

## N. J. Court of Errors and Appeals.

|                                                                 |                                                                       |
|-----------------------------------------------------------------|-----------------------------------------------------------------------|
| THE WATER COMMISSIONERS OF JERSEY CITY,<br>plaintiffs in error. | } <i>In Case.<br/>Writ of Er-<br/>ror to Su-<br/>preme<br/>Court.</i> |
| <i>vs.</i>                                                      |                                                                       |
| JOHN L. BROWN, defendant in error.                              |                                                                       |

ARCHIBALD K. BROWN, *Attorney for plaintiffs in error.*

ROB'T GILCHRIST, JR., *Of Counsel for plaintiffs in error.*

A. O. ZABRISKIE & SON, *Attorneys for defendant in error.*

This is an action of trespass on the case and was commenced in the Supreme Court of New Jersey by summons in favor of the said John L. Brown, and against the said The Water Commissioners of Jersey City returnable the fourth day of August, A.D. eighteen hundred and sixty-two.

The following is a copy of the declaration filed in said cause—viz: 10

New Jersey Supreme Court of the fourth day of August in the year eighteen hundred and sixty-two.

HUDSON COUNTY, ss: The Water Commissioners of Jersey City, the defendants, were summoned to answer unto John L. Brown, the plaintiff, of a plea of trespass on the case. And thereupon the plaintiff, by A. O. Zabriskie and Son, his attorneys, complains for that whereas, heretofore, to wit, on the twenty-ninth day of April, eighteen hundred and sixty-two, in the county of Hudson, the said defendants in consideration that the plaintiff had then and there by an offer and 20

A

proposal in writing before that time made by him to the defendants offered and proposed to and agreed with them to lay down a submerged pipe across the Hackensack River on the bottom thereof and provide the materials for the same in accordance with a plan that had been by him devised and submitted to the defendants for the price or sum of seventy-five thousand dollars, to be paid to him, by them, therefor, undertook and then and there agreed and faithfully promised that they, the defendants, would accept said offer and

10 proposals, and employ the plaintiff at that price to lay down said pipe and provide the materials therefor and that they would enter into a written contract with him for the execution of said work and for the payment of said money and then and there gave the plaintiff notice in writing that they had accepted said offer and proposal and would enter in such contract with him: And the plaintiff then and there confiding in such promise and acceptance left off and discontinued divers other engagements, employments, and business in which he had been before that time *been* occupied and en-

20 gaged, and refused to enter into other engagements which offered to him, and laid out and expended large sums of money in preparing and getting ready to execute and perform said work and lay said pipe: And the plaintiff avers that he hath always been ready and willing to construct, furnish and lay down said pipe, and to enter into and execute a written contract with sufficient surities for the performance of said work, as offered and proposed by him, and that he did on the twentieth day of June eighteen hundred and sixty-two, and at divers other times between the said twenty-

30 ninth day of April eighteen hundred and sixty-two and the commencement of this suit, offer to the defendants to sign and execute a contract in writing for said work, and to sign and execute a full and ample guaranty that said work would be securely and sufficiently done, and would stand for at least five years, with sufficient and responsible sureties, and tendered said sureties ready to sign and execute the same, and requested said defendants to enter into and execute the same.

Yet the said defendants not regarding their said promises and undertakings, but intending to injure and defraud the

plaintiff did not, nor would, at said times or at any other times employ the plaintiff to lay said pipe or enter into and execute such contract or accept or receive from the plaintiff a contract with proper sureties for the performance thereof, but wholly neglected and refused so to do, whereby the said plaintiff hath lost the profits and emoluments which would have arisen and accrued from the performance of said work, in laying said pipe and finding the materials, which would have been twenty thousand dollars, and has lost divers other contracts and employments which he gave up and declined 10 and refused to undertake in consequence of his promise and engagements with the defendants in this behalf, and by which he could have made the further sum of twenty thousand dollars, and has also lost the further sum of twenty thousand dollars, which he expended in preparing to execute the said work in laying said pipe on the bottom of said river. By means whereof the plaintiff hath sustained damage to the amount of thirty thousand dollars, for which he brings suit.

To this declaration the defendants pleaded Not Guilty on which issue was joined. 20

The following is a copy of said plea :

And the said defendants by Richard D. McClelland, their attorney, come and defend the wrong and injury when, &c., and say that they are not guilty of the said supposed grievances above laid to their charge or any or either of them, or any part thereof, in manner and form as the said plaintiff has above complained against them ; and of this they put themselves upon the country, &c.

On the trial of said issue before his honor E. B. Dayton Ogden, Associate Justice of the Supreme Court at a Circuit 30 Court held at the City of Hudson in and for the County of Hudson, the following bills of exceptions were allowed and sealed, viz :



## NEW JERSEY SUPREME COURT.

THE WATER COMMISSIONERS OF JERSEY CITY, }

*ads.*

JOHN L. BROWN.

} *Bill  
of  
Exceptions.*

The Jurors of the Jury in the record hereto annexed mentioned as in said record is set forth came before the Honorable Elias B. D. Ogden, an Associate Justice of the Supreme Court at the day and place therein mentioned, and the parties came also, and the said jurors being so chosen then and sworn as therein mentioned, thereupon the counsel for the said plaintiff's opened to the jury that the action was brought for damages sustained by reason of the defendants refusal to give the plaintiff the contract for laying the water pipe  
 10 across the Hackensack River: that after the plaintiff had made preparations, estimates and plans for the work, and they had been accepted by the defendants, of which they gave him notice, and he had spent most of his time about the matter, they suddenly refused him the contract; that the defendants are a corporation in charge of the Jersey City water works, which had been completed, they supposing the water pipes already laid under the Hackensack River enough.

Two years or eighteen months ago it became evident that  
 20 the old pipes were not enough, and the defendants, who for four years had apprehended the ice would injure the works, were desirous of calling in the aid of engineers. They advertised for plans and proposals, with the understanding that they would probably accept some one of those offered, and they desired engineers and other ingenious men to give their contrivances for the purpose, and to put in the price at which the contriver was willing to put down the pipe. A plan was given by the plaintiff, who is a mechanic, machinist and contractor. He had in his head the ability to  
 30 design machinery for any purpose. He gave his attention



to them properly. He had devised an original, ingenious and peculiar plan for a thirty-six inch pipe. His plan was to lay it so as not to break; it was peculiar by having at each fifty feet joints which would turn. His plan was original and never before contrived, and perfectly practicable. His plans and specifications were the product of his skill and ingenuity. He offered to do the work for eighty-five thousand dollars. The defendants required he should guarantee it for five years. They also required him to dredge out the river. By their advertisement they were not bound to accept his plan, but after keeping his plan from the 16th of December, 1861, they, on the 10th day of April, 1862, declined entering into the contract with the plaintiff to lay the pipe, and sent him notice of it. The great difficulty, he understood, was not with the plan, but its cost. He, at the request of some of the defendants, reconsidered it, and thought he could do it for seventy-five thousand dollars. He sent in a new proposition on the 25th day of April, 1862, to lay down the pipe according to his plan, for seventy-five thousand dollars. This proposition was in writing. The defendants considered his plan the best, and accepted his proposition by a resolution of the same 25th day of April, A. D. 1862. The resolution was regularly passed, and the next day the defendants notified him of their acceptance. He supposed he had the faith of honorable men to rely upon, and his offer and their acceptance being in writing, he sold out his scale business and his whole establishment to undertake the work. On the 12th day of May, 1862, he named his securities, Messrs. Fitch and Waterbury. He had spent no money in casting pipes, but he had got up models.

On the 2d day of June, 1862, the defendants rescinded the resolution of the 25th day of April, 1862. Of this no formal notice was given to the plaintiff, but he heard of it, and on the 24th of June, 1862, he went and tendered to the defendants a contract to execute, which had been drawn. The president of the board told him the resolution of the 25th day of April, 1862, had been rescinded; he had no authority to execute the contract. The plaintiff demanded of the defendants to execute the contract. They refused. The first question is, did their proceedings constitute a contract?

And if so, has the plaintiff sustained damages? If there was no profit in the contract, his damages will be very small, but if he would have made money by the contract he is injured to that extent.

He don't claim he can recover the value of his business given up, but he can recover the money he would have made out of the contract. His plans were valuable—his time was lost. To show what he would have made, we shall show and deduct from the contract price the cost, 1st of the casting and of putting the pipes together. 2d, of putting down the pipes. They were of great weight, and to be sunk at once in a river varying from eight to thirty-eight feet in depth. 3d, The fair value of the guarantee, for which something must be allowed to the defendants, as it was a part of his undertaking to give it. We shall show the profits are from \$20,000 to \$25,000. Allowing for the value of taking the risk of guaranteeing, the profit would be from \$15,000 to \$18,000.

And to maintain and prove the issue on his part the plaintiff called Garrett S. Boice, who being duly sworn, on the 23d day of January, A. D., 1863, testified as follows:

I have been Registrar since April 1st, 1861, of the Water Commissioners, and am now. I keep, and it is my duty to keep, the minutes of the Board. At page 101 of the minutes is a resolution as follows:

Resolved, That the Engineer be and is hereby directed to advertise for proposals to lay 1,000 feet of iron pipe equal in capacity to a 36 inch pipe, or of such dimensions as the Engineer shall direct, across the Hackensack river, on the bottom thereof; each bidder to furnish a plan for the construction of the pipe and for laying the same, the plan adopted by the board to be paid for at such price as this board shall direct; this board reserves the right to reject any or all plans and proposals if they deem it to the interest of the city so to do.

Proposals were advertised for Nov. 11, 1861, as follows:

OFFICE OF THE WATER COMMISSIONERS, }  
 JERSEY CITY, Nov. 11th, 1861. }

Sealed proposals will be received by the Water Commissioners of Jersey City until Monday, Dec. 16th, at 12 M., for furnishing and laying about 1000 feet of cast iron water-pipe equal in capacity to a 36 inch main, across the Hackensack river and on the bottom of the same. Bidders to furnish plans for the construction and laying of pipes, and the plan adopted to be paid for at such price as the board may direct. The work to be done during the summer of 1862. The right 10 is reserved to reject any or all proposals or plans if deemed for the interest of the city. All necessary information in regard to the work may be had on application at this office.

R. C. BACOT,  
*Superintendent and Engineer.*

Brown and others gave proposals on and before 16th Dec. 1861. There were eight other proposals. The plan furnished by Brown was accompanied by no specifications.

The proposal is as follows:

NEW YORK, Dec. 16th, 1861. 20

*To the Water Commissioners of Jersey City:*

Gentlemen—The undersigned proposes to furnish and lay water pipes across the Hackensack river as advertised for by the Water Commissioners of Jersey City, and according to plans submitted with this bid, for the sum of eighty-five thousand dollars (\$85,000). The amount of iron required for the whole job, I estimate at four hundred tons. The socket joints shown on the plan to give a full flow will require to be considerably larger than the straight pipes, and the bells and other parts of all those in the river will require 30 to be very strong. If your board should, after deliberation, conclude to increase or decrease the weight to vary the amount, the price can be varied accordingly. I have shown on the plan a certain number of socket joints and a certain number of piles; not meaning, however, to convey the idea that it will require just that number, but after examining the river thoroughly I should use twice the number if re-



quired to make a safe and permanent job. If you should entertain my proposition, I shall then be pleased to give you fuller details of my plan and explain to you personally how the joints are to be made, and I am sure on examination the whole will meet with your approval. If my plans and proposals are not accepted by the Board, I shall expect them to be returned to me.

I am, gentlemen,

Yours, most respectfully,

J. L. BROWN.

10

No. 16 Beekman street, New York.

All the proposals were referred by the following resolution held at a regular meeting Dec. 16th, 1861. On motion of Commissioner Pray, the plans and proposals were referred to a special committee of three to consider the same, and report to the Board the result of their investigation.

Commissioners Pray, Edge and Culver were the Committee.

On April 7th, 1862, the special committee reported as follows: Your committee, to whom was referred the plans and  
20 proposals for laying submerged pipe across the Hackensack river, on the bottom thereof, would respectfully report that they have given the several plans submitted to your committee, a thorough and impartial investigation upon their merits. And your committee desire to say that as much as they admire the merits of some of the plans (that of J. L. Brown in particular), still your committee would recommend that the plans and estimates be returned to their several owners. Your committee not deeming to the interest of the city to contract for said work under the present  
30 advertisement.

The report was adopted. It is signed by Pray, Edge and Culver.

On April 10th, 1862, I sent a notice to Brown without special instructions, but according to custom, informing him of the action of the Board.

OFFICE OF THE WATER COMMISSIONERS, }  
CITY HALL, JERSEY CITY, April 10, 1862. }

MR. J. L. BROWN :

*Dear Sir*—I am directed to notify you of the action of the Board of Water Commissioners, the 7th day of April, 1862, in reference to the plans and proposals for laying main pipe across the bottom of the Hackensack river.

