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NOTICE OF APPEAL.

In Chancery of New Jersey

Between FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Complainant,* *and* CITY OF BAYONNE, *Defendant.*	*Notice of Appeal.*

Sat below, Hon. Alonzo Church, Vice-Chancellor.

The defendant, City of Bayonne, hereby appeals to the Court of Errors and Appeals from that part of the final decree made and entered therein on the 15th day of May, 1928, which provides as follows:

> "(1) That under said agreements complainant is obligated to pay defendant for all water furnished by defendant to complainant from July 1, 1919, to, but not including, February 1, 1925, at a flat rate of $1.00 per 1,000 cubic feet, and no more.
>
> (2) That under said agreements complainant is obligated to pay defendant for all water furnished by defendant to complainant from and including February 1, 1925, to the date of this decree at the following rates paid by other equally large consumers, for an equal quantity of water supplied to them

by defendant in any month during said period, and no more, namely:

When the monthly consumption was less than 500,000 cubic feet, $1.75 per 1,000 cubic feet.

When the monthly consumption was in excess of 500,000 cubic feet but none in excess of 1,000,000 cubic feet, $1.65 per 1,000 cubic feet.

When the monthly consumption was in excess of 1,000,000 cubic feet, $1.50 per 1,000 cubic feet.

(3) That until the defendant shall change its present rates for water supplied by it to the other equally large consumers, the complainant shall pay for all water hereafter supplied to it by defendant in any month at the following rates presently paid by other equally large consumers for equal quantities of water supplied to them by defendant in any month, and no more, namely:

When the monthly consumption is less than 500,000 cubic feet, $1.75 per 1,000 cubic feet.

When the monthly consumption is in excess of 500,000 cubic feet but not in excess of 1,000,000 cubic feet, $1.65 per 1,000 cubic feet.

When the monthly consumption is in excess of 1,000,000 cubic feet $1.50 per 1,000 cubic feet.

(4) That so long as the said agreements shall remain in force the defendant shall not charge the complainant for water hereafter supplied to it by defendant in any month any higher or greater rate than the minimum rate that the defendant shall charge any other

equally large consumer whether within or without its municipal limits for equal quantities of water supplied to any such consumer by defendant in such month.

(5) That so long as the said agreements shall remain in force and the complainant shall pay the defendant for water hereafter supplied to it by defendant at the same rates as are paid by such other equally large consumers for equal quantities of water supplied to them by defendant in any month, the defendant, its officers, agents, servants and representatives, and each thereof, shall be and it and they are hereby ordered to absolutely desist and refrain from shutting off, diminishing or in anywise interfering with or taking any steps, actions or proceedings to shut off, diminish or in anywise interfere with the supply of water by the defendant to the complainant."

JAMES BENNY,
L. EDWARD HERRMANN,
Solicitors for Appellant,

Of Counsel.

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

L. EDWARD HERRMANN,
Of Counsel with Appellant.

PETITION OF APPEAL.

New Jersey Court of Errors and Appeals

Between FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Complainant,* *and* CITY OF BAYONNE, *Defendant.*	*On Appeal from Chancery.* *Petition of Appeal.*

To the Honorable, the Court of Errors and Appeals in the last resort in all causes:

The petition of City of Bayonne, the defendant in the above-entitled cause respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 15th day of May, 1928, wherein among other things it was ordered, adjudged and decreed as follows:

"(1) That under said agreements complainant is obligated to pay defendant for all water furnished by defendant to complainant from July 1, 1919, but not including, February 1, 1925, at a flat rate of $1.00 per 1,000 cubic feet, and no more.

(2) That under said agreements complainant is obligated to pay defendant for all water furnished by defendant to complainant from and including February 1,

1925, to the date of this decree at the following rates paid by other equally large consumers, for an equal quantity of water supplied to them by defendant in any month during said period, and no more, namely:

When the monthly consumption was less than 500,000 cubic feet, $1.75 per 1,000 cubic feet.

When the monthly consumption was in excess of 500,000 cubic feet but not in excess of 1,000,000 cubic feet, $1.65 per 1,000 cubic feet.

When the monthly consumption was in excess of 1,000,000 cubic feet, $1.50 per 1,000 cubic feet.

(3) That until the defendant shall change its present rates for water supplied by it to the other equally large consumers, the complainant shall pay for all water hereafter supplied to it by defendant in any month at the following rates presently paid by other equally large consumers for equal quantities of water supplied to them by defendant in any month, and no more, namely:

When the monthly consumption is less than 500,000 cubic feet, $1.75 per 1,000 cubic feet.

When the monthly consumption is in excess of 500,000 cubic feet but not in excess of 1,000,000 cubic feet, $1.65 per 1,000 cubic feet.

When the monthly consumption is in excess of 1,000,000 cubic feet, $1.50 per 1,000 cubic feet.

(4) That so long as the said agreements shall remain in force the defendant shall not

charge the complainant for water hereafter supplied to it by defendant in any month any higher or greater rate than the minimum rate that the defendant shall charge any other equally large consumer whether within or without its municipal limits for equal quantities of water supplied to any such consumer by defendant in such month.

(5) That so long as the said agreements shall remain in force and the complainant shall pay the defendant for water hereafter supplied to it by defendant at the same rates as are paid by such other equally large consumers for equal quantities of water supplied to them by defendant in any month, the defendant, its officers, agents, servants and representatives, and each thereof, shall be and it and they are hereby ordered to absolutely desist and refrain from shutting off, diminishing or in anywise interfering with or taking any steps, actions or proceedings to shut off, diminish or in anywise interfere with the supply of water by the defendant to the complainant.''

And your petitioner humbly appeals from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, and that the Court should have found that the complainant was entitled to pay to the defendant the charges for water consumed, as set forth in the bill of complaint, instead of the charges set forth to be due in and by said decree.

Petition of Appeal.

Your petitioner therefore prays that the said portion of the said decree of the Chancellor may be reversed, set aside and for nothing holden.

L. EDWARD HERRMANN,
Solicitor of Appellant.

Of Counsel.

BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

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

Complainant, Federal Shipbuilding and Dry Dock Company, respectfully shows that:

1. Complainant is a corporation duly organized and existing under the laws of the State of New Jersey, having its principal office at No. 51 Newark street, in the City of Hoboken, Hudson County, New Jersey. In and prior to the month of April, 1919, complainant's corporate name was Federal Shipbuilding Company, but since then said name has been changed to and now is Federal Shipbuilding and Dry Dock Company.

2. Defendant, the City of Bayonne, is a municipal corporation of the State of New Jersey and its office is in the City Hall, in the City of Bayonne.

3. In and prior to the month of April, 1919, complainant was, and ever since then has been, the owner of two large tracts of land situate as follows:

One thereof partly on the westerly shore of the Hackensack River, in the Town of Kearny, Hudson County, New Jersey (hereinafter referred to as complainant's Kearny property), and the other thereof lying generally opposite to complainant's Kearny property on the easterly shore of the Hackensack River in the City of Jersey City, Hudson County, New Jersey (hereinafter referred to as complainant's Jersey City property).

Bill of Complaint.

4. In and prior to the month of April, 1919, complainant had constructed and was operating a large ship yard on its Kearny property and was contemplating building upon and putting into use its Jersey City property which was then unimproved. At that time there extended through complainant's Kearny property, in part adjacent to property of the Blast Furnace Products Corporation, and also through complainant's Jersey City property, two large water pipe lines owned and used by defendant and providing the water supply for itself and its inhabitants.

5. In April, 1919, it became necessary for defendant to arrange to rebuild its two said water pipe lines and also to acquire a right of way through said properties for an additional and larger water pipe line for the purpose of said water supply. This being the situation, it was to the mutual advantage of complainant and defendant that the rights of way for such existing and proposed new water pipe lines across both complainant's Kearny and Jersey City properties should be relocated and definitely defined, and that such relocation should be effected in a manner that would permit of the most favorable use of said water pipe lines by the defendant and cause complainant the least inconvenience in its possession and use of its said properties.

