five hundred feet on the Passaic River, and bounded on the north by lands of Peter Van Bussum, on the east by other lands of your said orator, on the south by lands belonging to the estate of Banta, deceased, and on the west by the Passaic River, together with the dwelling house, barn and outbuildings situated thereon.

18. That your orators, Henry Kip, Euphemia Kip, Annie Merselis, wife of your orator, John E. Merselis, Gertrude C. Winslow, widow of Benjamin S. Winslow, deceased, and John Kip, are and for many years last past have been seized in fee as tenants in common of a tract of land containing about forty acres, situate on the west side of the Passaic River, in the Township of Acquackanonk, in the County of Passaic and State of New Jersey, having a frontage of about five hundred feet on the said Passaic River, and bound-

ed on the east by the Passaic River, on the south by lands formerly of James Simmons, on the west by Lakeview avenue, and on the north by Crooks avenue, together with the dwelling houses, barn and other buildings situated thereon.

10 19. That your orator, David Miller, is and for thirty years last past has been seized in fee of a tract of land within the city limits of the said City of Paterson containing about two acres and having a frontage of about two hundred feet on the Passaic River, which said lands are bounded on the north and west by lands of the Cedar Lawn Cemetery Company, on the south by Crooks avenue and lands occupied by the H. M. A. A. Boat Club and on the east by the Passaic River, together with the dwelling house, stable and out-buildings situated thereon.

20 20. That your orator, Garrett Terhune, is and for about two years last past has been seized in fee, by devise, of a tract of land containing about ten acres, situate on the west side of the Passaic River in the said City of Paterson, fronting on the said river and bounded on the north by lands of Doherty & Wadsworth, on the east by the Passaic River, on the south by lands of C. Howard Parmly, and on the west by Lakeview avenue, together with the dwelling house and barn situated thereon.

30 21. That your orator, William A. Hopson, is and for the last sixteen years has been seized in fee of a tract of land situate on the west side of the Passaic River in the City of Paterson, at the corner of Water street and Hamburgh avenue, which said lands have a frontage of seventy feet on Water street, about one hundred feet on Hamburgh avenue and fifty-five feet on the Passaic River, together with the house and buildings thereon.

40 22. That your orator, Peter P. Van Bussum, is and for many years last past has been seized in fee of a tract of land on the east side of the Passaic River at Dundee Lake aforesaid, containing about one hundred and thirty-seven acres, having a frontage of about one thousand feet on the said river, and bounded on the north by lands of Martha A. Phil-

lips, on the east by lands of David H. Meyers, on the south by lands of the Passaic Brick Company, and on the west by the Passaic River, together with the dwelling house, barn, carriage house, granary, cattle shed and outbuildings situated thereon.

23. That your orator, Scatto C. Nash, is and for over twelve years last past has been seized in fee of a tract of land containing about twenty acres, situate on the west side of the Passaic River in the Township of Acquackanonk, in the County of Passaic, and State of New Jersey, having a frontage of seventeen hundred and fifty feet on the said river, and bounded on the east by the Passaic River, on the south by lands of Richard P. Kipp and others, on the west by lands of William B. Merselis and Cornelius D. Vreeland and on the north by other lands of the said William B. Merselis, together with the dwelling house, green houses and other buildings situated thereon. 10

24. That at and during all the time hereinafter mentioned and during all the time your said orators have owned or possessed their said respective lands hereinabove described, and have possessed or been entitled to the property rights hereinafter set forth, and from time immemorial, the Passaic River has been and now is a natural stream of water and water course, flowing from its source above the City of Paterson, a municipal corporation located in the County of Passaic and State of New Jersey, through the said City of Paterson and other portions of Passaic, Bergen, Essex, and Hudson Counties, in said State of New Jersey, by, through and beyond the said respective lands and properties of your said orators, to its outlet in Newark Bay, in said State of New Jersey; that the said river and the water thereof and the use thereof have been of great value to your said orators and their predecessors in title, and your said orators and their predecessors in title have erected valuable dwelling houses, ice houses, and other buildings upon their said respective lands, and have valuable farms and building lots, privileges, franchises and property rights upon and along the said Passaic River, and in and to the water thereof and the use 20  
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thereof; that the respective lands of your said orators are all situated on the said Passaic River, wholly or in part below the said City of Paterson and wholly above the point where the tide ebbs and flows in the said river; that the said Passaic River at and above the said respective lands of your said orators is a private stream or water course; that by virtue of your said orators' ownership or possession of their said respective lands, your said orators have title or possession to the bed of the said stream to the middle thereof, subject only to the right of the State to regulate navigation so far as the said stream may be navigable, and have also a property right in the water flowing along and over their said respective lands, which cannot be impaired except by the lawful use of the said waters by riparian owners higher up the said stream, and that your said orators are and each of them is well entitled to the natural flow of the said river and the water thereof through its said course and the use and enjoyment thereof in its natural, pure, wholesome and drinkable condition, uncontaminated and uncorrupted by any foreign, injurious, noxious or filthy substance or substances, as the said waters have flowed in the said river from time immemorial, and that the said Passaic River and the water therein, prior to the commission of the wrongs and injuries hereinafter set forth, were at all times of the year pure, clear and free from contamination and corruption, and that the said water was potable and useable for all domestic and manufacturing purposes and very valuable for said and other purposes, and that such water supply from such river was economical, available and unfailing and abundant to a great and unusual degree and of great value.

25. That your said orators as such riparian owners were and are also entitled to the rights of fishing and bathing in and navigating the said river and cutting and harvesting ice thereon, and to the use thereof for drinking, manufacturing and domestic purposes, and that said rights cannot and in justice ought not to be destroyed, abridged, interfered with or restrained in any way, and that your said orators and their respective predecessors in title have from time immemorial exercised and been entitled to such rights, which are

and ever have been common law rights of your said orators, or their predecessors in title as such riparian owners, and paramount to the rights of any and all persons whatsoever, and to all other rights, privileges, or franchises in the said river or the water thereof.

26. And your said orators further show that ever since the year eighteen hundred and ninety-five the said Passaic River for the whole course thereof, from the City of Paterson to and below the respective lands of your said orators, and the waters thereof, have been rendered foul, polluted and corrupt, and have become and remain noisome, noxious, impure, unwholesome, offensive and filthy, and wholly unfit for the use of your said orators, residents and also riparian owners along said river, and wholly unfit for drinking, bathing, fishing, the watering of stock, the gathering and use of the ice formed thereon, and other domestic purposes, and for manufacturing purposes, by the wrongs and injuries hereinafter set forth, and that such pollution is far greater than would result or has resulted from the natural or reasonable use of the said river and the waters thereof by the owners of riparian lands along the said river above the lands of your said orators, or from surface drainage or the percolation of offensive matter through the soil into the said river. 10  
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27. That the Mayor and Aldermen of the City of Paterson is a public municipal corporation of the County of Passaic, in this State, and has a population of over one hundred thousand inhabitants, and is located on the banks of the Passaic River above the lands, property and residences of your said orators, respectively, hereinbefore described; that the said the Mayor and Aldermen of the City of Paterson in or about the year eighteen hundred and ninety began to unlawfully cause to be discharged from its sewers and to flow into said river above the respective properties of your said orators, large quantities of acids, impure substances, waste matter, sewage, contents of privies, cesspools and sewers; that the said city has since the year last aforesaid continued to unlawfully cause the said foul and noxious matters to be discharged into the said river in considerably increasing 30  
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quantities, and still continues and threatens to continue to discharge such foul and noxious matters into the said river in increasing quantities; that the said matter is and has all been discharged by the said city into the said river above the respective lands of your said orators, and is carried by the flow of the said river upon and over the lands of your said orators and thereby renders the water of said river at the properties of your said orators, noxious and unclean.

- 10       28. And your said orators further show that the sewerage system of the City of Paterson is built on the following plan: That part of the said city which stands on the left bank of the river is divided into five sewerage areas, the first of which is not yet provided with sewers; the remaining four areas have their sewer outlets into the Passaic River, and the uppermost of these outlets is located in the "Quarry," a short distance below the falls, and the lowest at Bergen street in the said city. That part of the city which stands on the right
- 20       bank of the river is divided into fourteen sewerage areas, the first of which is above the Passaic Falls and is not yet provided with any sewers, and the next six drain into the Passaic River through eight outlets, the uppermost of which is located at Prospect street. The eighth area (following down the river) is not provided with sewers, and the next three have four outlets. The twelfth area is not yet sewerred, and the thirteenth and fourteenth have one outlet each, the last having its outlet into the Passaic River at Market street, within the city limits under the Market street bridge. The Market street sewer is a trunk brick sewer eight feet in diameter running up the center of Market street and until it
- 30       reaches Vreeland avenue, a distance of about one thousand feet, and thence northerly along Vreeland avenue, a distance of about a quarter of a mile, and thence westerly about at right angles with Vreeland avenue a distance of about a mile, crossing Market street again and thence along various streets to Clay street. The total number of sewer outlets in the said city is twenty-two, eight on the left bank and fourteen on the right bank of the said river, and four of the said sewerage areas are not yet provided with sewers. The
- 40       total amount of sewage discharged into the river from the