A copy of the same is herewith enclosed. Your plan and proposal will be delivered to you upon application at this office.

10

Yours, respectfully,

G. S. BOICE, *Registrar*.

I sent the same notice to all the rest of the proposers.

I do not know that Commissioners sent for or had any any communication with Brown after this.

The second proposition of Mr. Brown, dated April 25th 1862, is as follows :

PRESIDENT OF THE JERSEY CITY WATER BOARD.

*Dear Sirs* : Some of your Board and others have requested me to review my former proposition for laying a sub-merged pipe across the Hackensack River. I have done so, and have concluded, after going into a close examination or calculation to reduce my offer to the sum of seventy-five thousand dollars.

If that amount will suit, I shall be pleased to perform the work ; if not, it will not be possible for me to do it.

I am, dear sir,

Yours, &c.,

J. L. BROWN.

New York, April 25th, 1862.

30

On April 29th, 1862, the following resolution was passed :

*Resolved*, That this Board accept the proposal of J. L. Brown, for laying a submerged pipe across the Hackensack river, on the bottom thereof, for the sum of seventy-five thousand dollars, in accordance with the plan previously submitted to this Board by said Brown ; and that the En-

gineer and Attorney of the Board be directed to prepare a contract for said work, and submit the same for approval to the Board for being executed—said contract to contain a full and ample guarantee that said work will be securely and sufficiently done, and cover a test of at least five years.

I sent a communication to Brown, dated April 30, 1862, of which the following is a copy :

OFFICE OF THE WATER COMMISSIONERS, }  
CITY HALL, JERSEY CITY, April 30, 1862. }

10 Mr. J. L. BROWN.

*Dear Sir :* I am directed to notify you of the action of the Board of Water Commissioners the 29th day of April, 1862, in reference to your proposal. Your proposal of the 28th instant, to lay a submerged pipe across the bottom of the Hackensack River. A copy of the same is herewith inclosed.

Yours respectfully,

G. S. BOICE, *Registrar.*

P. S.—The Superintendent wishes me to request you to 20 call at the office either Thursday, the 1st of April, or Saturday, the 3d of April, at 9 o'clock, A. M., as he wishes to confer with you in reference to the contract.

Annexed to this was a copy of the resolution of April 29, 1862, just stated.

Brown called as requested by Engineer in the bottom of the notice.

Then the plaintiff offered in evidence these letters of Mr. Bacot to Mr. Brown, dated May 6th, 9th, and 27th :

OFFICE OF THE WATER COMMISSIONERS, }  
CITY HALL, JERSEY CITY, May 6, 1862. }

30

Mr. J. L. BROWN.

*Dear Sir :* Could you make it convenient to see me at my house this evening, say at 8, P. M., so that the matter of contract proposed for pipe under the river might be arranged. I am very much engaged during the day, and liable to be called away from the office—so if you can come over at the



time named it would facilitate the matter. Commissioner Pray will be present. My residence is at the corner of Jersey avenue and South Fifth street.

Yours respectfully,

R. C. BACOT, *Sup't. & Eng.*

OFFICE OF THE WATER COMMISSIONERS,  
CITY HALL, JERSEY CITY, May 9, 1862. }

Mr. J. L. BROWN.

*Dear Sir*: I would like to see you to-morrow morning at 9 o'clock, at this office, on the subject of the river pipe, &c. 10

Yours respectfully,

R. C. BACOT, *Sup't & Eng.*

OFFICE OF THE WATER COMMISSIONERS,  
CITY HALL, JERSEY CITY, May 27, 1862. }

Mr. J. L. BROWN.

*Dear Sir*: Will you please call over and see me as soon after you get this as possible—in relation to the pipe proposed under the river. You will find me at my residence in Jersey avenue in the evening, if not convenient to call during the day. 20

Yours respectfully,

R. C. BACOT, *Sup't. & Eng.*

April 27, 1862. This contract was prepared (marked A.) It is in Bacot's handwriting. It was submitted to Board May 19, 1862. It was then laid on the table and no action had on it until the rescinding of the resolution.

Don't know that Brown ever saw this contract.

The Minutes of May 19th, 1862, contain the following entry: "The Superintendent also presented form of contract, specification, and bond with J. L. Brown for laying 30 36 inch main pipe across the bottom of the Hackensack River.

"Read, and on motion of Commissioner McLaughlin, laid on the table."

Another paper being shown witness, he says:

This is a form of agreement and specifications, and is marked B.

The plaintiff offers the contract A.

Between the 29th of April and the 2d of June, there was a change of Commissioners.

I was present when Mr. Brown came and offered to execute the contract some time after June 2d. I don't remember whether Mr. Wortendyke was there. Brown's sureties were not with him.

I don't know who his sureties were.

Mr. Brown sent this letter to the Commissioners on May 10 12th, 1862, it being a letter containing the names of his sureties:

TO THE CHIEF ENGINEER OF JERSEY CITY WATER WORKS:

I herewith offer the names of A. I. Fitch, Esq., and Charles G. Waterbury, Esq., as sureties for laying the pipe across the Hackensack River.

I am, Sir, yours most respectfully,

J. L. BROWN.

New York, May 12th, 1862.

And being cross-examined he says, the next line in the minutes of April 29, 1862, after the resolution of acceptance, contains a notice of motion of reconsideration of the resolution.

The old Board went out May 1st, 1862. The old Board consisted of Wortendyke, President, 1, Culver 2, Pray 3 Edge 4, Romar 5.

The new Board first met on the 5th day of May. Culver, McLaughlin, Pray, Wortendyke and Cleveland composed the new Board.

There was no other advertisement for this work than that which I have read, dated Nov. 11th, 1861.

I had no special authority from the Board to send Brown the letter of April 30th. No more than my authority as registrar. The postscript is a request of the superintendent.

I know of no rules or laws defining my duties which would make it my duty to send this notice.

No bond accompanied either proposal of Mr. Brown.

And being re-examined, he says:

I have been in the custom of giving such notices ever

since I have been registrar. I could not tell whether this practice was known to the Water Commissioners.

I think they did know of the practice, but not of this particular case.

They gave me no directions to give such notices. I don't recollect their ever inquiring of me whether I had given notice of their action. This printed form of notice was not in use in the office before I went there. They came in use shortly after I came into the office. The Commissioners knew this was my form, and some were in the habit of seeing 10 them. Bonds are not usually sent with proposals.

I have no recollection of seeing a bond accompanying proposal.

Four pieces of work have been done since I was registrar. Only two were done by contracts. I sent Brown no notice of Culver's notice of motion of reconsideration or of notice of motion to lay contract on the table.

And being re-cross-examined, says:

The minutes of April 29th, 1862, were published, and the notice of motion to reconsider was also published. The notice of November 11th, 1861, was published in the Standard and two or three New York papers.

And being re-examined: The two contracts made since I was there were for laying pipe or main.

*Franklin Gilmore* sworn on the part of the plaintiff, says, I live in Jersey City. I have known Brown about forty-five years. He was in the scale business before this, and had been in it at least thirty years. His manufactory was in 62d street, and salesroom formerly in Water street. He had been engaged in contract business while that was going on. 30

I know of his selling out his scale business. I could not fix the day of sale. On morning of 30th of April, 1862, I went up to his house with copy of resolution passed by the Board of Water Commissioners. I read that resolution to him.

*Question.* What did he say then? (The counsel for the defendant objected to the question, and the counsel for the plaintiff said they proposed this, not to show that he did sell out, but that he then formed a purpose to sell out, and the



court admitted the question). To which ruling of the court the counsel for the defendant excepted and prayed that the said exception might be sealed, and it is sealed accordingly.

[ L. S. ]

FIRST EXCEPTION.

Witness says. He said he would then sell out, this job was all he wanted to attend to. He sold out afterwards to a man by the name of Brown, don't recollect his first name. I don't recollect of Bacot ever sending for Brown by me.

10 To a question by the court, the witness says. I met Pray and he handed me the resolution. I met Pray in Grove street, Jersey City. I have been at Pray's house about this matter. I sometimes went to Brown to talk about contract. I felt an interest because I expected employment, being in Brown's employ. I have laid pipe in Central Park under Brown; this was a year ago last December (1861); I brought over Brown's bid; he sent it over by me; what I got from Pray was a copy of the resolution of acceptance in pencil mark; Mr. Pray was one of the commissioners who voted for the contract.

20 *John D. Brown.* I am in the scale business as salesman; I am salesman of Richard Brown; before that I was with J. L. Brown, as salesman; I worked with J. L. Brown in March, 1845; J. L. Brown sold out to Richard Brown April 30, 1862; Richard is no connection; the arrangement was gone through with on the 30th of April; Richard was a stranger to John L. Brown; the sale was evidenced by writing signed by the parties.

30 Brown's business was a very good business; at that time yearly sales from \$50,000 to \$75,000; manufactured scales himself; it was a profitable business; Brown has had no interest since in the business, and has had no business since.

Before he sold out he had taken contracts, and he did his business by commission; in February, 1848, to January, 1849, I was partner of his; from 1849 to 1852 I was selling on commission for him.

And being cross-examined, he says:

He proposed to sell out to me two or three days before

the first of May. He sold out all his stock two or three days before April thirtieth.

*Charles Guydet*, sworn for plaintiff. I have known J. L. Brown for nine or ten years. I have been engaged in business with him in street paving, as partner.

He was then engaged in scale business. That was from 1859 up to the present time. The reason he gave up the scale business was, that he could not attend to it. The laying of this pipe across the Hackensack would take all his time. 10

And being cross-examined says:

I don't know how long it would take him to lay the pipe across the Hackensack. I am still a partner with Brown in paving business. All I know about the reason for his selling out is what Brown told me. He told me this, when he received notice that the contract was awarded to him, somewhere about 1st of May, last year. I cannot say positive.

And being re-examined says:

I attend to street paving; I certainly know that this laying pipe would take all his time. 20

And being re-cross-examined:

All I know about what time it would take to lay this pipe is what Brown told me.

*George A Cushing*, sworn for plaintiff: I am a civil engineer; followed this about fifteen years; I am engineer in employ of Croton Aqueduct Department; they have in last three years had a good deal to do with laying down pipes; I have the laying of iron pipe under my superintendence; I have examined the plan and drawings of Brown; I have made an estimate of the cost of laying the pipe under the 30 Hackensack; the cost of pipe and the cost of laying.

|                                                                                                                                        |             |
|----------------------------------------------------------------------------------------------------------------------------------------|-------------|
| The cost of pipe would be (size 3 feet, thickness $1\frac{1}{2}$ inches).....                                                          | \$19,800 00 |
| Piling the river, spruce pile, two at each joint,<br>in all 145 piles, driven in bottom of the river,<br>driving and cost of pile..... | 3,000 00    |
| Piling banks of the river, driving and cost of<br>piles—70 piles.....                                                                  | 1,400 00    |

I got the number of piles from the plan and suppose the pipes to be 12 feet long, and joints that distance apart, and two piles under each joint.

Turning and fitting joints on straight and curved pipes, 86 joints, \$200 each..... 17,200 00

This is one of the most difficult parts of the whole work. It requires to be accurately done.

10 Two slip joints, one at each end, this is only for fitting these..... 2,500 00

The machinery and necessary apparatus to lower the pipe to bottom of river..... 10,000 00

Labor putting together the pipe and lowering.. 5,000 00

I got at the \$19,800, by calculating weight of pipe of 1,000 feet  $1\frac{1}{2}$  inches thick; allowance of weight of flanges, and of increased size of pipes.

Estimated castings at \$66 per ton— that is what Croton Department pay for castings, 3 cents per pound; I speak of a year ago.

20 The estimate of machinery for laying pipes, is a matter of judgment; it was pretty difficult and I could not fix it exactly; I allow \$10,000, for that is my judgment about it; it is ample to cover it.

The labor is a matter of judgment too; my experience of the last three years enables me to say it is ample allowance for mere labor of putting together.

I have ascertained that the velocity of water would be retarded 1-10th by the curves; the area of the pipe inside at 46 inches, is 60 per cent. greater than at 3 feet.

30 I made this estimate to ascertain what would be the profit of the contract at \$75,000; it would be \$16,200; I fixed price of grinding joints after consultation with one whose business it is to do that work.

I did not fix any specific plan for lowering it; I understood plan was to lower on inclined pile; exactly the detail of the plan I am not acquainted with; the plan showed how deep the water was; from 36 to 39 feet to the mud; I saw the plan, but did not see it a great while; plan showed pipes were to be laid below the bottom.

40 This model shows the plan of the joints I estimated for.



And being cross-examined says:

I have been with the Croton Board four years; before that I was with a railroad; I had the plan of Brown about an hour; I had a memorandum of the proposal which Brown gave me; he did not show his contract or state what it would be; had the plan last Friday.

And being re-examined says:

It would cost Brown no less if the pipe was laid in Boston before; It would depend on the character of the bottom whether I should require dredging to be done; I have no idea 10 of what dredging would cost; I should judge it was not very expensive; do not know cost of dredging.