6 To effect such purposes three agreements were then duly entered into between complainant and defendant, as well as an additional agreement between said Blast Furnace Products Corporation and defendant. A true copy of each of said agreements marked Schedule "A" is attached hereto and made a part hereof. Said agreements although dated in November, 1918,

did not in fact become effective until on or after April 4, 1919. As appears by said agreements complainant thereby agreed to pay a large part of the cost of relocating and reconstructing the portion of said water pipe lines then extending through its said properties and it in fact did so. As further appears from said agreements defendant thereby also agreed with complainant that in so far as defendant should from time to time have the legal right so to do it would furnish to complainant, its successors and assigns, upon demand in writing, water from the pipes laid on the rights of way thereby granted to defendant by complainant at the minimum market rate paid by any consumer of an equal quantity of water from said pipe lines, so long as said pipes should remain on said rights of way, or any part thereof. In and by said agreements complainant in order to aid defendant in such work of relocation and reconstruction also contracted with defendant to purchase from defendant and to pay in advance therefor water of the value of $150,000 to be furnished and delivered from time to time to complainant from the pipe lines and water plant of defendant as needed by complainant, "to be measured by meter and charged for at the current prices of water sold by the city at such times for consumers of an equal quantity."

7. On July 22, 1919, complainant paid defendant the sum of $150,000 so agreed by it to be paid in advance for water to be so furnished and delivered to it from time to time by the defendant, and said payment was accepted by the defendant. Following said payment said existing pipe lines were relocated and reconstructed in ac-

cordance with said agreements and complainant fully performed all of its obligations thereunder.

8. On July 1, 1919, defendant began to furnish complainant with the water so paid for in advance by complainant and has continued ever since to furnish complainant with water pursuant to the agreements so made between them. All of the water so furnished has been metered and there is no disagreement between complainant and defendant as to the amount of water so furnished. A difference of opinion has, however, existed and still exists between the said parties as to the prices which defendant has from time to time since July 1, 1919, been entitled to charge complainant for the water so furnished. Complainant has contended and still contends that for the period from July 1, 1919, to February 1, 1925, the current price of water sold by the defendant for consumers of an equal quantity was $1.00 per thousand cubic feet, and that for the period from February 1, 1925, to the present time such price has been upon a sliding scale basis with a minimum of $1.50 per thousand cubic feet and a maximum of $1.75 per thousand cubic feet. On the other hand, defendant has contended and still contends that from July 1, 1919, to January 1, 1923, said price was $1.20 per thousand cubic feet and has heretofore contended that from January 1, 1923, to January 1, 1925, said price was also $1.20 per thousand cubic feet. Defendant has also contended and still contends that such price from January 1, 1925, was $1.75 per thousand cubic feet. Complainant and defendant have at no time been able to agree upon the current prices so charged by defendant during said periods and defendant has now changed its position in said matter and

contends that for the period from January 1, 1923, until the present time said price was $1.75 per thousand cubic feet. Complainant understands that defendant bases its said present contentions upon the following grounds: (a) That under said agreements complainant is required to pay for the water so furnished it from time to time at the prices currently charged by defendant for an equal amount of water furnished by it to consumers located along said water pipe lines without the City of Bayonne, and not at the current prices charged to consumers within the City of Bayonne of whom there are and always have been a substantial number consuming a quantity of water equal to that consumed by complainant. (b) That at a meeting of the Board of Commissioners of the City of Bayonne held during the month of February, 1925, a resolution was adopted, of which a copy marked Schedule "B" is attached hereto, and that pursuant to said resolution defendant has charged or sought to charge such consumers without the limits of Bayonne at the rate of $1.75 per thousand cubic feet for the period since January 1, 1923, although during the same time it has charged similar consumers within the City of Bayonne a lesser rate or rates. On the other hand, complainant is credibly informed and believes and therefore states that from July 1, 1923, to February 1, 1925, defendant charged other consumers of an equal quantity of water furnished and delivered from the pipe lines and water plant of the defendant $1.00 per thousand cubic feet, and from February 1, 1925, to the present time upon a sliding scale basis with a minimum of $1.50 per thousand cubic feet and a maximum of $1.75 per thousand cubic feet. The basis for

such information and belief is, among other things, statements made to representatives of complainant by representatives of defendant in charge of its water supply and the revenue derived therefrom. Complainant also believes and therefore states that said resolution of February, 1925, in so far as it attempted to retroactively increase from January 1, 1923, the price charged by defendant for water furnished by it to such consumers either within or without the City of Bayonne was and is void and of no effect as against complainant and that it is only obligated to pay for the water heretofore furnished it by the defendant at the rates for which complainant has contended and still contends as hereinabove set forth.

9. At such last mentioned rates the total amount chargeable by defendant to complainant for the water so furnished complainant from July 1, 1919, up to and including August 31, 1926, is the sum of $149,206.09, or $793.91 less than the sum of $150,000 so paid by complainant to defendant in advance. At the rates so contended for by defendant the charges for the water so furnished during said period aggregate, according to defendant's contention, $192,227.13, being $42,227.13 in excess of said sum of $150,000. Complainant denies that it owes defendant said sum of $42,227.13 or any part thereof and claims and avers that under the said agreements so made between them complainant has paid in full for all of the water so furnished it, and in addition thereto said sum of $793.91.

10. Complainant has received no bill from defendant for any water furnished it since August 31, 1926, but from complainant's readings

of its meters it believes that at the rate properly chargeable for said month under said agreements the water furnished it by defendant is of the value of approximately $1,860. Complainant is ready and willing at any time to pay defendant at said rate for the water furnished it by defendant during September, 1926, or thereafter to be so furnished it, after applying against the proper charges therefor the sum of $793.91 so remaining unused out of the $150,000 paid by complainant to defendant on July 22, 1919. Complainant is also willing if required by this Honorable Court so to do to secure to defendant the payment of the sum of $42,227.13 so as aforesaid claimed by the defendant should it be found to be entitled thereto by this court or by any other court having jurisdiction to determine said controversy, and during the continuance of this suit to similarly secure payment to defendant of any amounts which may be in dispute pending the further furnishing of water to complainant by defendant.

11. Complainant has from time to time endeavored to settle the controversy so existing between it and the defendant, or to have the same determined by any court of competent jurisdiction in the premises. The defendant, however, has refused to either attempt to negotiate such a settlement or to have said controversy so determined.

12. Under date of September 23, 1926, defendant served upon complainant a notice signed on its behalf by James Benny, the City Attorney of defendant, of which the following is a true copy:

"DEPARTMENT OF PUBLIC AFFAIRS
Office of City Attorney
Bayonne, N. J.

September 23rd, 1926.

Federal Shipbuilding Company
Newark, New Jersey.

Gentlemen:—

I herewith enclose water bills by the City of Bayonne against your company amounting to $192,227.03, which after crediting the sum of $150,000 as per agreement of 1918, leaves a balance due to the City of $42,-227.03.

I also enclose a detailed statement of these bills beginning with September, 1918, and ending August 31st, 1926, both inclusive. You will notice that the bills are rendered at different rates, viz, from September, 1918, to December, 1922, both inclusive, at $1.20, and from January, 1923, to August 31, 1926, both inclusive, at $1.75. The increase in the rate is due to the increase imposed upon the City by the Board of Public Utility Commissioners, of the amount to be paid per million gallons to the Water Company.

Your prompt attention to this matter is requested, otherwise it will be necessary for the City to discontinue supplying you with water. Unless the matter is satisfactorily adjusted within 15 days after this date, the City will feel obligated to take the action above indicated.

Yours very truly,
(Signed) James Benny,
City Attorney.

JB:RL
Encl."

Bill of Complaint.

Complainant is credibly informed and believes that unless it meets the demand contained in said notice for the payment of the sum of $42,227.03 mentioned therein the defendant will discontinue its water supply to complainant and refuse to further furnish water to it. This information and belief is based upon both the above letter and statements made to representatives of complainant by the Director of Revenue and Finance of the City of Bayonne, the officer directly in charge of its Water Supply Department and of the revenue derived therefrom.

13. Complainant is engaged in carrying on an important shipbuilding and dry dock business, and other construction work, on its Kearny property. For these purposes it has heretofore constructed and now maintains and has in use upon said property a large number of valuable buildings and ship ways and much valuable equipment. It now and always has on said ways or in the dry dock and repair basin connected with said property a substantial number of vessels under construction or in the course of repair. All of said buildings, ways, equipment and vessels are dependent upon said water supply for protection against fire. During the month of August, 1926, complainant employed at its said plant an average of approximately 1,650 employees. The average number of such employees has increased during the month of September, 1926, and the work now on hand at said plant will require the further augmenting of said force. Complainant has no other source of water supply than that of the defendant and said water supply is indispensable for the usual and necessary operation of complainant's said plant and for

fire protection as aforesaid. The discontinuance of said water supply would, therefore, of necessity work irreparable injury to complainant.

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That the City of Bayonne, the defendant to this suit, may answer this bill of complaint (an answer under oath being waived) and each statement herein made.

2. That the said defendant may be enjoined and restrained from cutting off, interfering with or diminishing its supply of water to complainant and from taking any steps, actions or proceedings to interfere with its continuing to supply water to complainant.