said sewers is over seventeen million gallons a day. The said sewage so drained or cause to be drained by the City of Paterson into the Passaic River above the lands of your said orators, consists of great quantities of waste matter, contents of privies, cesspools, excrement and other noxious and corrupt material and substances, both solid and liquid, and the same is so discharged by the City of Paterson into the waters of the Passaic River without any effort on the part of the Mayor and Aldermen of the City of Paterson to prevent the injuries resulting to your said orators therefrom. The said river and the banks thereof in front of and upon the respective properties of your said orators have been partly filled and covered with filth and sewage matter, and the said lands, farms, residences, buildings, water supplies, plants, ice houses and appurtenances, have been thereby greatly impaired in value, and will be destroyed and become of no value if the said City of Paterson continues to discharge its said sewage into the said river as aforesaid. These discharges are wholly above the respective lands and properties of your said orators and are sufficient in quantity and of such a character as to discolor and impregnate the whole of said river and the water thereof and to make the said water of a dark color and of an offensive smell and unfit to drink or use for domestic or manufacturing purposes and to deprive your said orators of the use of the waters of the said river and of the enjoyment and exercise of their privileges and paramount rights therein as riparian owners. The air upon the lands of your said orators in the neighborhood of the said river has been polluted, corrupted and poisoned by the said sewage, and your said orators, their families, servants and employes have been injuriously exposed to noxious and unhealthy odors arising from the said impure condition of the waters of said river, and thereby the health of your said orators, their families, servants and employes has been injured. Your said orators are also unable to use or enjoy their common law and paramount rights of fishing and bathing in the said river and navigating the same, and are unable to use the said waters for drinking, domestic, manufacturing and other usual and necessary purposes, and are unable to sell or use ice cut on the said river for any purpose, and are unable to use or dis-

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pose of their said residences and properties.

29. And your orators further charge that the Mayor and Aldermen of the City of Paterson have no power or authority to collect the sewage of the said city into its said sewers and discharge such sewage into the waters of the Passaic River above the riparian lands of your orators without first obtaining the consent of your orators thereto or making compensation to your orators therefor, and that your orators are entitled to the flow of the water through the said river, in its natural state, free from such corruption or impurity, and that your orators have a property in the said river as it flows, as above described; and that it is one of the essential elements of their said property in the said river that the waters thereof should be pure and wholesome, and free from any contamination by reason of any sewage discharged from any house or building, place or places in the City of Paterson, and that your orators can only be deprived of this right of property in the said river by their own consent or by lawful condemnation and proper compensation paid therefor, and that the Mayor and Aldermen of the City of Paterson have not by condemnation or by agreement with your orators or any of them, or their predecessors in title, obtained the right to construct sewers which will empty into said river, and have not obtained the right in any way whatever to pollute the said river or in any way to deprive your orators of their said property in said river.

30. That your orator, the Dundee Water Power & Land Company, was incorporated under the name of the Dundee Manufacturing Company by a special act of the Legislature of the State of New Jersey, entitled "An Act to incorporate the Dundee Manufacturing Company in the County of Bergen," approved March fifteenth, eighteen hundred and thirty-two; that it was among other things provided in and by the second section of that act, that the said company might, for the purpose of manufacturing iron, cotton, wool and other articles, the manufacture of which was not prohibited by the laws of this State, buy, rent and hold such lands, tenements and water power in the said County of Bergen, or otherwise

to seize or become possessed of, and hold or convey, any real or personal estate, as might be necessary and useful for the purposes aforesaid, and the same might sell, let or otherwise dispose of, as they should deem proper; that by a supplement to the said last mentioned act passed February eighteenth, eighteen hundred and thirty-three, it was among other things provided that the said company, for the purposes mentioned in the second section of the act to which it was as upplement, might buy, rent, take and hold, or otherwise seize and become possessed of and hold all such lands, tenements and water power, and other real and personal estate, in the County of Essex, as might be necessary and useful for the purposes aforesaid, and the same might convey, sell, let or otherwise dispose of as they should deem proper; that in a further supplement to the said act approved March eighteenth, eighteen hundred and sixty-four, it was recited that where as the said company had theretofore issued their bonds for the aggregate sum of one hundred thousand dollars with interest, and had sold and disposed of the same and secured the payment of the principal and interest of said bonds by a mortgage upon the whole of its property, franchises and chartered rights as authorized by an act of the Legislature approved March fourteenth, eighteen hundred and sixty-one, and entitled "A further supplement to an act entitled 'An act to incorporate the Dundee Manufacturing Company, in the County of Bergen,' passed the fifteenth day of March, eighteen hundred and thirty-two;" that the said mortgage had been foreclosed in the Court of Chancery of this State, and the said property with its appurtenances, franchises and chartered rights, in said mortgage, contained, had been, by decree of said court, ordered to be sold for the payment and satisfaction of the principal and interest of said mortgage bonds to the several holders thereof, and that in case of sale under said decree and the execution issued thereon, it was proper and desirable that the said property rights and franchises should vest in the purchasers and they be enabled to reorganize and become a new body politic and corporate; but that doubts had arisen whether they could so reorganize under the act entitled "An act concerning the sale of railroads, canals, turnpikes and plank

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roads," approved March fifteenth, eighteen hundred and fifty-eight, without an enabling act for that purpose, and by which said last mentioned supplement, it was among other things enacted that whenever the said property, franchises and chartered rights of the Dundee Manufacturing Company should be duly sold and conveyed, under and by virtue of the decree of the Court of Chancery, and the execution thereon, recited in the preamble of the said act, it should and might be lawful for the purchaser or purchasers thereof to reorgan-  
10 ize and become a new body politic and corporate, in fact and in law, in the mode and manner prescribed in and according to the terms and stipulations of the said act entitled "An act concerning the sale of railroads, canals, turnpikes and plank roads," and should have and enjoy all the powers, rights and privileges conferred by, and be subject to the provisos, limitations and conditions contained in said act, except as therein otherwise provided, and should thereupon be entitled to and have all the rights, privileges and franchises, and be subject  
20 to all the conditions, limitation and restrictions contained in the act under which the said the Dundee Manufacturing Company was created, and in the supplements thereto so far as the same should be in force at the time of such sale and conveyance, except as therein otherwise enacted; that afterwards by a certificate filed in the office of the Secretary of State of the State of New Jersey on or about the second day of October, eighteen hundred and sixty-eight, under and pursuant to the provisions of the said last recited act and the said "act concerning the sale of railroads, canals, turnpikes and plank roads," the said purchasers of the said property,  
30 franchises and chartered rights of the said the Dundee Manufacturing Company did reorganize and become a new body politic and corporate, in fact and in law, pursuant to the provisions of the said acts; that by a further supplement to the said act, approved February fourteenth, eighteen hundred and seventy-two, it was among other things enacted that the said company should thereafter be known as "The Dundee Water Power and Land Company," and that it should be lawful for said company to establish an office in the City of New York, if the same should be to its advantage, for the  
40 letting of its powers or the disposal of its lands, or for any

other purpose; that pursuant to the powers so conferred upon it by the Legislature of this State, the said company purchased and acquired a large quantity of land and extensive water rights along and upon the banks of the said Passaic River, above the point at which the tide ebbs and flows in the said river, which said lands and water rights were situate in the said County of Bergen and in that part of the County of Essex which is now part of the County of Passaic; that for the purposes specified in its charter, and the said supplements thereto, the said company shortly after its incorporation as aforesaid, erected a dam across the said Passaic River at and opposite a point in what is now the City of Passaic, in the said County of Passaic, and above the point at which the tide in the said Passaic River ebbs and flows; that afterwards and in the year eighteen hundred and fifty-eight, the said dam was raised by the said company to a height of fourteen feet above the bed of the said river, at which height it has ever since been maintained; that the said dam has backed up the waters of the said river so as to make an artificial pond or lake, commonly known as Dundee Lake, about four miles in length and with an average width of about five hundred feet; that the said company at or about the time of the erection of the said dam, dug a canal or artificial water way about eighty feet in width, and commonly known as the Dundee Canal, through lands then owned by the said company, from a point above the said dam for a distance of about a mile and a half, having outlets or overflows into the Passaic River at various points below the said dam; that the said company has also erected and has since maintained a gate house at the head or inlet of the said canal on lands then and still owned by the said company; that the said canal is supplied wholly with water drawn from the Passaic River, above the said dam and above the point in the said river at which the tide ebbs and flows, and is wholly below the said City of Paterson, on the said river; that pursuant to the powers so as aforesaid conferred upon your said orator, it has from time to time, in the corporate name of your said orator for the time being, made and executed to a great number of persons leases perpetually renewable at the option of the lessees, for one or more mill powers, which are

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defined in the said leases as the right to draw from the said canal eight and one-half cubic feet of water per second, in the manner and on the terms in said leases more specifically set forth; that annexed hereto and marked "Schedule A" is a copy of the usual form of the said leases, and your orators pray that the same may be taken as part of this bill of complaint; that under the said leases the said lessees therein named respectively and their assigns take and are entitled to a valuable property right in the mill powers therein mentioned, and not a mere license to draw a certain quantity of water from the said river; that among the said leases are those more specifically hereinafter referred to; that besides the said so-called mill powers, which are permanent in character, your said orator has to dispose of, from time to time, a great quantity of surplus water, not required to supply the said mill powers running into and through the said canal; that the rights to the rents reserved in the said leases and the reversionary rights of your said orator in the said mill powers, and the right to sell such surplus water, are and each of them is a valuable property right in your said orator; that such property rights have been greatly impaired in value, and in part taken from your said orator, by the said pollution of the waters of the said river as hereinabove set forth, and your orator fears will be entirely destroyed if the said pollution is allowed to continue; that your said orator is also and for many years last past has been seized in fee of a tract of land on the west bank of the Passaic River, in the said City of Passaic, containing about one and a half acres of land and on which your orator's said gate house is and has been located, and also of a strip of land on the west side of the said river about nine hundred feet long and two hundred and fifty feet wide, and also of a strip of land on the east side of the said river in the said Township of Saddle River, of the average width of about three hundred feet, and extending from its said dam to tide water, a distance of about sixteen hundred feet; and that the value of the said lands of your said orator has been greatly depreciated by the said pollution of the said river, and will be entirely destroyed if the said pollution is not stopped.