Smaller joints to fit would cost nine-tenths of the larger; if the bottom was very uneven swivel joints must be more frequent. Wherever there was an inequality there ought to be a swivel joint. It might be lowered with a lead joint; if it were a good surface lead would stand.

The memorandum Brown gave me was on a strip of paper, about ten lines, a quarter of a foolscap page. It took me about half a day to get the information and make my 20 calculations; I went to Nesbit, of the Ornamental Architectural Works; I only consulted him on the grinding of the joints; I had neither the model or plans then; there is no item for dredging out the river.

I estimated for eighty-six socket joints; I understood there were eighty-six flexible joints; there are no more than fourteen shown on the plan; the other joints are not common joints; I estimated those joints at \$200 each, for all; the common joints would cost very much less; I estimated for eighty-six joints with tongue and groove; those joints are 30 flexible; the size was three feet and ten inches; the joints are thirty-six inches. This plan does not show a single pile under the joints; I think the pipe could not have been lowered without piling; the plan does not call for piles under the joints; there are in the bank sixty-eight piles; the plan, I think, shows two piles at each dot on the bank. My estimate of \$10,000 for machinery and apparatus I can give no reason for; I am not able to give the jury any description of the apparatus I had in my mind for lowering the pipe; I have not examined the bottom of the river and cannot say 40

whether there is any protruding rock or not; I understand the pipe was to be lowered on inclined piles, which would require a large quantity of rope and tackle; all that was to go below the water would be lowered at once; four hundred tons would be let down at once by Brown's plan; I estimated the whole pipe to weigh three hundred tons in my calculation; two hundred tons would be lowered at once; that is, pipe six hundred feet long; I have known more than that length of pipe raised; it would be necessary to apply your power  
 10 to each joint; I could not undertake to invent machinery by which it could be done; the curved joint is entirely new to me. The plan of the Boston pipe being shown to witness, says it is essentially the same as Brown's; there is another kind of flexible joint called ball and socket joint; this ball and socket joint would not turn all the way around; Brown's joint is a swivel joint.

*Henry Case*, sworn. I am a carpenter and house-framer, and accustomed to put up and frame buildings, churches, &c.; I live in Brooklyn; I have made estimates to lower  
 20 this pipe so as to get the job if I could; I could not say when it was; between January and June or May last; I talked to Mr. Brown about it; I was going to contract with J. L. Brown; I made estimates and told him what I would do a certain part for; it was to furnish him with something to put the pipe on, so that he could put it together, and after he got the pipe together, I would take charge of the pipe and lower it to the bottom of the river. I offered to do that; I told him I would do it for \$12,000; I was to find everything to lower the pipe into the bottom of the river, and pay  
 30 for labor for lowering the pipe; I am satisfied it could be done for that, and do it safely; I told him I would guarantee I could do it safely; I would not do it now for that, as everything is raised.

And being cross-examined, says: I calculated there would be four hundred tons to lower; don't like to tell the plans; it was no part of my plan to have the slant and straight piles spoken of by Mr. Cushing.

*John Witherell*, sworn. I am a contractor; been so for

six years; live in New York; have laid pipe for Croton aqueduct; somewhat accustomed to make calculations; I have made an estimate of what it would cost to furnish and lay water pipes across the Hackensack, according to Brown's plan and proposal; I calculated whole work as advertised by Commissioners of Water Works; I estimated it would cost complete on Brown's plan, about \$57,000; I have rough items:—

|                                        |          |    |
|----------------------------------------|----------|----|
| 400 tons of pipe, \$50.....            | \$20,000 |    |
| Wrought iron for bolts.....            | 1,000    | 10 |
| Turning and fitting joints.....        | 12,000   |    |
| Tools, &c., for work.....              | 6,500    |    |
| Two slip joints (together).....        | 1,250    |    |
| Piling, capping, staying, &c.....      | 2,500    |    |
| Fifty tons for ends, \$40 per ton..... | 2,000    |    |
| Piling for ends and Coffor dams.....   | 7,500    |    |
| Laying pipe in river.....              | 4,000    |    |
| Laying pipe at ends.....               | 200      |    |

---

\$56,950 20

I would, as I understood it, be willing to undertake the job for that; I have made this calculation with care; I calculated for swivel joints, according to Brown's plan; the other joints were to have no collars, it was only plain bolted together. The \$56,900 would allow me a profit; I have thought of it in my own mind as to guarantee for five years; there is no risk after it is once down.

And being cross-examined the witness says: The estimate I have given you I made a week or ten days ago; I then started to make the figures; I would be willing now to undertake that at present, except as to the price of iron; I made the estimate at Brown's request; don't know what price of iron is.

Grading streets, making roads, laying water-pipes is my business; never have furnished the pipe when I have laid; I could not give the number of piles necessary in the river or on either bank. My plan was to join the pipe on a platform, swing it over and let it down; Brown described plan to me on paper, and showed me the models; I have seen the plans here.



There are fourteen flexible joints; there is no motion in the joints of the straight pipe; there is a tongue and groove on the plan, the river is from twenty to sixty feet deep; I did not estimate for dredging; I calculated it would settle itself; I had not the plans; the plan I had was drawn by me; I was not so full as the one you have; I did not propose for the work; I ascertained what the fourteen joints would cost from conversation with engineers; my calculation for turning of the joints was from \$140 to \$150; the curved joints would cost seventy-five per cent more than the straight ones; the joint was new to me; I knew there was a flexible joint in Chelsea river; I knew it in the fall of 1861.

*Isaiah Wadley, Jr.*, sworn. I am a contractor; reside at Brooklyn; been in the business three years; have contracted for water-pipes; never made an estimate, but have made a proposal to lay this pipe, furnish the material, &c., for \$60,000; this was about the 1st of May, 1862; Brown gave me a sketch of the plan; I had not seen this plan then.

It was to be a thirty-six inch main; there were to be swivel joints; I understood the depth of water, as he told me, and the length of pipe; I made the offer after consulting with my father, and he said it could be laid for \$60,000; I was satisfied I could make money; I could not make a minute calculation; my father had experience; he had been superintendent of laying the Chelsea pipe; he is not an engineer, but a mechanic.

And being cross-examined, says: My father lives in Brooklyn; I did not intend to take this entirely on my own responsibility; my father was in with me; no one else.

I knew Mr. Brown at the time I made my proposal; my father visits Mr. Brown; the moment I saw Mr. Brown's joint I was satisfied it was the same joint laid at Chelsea that joint has been laid since 1850 or 1851.

*Robert C. Bacot*, sworn. I have been superintendent and engineer of the water works since the fall of 1859; I before had been registrar; the office of registrar existed very nearly from the first organization of the Board.

In the organization the registrar is secretary of the Board;

when Brown's first proposals were received I was engineer ; I recollect of no interview between Water Commissioners and Mr. Brown, between the date of his proposal and resolution of April 29th ; there might have been a meeting between Mr. Brown and a committee ; I was present one evening when Talcott was there ; do not recollect when that was ; think it was between the time of the two proposals, but am not certain.

Several citizens not connected with Water Commissioners were asked to attend ; Talcott was there, and Mr. Zabriskie ; 10 Brown then showed his model and drawings ; I do not know that he was there asked to review his plans ; I understood the objection was it would cost too much.

He sent a new proposal after this meeting at the President's office (Wortendyke's office.)

I had several interviews with Brown after he rendered his proposals about the form of the contract ; the Board directed a form of contract, specification and bond to be prepared by the attorney and myself. They were so prepared ; there are two forms of contract—one in handwriting of Brown received 20 from him, and the other is in my handwriting ; mine is marked A. ; the other was a blank form I gave Mr. Brown ; the blank form I gave him was to get his views as to time of finishing work, and to get his specification for doing the work ; form of contract was to be filled up by him. It was assented to by Brown (A). Was the contract agreed by Brown to be presented to the Board ; do not know whether securities had then been submitted to the Board, think they had not ; contract was prepared in April or May ; contract A was prepared before the rescinding of resolutions. 30

The note of May 12th, 1862, from Brown, was submitted to the Board ; there was no objection to Fitch ; but they required time to enquire as to Waterbury.

The Board had soundings of the bottom of the river ; Brown's soundings were taken from mine ; the bottom was of mud above hard pan, and sand below ; it would require dredging to permit the pipe to sink to the hard pan ; it would sink by its own weight to the sand ; it would have cost about \$1000 to dredge ; I sent a letter to Brown, asking him to come to me and attend to the matter of the contract ; 40

this letter is dated May 27th, 1862, and is read in evidence, pro ut the same.

And being cross-examined, the witness says : It was the understanding of the Board that this curved joint was Mr. Brown's own invention, was peculiar, and had not been used before ; I understood from Mr. Brown's conversation with the Board, that unless the Board accepted his proposal, they could not use this curved joint ; all the Commissioners were not at the meeting at Wortendyke's office ; paper C is the  
 10 specification drawn by me, and Brown assented to it ; he adopted this specification, and I understood it as the specification submitted by him ; I mean with the amendments pinned on it ; the specification marked C is read, pro ut the same.

The Counsel for the defendant then propounded the following question : Was it not understood between Mr. Brown and the Board that the resolutions of April 29th was passed and his bid accepted on the condition that the new Board should approve ?

20 The plaintiff objected to said question, because the acceptance was in writing, and secondly because the witness cannot be permitted to state what he understood.

The court overruled the said question, to which the counsel of the defendants except, and pray that this their exception may be sealed, and it is sealed accordingly.

[ L. S. ]

#### SECOND EXCEPTION.

Contract A was merely a form of contract to be presented to the Board as called for by the resolution ; I was not  
 30 authorized to make a contract, but to draw a form of contract ; I have seen a plan of the swivel joints among the plans of the Boston Water Works.

And being re-examined, says : I understood from Brown there was to be leather packing in his joint ; Brown had no interview with Water Commissioners at this office ; there was no interview with Brown and committee of Board before resolution of April 29th, 1862 ; I visited the Boston Water Works to see how the pipe was laid under the Chelsea River.



And being re-cross-examined, says:—I understool from Brown that he stated to the Committee that his joint was not the Boston joint—it was his joint—his own invention.

Brown called in on several occasions to inquire after the contract, whether it was decided or not; he said that he was very much engaged in getting a contract for laying a railroad in Washington; this was before April 29th, 1862.

And being re-examined, says:—The Commissioners Pray and Culver were present in committee at the meeting in which Brown stated this was his joint; he stated, I think, it 10 was his own plan and not the Boston plan; I stated my views to Commissioners Pray and Culver, that it resembled the Boston drawings, but Brown said no, it was his own invention; I had tracings of Boston plan.

*John L. Brown*, the plaintiff, being sworn:—I have been a scale maker 30 years, and gave it up 1st of May last; then sold out to attend to this contract; I closed the agreement with R. Brown after I received the resolution of April 29th, 1862; that resolution decided me; would not have sold if I had not got it; I exhibited model to Water Com- 20 missioners; told them partially how I intended to proceed in laying the pipe.

I never told them entirely the plan I had of putting down the pipe; I have conversed with but one man on the subject; told them fully as to joint size and thickness of it.

Didn't tell them of means of getting pipe down; I did not know when I made the proposition how the pipe was put down at Boston; I got up plan myself and got Edwin Smith to draw it; it was an entirely new plan.

First I heard of Boston plan was last week here; I attend- 30 ed on Mr. Bacot for the purpose of agreeing on form of contract; we agreed; I agreed to submit it to them; he wanted less movable joints; he said some of them objected to so many.

In my first interview with Bacot, he wanted me to make out my views, and he handed me a printed form; I assented to giving security; they wanted a guarantee for five years; after I received resolution I had note from Mr. Bacot, or from the office, with copy of resolution; I very soon came

over; the next day or two Bacot told me he wanted contract made; I told him I would do everything I could to forward it; he asked me to draw a contract as to what my ideas should be; after he had drawn up form of contract I offered securities.

I tendered myself on 21st June, 1862, ready to execute contract; my securities (Fitch was late) Waterbury was with me; Wortendyke said he was not authorized to consummate contract; he did not object to securities; no disagreement  
10 between Mr. Bacot and me about manner of contract as to specification.

The result of my calculations was that I could have done the work for \$53,000; that allowed nothing for profit or my own time; allowed for dredging river; allowed for dredging \$700; no dredging is marked out on plan.

I don't consider after the pipe was once laid, and it got to work, that there was any risk for five years.

There was difficulty in getting securities; warranting was worth \$5,000.

20 Have had no business of any consequence since; had no contract to build railroad in Washington, but was going to get act of Congress.