3. That this court may settle and determine the rate or rates payable by complainant to defendant for the water heretofore furnished by defendant to complainant or hereafter to be so furnished under said agreements.

4. That this Honorable Court may make a decree determining and adjudging the rights of the parties with respect to the subject-matter of this suit so that the said controversies between them may be finally settled and determined.

5. That complainant may have such further and other relief in the premises as may be equitable and just.

6. That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and to abide by such decree as this Court may make herein.

LINDABURY, DEPUE & FAULKS,
Solicitors for and of Counsel with Complainant.

Schedule A.

AGREEMENT No. 1.

This Indenture, made in original triplicate the 18th day of November, in the year of our Lord one thousand nine hundred and eighteen, between Federal Shipbuilding Company, a corporation of the State of New Jersey, party of the first part, hereinafter called the "Shipbuilding Company," the Mayor and Council of the City of Bayonne, a municipal corporation of the State of New Jersey, party of the second part, hereinafter called the "City," and New York Transit Company, a corporation of the State of New York, party of the third part, hereinafter called the "Transit Company."

Whereas, The Shipbuilding Company is the owner and in possession of a tract of land in the City of Jersey City, County of Hudson and State of New Jersey, bounded westerly by the Hackensack River, easterly by the Morris Canal, northerly by said canal and lands of Morris Canal and Banking Company, and southerly by lands of the Central Railroad Company of New Jersey, which said tract of land is shown on the plan attached hereto and made a part hereof; and

Whereas, The City is the owner of a strip of land approximately 20 feet in width extending through said lands of the Shipbuilding Company from the easterly bank of the Hackensack River to the westerly line of said Morris Canal, which said strip of land is designated on said plan by the letters "A-A," and

Whereas, The City and the Transit Company respectively have certain limited rights of way for pipe lines and telegraph and telephone lines

through portions of said lands of the Shipbuilding Company and the City is now maintaining and operating two (2) water pipe lines, each 30 inches in diameter, which are located in part under the said lands of the Shipbuilding Company and near the easterly line thereof and the Transit Company is now maintaining and operating two (2) oil pipe lines respectively 6 inches and 8 inches in diameter, which are or may be located in part along and upon the easterly line of said lands of the Shipbuilding Company; and

Whereas, It is to the mutual benefit of the parties hereto and it is their desire to have their respective rights in said lands determined, modified and defined as hereinafter set forth;

Now, therefore, this Indenture witnesseth: That the parties hereto for and in consideration of the premises, the mutual grants, covenants and agreements herein contained and the sum of one dollar ($1.00) by each to the other paid and other good and valuable considerations, receipt whereof is hereby duly acknowledged, do hereby grant, covenant and agree to and with each other as follows:

A.

1. The Shipbuilding Company, subject to the terms and conditions hereinafter contained grants, conveys, and confirms to the City, its successors and assigns, forever, the right to lay, construct, maintain, repair, operate and remove three (3) water pipe lines of which the two (2) existing lines and the extensions thereof shall not exceed 30 inches each, and the third line to be hereafter constructed shall not exceed 48 inches internal diameter, under and across the

following strips of land each 20 feet in width (a) beginning at the southeasterly corner of said lands of the Shipbuilding Company and extending thence northerly adjoining and parallel with the easterly line of said lands to the southerly line of said strip of land approximately 20 feet in width owned by the City, which said right of way is designated on said plan "B-B," (b) beginning at the northerly line of said strip of land approximately 20 feet in width owned by the City and extending thence northerly and westerly adjoining and parallel with the easterly and northerly lines of said lands of the Shipbuilding Company to the high-water line of the southeasterly shore of the Hackensack River, which said right of way is designated on said plan "C-C," (c) beginning at the high-water line of the southeasterly shore of the Hackensack River at the end of the last mentioned right of way and extending thence westerly adjoining and parallel with the northerly line of lands now or formerly under the waters of the Hackensack River granted by the State of New Jersey to Charles Siedler by deed dated February 14, 1895, and recorded in Book 614 of Deeds for said County of Hudson, page 621, etc., to the exterior line for piers mentioned in said grant and further in the same direction as far as the right of the Shipbuilding Company to make such grant of a right of way extends, which said right of way is designated on said plan "D-D."

And also the right to use such additional width not to exceed 20 feet adjoining said high-water line of the Hackensack River at the beginning of said right of way designated on said plan "D-D," as may be reasonably necessary for piling, masonry and trussing to retain said pipes

in the position in which they are laid and to securely anchor the water pipe lines laid under said Hackensack River and connect them with the water pipe lines on the southeasterly bank of said river.

Together with ingress and egress to and from said rights of way at any and all times and places to lay, construct, maintain, repair and operate said water pipe lines, but so as not to interfere unnecessarily with the operations of the Shipbuilding Company, its successors or assigns.

Subject, however, to the right of the Transit Company, its successors and assigns, to maintain, operate, repair and remove either or both of its said existing oil pipes in so far as the same may now be laid on said rights of way, but such right of the Transit Company shall cease and determine upon the removal or abandonment of such oil pipes.

And subject, also, to the right of the Transit Company, its successors and assigns, to cross said rights of way with its oil pipe lines either over or under the water pipe lines now or hereafter laid thereon at or near the southerly terminus of the right of way designated on said plan "E-E," and at or near the northerly terminus of the right of way designated on said plan "F-F," hereinafter granted to the Transit Company by the Shipbuilding Company.

Excepting and Reserving to the Shipbuilding Company, its successors and assigns, forever, the full and complete ownership, use and enjoyment of the lands through which said rights of way of the City extend, subject only to the rights and privileges hereby granted to the City, including, but not by way of limitation, the right to the Shipbuilding Company, its successors and

assigns, to fill in and to construct, maintain, replace, alter, repair and use on, under, over, across and along said lands through which said rights of way extend, wires, pipes, conduits, sewers, railroad tracks, industrial tracks, roads, bridges, tunnels and cranes, together with the right to erect, maintain, replace, alter, repair and use all necessary supports therefor, and also the right to reclaim, fill and dock out over the pipes laid or to be laid on said right of way below high-water line of the Hackensack River, giving the City the opportunity to protect its pipes in place by piling or otherwise, but none of such excepted or reserved rights shall ever be so exercised as to unnecessarily interfere with, impair or lessen the right hereby granted to the City to lay, construct, maintain, repair, operate and remove said water pipe lines on said rights of way.

Said grant to the City, its successors and assigns, is also made subject to and upon the following express terms and conditions, to wit:

First: Said water pipes shall be laid and maintained at a sufficient depth below the surface of the said lands of the Shipbuilding Company as the same are now or shall hereafter be filled and graded, not to prevent or interfere with the rights to the use and enjoyment of such lands hereby excepted and reserved to the Shipbuilding Company, its successors and assigns.

Second: The location of any of said water pipes whether now or hereafter laid shall not be so altered or changed as to interfere with the exercise of the rights and privileges hereby excepted and reserved to the Shipbuilding Company, its successors and assigns, in the lands through which said rights of way extend.

Third: The water pipe lines on that part of the right of way below high-water mark of the Hackensack River shall be laid, maintained and operated subject to and in accordance with the approval and direction of the War Department of the United States and of the Board of Commerce and Navigation of the State of New Jersey and their respective successors.

Fourth: In case the City, its successors or assigns, abandon the pipe lines laid on said rights of way or cease to use them for a period of two years for the transportation of water, then all the rights and privileges hereby granted shall thereupon revert to the Shipbuilding Company, its successors and assigns, and thereafter all the rights and privileges of the City, its successors and assigns, shall cease and determine, except the right to enter upon and remove its pipes and other material from said rights of way within four (4) months after such abandonment or expiration of such cessation of use, such right to be so exercised as not to interfere with the exercise of the rights and privileges hereby excepted and reserved to the Shipbuilding Company, its successors and assigns, in the lands through which said rights of way extend.

Provided, however, that no delay on the part of the City, its successors or assigns, in laying said 48 inch pipe line shall operate as an abandonment or waiver of the right to lay, construct, maintain, repair, operate and remove said 48-inch pipe line hereby granted to the City, its successors and assigns, by the Shipbuilding Company.

2. The Shipbuilding Company, subject to the terms and conditions hereinafter contained,

grants, conveys and confirms to the Transit Company, its successors and assigns, forever, the right to lay, construct, maintain, repair, operate and remove four (4) oil pipe lines to be constructed of pipe not to exceed 12 inches internal diameter under and across the following strips of land each 10 feet in width:

(a) Beginning at a point in the southerly line of said lands of the Shipbuilding Company where it is intersected by the westerly line of the right of way hereby granted to the City designated on said plan "B-B" and extending thence northerly, adjoining and parallel with said westerly right of way line of the City, to the southerly line of said strip of land approximately 20 feet in width owned by the City, which said right of way is designated on said plan "E-E."