31. That your orator, Botany Worsted Mills, is a corporation created and existing under the laws of the State of New Jersey, and was organized on or about the fourteenth day of May, eighteen hundred and eighty-nine, under the provisions of the act of the Legislature entitled "An act concerning corporations," approved April 7, 1875, and the several amendments thereof and supplements thereto; that among the objects for which your said orator was incorporated are the manufacture and sale of worsted and woolen goods; that soon after its said incorporation, it purchased and now owns in fee a tract of about thirty acres of land in the said City of Passaic, in the County of Passaic, and State of New Jersey, bounded on the north by President street, Barbour avenue and Highland avenue, on the east by the said Dundee Canal, on the south by Mattimore street, and on the west by Dayton avenue; that after such purchase your said orator erected on said lands a large factory for the purpose of manufacturing worsted and woolen goods; that your said orator has since acquired additional lands and enlarged its said plant, and since early in the year eighteen hundred and ninety, has been engaged at the place aforesaid in the manufacture of worsted and woolen goods for the purpose of sale; that on or about the ninth day of May, eighteen hundred and eighty-nine, your said orator leased one mill power of water from the said Dundee Water Power and Land Company under its form of perpetual lease hereinbefore referred to, under which your said orator has been and still is entitled to receive eight and one-half cubic feet of water per second for an annual rental of seven hundred dollars reserved in the said lease; that your said orator's said plant is and always has been operated and was intended to be operated by steam, and that the said water was leased by your said orator, not for the purpose of power, but for scouring, washing, condensing and dyeing raw material and fabrics in the conduct of your said orator's said manufacturing business; that your said orator used the said water for the said purposes from the making of the said lease until the year eighteen hundred and ninety-two; that at first it was pure enough to use for all these purposes without filtering, but soon began to show evidences of pollution, and by eighteen hundred and ninety-two

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became unfit for scouring, rinsing and dyeing; that your said orator was compelled to erect and did erect and has since maintained and operated, at large cost, a filter plant in order to counteract, so far as possible, the effect of the said pollution upon the said water, and has also been obliged to sink and has sunk a number of driven wells, and erected tanks, pumping machinery and other machinery in connection therewith, and has since maintained and operated the same, at large expense, in order to obtain water with which to carry  
 10 on its said manufacture; that your said orator, by the making of the said lease, acquired a valuable property right in so much of the said water of the Passaic River flowing through the said Dundee Canal as your said orator was entitled to have and receive under the said lease, but that by reason of the said pollution of the said river hereinbefore mentioned, the value of this property right of your said orator has been greatly diminished and impaired by the said wrongful acts of the said Mayor and Aldermen of the said City of Paterson, and will, your said orator fears, become entirely destroyed  
 20 and not only valueless, but a heavy financial burden to your said orator if the said pollution of the said Passaic River is not soon stopped.

32. That your orator, The Algonquin Company, is a corporation created and existing under the laws of the State of New Jersey, and was organized on or about the thirteenth day of July, eighteen hundred and eighty-nine, under the provisions of the act of the Legislature of the said State of New Jersey, entitled, "An Act concerning Corporations," approved April 7, 1875, and the several acts supplementary thereto and amendatory thereof; that among the objects for  
 30 which your said orator was incorporated are the manufacture and sale of cotton warp woolens; that on or about the second day of January, eighteen hundred and ninety-two, your said orator leased from the Dundee Water Power and Land Company a tract of land in the said City of Passaic, bounded on the north by Passaic street, on the east by Canal street, on the south by property then occupied by the Reid & Barry Company, and on the west by lands fronting on Columbia avenue, together with seventy-five horse power to be

furnished as in the said lease specified, at an annual rental of forty-six hundred and eighty dollars; that the said term commenced on the first day of January, eighteen hundred and ninety-two, and was to continue for five years; that under the terms of the said lease, your orator had an option to renew the same for a further period of five years at the expiration of the said term, which said option has been exercised by your said orator; that in and by the said lease it was covenanted and agreed by the said The Dundee Water Power and Land Company that it would furnish to your said orator the necessary water for scouring and dyeing the wool; and for use in your said orator's fulling mills and presses; that the said Dundee Canal runs about forty feet from the said demised premises and on the opposite side of Canal street therefrom; that at the time of the making of the said lease it was contemplated that said water should be furnished to your said orator from the said Dundee Canal, and it has been and is still so furnished; that at the time of the making of the said lease, the said water was sufficiently pure to be available to your said orator for the purposes aforesaid, and by virtue of the said lease, your said orator acquired not merely a license to take water from the said canal, but a valuable property right in the said water to the extent specified in the said lease; that by reason of the said pollution of the said waters of the Passaic River by the said the Mayor and Aldermen of the City of Paterson, the said valuable property right of your said orator has been greatly impaired in value, and your said orator fears will be entirely destroyed unless the said pollution is stopped; that the water in the said river and canal has become so impure and polluted that your said orator has been obliged to erect, and has erected and maintains and operates, at a large expense, a plant for the filtration of the said water; that your said orator is and for some time past has been unable to use the said water for dyeing unless it has been filtered, and cannot make in its said business any fabrics that are light in color, but is obliged to restrict its production to fabrics of the darker colors because of the foul and impure character of the water, even after it has been filtered; and that frequently the impurities in the said water, both before and after the erection of the said filter plant, have been de-

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stroyed, in whole or in part, large quantities of the manufactured product of your said orator.

33. That your orator, Dundee Woolen Company, is a corporation created and existing under the laws of the State of New Jersey, and was organized on or about the twentieth day of October, eighteen hundred and eighty-four, under the provisions of the said act of the Legislature of the State of New Jersey, entitled "An Act concerning corporations," approved April 7, 1875, and the several acts supplemental thereto and amendatory thereof; that among the objects for which your said orator was incorporated are the manufacture and sale of woolen goods; that in order to carry out the said objects for which your orator was incorporated as aforesaid, your said orator, shortly after its said incorporation, took over and assumed three certain leases made by the said Dundee Water Power and Land Company to the firm of Waterhouse Brothers, in the general form set out in Schedule A hereto annexed, one of which said leases was dated May second, eighteen hundred and seventy, for three mill powers, one dated November first, eighteen hundred and seventy, for two mill powers, and one dated May first, eighteen hundred and seventy-one, for three mill powers, making in all eight mill powers, and also a tract of land containing about one and one-half acres, situate in the said City of Passaic, and bounded on the north by lands of the Okonite Company, on the east by Canal street, on the south by Passaic street, and on the west by the tail race of the said Dundee Water Power and Land Company, together with the buildings and machinery on the said lands, for which the annual rental reserved in the said leases was and is the sum of five thousand six hundred dollars, and ever since its said purchase your said orator has used and still continues to use the said lands, buildings and machinery for the manufacture of woolen goods; that the said leases have been renewed by your said orator according to their terms and are now in full force and effect; that the rights and privileges secured to your said orator under the terms of the said several leases and the renewals thereof were valuable property rights in your said orator; that the said water was intended to be used by your

said orator at the time of the taking over of the said several leases from the said firm of Waterhouse Brothers, not for power only, but also for dyeing and scouring in the manufacture of woolen goods; that the cost of said water for power was more than the cost of steam, and the main inducement to your said orator for the taking over of the said leases was the condition of the water, which made it very desirable for such dyeing and scouring as was necessary in the conduct of your said orator's said business; that in the year eighteen hundred and ninety-two, the said water became noticeably bad, and has since grown rapidly worse, so that your said orator has been obliged to give up the manufacture of light colored fabrics, because they came out spotted and colored, in consequence of the polluted condition of the water; that your said orator was then obliged to erect, and did erect at great expense, a plant consisting of a tank, trestle, foundation, pump, pipe and connections for the purpose of storing water from a driven well which was driven on the said demised land many years ago to obtain water for drinking purposes, and your said orator was obliged to operate and has operated the said plant at a great annual expense so as to use the water from the said well for such dyeing and scouring, but notwithstanding this fact, your said orator has suffered great loss, damage and inconvenience to and in the use of the valuable property rights so as aforesaid acquired by your said orator by virtue of the said leases, and your said orator greatly fears that the said property rights will be wholly destroyed and taken from your said orator unless the pollution of the said waters of the Passaic River by the said Mayor and Aldermen of the City of Paterson is stopped.