I got as nigh as possible to what I could do the work for; the iron could be got for \$50 per ton, that was for the special castings; don't know what the Croton Board paid, but understand they paid \$38 to \$40 per ton for common.

|                                                         |       |
|---------------------------------------------------------|-------|
| I estimated 350 tons of special castings at.....        | \$50  |
| 49½ tons straight.....                                  | 40    |
| Temporary piling.....                                   | 3,000 |
| 30 Piling Banks.....                                    | 2,000 |
| 86 joints, fitting, &c., each.....                      | 160   |
| 2 slip joints barricaded.....                           | 2,000 |
| Tools, chain, and other apparatus for lowering pipe.... | 7,000 |
| Labor putting together and lowering.....                | 5,000 |
| Dredging.....                                           | 700   |

My idea was to have the straight joints turned and grooved, put and bolted together, and packed as the other joints, not to swivel, but otherwise, like the other joints; I proposed to have more swivel joints than Mr. Bacot put in specification.

By my proposal, I was to do everything necessary, without an increase of price.

The engineer and I agreed as to thickness of pipes.

The opening in every joint is a material part of my plan; I consented that the contract and specification drawn by Bascot should be presented to the Board as assented to by me.

And being cross-examined, witness says:

I intended to pack the joints in the bottom of groove; I would rather have taken \$5,000 less and settled up at once than guaranteed; it had been talked over verbally before the resolution that I was to guaranty, and it didn't reduce the price that I put in. 10

By first proposal I was not to guaranty; I agreed to do the work by 1st December, 1862; I know Wadley's father for thirty-five years; I never talked with him about this joint; I never showed the joint to Wadley; I never showed the plan of it to him; I showed the plan of it to his son; I know that Wadley said he worked on the flexible joint at Chelsea; he told me that when he was at Brooklyn, putting down pipe, he said he had put down the flexible joint under Chelsea river; this was about five years ago; had no curiosity to inquire about the flexible joint; my first contract for laying water pipe was in Brooklyn, five years ago; at the time I put in bids for that work, he did also, and we finally became partners in that; it amounted to about \$225,000; we were at it a little over a year; I was in constant intercourse with Wadley during that year; I am a New Hampshire man; lived in Boston about seven years. 20

Never said to Mr. Talcott my plan differed from Boston joint. 30

Re-examined. Between first and second offer I had ascertained more exactly what I could get my work done for; I had but short time to make my estimate for first proposal, but plenty of time for second proposal.

Thereupon the plaintiff rested, and the counsel for defendants moved the court to nonsuit the plaintiff on the following grounds:

1st. That the proposal of April 25th, 1862, and the resolution of April 29th, 1862, made no contract as the acceptance by the resolution was not of the very proposal. 40



2d. That if a contract was proved it was not the contract laid in the declaration.

3d. That if a contract was proved it was illegal as in contravention of the public statutes of the State, for want of power in the defendants to make such a contract, it not being in writing, there being no notice of the time and place at which the sealed proposals would be received for entering into the contract, the proposal not being for a sum certain; and the proposal was not definite nor certain. That there  
10 was more than one proposition of Brown's.

And the court refused to nonsuit the plaintiff, to which decision of the court the counsel for the defendants excepted and prayed that this exception might be sealed, and it is sealed accordingly.

[ L. S. ]

#### THIRD EXCEPTION.

The counsel for the defendant thereupon opened the cause and called—

*Theodore Hutchings*, as a witness, who being duly sworn  
20 for the defendants testified as follows: I reside in Boston; am engineer of steam fire engine; machinist by trade; did work for Chelsea Works from 1846 to 1859; I turned some joints to go across Chelsea river; I was in employ of South Boston Iron Company; I turned those joints in 1850 and 1851; the joints I turned were similar to this of Brown's in principle, though proportions are not the same; tongue, and groove, and collar; collar was shorter; I left the joint apart.

I saw the joint turned in the shop; I can see no difference between Brown's joint and ours; I understood there was to  
30 be a collar on our joint; the flexible joint could not be made without a collar; I have known that such a joint could be made ever since I was in a machine shop; if I had undertaken to describe a joint, a flexible joint, I should have described it exactly like the one of Brown's; I saw the curved joints before they were put down; they were cast by the company I work for; one end of the quarter turn was larger than the other; the one was smaller so that the collar

might be put on so as to slip on collar, also to save friction of water.

Straight pipe was twenty inches in the clear and the large end was larger, but cannot tell exactly how much.

*Albert Stannord*, sworn: I am superintendent of Eastern Division of Boston Water Works; been superintendent for upwards of twelve years, and been connected with the works for upwards of fourteen years.

The drawings produced to me (*pro ut* the same) come from our works, and represent the flexible pipe put down in 10 Chelsea creek; between 400 and 500 feet of flexible pipe laid there; drawings have been there since 1849 or 1850; drawings have been where any respectable person could get access to them on inquiring; I know of the putting down of such pipe in Chelsea river in 1850.

Mr. Samuel Hughes devised the plan; he had the general charge of it; it took something over two months to put down the pipe and joints; much more to have them made and cast.

The Brown joint and the joint in Boston are one and the 20 same thing; inner diameter of ours is twenty inches; ends of swivel same size and enlarged gradually to swivel joint; the inner diameter was twenty-six inches at the swivel joint.

And being cross-examined says: The collar fits up to end of pipe; the tongue with the packing is longer than the groove; the pipe has stood since 1851; no trouble with the pipe across the creek; we get supply over there and do not apprehend any trouble; the enlargements are intended to give supply and a calculation was made for them.

I know by seeing how work was put down; it was done 30 by Wadley; it was lowered down in sections; water is twenty-four feet deep, and tide runs there; do not recollect cost of lowering it; pipe has not leaked; have tried experiments with to see if it leaked; head 123 feet, at bottom of creek 147 feet; pipe  $1\frac{1}{4}$  inches thick.

*William H. Talcott*, sworn: Reside at Jersey City; am engineer; been such thirty-three years; I met with Water Commissioners and Mr. Brown in latter part of winter or

spring of 1862; I recollect his showing model; he claimed it was his plan; don't recollect (plan of) caveat or patent; previous to that meeting I had conversation with Brown at Morris Canal Office; he called to explain the plan to me as I understood at request of Mr. Pray.

The Commissioners advised with me as a citizen; I had previously heard about this pipe, and am not able to say that I had seen him before I saw him at the Morris Canal Office; Mr. Brown said his plan was different from the Boston joint, and attempted to show me the difference; he afterward brought me a model; he said it differed from the Boston joint inasmuch as it had a tongue and groove, and the Boston joint had not.

The examination of Mr. Talcott was here suspended in order that Mr. Romar might be sworn, who was desirous of leaving.

*John B. Romar* being duly sworn on his oath, saith: I was a Water Commissioner when Brown made his proposal; Mr. Wortendyke and myself visited the city of New York to see Mr. Brown after he had made his first proposal; he told us he had thought the matter over, and had seen Judge Marsh; that he had concluded to reconsider his former proposal, and would lower his proposal to \$75,000; that he did not care so much about profits, as he cared about the introduction of his plan; that he was anxious to introduce his pipe, and hoped to make up in the future what he might lose in the contract; he did not say whether he would make money by it or not; I understood him that it would afford a very small profit if any.

The object of the resolution (I mean the passage of it) was to commit the outgoing members in favor of crossing the Hackensack river with a submerged pipe, and for that purpose to put ourselves on record.

*Question.*—What was the intention of the Board in requiring the contract to be submitted to the Board before it was executed?

The question objected to by the counsel of the plaintiff, and the objection sustained by the Court; to which decision.



of the Court the counsel of the defendants except, and pray that this their exceptions may be sealed, and it is sealed accordingly.

[ L. s. ]

FOURTH EXCEPTION.

Did the Board intend to make any contract with Brown or leave that to the new Board ?

The contract must necessarily be made by the new Board ; it was spoken of at the time that the old Board had no time to make a contract. 10

And being cross-examined the witness says :

There was a difference of opinion among the members of the Board about Brown's contract ; the resolution decided that it should be referred to the new Board.

And being re-examined says : My understanding was that the city was not to be bound by the resolution, but it was to be referred to the new Board.

Did you vote with any intention of binding the city to any contract ?

To which question the counsel for the plaintiff objected ; 20 and the Court sustained the objection. Whereupon the counsel for the defendant except, and pray that this the exception be sealed, and it is sealed accordingly.

[ L. s. ]

FIFTH EXCEPTION.

I think Brown said the pipe could not be laid on that plan without his consent ; something was said about a patent for it, that he had it or was going to get it ; it was the understanding of the Board that unless they agreed with Brown, that they could not have that plan. 30

*William H. Talcott*, recalled : I have at the request of the Water Commissioners, examined the question of the capacity of Brown's pipe to deliver water ; I examined all the old and recent authorities ; I examined other books published to 1861, and some in 1862 ; it cannot by any possibility deliver anything like a straight thirty-six inch pipe, and more

than a stone can fall upwards; I do believe the difference would be not less than twenty per cent.

There are two kinds of plans by which the water could be introduced under the river—the ball and socket joint, and the spherical joint.

And being cross-examined, says: The reason Brown's pipe will not deliver the water a thirty-six-inch main would, is because the water is obstructed in its flow, is obstructed by any enlargement or diminution. When the water passing through  
 10 a straight pipe comes to the enlargement the current is slower; the water is deflected sideways, and that uses up a part of your power, and it moves slower until it meets the contraction; when it is deflected inward eddies are produced, and another part of the head is used up; as it goes again into the small pipe it goes slower, and to give it equal velocity through each requires greater power and consequent loss of head; that is the law when water is flowing under high pressure; in these, Jersey City Works, the momentum given to the water at river is the pressure of 125 feet less  
 20 friction; the greater the pressure the more the eddy, and the more the eddy, the greater the reduction of the velocity of the water; water moves in an unbroken column in a large pipe less friction; it takes head to start water as well as head to make it go faster; the curves make the loss of head; the velocity due at Hackensack river is 2 2-3 feet per second in a thirty-six inch pipe; the velocity due at reservoir at Belleville would be eighty-six feet per second; the rest is used up in friction from Belleville to Hackensack; I am not able to say how much Brown's pipe would retard the velocity, but I  
 30 know from my own experience the retardation would be large. Venturi says five enlargements will retard thirty-eight per cent; this was a straight pipe; the small part was 8-10 of an inch in diameter, the large part 2 13-100 inches. The velocity of the flow in the small part is 5 79-100 of a foot in a second, and in the the large part 82-100 of a foot; I have examined those experiments and they have weight with me in my conclusions.

Curves do not retard so much as enlargements; I devoted

from the 27th of May to the 7th of June to the examination of this subject.

Brown's pipe could not deliver as much as a thirty-six inch straight pipe would by twenty per cent. ; it is practicable to lay down a straight pipe with large curves at each end, and the difference between that and a straight pipe would be imperceptible. The ball and socket joint will turn in any direction ; Brown's is a spherical joint ; 'tis a flexible joint, but not a flexible pipe ; the difference of level between the Belleville reservoir and the submerged pipe is 160 feet ; the 10 effective head is the difference of the level of the two reservoirs, which is about thirty feet ; the effective of loss of head is a loss of velocity in the whole column.

*Delos E. Culver*, being duly sworn, says :—I was a Commissioner in 1852 and in fall of 1861, and am still, and am an engineer ; I recollect the plan of Mr. Brown.

I understood Mr. Brown to say that it was his own invention ; Mr. Brown said that in case the Board did not accept his plan they could not lay the pipe ; he further said that he had applied for, or had gotten, a caveat for a patent ; I 20 know that he discouraged the idea of our undertaking to lay the pipe ourselves under his plan, and I inferred that unless he laid it we could not lay it ; this was said before Pray, Edge and myself at the Committee meeting.

*Question* : Would the Board have negotiated with Mr. Brown if they had known it was not an original plan but was like the Boston plan, or that they were at liberty to use the plan ?

To which question the counsel for plaintiff objected ; and the court sustained the objection. To which ruling of the 30 court the counsel for the defendant except, and pray that this their exception be sealed, and it is sealed accordingly.

[ L. S. ]

#### SIXTH EXCEPTION.

And being cross-examined, says :—I was one of the Committee who went to Boston ; Edge, Pray, Wortendyke, Bacot and I went ; it was one of our objects to see how the water went under the Chelsea River ; I don't think we enquired



enough to learn how the joint was made; we did not see the man who could show us what the joint was; I don't think I saw the Boston drawing now produced; the clerk told us he could not find the drawing he was looking for; we had a great many offers, some quite as feasible as Brown's, and for a great deal less money; one plan was as low as \$15,680.

10 *John D. Ward*, being duly sworn, says, I am a mechanical engineer; I was associated with the Croton Water Board three years; to some extent I have informed myself as to the laws of the flow of water; the enlargements at the joints of Brown's pipe retards the flow of water; I have examined Mr. Brown's plan; his pipes could not produce a flow of water of the capacity of a thirty-six inch main; I saw the tongue and groove three or four, may be five years ago; I know of a joint constructed on a principle similar to Brown's; the mere matter of making it tight is not a matter of any importance; that is a matter of detail; in 1840 or 1841 the plan of the tongue and groove was presented by Peter Cooper,  
20 for the purpose of crossing the Harlem river.