(b) Beginning at a point in the northerly line of said strip of land approximately 20 feet in width owned by the City where it is intersected by the westerly line of the right of way hereby granted to the City designated on said plan "C-C" and extending thence northerly in a straight line adjoining and parallel with said westerly right of way line of the City until the right of way hereby granted meets the southerly line of said right of way of the City where the same curves west toward the Hackensack River, which said right of way is designated on said plan "F-F."

And also the right to maintain, operate, repair and remove either or both of the said existing oil pipes of the Transit Company in so far as the same may now be laid on said rights of way hereby granted to the City by the Shipbuilding Company, such right to cease and determine upon the removal or abandonment of such oil pipes.

Bill of Complaint—Schedule A.

And also the right to cross said rights of way of the City with oil pipe lines either over or under the water pipe lines now or hereafter laid thereon at or near the southerly terminus of the right of way designated on said plan "E-E" and at or near the northerly terminus of the right of way designated on said plan "F-F" hereby granted to the Transit Company by the Shipbuilding Company.

Together with ingress and egress to and from said rights of way at any and all times and places to lay, construct, maintain, repair and operate said oil pipe lines, but so as not to interfere unnecessarily with the operations of the Shipbuilding Company, its successors or assigns.

Excepting and reserving to the Shipbuilding Company, its successors and assigns forever, the full and complete ownership, use and enjoyment of the lands through which said rights of way of the Transit Company extend subject only to the rights and privileges hereby granted to the Transit Company, including, but not by way of limitation, the right to the Shipbuilding Company, its successors and assigns, to fill in and to construct, maintain, replace, alter, repair and use on, under, over, across and along said lands through which said rights of way extend wires, pipes, conduits, sewers, railroad tracks, industrial tracks, roads, bridges, tunnels and cranes, together with the right to erect, maintain, replace, alter, repair and use all necessary supports therefor, but none of such excepted or reserved rights shall ever be so exercised as to unnecessarily interfere with, impair or lessen the right hereby granted to the Transit Company to lay, construct, maintain, repair, operate

and remove said oil pipe lines on said rights of way.

Said grant to the Transit Company, its successors and assigns, is also made subject to and upon the following express terms and conditions, to wit:

First: Said oil pipes shall be laid and maintained at a sufficient depth below the surface of the said lands of the Shipbuilding Company as the same are now or shall hereafter be filled and graded before any of said oil pipes are laid thereon so as not to prevent or interfere with the rights to the use and enjoyment of such lands hereby excepted and reserved to the Shipbuilding Company, its successors and assigns.

Second: The location of any of said oil pipes whether now or hereafter laid shall not be so altered or changed as to interfere with the exercise of the rights and privileges hereby excepted and reserved to the Shipbuilding Company, its successors and assigns, in the lands through which said rights of way extend.

Third: In case the Transit Company, its successors or assigns, abandon the pipe lines laid on said rights of way or cease to use them for a period of two (2) years for the transportation of oil, then all the rights and privileges hereby granted shall thereupon revert to the Shipbuilding Company, its successors, and assigns, and thereafter all the rights and privileges of the Transit Company, its successors and assigns, shall cease and determine, except the right to enter upon and remove its pipes and other material from said rights of way within four (4) months after such abandonment or expiration of such cessation of use, such right to be so exercised as not to interfere with the exercise of the rights

and privileges hereby excepted and reserved to the Shipbuilding Company, its successors and assigns, in the lands through which said rights of way extend.

Provided, however, that no delay on the part of the Transit Company, its successors or assigns, in laying said pipe lines or any of them shall operate as an abandonment or waiver of the right to lay, construct, maintain, repair, operate and remove said pipe lines hereby granted to the Transit Company, its successors and assigns, by the Shipbuilding Company.

Fourth: The right hereby granted to the Transit Company to cross the water pipe lines of the City shall be so exercised as not to injure said water pipe lines and so as not to interfere with the proper hydraulic grade of said water pipes.

B.

1. The City, subject to the terms and conditions hereinafter contained, grants, conveys, and confirms to the Transit Company, its successors and assigns, forever, the right to lay, construct, maintain, repair, operate and remove four (4) oil pipe lines to be constructed of pipe not to exceed 12 inches internal diameter under and across a strip of land 10 feet in width beginning at a point in the southerly line of said strip of land approximately 20 feet in width owned by the City distant 20 feet westerly from the westerly line of said Morris Canal and extending thence northerly along a line 20 feet distant from and parallel with said westerly line of said Morris Canal to the northerly line of said strip of land approximately 20 feet in width owned by the City, which said right of way is designated on said plan "E-F."

And also the right to maintain, operate, repair and remove either or both of said existing oil pipes of the Transit Company in so far as the same may now be laid on that part of said strip of land approximately 20 feet in width owned by the City between the easterly line of the right of way hereby granted and the westerly line of said Morris Canal, such right to cease and determine upon the removal or abandonment of such oil pipes.

Together with ingress and egress to and from said right of way at any and all times and places to lay, construct, maintain, repair and operate said oil pipe lines, but so as not to interfere unnecessarily with the operations of the City, its successors or assigns.

Excepting and reserving to the City, its successors and assigns, forever, the full and complete ownership, use and enjoyment of the lands through which said right of way extends, subject only to the rights and privileges hereby granted to the Transit Company, including, but not by way of limitation, the right to the City, its successors and assigns, to fill in and to construct, maintain, replace, alter, repair and use on, under, over, across and along said lands through which said right of way extends, wires, pipes, conduits, sewers, railroad tracks, industrial tracks, roads, bridges, tunnels and cranes, together with the right to erect, maintain, replace, alter, repair and use all necessary supports therefor, but none of such excepted or reserved rights shall ever be so exercised as to unnecessarily interfere with, impair or lessen the right hereby granted to the Transit Company to lay, construct, maintain, repair, operate and remove said oil pipe lines on said right of way.

Said grant to the Transit Company, its successors and assigns, is also made subject to and upon the following express terms and conditions:

First: Said oil pipes shall be laid and maintained at a sufficient depth below the surface of the said lands of the City as the same are now or shall hereafter be filled and graded before any of said oil pipes are laid thereon so as not to prevent or interfere with the rights to the use and enjoyment of such lands hereby excepted and reserved to the City, its successors and assigns.

Second: The location of any of said oil pipes whether now or hereafter laid shall not be so altered or changed as to interfere with the exercise of the rights and privileges hereby excepted and reserved to the City, its successors and assigns, in the lands through which said right of way extends.

Third: In case the Transit Company, its successors or assigns, abandon the pipe lines laid on said right of way or cease to use them for a period of two (2) years for the transportation of oil, then all the rights and privileges hereby granted shall thereupon revert to the City, its successors and assigns, and thereafter all the rights and privileges of the Transit Company, its successors and assigns, shall cease and determine, except the right to enter upon and remove its pipes and other material from said right of way within four (4) months after such abandonment or expiration of such cessation of use, such right to be so exercised as not to interfere with the exercise of the rights and privileges hereby accepted and reserved to the City, its successors and assigns, in the lands through which said right of way extends.

Provided, however, that no delay on the part of the Transit Company, its successors or assigns, in laying said pipe lines or any of them shall operate as an abandonment or waiver of the right to lay, construct, maintain, repair, operate and remove said pipe lines, hereby granted to the Transit Company, its successors and assigns by the City.

2. The City for itself, its successors and assigns, expressly excepting, reserving and not including the rights and privileges hereby granted, conveyed and confirmed to it by the Shipbuilding Company, remises, releases, surrenders, discharges and forever quit-claims and relinquishes unto the Shipbuilding Company, its successors, and assigns, forever, any and all estate, right, title interest, privilege, control, property, possession, claim and demand whatsoever, as well in law as in equity, of the City, of, in and to all and every of said lands of the Shipbuilding Company shown on such plan and every part and parcel thereof, and of, in and to the lands now or formerly under the waters of the Hackensack River in front of said lands and every part and parcel thereof, with the appurtenances, and particularly, but not by way of limitation, any and all estate, right, title, interest, privilege, control, property possession, claim and demand, which it has or it or its successors or assigns may hereafter have of, in and to said lands and lands under water referred to above under or by virtue of the following instruments:

(a) Grant from George F. Gantz to New York and New Jersey Water Company, dated October 15, 1895, and recorded in Book 667 Deeds for said County of Hudson at Page 195.