34. That your orator, Andrew McLean Company, is a corporation created and existing under the laws of the State of New Jersey, and was organized on or about the first day of September, eighteen hundred and ninety-seven, under the provisions of the act of the Legislature of the said State of New Jersey, entitled "An Act concerning corporations (revision of 1896)," approved April twenty-first, eighteen hun-

dred and ninety-six, and the several acts supplementary thereto and amendatory thereof; that among the objects for which your said orator was incorporated are the manufacture and sale of cotton goods; that soon after its incorporation and in order to conduct the business for which it was incorporated as aforesaid, your said orator purchased from the firm of Andrew McLean & Company a tract of land containing about four acres in the said City of Passaic, bounded on the north by lands of the said Dundee Water Power and  
10 Land Company; on the east by the Passaic River; on the south by Sussex street and on the west by Third street and the said Dundee Canal, together with the buildings and machinery thereon which were theretofore used by the said firm of Andrew McLean & Company for the manufacture, bleaching, dyeing and finishing of cotton goods and which have since been and still are owned by your said orator and used by it for the purposes aforesaid; that at the time of the said purchase your said orator also took over and assumed a certain lease made on or about the fifteenth day of September,  
20 eighteen hundred and ninety, by the said Dundee Water Power and Land Company to the said firm of Andrew McLean & Company in the general form set out in Schedule A hereto annexed for one mill power of water at an annual rental of seven hundred dollars, which said lease is now in full force and effect; that the rights to which your said orator is entitled under the terms of the said lease were valuable property rights; that the said water was not intended to be used by the said firm of Andrew McLean Company or by your said orator for power, but for bleaching, dyeing and  
30 finishing fabrics manufactured in the said business of your said orator, and had the said waters of the said Passaic River not been polluted by the said Mayor and Aldermen of the said City of Paterson, would have been of great value to your said orator for the purposes aforesaid, but by reason of the said pollution of the said river the use of the said water and of the property rights to which your said orator is entitled under the said lease has been in part taken and greatly impaired in value, and if the said pollution continues, will, your said orator fears, be entirely taken from your said orator and destroyed.  
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35. That your orator, Worthen and Aldrich Company, is a corporation created and existing under the laws of the said State of New Jersey, and was organized on or about the twenty-seventh day of December, eighteen hundred and ninety-two, under the provisions of the act entitled "An Act concerning corporations," approved April 7, 1875, and the several amendments thereof and supplements thereto; that among the purposes for which your said orator was incorporated are the manufacture, dyeing, printing, finishing and sale of woolen and cotton fabrics; that shortly after its said incorporation your said orator took over the property, assets and business of the firm of Worthen and Aldrich, including a tract of land containing about three and one-quarter acres, situate in the said City of Passaic, and bounded on the north by a spur of the Erie Railroad; on the east by lands of the Passaic Print Works; on the south by the Passaic River, and on the west by lands of the said Dundee Water Power and Land Company; that your said orator, at the time of the said purchase also took over and assumed a certain lease made by the said Dundee Water Power and Land Company to the members of the said firm of Worthen and Aldrich, bearing date on or about the twentieth day of March, eighteen hundred and eighty-eight, for one mill power of water, at an annual rental of seven hundred dollars, which said water was intended to be used and was used by your said orator for ryeing and washing the fabrics handled by it in the conduct of its said business and for boiler use, and not for power; that during the first few years that the said plant was operated, the said water was sufficiently pure for the said purposes, but the condition of the said water became so bad, owing to the said pollution by the said Mayor and Aldermen of the City of Paterson, that your said orator was compelled, in order to obtain water sufficiently pure for its said purposes; that your said orator, under the provisions of the said lease, so as aforesaid taken over by your said orator, acquired a valuable property right in so much of the said water of the Passaic River flowing through the said Dundee Canal as your said orator was entitled to have and receive under the said lease, but hat, by reason of the pollution of the said river hereinbefore mentioned, the value of the said water and

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property rights of your said orator has been greatly diminished and impaired by the said wrongful acts of the said Mayor and Aldermen of the said City of Paterson, and will be totally destroyed if the said pollution of the waters of the said river is not stopped.

36. That your orator, United States Finishing Company, is a corporation created and existing under the laws of the State of New Jersey, and was organized on or about the thirtieth day of June, eighteen hundred and ninety-nine, under the provisions of the act of the Legislature of the State of New Jersey, entitled "An Act concerning Corporation (revision of 1896," approved April 21, 1896, and the several acts amendatory thereof and supplemental thereto; that among the objects for which your said orator was incorporated are the manufacture and sale of cotton fabrics; that shortly after its said incorporation your said orator succeeded to the business formerly carried on by the Reid & Barry Company, also a corporation of the State of New Jersey, and among the property and assets of the said company, and for the purposes of conducting its said business, your said orator took over and assumed a certain lease made by the said The Dundee Water Power and Land Company to the said Reid and Barry Company, in the year eighteen hundred and sixty-nine, for a tract of land in the said City of Passaic, beginning at a point upon the westerly side of Canal street four hundred feet south of the intersection of said westerly line of Canal street and the southerly line of Passaic street and the southerly line of Passaic street, and running thence southerly line of Passaic street, and running thence southerly along the westerly side of said Canal street to the Passaic River about two hundred and sixty feet; thence westerly along the Passaic River to its intersection with the tail-race of the said Dundee Canal about three hundred and fifty feet; thence northerly along the east side of said tail-race to the branch thereof running generally easterly and westerly; and thence easterly along the south line of said branch canal and such line produced to the point of beginning, together with seven mill powers of water; that the said lease was in the general form hereto annexed and marked "Schedule A,"

and has been from time to time renewed under the terms thereof, and is still in full force and effect; that the general use made and intended to be made by your said orator of the said water was for scouring, washing, boiling, bleaching, dyeing and finishing purposes, and for its boilers, for which purposes the quality of the water, if unpolluted, would make it especially valuable; that under and by virtue of the terms of the said lease your said orator has a valuable property right in the waters of the Passaic River flowing into the said Dundee Canal to the extent specified, which said valuable property right has been in part taken and greatly impaired in value by the pollution of the said river by the said the Mayor and Aldermen of the City of Paterson, and your said orator fears that unless the said pollution is stopped, the said property rights of your said orator will be entirely taken and destroyed; that in recent years, because of the pollution of the water, your said orator has been unable to produce white goods or execute orders for white goods, and has been forced out of that branch of the dyeing and bleaching business; that whenever white is now used in its finishing processes, the white has to be applied as a dye, just like any other color, thereby increasing the expense and making the goods less satisfactory; that by reason of the water carrying oil, dirt, grease and other impurities to the cloth in its various processes, and being spread or thrown upon the cloth in streaks and spots, its use causes discoloration and sometimes destruction of the said goods, even when they are manufactured in dark colors; that the possible output of your said orator has been greatly reduced, and great damage has been sustained by it in being obliged to entirely rehandle goods which have once been fully finished, in order to make them marketable; that the pollution of the said water not only injures your orator's boilers, but necessitates frequent cleaning, sometimes by the use of chemicals; that in order to continue your said orator's business, it has been obliged to sink, maintain and operate, at a great expense, five driven wells, but your operator has found that such wells are unsatisfactory, in that the water is bad for the boilers and unsuitable for your said orator's bleaching and dyeing purposes.

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37. That your orator, Passaic Woolen Company, is a corporation created and existing under the laws of the State of New Jersey, and was organized on or about the eighteenth day of December, eighteen hundred and eighty-four, under the act of the Legislature entitled "An Act concerning Corporations," approved April 7, 1875, and the several acts supplemental thereto and amendatory thereof; that among the purposes for which your said orator was incorporated as

10 aforesaid is the manufacture of fancy and plain woolen goods; that your said orator holds under four several leases from the said the Dundee Water Power and Land Company, a tract of land in the said City of Passaic, containing about one and one-half acres, bounded on the north by the Dundee Canal, on the east by Second street, on the west by lands of the New York Belting and Packing Company, Limited, and on the south by the Passaic River, together with eight mill powers of water, at an annual rent of fifty-six hundred dollars; that the first of said leases was made on or about the

20 first day of May, eighteen hundred and seventy-one, to one Jacob Basch, and on or about the first day of May, eighteen hundred and ninety-two, was renewed in the name of your said orator; that the second of said leases was made on or about the first day of November, eighteen hundred and seventy-one, to the said Jacob Basch, and was renewed on the first day of November, eighteen hundred and ninety-two, in the name of your said orator; that the third of said leases was made on or about the nineteenth day of August, eighteen hundred and seventy-six, to the said Jacob Basch, and on or about the nineteenth day of August, eighteen hundred and

30 ninety-seven, was renewed in the name of your said orator; that the fourth of said leases was made on or about the first day of August, eighteen hundred and seventy-seven, to said Jacob Basch, and on or about the first day of August, eighteen hundred and ninety-eight, was renewed in the name of your said orator; and that all of said leases are still in full force and effect, and your said orator is entitled to the rights and privileges secured thereunder to the lessee therein named; that your said orator has used and still uses the said

40 water for dyeing and scouring, but that of late years, by reason of the said pollution of the waters of the Passaic River

flowing into the said Dundee Canal, by the Mayor and Aldermen of the City of Paterson, said water has become unfit for dyeing and scouring, so that your said orator has been obliged to erect and has erected and operated, and still maintains and operates, at a large expense, a filter plant for the purpose of filtering said water; that notwithstanding the said filter, your said orator has been obliged to abandon the manufacture of many fabrics which it otherwise would have been able to produce, to the great loss of your said orator; that your said orator has also been put to great expense in the cleaning of its boilers because of the said pollution of the said water; that by virtue of the said leases your said orator has a valuable property right in the waters of the said river to the extent specified in the said several leases, which said property rights have been greatly impaired in value, and in part taken from your said orator by the said pollution of the said river, and your said orator fears that said property rights will be wholly destroyed and rendered valueless if the pollution of the said river continues further.