The present syphon across the Hackensack is twenty-four inches, and the present pipe twenty inches; from the axis of the pipe on the bridge to the axis of the syphon on the bottom of the river is twenty-four feet; if the syphon was up, the flow would be the same; the syphon retards the flow in the twenty inch pipe; it does not pass over the river as much water as if the pipe was straight across the river; if the contract to lay the twenty inch pipe had been to pass as much water over the river as a twenty inch straight pipe, the syphon  
30 would not have been a performance of the contract.

*Orestes Cleveland*, I am a water commissioner, and have been since May, 1862; Mr. Brown had proposed his plan before I came in; when I came in at the first meeting the contract was presented; I made some experiments as to this pipe, because I did not understand the subject; it struck me that we could not get the water through this pipe of Brown's that we could through a straight pipe, and I made the experiments.

I took a tub thirty inches deep, five feet two and three-eighths inches in diameter; at the point at which the water stood at rest I drove a nail, and a nail thirteen inches below it; the water in the tub was twenty-four inches deep; I inserted a straight pipe near the bottom of the tub three feet long and one and a half inches in diameter, opened the pipe, and took my watch and ascertained that it took three minutes and twenty-eight seconds for the water to flow out; I then took a pipe with a curve in it—the curved pipe was one and a half inches in the straight part, and one and twenty-two twenty-fourths inches where Brown's was forty-six inches; I then removed the straight pipe and inserted this; the same quantity of water ran through it in five minutes and fourteen seconds; I then took a pipe of the same dimensions, with two joints, and the same quantity of water ran through it in six minutes and eleven seconds.

At the meeting where some of the citizens were present with the commissioners, it was said by some one, I can't say by whom, but Brown was present, that this plan was his (Brown's) exclusively, and we could not use it except by employing him.

And being cross-examined says, this meeting was at Mr. Wortendyke's office, and there were about fifteen to twenty persons present.

*Ephraim Marsh*, being sworn, says, I saw Brown in Jersey city in April, 1862, at the Morris Canal office; Mr. Talcott was there; I saw him twice; Talcott asked him if his plan was similar to the Boston plan? he said no, it was not like it; it was not taken from the Boston joint, but was his own getting up, and took a pencil and paper to show how it differed from the Boston joint; there was no enlargement shown on his drawing; and when he was asked whether the bend of the joint would not obstruct the flow of water? he said that was provided for by an enlargement of from four to six inches; he further said he was not familiar with drawing; he said his plan would certainly accomplish the object, and that it was his original invention.

He said about the same thing at the meeting of citizens at Mr. Wortendyke's office.

*William H. Wood*, being sworn, says, I am a civil engineer; I have made experiments as to the flow of water; I had a head of water of ten or twelve feet; I took a tube  $35\frac{1}{2}$  inches long, with a bore of about 3-16ths of an inch, and inserted the pipe so as to cause the water to flow vertically; the water rose  $13\frac{1}{4}$  inches above the top of the pipe, in solid column, without breaking; I tried it with a pipe of the same length as above, but with eight enlargements of double the diameter of the straight part of the pipe; with  
 10 the same head of water it rose  $9\frac{1}{2}$  inches above the top; I tried it with a pipe of same dimensions, but with eight enlargements and sixteen angles; the water rose  $5\frac{1}{4}$  inches above the top; the loss in height of column was 60 per cent.; the straight pipe raised the water  $2\frac{1}{2}$  times more than the one with sixteen angles.

Brown's pipe will not deliver the water of a thirty-six inch main; it is not equal capacity to a thirty-six inch main.

And being cross-examined, he says, I have never made other special experiments with reference to this point; the  
 20 object I had was to obtain the effect of angles.

*Ephraim Pray*, sworn. I am now, and was in 1861 and 1862 a Water Commissioner; Mr. Brown responded to the advertisement the Commissioners put in the paper, and presented a plan and a model of a joint he proposed to use in connecting the pipe; Mr. Brown brought the written proposal in person, and had this plan of the river (*pro ut* the same) and this model (*pro ut* the same) and this plan of the joint (*pro ut* the same); the full Board was in session at their office at the City Hall; he came in and stated that in  
 30 response to the advertisement, he had made an examination of the locality, and had made a plan (*pro ut* the same) and estimate for it, and asked the Board to give him to understand that in case his plan was not adopted, it would be returned to him, he claiming it as his personal property, saying he did not want the Board to take his plan and adopt it, and advertise it for estimates.

We satisfied him that it was not our intention to take his private property and advertise for proposals for it.

Then he submitted his plan to the Board; the Board did



not know what his plan was before that ; Mr. Brown claimed the plan as his private property when he presented it ; I received information that there was a patent for the plan ; I drew the report returning the plans.

*Mr. Stannord* being recalled, says. I don't know how much water the Chelsea pipe will deliver, or whether it will deliver as much as a twenty inch pipe ; the head at Chelsea is 123 feet, and at the bottom 147 feet ; there is a difference of 16 feet between the level of reservoirs at Brookline ; the population of East Boston is about fifteen thousand ; the head from which the water is distributed at East Boston is 10 about 80 feet ; the main reliance of East Boston is a pipe which does not go into the reservoir ; it is 80 feet below Brookline reservoir ; this is a twelve inch pipe.

All we get in East Boston is surplus water ; there are times when we can't get it up ; we want water most in winter on account of waste.

The defendants offer the printed form of contract prepared by Mr. Brown (*pro ut* the same).

*Garret S. Boice*, being recalled, testified : I sent the notice of the passage of the resolution of April 29th, 1862, on 20 April 30th, at half-past three, P. M. to Brown by mail.

During the summing up for the plaintiff, Mr. Scudder, of counsel for plaintiff, reads from the book of minutes of the defendants, the following entry :

The following communications were received and disposed of :—

From A. S. Whiting, submitting proposal to furnish and lay main pipe across the bottom of the Hackensack river.

Commissioner Pray offered the following resolution in re 30 lation thereto, which was adopted :

Resolved, That the communication be received and laid upon the table, and the Registrar be directed to notify Mr. A. S. Whiting that the Board had adopted a plan for laying said pipe and contract had been ordered prepared."

To which reading the counsel for the defendants object, on the grounds that the passage had not before been alluded to or offered ; nor had the minutes been offered in evidence, and pray the Court to overrule said entry, which the Court

refuse to do, and to such ruling of the Court the counsel for the defendants except and pray that this their exception may be sealed, and it is sealed accordingly.

[L. s.]

#### SEVENTH EXCEPTION.

The summing up having been concluded, thereupon the counsel for the defendants prayed the Court to charge the jury that the damages of the plaintiff could only be such as were in contemplation of the parties at the time of the contract, and if they believed the witnesses who had certified  
 10 to the plaintiff's conversation in which he stated he expected to make but little if any profit out of the contract, their verdict for damages must be small.

And also requested the Court to charge the jury that the damages on the contract to execute a contract could not be the profits that would have been made by performing the contract which it was agreed should be executed.

Thereupon the Court charged the jury as follows :

#### *Gentlemen of the Jury :*

20 By giving a brief historical statement of the legislation which has taken place on the subject of introducing pure and wholesome water into Jersey City and the adjacent neighborhoods, and by construing that legislation by its language and the established rules for giving effect to the acts of corporations, I think that I can clear away some of the mist and confusion which has gathered around the subject matter of this suit, and prepare your minds for examining the points really in issue, and applying the law and the testimony directly to them.

30 As early as the year 1850, the subject of procuring a competent supply of water for the townships lying east of and below Bergen Hill, occupied the public mind. The proximity of those locations to the city of New York made them desirable places of residence, and as that city had already availed itself of the Croton river for furnishing pure water to its inhabitants, it may be supposed that obtaining a similar luxury on this side of the North river would commend

Jersey City and its environs to the favorable attention of capitalists and others inclining to invest beyond the limits of the great metropolis, and would promote the comfort and health of those inhabiting these localities at that time.

The design was a comprehensive one, inasmuch as a source for the supply had to be sought from the Passaic river, above the effects of the sea, and the costs of introducing the water at the desired points would be large.

Application was made to the Legislature for aid, and on the 18th of March, 1851, an act was approved which appointed Mr. Stevens, Mr. Coles, Mr. Gregory, Mr. Van Boskirk and Mr. Ward, a board to be known as "The Water Commissioners" for Hoboken, Van Vorst and Jersey City.

It was made their duty to examine and consider all matters relative to supplying those places with pure and wholesome water, and the amount of money necessary to effect that object, and they were clothed with power to employ engineers and surveyors in the fulfilment of their duties.

Those Commissioners were required to make a report of their proceedings showing their plan, estimate and expense, 20 reasons and calculations, and conveying all information they might deem important connected with the object of their appointment.

A copy of the report was required to be furnished to each of the three townships, and one also to be presented to the Legislature.

It appears by the preamble of an act continuing the same subject, passed by the Legislature on the 25th of March, 1852, that the said Commissioners had then performed their duties. They therefore became dead by exhausting their 30 powers, and are no part of the present body known as "The Water Commissioners of Jersey City."

After the report of those Commissioners was made, the inhabitants of Jersey City, through their Mayor and Common Council, applied to the Legislature and obtained authority to take such portion of the waters of the Passaic river as might be required to furnish a sufficient quantity of water for the domestic and other purposes of the city.

It was not done by a supplement to the act to incorporate Jersey City, but by a separate "Act to authorize the con- 40



struction of works for supplying Jersey City and places adjacent with pure and wholesome water."

The authority thus granted to the inhabitants of Jersey City, was directed in the act to be exercised exclusively by and through a board constituted of four persons named by the Legislature, and one to be elected by the people at the next charter election after the passing of the act. The mode of continuing a succession in the board was also provided for in the act, and the body was called Commissioners.

- 10 Those Commissioners were authorized to make necessary surveys, to take and hold, for and in the name of "The Mayor and Common Council of Jersey City, lands and real estate necessary for the purposes of the enterprise, and in general to do any other thing necessary and convenient for accomplishing the purposes contemplated by the act.

- They are in terms vested with powers to make contracts for the supplying of materials or the performance of work or labor, because the 9th section of the act requires that every person who shall enter into any such contract with  
20 them shall give satisfactory security to them for the faithful performance of his contract.

The 10th section exempts from execution materials procured under contracts with the Commissioners and makes it their duty to pay the money due over to the judgment creditors.

- A majority of the Commissioners is made a quorum for the transaction of any business, allowed or required by the powers or duties of their commission; and their contracts and acts done within the scope of their authority are con-  
30 sidered as done by the Mayor and Common Council of Jersey City.

They also are empowered to prosecute or defend any action by the name of *The Water Commissioners of Jersey City*, for the breach of any contract express or implied touching the execution or management of the works, or any promise or contract made to or with them.

It is provided that a vacancy or change in the Board of Commissioners, shall not change their right as a body to commence or maintain an action; but in all such cases they

shall be considered from the time of the organization of the Board as a corporation.

What is a corporation?

It is a body created by law composed of individuals united under a common name, the members of which succeed each other, so that the body continues the name, notwithstanding the change of the individuals who compose it, and is for certain purposes considered as a natural person.

"The great object of an incorporation is to bestow the character and properties of individuality on a collective or 10 changing body of men!"

A common union of individuals by articles of association or by delegation as committee men through a resolution of a corporate body is deficient in the coercive authority required for making their acts obligatory. When the members who compose such an union are disposed of by death or otherwise, it has not the power to transfer their privileges to other persons.

The main object in creating a corporation is to gain the union, constitution, and assistance of several persons for the 20 successful promotion of some design of general utility.

When a corporation is created in this state, it becomes vested by the provisions of the general act concerning corporations with certain enumerated powers, although they may not be specified in the special act by which it is incorporated. It shall have succession by its corporate name. It can sue or be sued in any court of law or equity. It can make and use a common seal. It can hold any property which the purposes of the corporation shall require. It may 30 appoint such officers and agents as the business shall render necessary, and allow them suitable compensation. And it shall possess and exercise any corporate powers which may be necessary for the execution of the powers with which it is clothed.

These are the ordinary and usual powers of corporations, all or any of which they may exercise, unless restrained by the special provisions of the acts incorporating them.

The Legislature can limit the powers by express restrictions; but where the act of creation contains no such limi-

tations, the body may exercise all the functions incident to a legal corporation.