(b) Grant from Abigail P. Wauters to Turner A. Beall, dated September 17, 1895, and recorded in Book 651 of Deeds for said Hudson County at Page 491.

(c) Grant from Abigail P. Wauters and others to Turner A. Beall, dated September 3, 1896, and recorded in Book 653 of Deeds for said Hudson County at Page 500.

(d) Grant from Charles Siedler to New York and New Jersey Water Company, dated October 3, 1895, and recorded in Book 662 of Deeds for said Hudson County at Page 554.

(e) Grant from George W. Flaacke and James B. Vredenburgh to Turner A. Beall, dated September 11, 1895, and recorded in Book 662 of Deeds for said Hudson County at Page 527.

3. The City, for itself, its successors and assigns, covenants and agrees to and with the Shipbuilding Company, its successors and assigns, as follows:

First: The City, its successors and assigns, in so far as it and they shall from time to time have the legal right so to do, will furnish to the Shipbuilding Company, its successors and assigns, upon demand in writing, water from the pipes laid on said rights of way hereby granted to the City by the Shipbuilding Company, at the minimum market rate paid by any consumer of an equal quantity of water from said pipe lines, so long as said pipes shall remain upon said rights of way or any part thereof.

Second: The City, its successors and assigns, shall and will at all times hereafter while it may maintain said water pipe lines or any thereof across said lands of the Shipbuilding Company maintain the same in good order and repair and

properly operate the same, but a breach of this covenant shall not work a forfeiture of the rights and privileges herein granted to the City, its successors and assigns.

C.

1. The Transit Company for itself, its successors and assigns, expressly excepting, reserving and not including the rights and privileges hereby granted, conveyed and confirmed to it by the Shipbuilding Company, remises, releases, surrenders, discharges and forever quit-claims and relinquishes unto the Shipbuilding Company, its successors and assigns, forever, any and all estate, right, title, interest, privileges, control, property, possession claim and demand, whatsoever, as well in law as in equity, of the Transit Company, of in and to all and every of said lands of the Shipbuilding Company shown on such plan and every part and parcel thereof, and of, in and to the lands now or formerly under the waters of the Hackensack River in front of said lands, and every part and parcel thereof with the appurtenances, and particularly, but not by way of limitation, any and all estate, right, title, interest, privilege, control, property, possession, claim and demand which the Transit Company has or which it or its successors or assigns may hereafter have of, in and to said lands and lands under water referred to above under or by virtue of the following instruments:

(a) Grant from Delos E. Culver and others to John B. Barbour, dated May 21, 1881, and recorded in Book 365 of Deeds for said Hudson County at Page 40.

(b) Consent by William H. Chaddock and others to making of above grant, dated May 2,

1881, and recorded in Book 366 of Deeds for said Hudson County at Page 72.

(c) Grant from Abigail P. R. Wauters to John B. Barbour, dated August 27, 1880, and recorded in Book 356 of Deeds for said Hudson County at Page 504, and re-recorded in Book 360 of Deeds for said County at Page 144.

(d) Grant from Charles Siedler to Standard Oil Company, dated May 24, 1881, and recorded in Book 360 of Deeds for said Hudson County at Page 164.

(e) Grant from Abraham P. Newkirk to John B. Barbour, dated August 28, 1880, and recorded in Book 356 of Deeds for said Hudson County at Page 492, and re-recorded in Book 360 of Deeds for said County at Page 146.

(f) Grant from Michael D. Vreeland to John B. Barbour, dated August 28, 1880, and recorded in Book 356 of Deeds for said Hudson County, at Page 495, and re-recorded in Book 360 of Deeds for said County at Page 148.

(g) Grant from George M. Newkirk to John B. Barbour, dated September 9, 1880, and recorded in Book 356 of Deeds for said Hudson County at Page 490, and re-recorded in Book 360 of Deeds for said County at Page 142.

(h) Deed from New York Transit Company to Federal Shipbuilding Company, dated August 8, 1918, and recorded in the Office of the Register of Hudson County on August 15, 1918, which said deed excepts and reserves to the Transit Company, its successors and assigns, a right of way for pipe lines over a portion of the lands thereby conveyed.

(i) Lease from John J. Post and others to John B. Barbour, dated September 3, 1880, and

recorded in Book 362 of Deeds for said Hudson County at Page 560.

(j) Lease from John V. H. Clendenney to John B. Barbour, dated September 2, 1880, and recorded in Book 356 of Deeds for said Hudson County at Page 493, and re-recorded in Book 360 of Deeds for said County at Page 266.

(k) Agreement between John B. Barbour and John V. H. Clendenney, dated August 6, 1883, and recorded in Book 383 of Deeds for said Hudson County at Page 191.

2. The Transit Company for itself, its successors and assigns, expressly excepting, reserving and not including the rights and privileges hereby granted, conveyed and confirmed to it by the City, remises, releases, surrenders, discharges and forever quit-claims and relinquishes unto the City, its successors and assigns, forever, any and all estate, right, title, interest, privilege, control, property, possession, claim and demand whatsoever as well in law as in equity of the Transit Company, of, in and to said strip of land approximately 20 feet in width, owned by the City shown on such plan and every part and parcel thereof, and of, in and to the lands now or formerly under the waters of the Hackensack River, in front of said lands and every part and parcel thereof, with the appurtenances, and particularly but not by way of limitation, any and all estate, right, title, interest, privilege, control, property possession, claim and demand which the Transit Company has or which it or its successors or assigns may hereafter have under or by virtue of the grant from George M. Newkirk to John B. Barbour, dated September 9, 1880, and recorded in Book 356 of Deeds for said Hudson County at Page

490, and re-recorded in Book 360 of Deeds for said County at Page 142.

3. The Transit Company, for itself, its successors and assigns, covenants and agrees to and with the Shipbuilding Company and the City, their and each of their successors and assigns, as follows:

First: The Transit Company, its successors and assigns, shall and will at all times hereafter while it may maintain said oil pipe lines, or any thereof across said lands of the Shipbuilding Company and the City or either of them, maintain the same in good order and repair and properly operate the same, but a breach of this covenant shall not work a forfeiture of the rights and privileges herein granted to the Transit Company, its successors and assigns.

In witness whereof, the parties hereto have caused this indenture to be duly and properly executed as of the day and year first above written.

FEDERAL SHIPBUILDING COMPANY,
By E. H. Gary, President.

Approved as to form:
W. W. Corlett,
11-19-18.

(SEAL.)

Attest:
Thomas Murray,
Assistant Secretary.

Bill of Complaint—Schedule A.

THE MAYOR AND COUNCIL OF THE CITY OF BAYONNE,

By.....Mayor.

Attest:

....., Clerk.

NEW YORK TRANSIT COMPANY,

(SEAL.) By D. S. Bushnell, President.

Attest:

Geo. Chesebro, Secretary.

AGREEMENT NO. 2.

This Indenture, made in original duplicate the 18th day of November, in the year of our Lord one thousand nine hundred and eighteen, between Federal Shipbuilding Company, a corporation of the State of New Jersey, party of the first part, hereinafter called the "Shipbuilding Company," and The Mayor and Council of the City of Bayonne, a municipal corporation of the State of New Jersey, party of the second part, hereinafter called the "City."

Witnesseth, That the Shipbuilding Company for and in consideration of the covenants of the City hereinafter contained, the sum of one dollar ($1.00), good and lawful money of the United States of America, and other good and valuable considerations, to it paid by the City at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted and conveyed and by these presents does grant and convey to the City, its successors and assigns, forever, the right to lay, construct, maintain, repair, operate and remove three (3)

water pipe lines of which two (2) lines shall not exceed 30 inches each and the third line 48 inches internal diameter under and across a strip of land in the Town of Kearny, County of Hudson and State of New Jersey, 20 feet in width beginning at the point where the boundary line between lands of the Shipbuilding Company and lands now or formerly of the Blast Furnace Products Corporation intersects the southerly line of the Morris Canal and extending thence westerly adjoining and parallel with said southerly line of said Morris Canal 523.74 feet more or less to the point where the two present 30 inch water pipe lines of the City are laid under said Canal, which said right of way is designated on a plan hereto attached and made a part hereof as "A-A."

Together with ingress and egress to and from said right of way at any and all times and places and so as not to interfere unnecessarily with the operations of the Shipbuilding Company, its successor or assigns, to lay, construct, maintain, repair and operate said water pipe lines.