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38. And your said orators, Botany Worsted Mills, The Algonquin Company, Dundee Woolen Company, Andrew McLean Company, Worthen & Aldrich Company, United States Finishing Company and Passaic Woolen Company, further show that in addition to the injuries sustained by them to their said property rights hereinbefore set forth, the enjoyment and value of said property rights have been greatly lessened in value as hereinafter set forth; that whenever the said waters of the said river are used by your said orators in the boilers in their respective manufactories for the purpose of furnishing steam power the foul and corrupt materials in said water settle in the said boilers, thereby making necessary a greater consumption of coal in order to secure the amount of steam necessary in the business of your said orators, and also making necessary frequent and expensive cleanings of the said boilers; that the impurities so as aforesaid deposited in the said waters by the said City of Paterson also cause the fabrics of your said orators to become rotted and decayed if left therein for any length of time, so that in the dyeing, rinsing, scouring and other operations of your

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saïd orators, in which the said fabrics come in contact with the said waters, it is necessary to handle and re-handle the said fabrics more than would be necessary were the water clear and unpolluted, and that notwithstanding the great expense incurred by your saïd orators severally in the frequent handling and re-handling of the said fabrics under the circumstances aforesaid, great quantities of the said fabrics are destroyed or rendered unfit for sale, and that because of the foul and noisome waters the health of your saïd operators' employes is greatly affected, and the amount of work which they are able to perform is materially lessened, and your saïd orators have been compelled to abandon the manufacture of many fabrics which they otherwise would have been able to produce and sell at great profit to themselves.

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 39. And your orators, Botany Worsted Mills, Dundee Woolen Company and Passaic Woolen Company, further show that your saïd orators located their saïd manufacturing plants in the saïd City of Passaic on account of the then quality of the water of the Passaic River and its fitness for use in dyeing, washing, bleaching and the other purposes for which they used it in their various manufacturing processes and that the quality of the saïd water and its fitness for the saïd purposes has been almost wholly destroyed by the saïd unlawful acts of the saïd the Mayor and Aldermen of the City of Paterson, and will be wholly destroyed if the saïd unlawful acts are not restrained and enjoined by this honorable court.

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 40. And your orators further show that the damages which they have severally sustained by the destruction of or interference with their saïd property rights through the saïd wrongful and illegal acts of the City of Paterson, as near as the same can be ascertained, calculated upon the basis of saïd injuries being permanent, are as follows: Henry W. Doremus, sixty-seven thousand five hundred dollars; Peter Alyea, forty-three thousand and two hundred dollars; George G. Van Riper, seventy-eight thousand two hundred dollars; John H. Merselis and Edwin Merselis, thirty thousand dollars; Edo V. Cadmus and Cornelius D. Cadmus, ninety thousand dollars; Richard Van Riper, fifty-eight thousand  
 40 five hundred dollars; Edo Van Riper, twenty-nine thousand

dollars; Frederick H. Gelderman, eighteen thousand dollars; William P. Vreeland, thirty thousand five hundred dollars; Richard H. Hoitsman, thirty-six thousand dollars; Albert A. Outwater, Richard Outwater and Eliza Outwater, seventy-seven thousand dollars; Peter H. Doremus, thirty-eight thousand five hundred dollars; Mary A. Van Saun, thirty-two thousand seven hundred dollars; Paulina Wehnert, forty-five thousand dollars; Margaret Kipp, two thousand four hundred dollars; Martha A. Phillips, twenty-seven thousand dollars; Passaic Brick Company, sixty-two thousand dollars; Henry Kip, Euphemia Kip, Annie Merselis, Gertrude C. Winslow and John Kip, twenty-five thousand dollars; David Miller, five thousand dollars; Garrett Terhune, thirteen thousand dollars; William A. Hopson, eighteen thousand five hundred dollars; Peter P. Van Bussum, one hundred and twenty-three thousand dollars; Scatto C. Nash, seventy-seven thousand dollars; Dundee Land and Water Power Company, fifty thousand dollars; Botany Worsted Mills, five hundred thousand dollars; The Algonquin Company, seventy-five thousand thousand dollars; Dundee Woolen Company, one hundred thousand dollars; Andrew McLean Company, one hundred and fifty thousand dollars; Worthen & Aldrich Company, one hundred thousand dollars; United States Finishing Company, three hundred thousand dollars; and Passaic Woolen Company, one hundred thousand dollars.

All which actings, doings and pretenses of the said the Mayor and Aldermen of the City of Paterson are contrary to equity and good science, and tend to the manifest wrong, injury and oppression of your orators in the premises.

To the end, therefore, that the said the Mayor and Aldermen of the City of Paterson, defendant, may, but without oath, which is hereby waived pursuant to the statute, to the best and utmost of its knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were again repeated and the said defendant distinctly interrogated thereto, and that the said the Mayor and Aldermen of the City of Paterson may be restrained and enjoined by order or decree of this honorable court, from

polluting and continuing to pollute the waters of the said Passaic River above the respective lands and properties of your orators, and from pouring and emptying and continuing to pour and empty its sewage, or any sewage, filth or other matter or thing which may contaminate or pollute the waters of the said Passaic River into the said river above the said respective lands and properties of your orators, and from interfering in any way with the enjoyment by your orators of their rights as riparian owners or otherwise as hereinafter set out, unless and until the said defendant makes such compensation to your orators for the diminution in value of their said lands and property rights as shall be ascertained by this honorable court to be just, and that your orators may have such further and other relief in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orators not only the State's writ of injunction issuing out of and under the seal of this honorable court to be directed to the Mayor and Aldermen of the City of Paterson, its officers, agents, servants and employes, restraining them and each of them from polluting and continuing to pollute the waters of the said Passaic River above the respective lands, properties and premises of your orators, and from pouring and emptying and continuing to pour and empty its sewage, or any sewage, filth or other matter or thing whatever, which may contaminate or pollute the waters of the said Passaic River at and above the said respective lands and properties of your orators, and from interfering in any way with the enjoyment by your respective orators of their rights as riparian owners or otherwise, as hereinabove set out, unless and until the said defendant makes such compensation to your orators for the diminution in value of their said lands and property rights as shall be ascertained by this honorable court to be just, but also the State's writ of subpoena issuing out of and under the seal of this honorable court, to be directed to the said the Mayor and Aldermen of the City of Paterson, commanding it by a certain day, and under a certain penalty, therein to be expressed, to be and appear before your Honor in this honorable court, then and

there to answer all and singular the premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience.

And your orators as in duty bound will ever pray, etc.

LINDABURY, DEPUE & FALKS,  
*Solicitors for and of Counsel with Complainants.*

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#### SCHEDULE A.

PROPOSALS by the Dundee Manufacturing Company, for the Leasing of their Mill Power and Land, on Passaic River, at Passaic, New Jersey.

I. The Dundee Manufacturing Company propose to lease their Mill Powers, situated at Passaic, New Jersey, on the following terms and conditions, to be varied as the parties may agree in the Indenture of Lease. The said Company will demise and lease a parcel of land to be described in the lease, with one or more Mill Powers, each of the quantity of water described below, and with the covenants contained in the annexed Indenture of Lease, for the term of twenty-one years, at the yearly rent of seven hundred dollars for each Mill Power, to be paid quarter-yearly, on the first days of May, August, November and February in each year, free from all charges or deduction whatever, for taxes or assessments of every description that may be assessed or levied upon the demised premises after the making of the lease, all of which are assumed by the lessees, who shall therefrom save harmless and keep indemnified the lessors and their assigns; said lease to be renewable at or before the expiration of said term of twenty-one years, at the request and at the cost and charges of the lessees or their assigns, and at or before the expiration of every succeeding term of twenty-one years thereafter forever, at the same yearly rent, payable in like manner, quarter-yearly, upon the same days, and under and subject to the like covenants, conditions, restrictions, res-

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ervations and agreements as are herein contained; provided, however, that such renewal shall be granted only on condition that all rents, taxes, charges and assessments due and to become due during the current term shall be first paid and satisfied, and that all the conditions, agreements, matters and things herein contained on the part of the lessees shall have been kept, observed and fulfilled.

10 II. Each Mill Power shall be designated and known by consecutive numbers, and is declared to be the right to draw from the nearest raceway or canal of the lessors, through the land to be demised, and to be used thereon, eight and one-half cubic feet of water per second, so long as the water in the main reservoir at the dam shall stand within twelve inches below the level of the top of said dam, with a free flow therefrom into the main canal or raceway, all the inlet gates to the same being open, with a fall not exceeding a point twenty-three feet below the level of the top of said dam; and no more is to be drawn in any one second, nor  
20 is the same to be drawn more than twelve hours in each day of twenty-four hours; and in case the water in the main reservoir shall fall below the point designated as twelve inches below the level of the top of said dam, the lessors, by themselves or their agents, shall shut down the gates of the lessees of the Mill Powers in the reverse order of their numbers, beginning at the highest number, sufficient to maintain the water in the main reservoir at the said point; and the lessors, and their proper agents, may, at all reasonable times, in a peaceable manner, and upon due notice to the agent or  
30 person then in charge of or on duty at any Mill, enter the demised premises to measure and compare the quantity of water used with the quantity leased, and for that purpose to make use of such appliances and requirements as the lessors shall deem necessary, but not so as to materially interfere with the regular operation of the business to which the power may be applied; and in the measurement all wastage shall be included.