In the present instance the Legislature, with the concurrence of those who were advocating the measure, deemed it expedient to unite together a body of five persons, for the special purpose of combining their skill and personal enterprise in accomplishing the great design which the people of Jersey City had in view. They were at the same time perfecting and passing into a law a supplement to the act to incorporate Jersey City, which act makes the mayoralty an annual office, and the members of the Common Council biennial officers, divided into classes elective at the charter election. If the Legislature had intended to place the large powers and responsibilities which were incident to the introduction and continuance of water for domestic consumption and of imposing the consequent taxes and assessments for the use of it, within the control of the Mayor and Common Council, in which body was vested by the original charter the *legislative power* of the Corporation of Jersey City, they could very easily have incorporated both matters in one bill. They seem to have acted upon a more certain and conservative policy by devolving the new trust upon a distinct body of men, and while the municipality of Jersey City and the estates of the property holders were made liable for the payment of principal and interest of the debt that would be incurred in defraying the expenses of constructing the contemplated works, the power and duty of locating and erecting the works, and of incurring the debt, were lodged in a separate association more permanent in its character, and further removed from the influences of municipal legislation. It is clear to my mind that the first Board of Commissioners under the act of 1852, to wit: Mr. Gregory, Mr. Ward, Mr Bramhall, the president of the Board of Alderman at that time, and the person elected for the purpose at the next charter election after the 25th of March, 1852, became a body corporate in law, that they were vested with the incidents of a corporation necessary for fulfilling the purposes of their creation, and will be continued through a succession as provided for in the act, until dissolved by future legislative action. The same view of the nature and character of the



Board has heretofore been expressed by the Supreme Court in 1859.

Such then being the nature and character of their construction, the Board meet from time to time for the transaction of business allowed or required by the powers or duties of their trust, without regard to the Mayor and Common Council, and their acts are made valid and effectual, and communicated to their constituents in the same manner that the doings of other corporations are made effective, namely, by votes of the component members recorded in their book of 10 minutes. The enactment, in declaring what shall be a quorum, contemplated that the business of the Board would be transacted in the manner it is done in boards of directors in private corporations. It has been recognized and also adopted as the law in this State, that "the acts of such body or board evidenced by a written vote, are as completely binding on the corporation, and as complete authority to their agents as the most solemn acts done under the "corporate seal," I therefore must differ on this point from the views expressed by the counsel for the defendants, and do 20 instruct you that the recorded votes of the Board of Commissioners are binding, and that a majority of the five component members of the Board need not put their individual names to the evidence of their acts as a Board; that is to say, they need not sign a paper each time they determine upon an act within the scope of their authority, but, deliberating under the organization of a President and Secretary, the record of their votes is an authoritative publication of their acts in law, and is binding without the expression of their individual assent, by the manual act of signing the 30 proceedings.

The primary legal questions being thus settled by the Court for the purposes of this trial, you can approach without embarrassment or legal doubt, an examination of the intercourse and negotiations shown by the testimony to have taken place between Mr. Brown and the Board of Commissioners. It is a matter of history that the Commissioners entered at once upon their duties, and that they have constructed works which convey the waters of the Passaic

from above Belleville to a reservoir on the top of Bergen Hill, whence it is distributed to the various consumers.

- Finding that the present arrangements are insufficient for a permanent and secure supply, they determined to lay a new and enlarged main pipe, and to have it submerged under the Hackensack River. For the better accomplishment of the proposed improvement, on or about the 5th of November, 1861, over nine years after their organization, they passed a resolution which is recorded in their minutes, directing their superintendent and engineer to advertise for sealed proposals for laying the new pipe on the bottom of the Hackensack river, and on the 11th of November an advertisement appeared in several newspapers, dated at the office of the Water Commissioners, and signed by Mr. Bacot, their superintendent and engineer, calling for sealed proposals until the 16th of December at twelve o'clock, for furnishing and laying about 1000 feet of cast iron water pipe, *equal in capacity* to a thirty-six inch main across the Hackensack river, and on the bottom of the same. The work to
- 10  
20 be done during the summer of 1862.

This advertisement met the eye of John L. Brown, a person accustomed to undertake large enterprises by contract work. He directed his mind to the subject, and on the 16th of December he sent in his written proposal to the Water Commissioners in answer to their advertisement, proffering to find all the materials and to do all the work for \$85,000. At the close of the proposal he told the Commissioners, that if his plan and proposal are not accepted, he should expect them to be returned to him.

- 30 Several other plans and proposals were submitted by other bidders, and on the same day all the proposals were referred to a special committee of three. The subject remained in their hands until the seventh of the following April—nearly four months, they and other members of the Board, and several scientific gentlemen in Jersey City, having in the meantime had explanatory meetings with Mr. Brown on the principles and merits of his plan for doing the work. The next matter in order of time which has been brought into the case, is the amendment of the act of the
- 40 Commissioners by the Legislature, in which among other

things is a provision declaring that it should be sufficient for them to give public notices referred to in the 8th Section, in two, instead of all the newspapers in the County. That supplement was passed and approved on the 17th of March, 1862, while the committee still held the plans in their hands.

On the 7th of April the committee reported that they had given the several plans a thorough and impartial investigation *on their merits*—that they admired some of the plans much, especially that of Mr. Brown, still they recommended 10 that the plans and estimates be returned to the several owners, the committee not deeming it to the interest of the city to contract for said work under the present advertisement. This action was communicated to Mr. Brown, and he came over to the office for his papers. He however did not take them away. An oral negotiation was continued with him. His price was considered too high.

Mr. Bacot has testified that he understood the objection of the Commissioners to Brown's proposal was that his plan would cost too much. He was asked to review his estimates, 20 and it was suggested to him that if the price could be reduced to \$75,000 his proposal would be advocated.

He did re-examine the subject, and on the 25th of April he sent another written proposal which reduced his offer to \$75,000.

That communication came before the Board on the 29th of April, and it was thereupon resolved by a vote of three affirmative to one negative that the Board accept the proposal for the sum of \$75,000, in accordance with the plan previously submitted by Mr. Brown; and that the Engineer and 30 attorney (both being agents of the Board) be directed to prepare a contract for the work, and to submit it for approval before being executed—the contract to contain full and ample guarantee that the work would be *securely* and *sufficiently* done, and cover a test of at least five years. A copy of that resolution was sent to Mr. Brown the following day, accompanied with a request that he would come over on the Monday following.

The next meeting of the Board was held on the 5th of May.



Mr. Romar and Mr. Edge in the meantime had gone out, and Messrs. Cleveland and George McLaughlin had come in.

Mr. Culver was present at that meeting, and was elected President *pro tem*.

When the resolution of acceptance of Brown's proposal was passed at the previous meeting on the 29th of April, Mr. Culver gave notice to the Board that at the next meeting he would move a reconsideration of that vote. The minutes of the next meeting do not show that a reconsideration  
 10 was asked for, although Mr. Culver presided at the meeting; but it does appear in those minutes that after the rules of order of the former Board were adopted, a proposal from Mr. Whiton (I think) for laying the pipe in the river was taken up, and on motion that it was resolved that the same should be returned to him and he be informed that the Board had already accepted a proposition for that work and had directed a contract to be drawn up.

Here, gentlemen, is found an answer to the suggestion that the vote of the 29th of April was not to be conclusive  
 20 until after the action of the new Board, inasmuch as the new Board, by the vote on Whiton's proposal, signified their acquiescence in the action of the former members of the Board.

On the following day, Mr. Bacot wrote to Mr. Brown to come over and consummate the arrangements. He wrote again on the 9th of May. On the 12th of May Mr. Brown furnished in writing to Mr. Bacot the names of A. I. Fitch and Mr. Waterbury as his sureties. No notice was given to Mr. Brown of their insufficiency. The contract was prepared by the Engineer and Attorney, with those names in the  
 30 bond, and on the 19th of May, it was presented to the Board, and on motion laid on the table.

At the next regular meeting, no action was taken on the subject.

On the 2d of June, Mr. Cleveland offered the following resolution, which was adopted—himself and Commissioners Culver and McLaughlin voting for it, and the President, Mr. Wortendyke and Mr. Pray voting against it:

*Resolved*—That this Board decline the bid of J. L. Brown, to lay a pipe upon the bottom of the Hackensack River;

and that the resolution passed by this Board, April 29th, 1862, accepting said bid, be rescinded.

This is a singular resolution, gentlemen. That Board then had no bid of Brown's before them. Brown had made a written proposal to the old Board, which had been accepted by them by resolution, as Mr. Cleveland's resolution in words admit.

Its character had been changed before the 2d of June, from an open bid to an *express contract*; for I take it to be a well settled rule of law, that when an offer of purchase or sale, or to do work for a consideration, is made by the one party and accepted by the other, before notice of withdrawal, it becomes a contract and is no longer a bid or offer.

It has been insisted that the acceptance of the 29th of April was coupled with a new feature—the requirement of security; but this objection was removed by the proof that on the 12th of May Mr. Brown agreed to the new term, by sending in to Mr. Bacot the names of Mr. Fitch and Mr. Waterbury as his guarantors, which names were inserted in the contract.

20-

On the 21st of June Mr. Brown went with his proposed sureties to the office of the Commissioners and they tendered themselves ready to execute the papers as agreed upon. The President of the Commissioners replied that he was not authorized to consummate the contract, giving no special reasons for his refusal. At that point the negotiations ceased, and the controversy and litigation began. Mr. Brown shortly afterwards commenced this action in the Supreme Court against the Board of Water Commissioners for damages sustained by him, because he was not permitted to furnish the necessary materials and execute the work in conformity with the plan and price which had been submitted to and accepted by them, and it is for you to determine by your verdict whether he is entitled in equity and good conscience, and by the law of the land as declared by the Court, to any remuneration, and if he is, to what amount.

The statement in writing of his cause of action, called the declaration, sets out that the defendants in consideration that the plaintiff had, by a proposal in writing made by him, offered and agreed with them to lay down a submerged pipe

40

across the Hackensack river, on the bottom thereof, and provide the materials for the same in accordance with a plan that had been by him devised and submitted to them, for the sum of \$75,000, undertook and agreed and promised that they would accept his offer and proposals, and employ him at that price to lay down the pipe and provide the materials, and farther, that they would enter into a written contract with him for the same, and gave him notice in writing that they had accepted his proposal and would enter into  
 10 such contract; that he confided in such acceptance and prepared himself, and got ready to execute the work and lay the pipe.

It also avers that Brown has been ready at all times to construct, furnish and lay down the pipe, and to execute a written contract for the same, with sufficient sureties for his performance, and that on the      of June, and at other times between the 29th of April and the commencement of the suit he offered them to sign a written contract, and to execute  
 20 a written guarantee, with ample sureties, that the work should be done, and requested the defendants to enter into and execute the contract; but that the defendants disregarding their acceptance of his proposal, and their promise, would not employ him to lay the pipe, and would not enter into the contract or accept from him a contract, with proper sureties, but refused so to do.

It then states among other damages sustained by him, that he has lost the profits and emoluments which would have been made by him from the performance of the job.

The defendants by their plea deny the correctness of the  
 30 demand made upon them by the plaintiff.

Has the plaintiff established by proof the material allegations in his declaration?

There can be no doubt of that, gentlemen, if you believe the witnesses who have been sworn, and the genuineness of the papers which have been offered in evidence, and the correctness of the minutes of the official proceedings of the defendants as registered in their public records.

Their order in November for publication for proposals—the publication itself—the written proposal of the plaintiff  
 40 —its reference to a special committee, the report of that



committee recommending that it should be returned to him—his notice from the Registrar to that effect, the subsequent interviews between the plaintiff and the members of the Board upon *that* subject matter—the retaining of the plans by the Board during the whole time—his second written proposal for a less price—their entertaining that proposal, and the resolution accepting it and directing their engineer and their attorney to prepare a proper contract for submission to them before execution, and requiring sufficient security for his faithful performance and five years guarantee 10—the transmission of a copy of that acceptance to the plaintiff by the secretary of the Board—the correspondence between him and Mr. Bacot in consequence of the acceptance, the plaintiff's agreement to give security, and his letter to Mr. Bacot furnishing the names of two gentlemen, whose pecuniary responsibility has not been questioned—the resolution of the new Board upon Whiton's proposal, confirming the action of the old Board in accepting the offer of the plaintiff, the preparation of the contract and bond, and the submission of it to the Board, and the attendance of the 20 plaintiff and his sureties at the office of the Company in June, and their offer to execute the necessary papers, and his demand of the contract, and the refusal of the President of the Board to comply with his requests, are all in testimony before you; and those proofs, if believed by you, are full and sufficient evidence of the cause of action spread out in the declaration of the plaintiff.

I now propose to direct your attention to the defences which have been interposed by the Commissioners, and with you to examine and determine whether they have in whole 30 or in part met and overcome the case made by Mr. Brown.

Great latitude has been given to counsel on both sides in the discussion which closed on Friday evening; and all the learning has been brought to bear which the points raised required for their elucidation.

Two main grounds taken by the defendants have been examined and disposed of in the earlier part of my charge. I already have instructed you that "The Water Commissioners" are a corporation—that they had power to make the contract upon which the plaintiff has sued them—that 40

their acts can be established by the resolutions recorded in their minutes, and that the proposal made by Mr. Brown to them, and their resolution of acceptance, formed a contract binding in law.