Excepting and reserving to the Shipbuilding Company, its successors and assigns, forever, the full and complete ownership, use and enjoyment of the lands through which said right of way of the City extends, subject only to the rights and privileges hereby granted to the city, including, but not by way of limitation, the right to the Shipbuilding Company, its successors and assigns, to fill in and to construct, maintain, replace, alter, repair and use on, under, over, across and along said lands through which said right of way extends, wires, pipes, conduits, sewers, railroad tracks, industrial tracks, roads, bridges, tunnels and cranes, together with the right to

erect, maintain, replace, alter, repair and use all necessary supports therefor, but none of such excepted or reserved rights shall ever be so exercised as to unnecessarily interfere with, impair or lessen the right hereby granted to the City to lay, construct, maintain, repair, operate and remove said water pipe lines on said right of way.

Said grant to the City, its successors and assigns, is also made subject to and upon the following express terms and conditions, to wit:

First: Said water pipes shall be laid and maintained at a sufficient depth below the surface of the lands of the Shipbuilding Company as the same are now or shall hereafter be filled and graded, not to prevent or interfere with the rights to the use and enjoyment of such lands hereby excepted and reserved to the Shipbuilding Company, its successors and assigns.

Second: The location of any of said water pipes whether now or hereafter laid shall not be so altered or changed as to interfere with the exercise of the rights and privileges hereby excepted and reserved to the Shipbuilding Company, its successors and assigns, in the lands through which said right of way extends.

Third: In case the City, its successors or assigns, abandon the pipe lines laid on said right of way or cease to use them for a period of two (2) years for the transportation of water, then all the rights and privileges hereby granted shall thereupon revert to the Shipbuilding Company, its successors and assigns, and thereafter all the rights and privileges of the City, its successors and assigns, shall cease and determine, except the right to enter upon and remove it pipes and other material from said right of way within

four (4) months after such abandonment or cessation of use, such right to be so exercised as not to interfere with the exercise of the rights and privileges hereby excepted and reserved to the Shipbuilding Company, its successors and assigns, in the lands through which said right of way extends.

Provided, however, that no delay on the part of the City, its successors or assigns, in laying said 48-inch pipe line shall operate as an abandonment or waiver of the right to lay, construct, maintain, repair, operate and remove said 48-inch pipe line hereby granted to the City, its successors and assigns, by the Shipbuilding Company.

The City, for itself, its successors and assigns, covenants and agrees to and with the Shipbuilding Company, its successors and assigns, as follows:

First: The City, its successors and assigns, in so far as it and they shall from time to time have the legal right so to do will furnish to the Shipbuilding Company, its successors and assigns, upon demand in writing, water from the pipes laid on said right of way hereby granted to the City by the Shipbuilding Company at the minimum market rate paid by any consumer of an equal quantity of water from said pipe lines, so long as said pipes shall remain upon said right of way or any part thereof.

Second: The City, its successor and assigns, shall and will at all times hereafter while it may maintain said water pipe lines or any thereof across the lands of the Shipbuilding Company, maintain the same in good order and repair and properly operate the same, but a breach of this covenant shall not work a forfeiture of the rights

and privileges hereby granted to the City, its successors and assigns.

In witness whereof, the parties hereto have caused this indenture to be duly and properly executed as of the day and year first above written.

FEDERAL SHIPBUILDING COMPANY,
By E. H. Gary, President.

Approved as to form:
W. W. Corlett,
11/19/18

(SEAL)

Attest:
Thomas Murray,
Assistant Secretary.

THE MAYOR AND COUNCIL OF
THE CITY OF BAYONNE,
By ....., Mayor.

Attest:
....., Clerk.

AGREEMENT NO. 3.

This Agreement, made in original duplicate the 18th day of November, 1918, by and between Federal Shipbuilding Company, a corporation of the State of New Jersey, of the first part (hereinafter called the "Company"), and The Mayor and Council of the City of Bayonne, a municipal corporation of the State of New Jersey, of the second part (hereinafter called the "City"), witnesseth:

Whereas, The City has acquired and is now operating the water works plant of New York

and New Jersey Water Company, a corporation of the State of New Jersey, which for a number of years has supplied the water used in the City, consisting in part of a right of way and certain water pipe lines thereon extending across property now owned by the Company located on the west side of the Hackensack River in the Town of Kearny, County of Hudson, State of New Jersey, and in part of a strip of land approximately 20 feet in width owned by the City on the east side of the Hackensack River in the City of Jersey City, in said County of Hudson, and two 30-inch water pipe lines extending along such strip and thence upon a right of way of the City across other lands owned by the Company, the said water pipe lines being connected by two 18-inch water pipe lines laid under the said Hackensack River also forming part of said plant; and

Whereas, the City, in order to increase the capacity of its said water works plant, has desired to lay a third pipe line, 30 inches in diameter, under the said river and has asked for the consent thereto of the said Company as owner of certain riparian rights in order that the said new line might be laid directly across said river in a manner to avoid one or more angles which would be necessary in following the exact course of the existing 18-inch lines under said river; and

Whereas, instead of carrying out such project it has been and is deemed mutually to the interest of the City and of the Company that the location of the existing pipe lines hereinbefore referred to should be changed and new pipe lines of a greater total capacity constructed by the City as shown upon the blue print an-

nexed hereto and made a part hereof marked "Exhibit A," and as hereinafter set forth; and

Whereas, By indenture bearing even date herewith between the Company, the City and New York Transit Company and delivered simultaneously herewith and as part of the consideration for this agreement, the Company has granted, conveyed and confirmed to the City the necessary rights of way on the east side of the Hackensack River for such re-location of the City's pipe lines; and

Whereas, By another indenture bearing even date herewith and delivered simultaneously herewith and as part of the consideration for this agreement, the Company has also granted to the City a part of the necessary new right of way on the west side of the Hackensack River for such re-location of its pipe lines and the City has acquired from the Blast Furnace Products Corporation the remainder of such new right of way on the west side of the Hackensack River.

Now, therefore, in consideration of the premises and of the mutual promises hereinafter set forth, the parties hereto have agreed and do hereby agree each with the other as follows:

1.

The Company agrees:

(a) To pay to the City, upon the execution and delivery of this agreement, $2,500.00 in cash as and for its full share of the cost of acquiring said right of way over the lands of the Blast Furnace Products Corporation.

(b) To purchase from the City and to pay in advance for the same at the time of the commencement of the work to be done by the City

as hereinafter described, water of the value of $150,000.00, to be furnished and delivered from time to time to the Company from the pipe lines and water plant of the City as needed by the Company, to be measured by meter and charged for at the current prices of water sold by the City at such times for consumers of an equal quantity.

(c) It is estimated by the City that the entire cost of the work of changing its pipe lines and laying its new pipe lines as indicated on said blue print and as hereinafter described, will be approximately $500,000.00. Of this amount the Company agrees to pay to the City in installments as hereinafter provided not to exceed $350,000.00, upon the agreement of the City that the amount so paid to it shall be expended solely in defraying the cost of said work.

2.

The City agrees:

(a) That it has represented and now represents to the Company that the re-location of said pipe lines of the City will have to be carried out in substantially the following manner:

First: A 30-inch pipe will have to be laid on said new right of way west of the Hackensack River from the point on the south side of the Morris Canal, where said canal is crossed by the two present water pipe lines of the City to the westerly bank of the Hackensack River. The points between which said pipe will have to be laid are designated on said blue print "A-A."

Second: Two 30-inch pipes will then have to be laid across and under the Hackensack River from the west bank thereof to the east bank

thereof, at a depth of not less than twenty-six feet below mean low water.

Third: A 30-inch pipe will then have to be laid on said new right of way east of the Hackensack River from the east bank thereof at or near the northeasterly corner of the property of the company south of the Morris Canal along or near the northerly and easterly sides of said property to the northerly line of the said strip of land approximately 20 feet in width owned by the City. The points between which said pipe will have to be laid are designated on said blue print "B-B."

This work when done will afford the City an opportunity to connect up a 30-inch line with its present water pipe lines on the east and west sides of the Hackensack River. When so connected the City will take up and remove all of the pipe lines and appliances located on the portion of the said 20-foot strip marked on the said blue print as "C-C," and also, but not until the Company is receiving an adequate supply of water through the 12-inch and 18-inch pipes to be provided and laid by the City as hereinafter specified, all of its pipe lines and appliances located on the City's said right of way over the Company's property west of the Hackensack River, marked on the said blue print as "D-D," and will relay said pipes or such portion of them as may be necessary along the relocated pipe line connecting the same up with the second 30-inch pipe line extending across and under the Hackensack River.