40 III. The lessors are to construct and forever keep in good repair the principal canals or raceways, and from time

to time, as occasion may require, they are to remove and clear out obstructions that may accumulate therein. They are also forever to maintain the dam in the Passaic River, at the head of their principal canal, at not less than the height at which the same is now constructed; and for the removal of obstructions, and convenience of repairs by lessors or lessees, the lessors shall have the power to draw off the water on each Sunday, on the first day of January, the twenty-second day of February, the fourth of July, the twenty-fifth day of December, in each and every year, and whenever the said days shall fall upon Sunday, then on the next following Monday; also upon Good Friday, Easter Monday, the Monday after Whit-Sunday (or Pinkster), Thanksgiving Day, and on all such fast days and holidays as shall be proclaimed by the civil authorities or be generally observed, in each and every year, without any deduction or diminution of rent. 10

IV. The flumes of every Mill shall be made and constructed by the lessees, under the inspection and subject to the approval of the lessors, or their officer or agent appointed for that purpose; shall be properly sheet-piled and be furnished with a good and substantial gate at the head of each flume, which gate shall be so constructed that when requisite, it may be closed in such manner as to prevent water from flowing into the flume; and the flumes shall be maintained, belong to and kept in repair by the respective lessees; when the lessees of two Mill sites adjoining each other shall choose to construct their tail-races together for their joint use, not less than fourteen feet in width of each lot shall be appropriated for such raceway so far as the joint use thereof shall extend, and such joint tail-race shall be excavated as deep as the lowest low water mark, the sides thereof be properly secured from caving in and so as not to impede the free flow of the water. The lessors reserve the right to place a sill across the mouth of each tail-race at or below the level of the lowest low water mark. No vessel shall be allowed to lie in any joint tail-race, or in the canals of the lessors, in such manner as to cause a detriment to the Mill Powers, and the 30 40

lessors, by their proper agent, may order and compel the removal of any vessel infringing upon this rule or condition.

V. If any lessee shall sustain any injury from deficiency of water in the head-race happening from any cause whatever, other than his own neglect or misconduct (except as provided for in Article II), his rent may be deducted for the proportion of such deficiency of water during the time that such deficiency shall exist, and no longer; and if such deficiency shall happen through the misconduct or wilful neglect of the lessors, the lessee may also, at the same time, have an action at law against the lessors, and recover therein double the value of the proportionate part of the rent that may be deducted for such deficiency as aforesaid.

VI. The lessees are not to use more water than is granted, nor waste it, nor permit it to be wasted for want of repairs, or through the deficiency of their works, or otherwise; and if so wasted, or more be used than is leased, the lessors may stop the water from entering their flumes by closing the gates across them, or by any other method, until such waste or excessive use be sufficiently guarded against, and may also, at the same time, have their action at law for damages and recover therein double the value of the water so wasted, or excessively used.

VII. All buildings erected upon any land demised by the annexed lease, more than ten feet high, are to be of stone or brick, the roof covered with slate, tin, or other incombustible substance, and the covings well secured against fire; and if any other be erected, the lessors or their assigns may enter and abate them, or have any other appropriate remedy therefor.

VIII. All the land demised to the lessees of the water power shall be held, used and improved for mills and buildings required for the improvement and use of the same as mill sites and the business connected therewith, and shall not be appropriated to any other purpose whatever, nor assigned nor underlet, except in connection with the mill sites and

subject to all the conditions and restrictions of the original grant; and no dwelling houses, stores or stables shall be allowed thereon.

IX. The lessees are not to use any building on the land demised by the annexed lease, for, or to set up or continue the manufacture of gunpowder, vitriol, spirits of turpentine, paints, varnish, or for any laboratory, pottery, distillery of any kind, furnace or forge, or any chemical or other works whatever which may be so noxious or dangerous from fire or otherwise, as to impair, injure or endanger the life, safety, or reasonable comfort of any person employed in or about the same, or in or about adjacent buildings, or which shall endanger adjacent buildings, property or works. And in case any such should be so set up, continued or used, the lessors or their assigns may enter and abate them, and also may sue for damages, or have any other appropriate remedy therefor, or to restrain the same, and may also stop the water as above mentioned from passing into the flumes of the party so seting up, continuing or using the same until such nuisance be removed or discontinued. Nor are the lessors or their assigns to set up, continue or use any such buildings on, nor lease, grant nor demise any of the lands for the use of their Mill Powers at Passaic, for buildings or any work or business in this clause before mentioned and restricted; provided, however, that the agreement in this clause to prevent nuisances is not to be understood to apply to or prevent the building, using and maintaining machine shops and foundries, with the smith's forges, hammers and other things necessary and pertaining thereto, for making all kinds of machinery, or for making and repairing the machinery to be used in any buildings on said lands, nor to prohibit the setting up and using any establishment for bleaching, *dying*, coloring or printing goods, with all things necessary therefor (excepting dangerous, noxious or offensive works as aforesaid), as distinct and independent establishments or otherwise.

X. If any lessee, his executors, administrators or assigns, shall fail to pay the rent reserved for the space of thirty

days next after any of the said days of payment as aforesaid, the same being first lawfully demanded, or shall fail to observe, perform, fulfil and keep all and every one of the covenants, conditions and restrictions, matters and things herein and in the annexed lease contained, on the part and behalf of the lessee to be observed, performed, fulfilled and kept, then and from thenceforth in either of said cases, it shall and may be lawful for the lessors or their assigns, into the demised premises or any and every part thereof in the name of the whole to re-enter, and the same to have again, 10 repossess and enjoy as of their former estate therein, and the lessees and their assigns and all other tenants and occupiers of the demised premises thereout and from thence to expel, put out and remove and from and after such re-entry made the lease for the land and water power shall cease, determine and be utterly void.

XI. If the lessee or his assigns shall not choose to renew the lease at the expiration of any of the terms of twenty-one 20 years aforesaid, or if the lease shall for any cause be determined and become void, then the land and water power leased shall be surrendered and yielded up to the lessors or their assigns in good repair; and the lessee and his assigns shall not permit or suffer the same or any part of them, or any buildings, flumes, raceways or gates appertaining thereto, erected or constructed on the land leased, to go to decay, waste or spoil, but will at all times during the existence of his lease keep them in good repair.

XII. In case any lessee shall *bona fide* assign any Mill 30 Power with the land originally demised therewith, or when several Mill Powers shall have been demised in the same lease, and the land demised with them is not therein specially divided, apportioned and attached to each, if the lessee shall *bona fide* assign any one or more of them, with such part and portion of the land as shall be necessary for the profitable use and employment of the power or powers assigned, leaving sufficient for the profitable use and employment of the power or powers not assigned the assignee shall be holden 40 to pay the rent of the Mill Power and land so assigned, and

to perform all the agreements, covenants and conditions relating thereto and connected therewith; and the lessors will not hold the original lessees responsible therefor, unless such assignment be made fraudulently, with the intent to defeat the lessors of any of their said rents or of their remedies for breach of any agreements, or unless the said lessees shall reserve a rent out of the premises to themselves or others, or shall retain some estate, title or interest therein; and from theneforth such assignee shall by virtue of such assignment and without any further agreement for that purpose, become 10  
and be bound to the lessors and their assigns, to pay the rent, and to perform, fulfil, keep and observe all the terms, conditions, covenants, restrictions and all other matters and things touching the property and estate assigned, which were obligatory upon the original lessee, his executors, administrators or assigns; *provided*, that the consent of the lessors or their assigns shall first be obtained to such assignment, and said consent, signed by the President or Secretary of said Company, be first endorsed upon said assignment, and without 20  
such consent first endorsed and signed as aforesaid, this article shall not be binding upon the lessors or their assigns. And in case of any assignment as aforesaid of any one or more of several Mill Powers originally demised by the same lease, with the proper and convenient part of the land, as before stated, and upon the compliance by the assignee with the terms of the foregoing proviso, the premises so by such assignment severed and divided, as well those so assigned, as those not assigned, shall be and be considered in all respects as if the same had been originally severed in like manner and had been demised by the said lessors in several and 30  
distinct leases; and all the covenants, agreements, conditions, restrictions and other things of and concerning the whole of the demised premises, shall apply to each part of said premises after such severance in like manner, as if each of said parts had been demised alone, the rent, however, reserved for all the powers demised in the original lease, to be divided to and among the powers assigned and those not assigned, in such proportions as may be agreed to by the lessors or their assigns as aforesaid.

At a meeting of the Board of Directors of "*The Dundee*" 40

*Manufacturing Company,*" on Thursday, July 6, 1865, the foregoing proposals for leasing their Mill Powers and Mill Sites, were approved and adopted.

CHARLES L. PEARSON,  
*Secretary,*

THIS INDENTURE, made this  
day of \_\_\_\_\_, in the year of our Lord, one  
thousand eight hundred and \_\_\_\_\_, between "THE  
10 DUNDEE MANUFACTURING COMPANY," of the  
State of New Jersey, of the First Part, and

\_\_\_\_\_ of the Second Part ; WHEREAS, the said  
part \_\_\_\_\_ of the Second part ha \_\_\_\_\_ agreed to take a lease  
from the said "The Dundee Manufacturing Company," of  
the lot and parcel of land hereinafter described, with  
\_\_\_\_\_ Mill Power, as described in the  
annexed Proposals, which proposals, with all the terms, con-  
20 ditions, agreements, powers, privileges, limitations, restric-  
tions and other matters therein contained, are hereby adopt-  
ed by the said parties hereto, and made a part of this in-  
denture; Now, therefore, the said "The Dundee Manufac-  
turing Company," for and in consideration of the rent here-  
inafter reserved, and of the agreements herein and in the  
said proposals contained on the part and behalf of the said  
part \_\_\_\_\_ of the Second Part, to be paid, done and per-  
formed, have demised, leased and to farm let, and by these  
presents do demise, lease and to farm let, unto the said  
part \_\_\_\_\_ of the Second Part.