It has also been urged in defence that by the requirements of the 8th section of the act authorizing the construction of the water works, there should have been a new advertisement for sealed proposals, and that the acceptance of the second offer of Mr. Brown was made without authority, and  
 10 void. This position is a purely legal question, solvable by applying the rule which determines what parts of statutes are simply directory. When parts of a statute say that certain proceedings shall be done in a certain way or at a certain time, and a strict compliance with those terms is not of the essence of the power of the agents who are to perform the acts, or of the acts required to be done, the clauses are held to be merely directory and may be overlooked. They do not create *conditions precedent* to the making of the contract.

20 I am of opinion that the clause directing the giving of public notice, and that which provides that every bid shall be accompanied with a bond are only directory; and that the proceedings in the matter of the negotiation and agreement to employ Mr. Brown should be held valid, although those directions were disregarded by the Commissioners in April last.

Another defence has been made upon an alleged variance between the contract stated in the pleading and the proof—that Brown has declared for a breach of an agreement to employ him to lay pipes in accordance with a plan that had  
 30 been *devised* by himself, and submitted to the defendants; whereas there is no proof that he invented the joint that he proposed to use in connecting the straight water pipes. The point is a very small one. It rests upon the definition to be given to the word “devised” as used in the present connection. The counsel for the Commissioners say that it must be taken to mean “invented,”—the counsel for Mr. Brown say that he meant by it a new application of principles, or a new arrangement of well known appliances used in the science  
 40 of hydraulics.

Which is right? can you tell?

Who was most likely to know what Brown intended in using that word, the counsel for the Commissioners, or Brown himself? The word is capable of conveying both ideas, and I can see no reason why the definition insisted on by the defence should be adopted rather than the definition claimed by the plaintiff.

The Commissioners in their notice of the 11th of November, did not call for *new inventions*. They advertised for bids to furnish and lay 1,000 feet of pipe on the bottom of 10 the Hackensack river. And they required that bidders should furnish plans (not new inventions) for the construction and laying of the pipe, promising that the plan adopted should be paid for at *such* price as the Board should direct. This certainly offered very little inducement for inventing and submitting an original principle, and the application of it to the science of *hydrodynamics*.

It has been further urged as a defence, that the plan submitted by Mr. Brown was not a feasible one; that if he had laid the pipe in conformity with it, the thing would have 20 been a failure. If that be so, gentlemen, his damages should be but nominal. He proposed to give the Commissioners a work which would answer their purposes, and if you are satisfied by the proofs, which I do not feel competent to examine and test, that he would have failed in the practical adoption of his plan, he could not have realized any clear available profit by furnishing the pipe and doing the proposed work, and hence he has sustained no appreciable damages from losing the job.

But, gentlemen, in judging of the correctness of this part 30 of the defence, you must not lose sight of another matter that has been urged against the right of recovery in this case, namely that Brown's plan is the counterpart of one that was adopted in Boston for carrying a water pipe under Chelsea Creek, which pipe has been in complete successful operation there for over a dozen years, and has answered all the ends which were sought for in its use there.

*Fraud* also has been set up. The defendants insist that the proposal and plan submitted and the negotiations for contracting on the part of Brown were so tainted with fraud, 40



that the whole contract, if one was made, is utterly void. Fraud, intended fraud will vitiate any contract. It is important to look and see how defendants seek to apply that rule of law.

The defendants have urged that Brown knowingly deceived them by creating a belief in their minds that his was an original invention, and not the Boston plan. Brown swears that he did not deceive them therein—that he did not consider it to be the Boston plan. Now will you remember that before Brown's offer was made a committee of the Board had been to Boston and obtained such information about that plan as was accessible. They could have compared the two together, and if it was so essential for the success of their enterprise that the Boston plan should be avoided, they had a sufficient number of scientific men in their counsels to have satisfied themselves before the proposal of Brown was accepted, that his pretensions were false and a tissue of impositions.

If, gentlemen, upon a view of all the facts of the case, and the law which I have explained, you shall determine that the plaintiff is entitled to recover, the only remaining subject of consideration will be the amount of damages that you should award him.

Although the Board on the 2d of June had no power to rescind by resolution, an act done in April before, yet they had the ability to refuse to carry out the engagements of their predecessors.

They did so. Such refusal did not invalidate the resolution passed in April, but the Commissioners divested it of all beneficial use to Mr. Brown, because he could not proceed to execute the work without an executed written contract. By arresting action when and where they did, they subjected the inhabitants of Jersey City, in their corporate capacity, to the payment of such damages as Mr. Brown has sustained from their refusal to go on with the work.

#### MEASURE OF DAMAGES.

Much learning has been elicited on both sides upon the question of the proper measure of damages in such a case.

No decision has been cited from the courts in this State bearing on the precise point. The case of Shaw is not in point, because that was a suit in trespass, and the gist of the action was totally different from the gravamen of this case.

Upon a careful consideration of the point and such examination of the citations as the limited time afforded to me for the purpose has permitted, I feel satisfied that the rule declared by the Supreme Court of New York, in the case of Masterton *vs.* the Mayor and Common Council of the city of Brooklyn, is a safe and legal one. It is in harmony with the 10 principles of the civil law, and commends itself to the good sense of practical men.

That suit was brought to recover damages for a breach of a contract to furnish marble for building the new City Hall in Brooklyn. The contract was made with specific requisitions of quality and bulk and dressing, all to be done at fixed prices. After the contractor had furnished 14,779 feet of marble, for which he was paid the contract price, the city suspended operations on the building for want of funds, and refused to receive any more materials from Masterton. After 20 waiting a reasonable time he sued the city, and on the trial the Circuit Judge gave to the jury his view of the proper measure of damages. The case was reviewed in the Supreme Court, and that tribunal decided that the proper measure of damages would have been the amount which Masterton would have realized as profits had he been allowed fully to execute the contract. That remote and contingent benefits could not be taken into account; but profits to be earned and made by the faithful execution of a fair contract are proper matters of consideration, and a right to 30 recover an equivalent for such by way of damages results directly and indirectly from the act of the party who prevents the contract from being performed.

In applying this rule to the case which is now to be placed in your hands, if you believe that the plaintiff is entitled to recover full damages for the breach of the alleged contract, those damages should be limited to the profits which the plaintiff has shown you he would have made if he had been permitted to furnish the materials and lay the pipe across the Hackensack according to his plan and proposals. I 40

think, gentlemen, that it would be proper to make ample and sufficient allowance and deduction from the bottom line of profits shown by deducting the estimated costs of materials and performance of the work from the gross sum agreed on as compensation, because there are always risks and contingencies in executing such heavy contracts which cannot be anticipated. A fair and reasonable remuneration for the loss which the plaintiff has sustained is all that he should receive in damages, such as could fairly have entered into  
 10 the contemplation of the parties when they negotiated the alleged contract.

And the counsel for the defendants then and there excepted to the charge of the said judge, in that he did not charge the said jury as he was requested, that the damages of the plaintiff could only be such as were in the contemplation of the parties at the time of the contract, and if they believed the witnesses who had testified to the plaintiffs conversation, in which he stated that he expected to make but little if any profit out of the contract, their verdict for dam-  
 20 ages must be small, and prayed that this their exception might be sealed, and it is sealed accordingly.

[L. S.]

## EIGHTH EXCEPTION.

And the counsel for the defendants also excepted to the charge of the said judge in that he did not charge the said jury as he was requested, that the damages on the contract to execute a contract could not be the profits that would have been made by performing the contract which it was agreed should be executed, and prayed that this their exception  
 30 might be sealed, and it is sealed accordingly.

[L. S.]

## NINTH EXCEPTION.

And the counsel for the defendants also excepted to the charge of the said judge in that he charged the said jury that it was clear to his mind that the first Board of Commissioners under the act of 1852, to wit: Mr. Gregory, Mr. Ward, Mr.



Bramhall, the President of the Board of Alderman at that time, and the person elected at the first charter election after the 21st of March, 1852, became a body corporate in law; that they were vested with the incidents of a corporation necessary for the purpose of fulfilling the purposes of their creation, and will be continued through a succession as provided for in the act, until dissolved by future legislative action, and prayed that this their exception might be sealed, and it is sealed accordingly.

[L. s.]

10

## TENTH EXCEPTION.

And the counsel for the defendants also excepted to the charge of the said judge in that he charged the said jury that the acts of such a body or board as the defendants evidenced by a written vote, are as completely binding on the corporation, and as complete authority to their agents as the most solemn acts done under the corporate seal. I therefore must differ from the counsel of the defenants, and do instruct you that the recorded votes of the Commissioners are binding, and pray that this their exception may be sealed, and it is sealed accordingly.

20

[L. s.]

## ELEVENTH EXCEPTION.

And the counsel for the defendants also excepted to the charge of the said judge in that he charged the said jury that it appeared by the minutes of the Board that after the rules of order of the former board were adopted, a proposal from Mr. Whiton for laying the pipe in the river was taken up, and on motion it was resolved that the same should be returned to him, and he be informed that the Board had already accepted a proposition for that work, and had directed a contract to be drawn up, and prayed that this their exception might be sealed, and it is sealed accordingly.

30

[L. s.]

## TWELFTH EXCEPTION.

And the counsel for the defendants also excepted to the said charge in that the said judge charged the said jury that the resolution rescinding the resolution of April 29, 1862, was a singular resolution. *That* board then had no bid of Brown's before them. Brown had made a written proposal to the old board which had been accepted by them by resolution, as Mr. Cleveland's resolution in words admits—its character had been changed before the 2d of June from an open bid to an express contract, and prayed that this their  
 10 exception might be sealed, and it is sealed accordingly.

[L. s.]

## THIRTEENTH EXCEPTION.

And the counsel for the defendants excepted to the said charge of the said judge in that he charged the said jury that it had been insisted that the acceptance on the 29th of April was coupled with a new feature, the requirement of security, but that objection was removed by the proof that  
 20 on the 12th of May Mr. Brown agreed to the new term by sending into Mr. Bacot the names of Mr. Fitch and Mr. Waterbury as his guarantors, which names were inserted in the contract, and prayed that this their exception might be sealed, and it is sealed accordingly.

[L. s.]

## FOURTEENTH EXCEPTION.

And the counsel for the defendants excepted to the said charge of the said judge, in that he charged the said jury that on the 21st of June Mr. Brown went with his proposed  
 30 sureties to the office of the Commissioners, and they tendered themselves ready to execute the papers as agreed upon, and prayed that this their exception might be sealed, and it is sealed accordingly.

[L. s.]

## FIFTEENTH EXCEPTION.

And the counsel for the defendants excepted to the charge

of the said judge, in that he charged the said jury that "Has the plaintiff established, by proof, the material allegations in his declaration? There can be no doubt of that, gentlemen, if you believe the witnesses who have been sworn, and the genuineness of the papers which have been offered in evidence, and the correctness of the minutes of the official proceedings of the defendants as registered in their public records. Their order in November for publication for proposals—the publication itself—the written proposal of the plaintiff—its reference to a special committee, the report of that committee 10 recommending that it should be returned to him—his notice from the Registrar to that effect—the subsequent interviews between the plaintiff and the members of the Board upon that subject-matter—the retaining the plans of the Board during the whole time—his second written proposal for a less price—their entertaining that proposal, and the resolution accepting it and directing their engineer and their attorney to prepare a proper contract for submission to them before execution, and requiring sufficient security for his faithful performance, and five years guarantee—the trans- 20 mission of a copy of that acceptance to the plaintiff by the Secretary of the Board—the correspondence between him and Mr. Bacot in consequence of the acceptance. The plaintiff's agreement to give security, and his letter to Mr. Bacot furnishing the names of two gentlemen whose pecuniary responsibility has not been questioned—the resolution of the new Board upon Whiton's proposal confirming the action of the old Board in accepting the offer of the plaintiff—the preparation of the contract and bond, and the submission of it to the Board, and the attendance of the plain- 30 tiff and his sureties at the office of the company in June, and their offer to execute the necessary papers, and his demand of the contract, and the refusal of the President of the Board to comply with his requests are all in testimony before you, and those proofs, if believed by you, are full and sufficient evidence of the cause of action spread out in the declaration of the plaintiff, and prayed that this their exception might be sealed, and it is sealed accordingly.

[L. s.]



## SIXTEENTH EXCEPTION.

And the counsel for the defendants also excepted to the said charge of the said judge in that he charged the said jury that I have already instructed you that the Water Commissioners are a corporation, that they had power to make the contract on which the plaintiff has sued them, that their acts can be established by the resolutions recorded in their minutes, and that the proposal made by Mr. Brown to them, and their resolution of acceptance, formed a contract binding in law, and prayed that this their acceptance might be sealed, and it is sealed accordingly.

[ L. s. ]

## SEVENTEENTH EXCEPTION.

And the counsel for the defendants excepted to the said charge of the said judge in that he charged the said jury, I am of opinion that the clause directing the giving of public notice, and that which provides that every bid shall be accompanied with a bond, are only directory, and the proceedings in the matter of the negotiation and agreement to employ Mr. Brown should be held valid, although those directions were disregarded by the Commissioners in April last, and prayed that this their exception might be sealed, and it is sealed accordingly.