The City before taking up and removing any of its said pipe lines and appliances located on its said right of way west of the Hackensack River, marked on said blue print as "D-D," will,

as part of the work to be done hereunder, provide and lay, and will also furnish any and all labor, material and appliances suitable or necessary for laying and for any and all excavations, construction, back filling, shoring, piling or other work incident to the laying of the following water pipes across and under the Company's property west of the Hackensack River, (1) a 12-inch pipe extending westerly from the Company's 12-inch connection with the City's pipe lines on said right of way to the Company's 6-inch connection with said pipe lines, the points between which said 12-inch pipe is to be laid being designated on said blue print as being "E-E," and (2) an 18-inch pipe extending northerly from the Company's said 6-inch connection with said pipe lines to the City's pipe lines to be laid on its said new right of way west of the Hackensack River, the points between which said 18-inch pipe is to be laid being designated on said blue print as "E-F." Said 12-inch pipe shall be properly connected by the City with the Company's 12-inch intake pipe at the point designated on said blue print as "E," and said 18-inch pipe shall be properly connected by the City with said 12-inch pipe to be laid by the City and with the Company's 6-inch intake pipe at the point designated on said blue print as "E," and with the City's 30-inch pipe lines laid on said new right of way of the City west of the Hackensack River at the point designated on said blue print as "F." The City will also at its sole cost and expense provide and install an 18-inch water meter of a type approved by the Company with a connection to both of said 30-inch pipe lines of the City.

Said pipes shall be cast iron hub and spigot water pipe, Class B, according to the specifications of the American Water Works Association, and shall be laid so that the top of the pipe is three (3) feet below the surface of the ground, and where deemed necessary by the Company's engineer, on piling or other foundations approved by the said engineer. All work in connection with the laying of said pipes shall be done under the supervision of the Company's engineer and to his satisfaction, and so as not to interfere with the operation of the Company's plant.

Said 12-inch and 18-inch pipes when laid and said meter when installed shall be and become the property of the Company, and thereafter shall be repaired, maintained, replaced and operated at its sole cost and expense. In exchange for said 18-inch water meter the Company will deliver to the City the 6-inch, 8-inch and 12-inch water meters now owned by the Company.

It is further represented by the City that the foregoing work must be done by contract as the City has neither the equipment nor organization to undertake the same itself. The City therefore undertakes to enter into a legal contract to have said work performed, which contract will provide for the usual progress payments as the work advances. To the extent that it will suffice, the City undertakes and agrees to make all progress payments upon said work when due from the said sum of $150,000.00 to be paid to the City by the Company as an advance payment for water, and thereafter the Company agrees to pay the City, upon receipt of proper certificates of the engineer in charge of the work selected by the City, the amounts shown to be

due upon said work up to the sum of $350,000.00, hereinabove mentioned in paragraph (c) of section 1 hereof, which amounts as paid, the City agrees in turn to apply and use solely in payment of the said work.

(b) The City accepts full responsibility for and control over the work of re-locating and improving its pipe lines as hereinbefore described, and reserves absolutely to itself the right to select all necessary material and to determine the method of re-locating the said pipe lines.

The City further agrees, notwithstanding anything herein contained, that the pipe lines so to be located, constructed and maintained by it upon the said new rights of way shall be constructed of proper material and that all of the work in connection therewith shall be done in a good and workmanlike manner and so as not to unnecessarily interfere with any of the work or operations of the owners of the land or so as to injure any of their other property.

(c) The City agrees to entirely complete the said re-location and reconstruction of all of such pipe lines and to connect up the same ready for use, and also to remove its present pipe lines and appliances from its right of way over the Company's property westerly of the Hackensack River shown as "D-D" on such blue print, and from its own property easterly of the Hackensack River within the limits shown as "C-C" on such blue print, not later than May 1, 1919, provided that a reasonable extension of time to complete said work shall be granted to the City for delays, if any, due to riots, strikes, delays in transportation, delays in manufacture of material, or any other cause beyond the reasonable control of the City or its contractor.

(d) Upon the removal, as herein provided, of its pipe lines and appliances from that portion of the City's property easterly of the Hackensack River, shown as "C-C" on such blue print, the City shall and will offer at public sale to be held in accordance with the laws of the State of New Jersey free and clear from all encumbrances, except the right of way for oil pipe lines granted to New York Transit Company by the City by said indenture bearing even date herewith between the Company, the City and said New York Transit Company, all of said strip of land 20 feet in width so as aforesaid owned by the City east of the Hackensack River, together with all of the right, title and interest of the City, its successors and assigns in and to the lands now or formerly under the waters of the Hackensack River in front of such strip, reserving to itself, its successors and assigns, however, a right of way for its pipe lines over the most easterly 20 feet of said strip, the portion of said strip of land in which such right of way is to be reserved being shown on such blue print as "C-G," which said right of way so to be reserved upon such sale shall be in all respects identical with the rights of way over the said lands of the Company east of the Hackensack River, granted, conveyed and confirmed by the Company to the City by the first above mentioned indenture.

The amount of not in excess of three hundred fifty thousand dollars ($350,000.00) to be paid as aforesaid by the Company to the City hereunder (other than for water) shall be reduced by an amount equal to the net proceeds of said sale; and if the Company, prior to said sale, has so paid to the City an amount which, with the net proceeds of said sale exceeds three hundred

fifty thousand dollars ($350,000.00), then the City will refund to the Company an amount equal to such excess, but in no event more than three hundred fifty thousand dollars ($350,000.00).

(e) Upon the completion of said work, the City is to have the right during the ensuing period of three (3) months to take up, remove, retain and have as its own property the two said 18-inch water pipe lines now laid under the Hackensack River. If, however, the City shall not remove or cause such last mentioned pipe lines to be taken up and removed within such period of three (3) months, it shall be regarded as having abandoned said two 18-inch pipe lines to the Company, and the Company may at any time thereafter if and when it so desires, take up and remove such two 18-inch pipe lines at its expense and retain the same or the proceeds of any sale or other disposition thereof which it may make as and for the property of the Company.

(f) Upon the completion of the work of relocating its said pipe lines, the City will execute and deliver or cause to be executed and delivered to the Company without further consideration such deeds or other instruments as may be necessary to convey and release to the Company, its successors and assign all of the right, title and interest which the City or any mortgagee or mortgagees now and then has or have in and to the lands comprising the present right of way of the City extending over property of the Company west of the Hackensack River shown on said blue print as "D-D."

(g) The City undertakes immediately upon the execution of this agreement to procure and deliver to the Company such releases or other

instruments as shall be proper or necessary to remove from the lands of the Company on the east bank of the Hackensack River shown on such blue print, and the lands now or formerly under the waters of said river in front thereof, and every part and parcel thereof, with the appurtenances, the lien of the following mortgages:

1. Mortgage from New York & New Jersey Water Company to The State Trust Company, Trustee, dated April 20, 1895, and recorded in Book 336 of Mortgages for said County of Hudson, page 522.