30 \_\_\_\_\_ and assigns  
all \_\_\_\_\_ lot and parcel of land, situate in  
the Township of Acquackanonk, in the County of Passaic,  
and State of New Jersey,  
together with \_\_\_\_\_ Mill Power known  
and distinguished as Number \_\_\_\_\_ (as de-  
scribed in the said annexed Proposals, and to be used as  
therein set forth), with the privileges and appurtenances  
therein mentioned.

40 TO HAVE AND TO HOLD the said lot of land and

Mill Power above described, unto the said part of  
 the Second Part,  
 and assigns, for and during the term and terms, and sub-  
 ject to the agreements, conditions and all other matters and  
 things in the said annexed Proposals set forth as obligatory  
 upon the lessees or their estates, and yielding and paying  
 therefor to the said party of the First Part, and their assigns,  
 the yearly rent of  
 dollars, on the several quarter days, and in the sums specified  
 in the said Proposals. And the said part of the Second 10  
 Part do hereby covenant, for  
 and assigns, with the said  
 party of the First Part and their assigns, that  
 the said part of the Second aPrt  
 will make or cause to be made the said payments of rent at  
 the times and in the manner above specified.

And the said parties hereto mutually covenant, each with  
 the other and with their respective legal representatives and  
 assigns, that they will respectively keep, observe and fulfill 20  
 all the terms, conditions, covenants, and other matters and  
 things in the said annexed Proposals set forth, as respective-  
 ly obligatory upon them, and upon their respective legal rep-  
 resentatives and assigns, or upon their respective estates.

IN WITNESS WHEREOF, the said "The Dundee Manufac-  
 turing Company," have caused their corporate seal to be  
 hereunto affixed, and these presents to be subscribed by their  
 President, and attested by their Secretary; and the said

Signed, Sealed and Delivered |  
 in presence of |

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#### IN CHANCERY OF NEW JERSEY.

The demurrer of the defendant, The Mayor and Aldermen  
 of the City of Paterson, to the bill of complaint of the above  
 named complainants.

This defendant by protestation, not confessing all or any 40

of the matters and things in the said bill of complaint contained, in such manner and form as the same are therein set forth and alleged, demur to said bill and for causes of demurrer show as follows:

10 First. The said complainants have not in and by their said bill made or stated such a cause as entitles them in a court of equity to any discovery from this defendant or any relief from this defendant in respect to the matters contained in said bill, or any of such matters, and the said bill is without equity and does not state or set forth in any way any cause in equity against this defendant.

20 Second. The said bill does not show whether the compensation therein demanded is for permanent injuries or for injuries suffered before the time of the filing of said bill. If the compensation so demanded is for permanent injuries, then the said bill does not allege or set forth, as it necessarily should, that the discharge by this defendant of its sewage into the Passaic River, for the alleged injurious results of which such compensation is demanded is designed to be permanently continued; and if the compensation so demanded is for injuries before the time of the filing of said bill, then the complainants are not entitled to the interposition of this court but must seek their remedy in a court of law.

30 Third. The said bill does not state or show the amount of compensation demanded by the complainants, or any or either of them.

Fourth. The said bill does not show that the injurious condition of said river therein alleged is the necessary or natural result of the discharge of this defendant's sewage into said river.

40 Fifth. It is apparent from the allegations of and statements in said bill that the said alleged injurious condition of said river is the inevitable result of the maintenance of the dam across said river in said bill mentioned. So far as appears from said bill, said dam was erected and has been

and still is maintained without any lawful authority or legal right, and, as appears from said bill, not only prevents the natural flow and impedes the natural course of purification of said river, to the benefit of which this defendant is entitled in the carrying away and disposal of its said sewage, but constitutes an obstruction to the navigation of said river.

Sixth. The said bill does not present a case on the part of the complainants, or any of them, which gives a court of equity jurisdiction, or in which any equitable remedy is proper, or in which the remedies supplied by courts of law are not ample and adequate. 10

Seventh. The said bill improperly joins together the different causes of action and different legal and equitable claims which are held by the complainants in severalty and which cannot be properly tried and heard together.

And this defendant also demurs to the part of said bill that relates to the complainant, the Dundee Water Power and Land Company, excepting the portion thereof in the latter part of the thirtieth paragraph of said bill relating to a tract and two strips of land there mentioned, and for causes of demurrer, in addition to the first six causes of demurrer hereinbefore set forth, which are here applied to the part of said bill here demurred to, shows as follows: 20

First. Said part of said bill here demurred to does not show that the canal or artificial waterway in said part of said bill described was dug and has been and still is maintained, and the water of said river has been and is still thereby diverted, as in said part of said bill described, under or by any lawful authority or legal right. 30

Second. The alleged property rights of the said complainant, in said part of said bill here demurred to mentioned, being based on the apparently supposed right of the said complainant to maintain said dam and canal or artificial waterway, and to divert the water of said river as aforesaid, are not of such a character as to entitle the said complainant 40

to compensation for any injury thereto by said alleged pollution of said river, or to an injunction against such pollution.

Third. The use of the water of said river by the said complainant, in said part of said bill here demurred to described, is not reasonable use thereof, or such a use thereof as the said complainant, so far as appears from said part of said bill, is entitled to make.

10 And this defendant also demurs to the part of said bill that relates to the complainants, the Botany Worsted Mills, The Algonquin Company, the Dundee Woolen Company, The Andrew McLean Company, the Worthen and Aldrich Company, the United States Finishing Company and the Passaic Woolen Company, and for causes of demurrer, in addition to the first seven causes of demurrer, hereinbefore set forth, which are here applied to the part of said bill here demurred to, show as follows:

20 First. Said part of said bill does not show that said complainants or any or either of them, are the owners or even tenants of land on the banks of said river or adjoining said river above the point where the tide in said river ebbs and flows.

So far as appears from said part of said bill, said complainants take for their use respectively water from the said canal or artificial waterway at considerable distance from said river and at a point below where the tide in said river ebbs and flows.

30 Second. The rights of said complainants to take water from said canal, in said part of said bill described, are not such rights in and to the water of said river, or any part thereof, as entitles them to compensation, for any injury thereto by said alleged pollution of said river, or to any injunction against such pollution.

40 Third. Said rights of said complainants being based on the apparently supposed right of the complainant, the Dundee Water Power and Land Company, to maintain said dam

and canal, and to divert the water of said river as aforesaid, are not of such a character as to entitle the said complainants to compensation, for any injury thereto by said alleged pollution of said river, or to an injunction against such pollution.

Wherefor, and for divers other good causes of demurrer appearing in said bill, this defendant does demur thereto and humbly prays the judgment of this honorable court whether it, this defendant, should be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its cost and charges in their behalf most wrongfully sustained. 10

MICHAEL DUNN,  
*City Counsel and Solicitor for Defendant.*

GEORGE S. HILTON,  
*Of Counsel with Defendant.*

STATE OF NEW JERSEY,  
COUNTY OF PASSAIC.

ss.

Michael Dunn, of full age, being duly sworn according to law, saith, that he is the City Counsel of the City of Paterson, and as such is the agent of the defendant, in this suit, and that the foregoing demurrer is not interposed for delay but in good faith for the causes therein set forth. 20

MICHAEL DUNN.

Sworn and subscribed this fourth day of April, A. D. 1902, before me. 30

CHAS. B. DUNN,  
*Master in Chancery of New Jersey.*

I hereby certify that I have perused the complainants' bill in the above stated cause and that the above demurrer is well founded in point of law.

GEORGE S. HILTON,  
*Of Counsel.* 40

## IN CHANCERY OF NEW JERSEY.

Between

HENRY W. DOREMUS, *et al.*,  
*Complainants,**and*10 THE MAYOR AND ALDERMEN OF  
THE CITY OF PATERSON,  
*Defendants.*

Mr. Depue for Complainants.

Mr. Hilton for Defendant.

*Stevens, V. C.*

20 This is a demurrer to a bill filed by the complainants, who are either riparian owners of land on the Passaic River above the ebb and flow of the tide, or lessees of riparian owners. The complainants pray for an injunction restraining the pollution of the river by sewage unless the city will make "such compensation for the diminution in the value of their land and property rights as shall be ascertained by this Honorable Court to be just." The bill, though a new one, is practically a continuation of the case of *Simon v. Paterson*, 13 Dic. 1, on App. 15, Dick. 385, and is based upon the complainants' view of the scope of the decision of the Court of Appeals in that case.

30 As several of the causes of demurrer have been disposed of by that decision, only two seem to me to require discussion at this time.

It is said that the Dundee Company and those who hold under it, are not entitled to the relief prayed for, because the Company's dam is an unlawful structure, and its continuance as such, gives rise to the very evils which are made the bases of complaint. It is only necessary to say in answer to this that it does not appear from the allegations of the bill that it is an unlawful structure. The dam was erected shortly

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after the year 1832. In 1858 it was raised to a height of 14 feet above the river bed, and it has been maintained at that height ever since. Even if it could be inferred from the allegations of the bill that it was built upon lands which did not belong to the company, and there is nothing in the bill from which such an inference can be made, it has stood at its present height for over forty years—a period of time more than sufficient to legalize it as against adverse claimants. It was constructed at a point where the title to the bed of the stream was or might have been in the Company, and where the construction was or might have been lawful. I cannot assume, in the absence of evidence, that it was unlawful.