[ L. s. ]

## EIGHTEENTH EXCEPTION.

And the counsel for the defendants excepted to the said charge of the said judge, in that the said judge charged the said jury that it had been urged as a defence that the plan submitted by Mr. Brown was not a feasible one; that if he had laid the pipe in conformity with it, the thing would have been a failure, that in judging of the correctness of that part of the defence you must not lose sight of another matter set up in defence, that Brown's plan is the counterpart of one that was adopted in Boston for carrying a water pipe under Chelsea creek, which pipe has been in complete and successful operation there for over a dozen years and has an-

swered all the ends that were sought for in its use there; and prayed that this their exception might be sealed and it is sealed accordingly.

[L. s.]

NINETEENTH EXCEPTION.

And the counsel for the defendants excepted to the said charge of the said judge, in that he charged the said jury on the measure of damages in this action, that I feel satisfied 10 that the rule declared by the Supreme Court of New York in the case of Masterton against the city of Brooklyn, is a safe and legal one; and that tribunal declared that the proper measure of damages would have been the amount which Masterton would have realized as profits had he been allowed fully to execute the contract,—that remote and contingent benefits could not be taken into account, but profits to be made and earned by the faithful execution of a fair contract are proper matters of consideration, and a right to recover an equivalent for such by way of damages results directly 20 and immediately from the act of the party who prevents the act from being performed. In applying this rule to this case, if you believe the plaintiff entitled to recover full damages for the breach of the alleged contract, those damages should be limited to the profits which the plaintiffs would have shewn you he would have made if he had been permitted to furnish the materials and lay the pipe across the Hackensack according to his plan and proposal, and prayed that this their exception might be sealed, and it is sealed accordingly.

[L. s.] 30

TWENTIETH EXCEPTION.

And the court on the said evidence and charge left the said case to the said jury, who found a verdict for the plaintiff for the sum of eight thousand dollars damages and costs, and in as much as the said several matters so produced and given in evidence, and the said proceedings in the said cause and the said exceptions do not appear by the record of the verdict aforesaid, the said counsel for the said defend-

ants did request the said judge to put his seal to the said bills of exception and thereupon the said judge seals the same accordingly, this twenty-third day of January, eighteen hundred and sixty-three.

[L. s.]



## NEW JERSEY SUPREME COURT.

JOHN L. BROWN,

v.

*In Case.*

THE WATER COMMISSIONERS of Jersey City.

It is agreed that the above mentioned cause, removed by the above named defendant to the Court of Errors and Appeals, shall be heard upon the exceptions stated in the foregoing, the same being agreed upon as the exceptions taken, though not sealed at the time, and the subsequent death of Mr. Justice Ogden preventing an actual signing and sealing of the said bills, this agreement being made pursuant to statute.

*Signed A O Zabriskie & Son*  
*Arch K Brown*

## NEW JERSEY COURT OF ERRORS AND APPEALS.

THE WATER COMMISSIONERS of Jersey City,

v.

*In Error.*

JOHN L. BROWN.

It is agreed that a rule may be entered as of the last term of said court, substituting Archibald K. Brown as attorney for the plaintiffs in Error.

November 15, 1865.

*Signed* A. O. ZABRISKIE & SON,  
 Attorneys of Defendants in Error.

" *R. S. McClelland*  
 " *Arch. K. Brown.* *Sate atty of*  
*City of Plffs in Error*

# NEW JERSEY COURT OF ERRORS AND APPEALS.

|                                         |                    |
|-----------------------------------------|--------------------|
| THE WATER COMMISSIONERS of Jersey City, | } <i>In Error.</i> |
| <i>v.</i>                               |                    |
| JOHN L. BROWN,                          |                    |

} *Assignment of errors.*

Afterwards, to wit, on the 21st day of November, in the year eighteen hundred and sixty-five, before the said court, at Trenton, come the said plaintiff, by Archibald K. Brown, their attorney, and say that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, in this, to wit:

1. That the Justice of the Supreme Court, before whom the said cause was tried, notwithstanding the objection of the counsel of the defendants below, permitted Franklin Gil-  
 10 more, a witness for the plaintiff below, to be asked what the plaintiff below said on the reading to him of the resolution of the defendant below, passed April 29th, 1862, and said witness to narrate the statements of the plaintiff below.!

2. And in this, that the said justice overruled the question put by the defendants below to the witness, Robert C. Bacot, viz: Was it not understood between Mr. Brown and the board that the resolution of April 29th was passed and his bid accepted on the condition that the new board should approve.

20 3. And in this, that the said Justice refused to non-suit the plaintiff below on all or any one of the following grounds:

1st. That the proposal of April 25, 1862, and the resolution of April 29, 1862, made no contract, as the acceptance by the resolution was not of the very proposal.

2d. That if a contract was proved it was not the contract laid in the declaration.

3d. That if a contract was proved it was illegal, as in contravention of the public statutes of the State, for want of power in the defendants to make such a contract, it not be-  
 30 ing in writing—there being no notice of the time and place

at which the sealed proposals would be received for entering into the contract—the proposal not being for a sum certain—and the proposal not definite nor certain, and that there was more than one proposition of Brown's.

4. And in this, that the said Justice overruled the question put by the counsel of the defendants below to John B. Romar, viz :

What was the intention of the Board in requiring the contract to be submitted to the Board before it was executed ?

5. And in this, that the said Justice overruled the question put to said John B. Romar, viz :

Did you vote with any intention of binding the city to any contract ?

6. And in this, that the said Justice overruled the question put to Delos E. Culver, a Water Commissioner, viz :

Would the Board have negotiated with Mr. Brown if they had known it was not an original plan, but was like the Boston plan, or that they were at liberty to use the plan ?

7. And in this, that the said Justice allowed the counsel for the plaintiff below to read from the book of minutes of 20 the Board of Water Commissioners the following entry :

The following communications were received and disposed of :—

From A. S. Whiting, submitting proposal to furnish and lay main pipe across the bottom of the Hackensack river.

Commissioner Pray offered the following resolution in relation thereto, which was adopted :

Resolved, That the communication be received and laid upon the table, and the registrar be directed to notify Mr. A. S. Whiton that the Board had adopted a plan for laying 30 said pipe and contract had been ordered prepared.

To which reading the counsel for the defendants object, on the grounds that the passage had not before been alluded to or offered; nor had the minutes been offered in evidence.

8. And in this, that the said Justice did not charge the said jury as he was requested, that the damages of the plaintiff could only be such as were in the contemplation of the parties at the time of the contract, and if they believed the witnesses who had testified to the plaintiff's conversation in which he stated that he expected to make but little, if any, 40



profit out of the contract, their verdict for damages must be small.

9. And in this, that the said justice refused to charge the said jury as he was requested, that the damages on the contract to execute a contract could not be the profits that would have been made by performing the contract which it was agreed should be executed.

10. And in this, that the said justice charged the said jury that it was clear to his mind that the first board of commissioners, under the act of 1852, to wit, Mr. Gregory, Mr. Ward, Mr. Bramhall, the president of the board of aldermen at that time and the person elected at the first charter election after the 21st of March, 1852, became a body corporate in law; that they were vested with the incidents of a corporation necessary for the purpose of fulfilling the purposes of their creation, and will be continued through a succession provided for in the act until dissolved by future legislative action.

11. And in this, that the said justice charged the said jury that the acts of such a body or board as the defendants, evidenced by a written vote, are as completely binding on the corporation and as complete authority to their agents as the most solemn acts done under the corporate seal. I therefore differ from the counsel of the defendants and do instruct you that the recorded votes of the commissioners are binding.

12. And in this, that the said justice charged the said jury that it appeared by the minutes of the board that after the rules of order of the former board were adopted a proposal from Mr. Whiton, for laying the pipe in the river, was taken up, and on motion it was resolved that the same should be returned to him and he be informed that the board has already accepted a proposition for that work, and had directed a contract to be drawn up.

13. And in this, that the said justice charged the said jury that the resolution rescinding the resolution of April 29, 1862, was a singular resolution. *That* board then had no bid of Brown's before them. Brown had made a written proposal to the old board, which had been accepted by them by resolution, as Mr. Cleveland's resolution in words admits

—its character had been changed before the 2d of June from an open bid to an express contract.

14. And in this, that the said justice charged the said jury that it had been insisted that the acceptance on the 29th of April was coupled with a new feature—the requirement of security—but that objection was removed by the proof that on the 12th of May Mr. Brown agreed to the new term by sending into Mr. Bacot the names of Mr. Fitch and Mr. Waterbury as his guarantors, which names were inserted in the contract. 10

15. And in this, that the said justice charged the said jury that on the 21st of June Mr. Brown went with his proposed sureties to the office of the commissioners, and they tendered themselves ready to execute the papers as agreed upon.

16. And in this, that the said Justice charged the said jury as follows: “Has the plaintiff established, by proof the material allegations in his declaration? There can be no doubt of that, gentlemen, if you believe the witnesses who have been sworn, and the genuineness of the papers which have been offered in evidence, and the correctness of the minutes of the official proceedings of the defendants as registered in their public records. Their order in November for publication for proposals—the publication itself—the written proposal of the plaintiff—its reference to a special committee, the report of that committee recommending that it should be returned to him—his notice from the Registrar to that effect—the subsequent interviews between the plaintiff and the members of the Board upon that subject matter—the retaining the plans by the Board during the whole time—his second written proposal for a less price—their entertaining that proposal, and the resolution accepting it and directing their engineer and their attorney to prepare a proper contract for submission to them before execution, and requiring sufficient security for his faithful performance, and five years guarantee—the transmission of a copy of that acceptance to the plaintiff by the Secretary of the Board—the correspondence between him and Mr. Bacot in consequence of the acceptance—the plaintiff’s agreement to give security, and his letter to Mr. Bacot furnishing the names of two 40 20 30

gentlemen whose pecuniary responsibility has not been questioned—the resolution of the new Board upon Whiton’s proposal confirming the action of the old Board in accepting the offer of the plaintiff—the preparation of the contract and bond, and the submission of it to the Board, and the attendance of the plaintiff and his sureties at the office of the company in June, and their offer to execute the necessary papers, and his demand of the contract, and the refusal of the President of the Board to comply with his requests are  
 10 all in testimony before you, and those proofs, if believed by you, are full and sufficient evidence of the cause of action spread out in the declaration of the plaintiff.

17. And in this, that the said Justice charged the said jury: I have already instructed you that the Water Commissioners are a corporation, that they had power to make the contract on which the plaintiff has sued them, that their acts can be established by the resolutions recorded in their minutes, and that the proposal made by Mr. Brown to them, and their resolution of acceptance, formed a contract binding in law.  
 20

18. And in this, that the said Justice charged the said jury: I am of opinion that the clause directing the giving of public notice, and that which provides that every bid shall be accompanied by a bond, are only directory, and the proceedings in the matter of the negotiation and agreement to employ Mr. Brown should be held valid, although those directions were disregarded by the Commissioners in April last.

19. And in this, that the said Justice charged the said  
 30 jury: that it had been urged as a defence that the plan submitted by Mr. Brown was not a feasible one; that if he had laid the pipe in conformity with it, the thing would have been a failure, and in judging of the correctness of that part of the defence you must not lose sight of another matter set up in defence, that Brown’s plan is the counterpart of one that was adopted in Boston for carrying a water pipe under Chelsea creek, which pipe has been in complete and successful operation there for over a dozen years and has answered all the ends that were sought for in its use there.

40 20. And in this, that the said Justice charged the said



jury on the measure of damages in this action : I feel satisfied that the rule declared by the Supreme Court of New York in the case of Masterton against the city of Brooklyn, is a safe and legal one ; and that tribunal declared that the proper measure of damages would have been the amount which Masterton would have realized as profits had he been allowed fully to execute the contract,—that remote and contingent benefits could not be taken into account, but profits to be made and earned by the faithful execution of a fair contract are proper matters of consideration, and a right to 10 recover an equivalent for such by way of damages results directly and immediately from the act of the party who prevents the act from being performed. In applying this rule to this case, if you believe the plaintiff entitled to recover full damages for the breach of the alledged contract, those damages should be limited to the profits which the plaintiff would have shewn you he would have made if he had been permitted to furnish the materials and lay the pipe across the Hackensack according to his plan and proposal.

There is also error in this, that by the record aforesaid it 20 appears that the judgment aforesaid in form aforesaid given, was given for the said John L. Brown against the said the Water Commissioners of Jersey City, whereas by the law of the land the said judgment ought to have been given for the said the Water Commissioners of Jersey City, against the said John L. Brown ; and the said the Water Commissioners of Jersey City pray that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled and altogether held for nothing, and that they may be restored to all things 30 they have lost by occasion of the said judgment, &c.

ARCHIBALD K. BROWN,  
*Attorney for plaintiff's in error.*