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The other cause of demurrer requiring present consideration is, that some of the complainants are not riparian owners, and therefore not entitled to damage or an injunction. *Stockport Water Co. v. Potter, 3 Hurls., &c., 300*, is relied upon. The bill includes three classes of persons; first, those who are, in the fullest sense, riparian owners above the ebb and flow of the tide; second, those whose lands adjoin, not the river, but the artificially constructed canal whose waters are drawn from the river; third, those who are neither owners or lessees of lands fronting on the river or on the canal, but who are lessees of a certain amount of "mill power" which is used in their respective factories, either for driving the machinery or for scouring, dyeing, &c.

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As to the first class there can be no doubt that its members are entitled to an injunction or damages under the decision in *Simmons v. Paterson*.

The second and third classes resemble each other in this respect, viz., that they both lease mill power.

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Mill power is, in the leases, defined to be "the right to draw from the nearest raceway or canal of the lessors, through the land to be demised and to be used thereon, eight and one-half cubic feet of water per second so long as the water in the main reservoir at the dam shall stand within twelve inches below the level of the top of said dam, with a free flow therefrom and the main canal or raceway, all the inlet gates to the same being open, with a fall not exceeding a point 23 feet below the level of the top of the dam." There is a restriction that in case the water in the main reservoir

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shall fall below the point designated as twelve inches below the level of the top of the dam, the lessors shall shut down the gates of the lessees in the reverse order of their numbers, sufficient to maintain the water in the main reservoir at the said point.

10 It will be unnecessary for the purposes of this discussion to differentiate the second of the above classes from the third, because I think that under the law of this State, as I understand it, both classes may, because they are lessees of mill power, directly or indirectly participate in the benefit of this suit.

20 In *Stockport Water Works Co. v. Potter, 3 Hurl., &c., 300*, it was held by a divided court that where a riparian proprietor conveys land not abutting on a stream and grants water rights to be used thereon, the grant of water rights, though valid as against the grantor, creates no rights for the interruption of which the grantee can sue a third party. This case was considered by the Supreme Court in *Butler Rubber Co. v. Newark, 32 Vr. 32*, and there distinguished. It was held that on the assumption that the grantee of the right to take water for the purpose of its mill was not under its deed a riparian proprietor, still it was entitled to compensation for the damages it sustained by the taking of the water of the Pequannock for the benefit of the city of Newark under proceedings to condemn. Mr. Justice Depue said "The right the plaintiffs obtained to the use of the waters of the stream in virtue of the grant from the Newbrough Co. is undeniably property. As such under our constitution, they can not be deprived of it except on compensation made. This principle applies whether the water taken or the injury done to the mill property by diverting the waters from the mill be considered. The destruction of private property, either total or partial, *or the diminution of its value*, by the act of the governments directly and not merely incidentally affecting it is a taking within the constitutional provision, which can be effected only under the right of eminent domain, subject to the constitutional limitation of making just compensation."

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40 In *Kensit v. Great Eastern R. R. Co., 27 Ch. Div. 136*, Lindley L. J., speaking of the *Stockport Water* case, says it "simply decides that the grantee if a riparian proprietor must take

the water as he finds it. If it is dirty when it comes to the mouth of his pipe, he cannot complain of those who have dirtied it. He has not the right of a riparian proprietor. The case does not decide that the licensee or grantee of a riparian proprietor cannot take some water from the stream if he hurts nobody. \* \* \* The argument cannot be maintained unless we say that a riparian proprietor cannot allow anybody to take any water out of a stream, whether anybody is injured or not. It seems to be it would be monstrous to decide anything of the sort." Even in the Stockport Company's case, it is admitted that the non-riparian grantee can acquire water rights good as against the grantor, "but not so as to sue other persons in his own name for the infringement of them."

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Now what is the status of the present case? It is, in form, a suit in the alternative for an injunction or the just compensation guaranteed by the constitution. But in *Simmons v. Paterson*, 15 Dick. 393, it was held by the Court of Appeals that the complainants were, by reason of their continued acquiescence, not entitled to an injunction if relief could be otherwise afforded, and that relief could be afforded by making to them "such compensation for the diminution of the value of their lands as should be ascertained to be just." The suit is, therefore, substantially, a suit for compensation for property taken, and the question is, have the lessees of water power a property right therein? If they have such a right, and it is diminished in value by the act of the City of Paterson, that is a taking within the meaning of the constitutional provision and they are entitled to damages. I think they have such a right.

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The dam, as I have said, is, so far as appears, a lawful structure. It was erected by the Dundee Manufacturing Co. shortly after the year 1832. By its charter, granted in that year and amended in the year following, the Legislature authorized the company to buy, rent and hold lands, tenements and water power necessary and useful for the purpose of manufacturing iron, cotton, wool and other articles and the same, "to sell, let or otherwise dispose of as they should deem proper." Again in 1872 the Legislature enacted that the reorganized company might establish an office in the

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City of New York, "for the letting of its power or the disposal of its lands, or for any other purpose." Here, then, was an express authorization by the legislature to let power. Now, of course, the Legislature did not intend to authorize and could not have authorized the letting of power, in such manner as to deprive the lower riparian owners of their right to the flow of the stream. What that right is, is clearly stated in a passage, often quoted, from a judgment of Lord Kingsdown in *Minor v. Gilmour*, 12 Moo. P. C., at p. 156.

10 He says: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of water flowing past his land; for instance, to the reasonable use of the water for domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency upon proprietors lower down the stream. But further, he has the right to the use of it for any purposes, or what may be deemed the extra-

20 ordinary use of it, provided he does not thereby interfere with the right of other proprietors either above or below him. Subject to this condition, he may dam up a stream for the purpose of a mill or divert the water for the purpose of irrigation. But he has no right to intercept the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury." This I understand to be the doctrine of *Higgins v. Flemington Water Co.*, 9 Stew. 538.

The Dundee Company, in virtue of its riparian ownership, had, as it appears from this passage, the right to dam, and the further right to use the water of the river for milling

30 purposes, if such did not interfere with its lawful use by other proprietors. It might by adverse possession, or by contract with lower proprietors, have acquired a greater right. *Holsman v. Boiling Springs Bleaching Co.*, 1 McCar. 336.

But the Dundee Company, by legislative enactment, had this further right, viz., a right to *let* water power—not a right to let more water power than it could lawfully use itself, but, I take it, as much as it could lawfully use. The right to thus let was not in terms a restricted right—a right

40 to let to those only who were or might become riparian own-

ers. It was a general right. Being general, some reason for cutting it down must be shown. But in point of fact the public is benefited by the full utilization of one of nature's forces and because of the limitation mentioned in the judgment of Lord Kingsdown, no other person's right is or can be interfered with. Assuming, then, that the law, as it was declared in the Stockport Water Company's case, is the law of this state, that case cannot be regarded as controlling, for the case at bar has been taken out of its operation. Certainly it will not be asserted that the Legislature may not authorize the transfer of rights in gross to water power, even if, at common law, such transfer, though valid and enforceable in some respects, is not so in others. The Legislature has made choses in action and transfers of estates in expectancy assignable. It has enabled grantees of reversions and lessees to avail themselves of covenants and conditions in leases, and I can see no reason why, if water rights in gross can not, by the rules of the common law, be effectually assigned, the Legislature could not have made them assignable. It would seem, therefore, to be quite inadmissible to assert that when the Legislature declared that the company might let and rent water power, they did not intend to vest in the lessee the right of the lessor to the extent that he possessed and conferred it.

Now I cannot imagine that when the Legislature authorized a letting, it intended that the lessee of the thing demised should have every other right of property in it, except the right to prevent its pollution—that is, its partial or complete destruction for all the beneficial purposes of the lease. Says Mr. Justice Van Syckel, in *Simmons v. Paterson* (supra): "The higher owners cannot lawfully combine and by construction of artificial conduits collect foul matter and pour it, in mass, into the stream. Such a scheme, when put into operation, constitutes the taking of private property which the Legislature cannot authorize except upon just compensation to the party injured."

We have, then, this situation: A legislative grant to the Dundee Company of a right to acquire and use power, a legislative grant of a further right to let and rent power—an adjudication in the *Butler Rubber Company's* case that a

right in gross to water is a property right for which, if taken for municipal use, compensation must be made; and a declaration in the Simmons case, that pollution is such an injury as constitutes a taking, within the meaning of the constitution. This grant and these decisions seem to me to take the case out of the operation of the Stockport Water Company's case, if that case be law here.

10 The further point is made that the lessees of power cannot be joined in the same bill with riparian owners properly so denominated. This objection seems to be without substance. Assuming that Rule 132 does not apply, it seems clear that the present case comes within the reason of the later Chancellor's opinion with the decisions cited and commented on by him in the Simmons case, reported under the name of Att'y Gen'l v. Paterson, 13 Dick. 1. No disapproval of his views in that respect is to be found in the opinion delivered on behalf of the Court of Review. I may add that as the bill now stands, Rule 130 clearly applies to those who are  
20 riparian owners. If it does not apply to lessees of water power because such lessees do not own or possess "distinct tenements," it would seem from the clauses of the leases to which I have already referred that there is to a certain extent a community of interest or obligation among the several lessees, when the water is low, which makes it at least desirable that both lessor and lessees should participate in an assessment of damages.

A true copy.

E.. C. STOKES,  
Clerk.

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