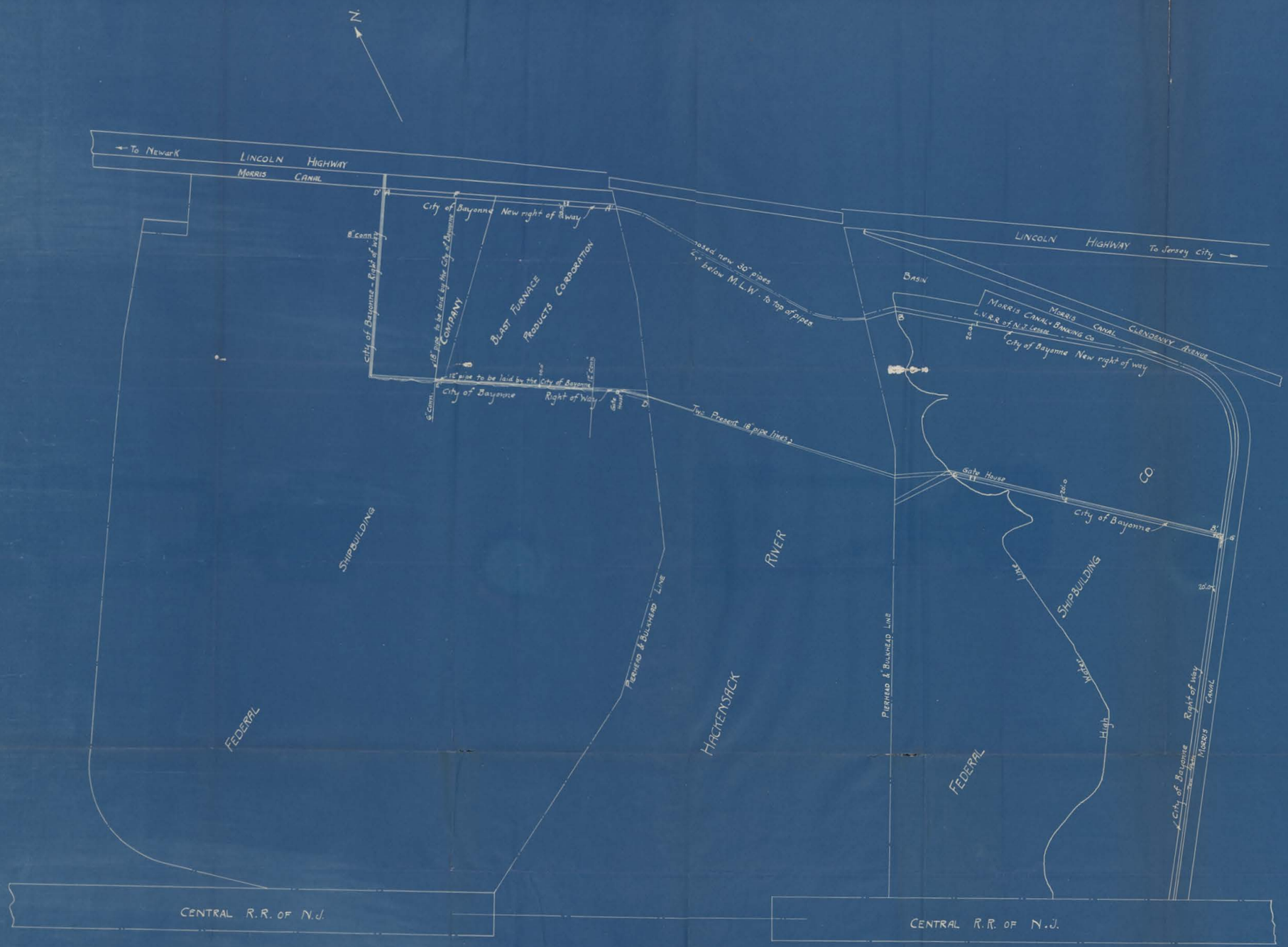
2. Mortgage from New York & New Jersey Water Company to The State Trust Company, Trustee, dated October 29, 1895, and recorded in Book 347 of Mortgages for said County of Hudson, page 266.

3. Mortgage from New York & New Jersey Water Company to The City Trust Company of New York, Trustee, dated July 2, 1900, and, recorded in Book 429 of Mortgages, page 529.

Except in so far as said mortgages or any of them are or may be a lien on the rights of way granted, conveyed and confirmed by the Company to the City by said indenture bearing even date herewith between the Company, the City and New York Transit Company, and the City further agrees at all times hereafter to indemnify and save and keep harmless the Company of, from and against any and all claims or demands which may be made against the Company, and any and all loss, costs, damage, counsel fees, charges, suits, actions and expenses of whatever kind and nature that shall or may at any time arise, accrue or happen to be brought against the Company for or by reason of or in any way connected with

FEDERAL

CENTRAL R. R.


N.
To Newark
LINCOLN HIGHWAY
MORRIS CANAL
City of Bayonne New right of way
8" Conn.
City of Bayonne - Right of way
18" pipe to be laid by the City of Bayonne
COMPANY
BLAST FURNACE
PRODUCTS CORPORATION
12" pipe to be laid by the City of Bayonne
City of Bayonne
Right of Way
Gate House
Two Present 18" pipe lines
Proposed new 30" pipes
below M.L.W. to top of pipes
LINCOLN HIGHWAY To Jersey City
BASIN
MORRIS CANAL
MORRIS CANAL & BANKING CO
L.V.R.R. of N.J. Lessee
CLENDENNY AVENUE
City of Bayonne New right of way
Gate House
City of Bayonne
CO.
SHIPBUILDING
FEDERAL
PIERHEAD & BULKHEAD LINE
HACKENSACK
RIVER
PIERHEAD & BULKHEAD LINE
SHIPBUILDING
FEDERAL
High Water Line
City of Bayonne Right of Way
MORRIS CANAL
CENTRAL R.R. OF N.J.
CENTRAL R.R. OF N.J.

said mortgages or any of them affecting all or any part of the Company's said lands and lands now or formerly under the waters of the Hackensack River in front thereof, with the appurtenances.

The provisions of this agreement shall apply and enure to the benefit of and be binding upon the parties hereto, their successors and assigns, it being understood that the said assigns of the Company include, but not by way of limitation, the Federal Dry Dock and Repair Company, a corporation of the State of New Jersey, to which the Company contemplates conveying the portion of its property situate on the easterly side of the Hackensack River prior to or during the performance of this agreement.

In Witness Whereof, the Company has hereunto caused its corporate seal to be annexed and this instrument to be signed by its president and attested by its secretary, and the City has hereunto set its municipal seal and causes this instrument to be signed and attested by its proper municipal officers duly authorized to execute the same.

FEDERAL SHIPBUILDING COMPANY,

By E. H. Gary, President.

Approved as to Form:

W. W. Corlett,
11/19/18.

(SEAL)

Attest:

Thomas Murray,
Assistant Secretary.

Bill of Complaint—Schedule A.

THE MAYOR AND COUNCIL OF
THE CITY OF BAYONNE,

By ....., Mayor.

Attest:

....., Clerk.

AGREEMENT NO. 4.

Indenture, made this fifteenth day of November, 1918, by and between the Blast Furnace Products Corporation, a corporation duly organized and existing under, and by virtue of the Laws of the State of Delaware, having an office in the Town of Kearny, County of Hudson and State of New Jersey (hereinafter referred to as the "Grantor") and The Mayor and Council of the City of Bayonne, a municipal corporation in the County of Hudson and State of New Jersey (hereinafter referred to as the "Grantee") and their respective successors and assigns, witnesseth:

That, for and in consideration of the sum of one dollar ($1.00), to it in hand paid, receipt whereof is hereby acknowledged, and other good and valuable consideration, the Grantor does hereby sell, grant and convey to the Grantee the right and privilege to lay, maintain and operate such water pipe lines as may, from time to time, be necessary for the transportation and supply of water to the Grantee under the premises owned by the Grantor, situate in the Town of Kearny, County of Hudson, and State of New Jersey, upon a right of way consisting of a strip of land twenty feet (20′) in width, bounded and described as follows:

Bill of Complaint—Schedule A.

Beginning at a northwesterly corner of the said premises of the Grantor in the boundary line between the premises now or formerly of the Federal Shipbuilding Company and said premises of the Grantor, and running thence easterly along the southerly line of the Morris Canal, a distance of four hundred and forty feet (440′) more or less, to the west bank of the Hackensack River; thence in so far as Grantor can grant the same, under and across the said river to a point on the east bank of the said Hackensack River, approximately at the southerly line of the said Morris Canal on the east bank of the said Hackensack River.

Together with necessary ingress and egress, to construct, maintain, operate, repair and remove the said water pipe lines.

To Have and to Hold the same to the Grantee, its successors and assigns forever, for the uses and purposes herein expressed, subject, however, to and upon the following conditions:

First: The Grantee will use the said right of way for the purposes herein described and only for those purposes, and will install and commence the operation of the said pipe lines not later than July 1st, 1919, except as necessarily delayed beyond July 1st, 1919, by causes beyond the reasonable control of Grantee or its contractor. Within thirty days after the date hereof, the Grantee will make and furnish to the Grantor a survey of the said right of way, satisfactory to the Grantor, which survey shall be attached to and considered a part of the above description and this agreement. No gate house or other structure or obstruction shall be erected or placed upon the said right of way.

Second: All pipe lines shall be laid under the surface of the said twenty-foot strip or right of way. The Grantee agrees to keep the said right of way free from all filling material, planking, piping and other materials not actually in use in the installation, repair or removal of pipe lines on the said right of way herein granted, and to level off the surface of the said right of way and remove therefrom all filling material, planking, piping and other materials as soon as possible after any necessary excavation is made, and to keep and maintain the said surface of the said right of way level and in a slightly condition.

Third: Pipe lines under the said river are not in any event to be laid south of a straight line drawn from the southerly line of said twenty-foot strip or right of way herein granted, at the westerly bank of said Hackensack River, to the southerly line of said Morris Canal on the east bank of the said river, and are to be laid, maintained and operated, subject to the approval of the War Department of the United States, and of the Board of Commerce and Navigation of the State of New Jersey. During the installation the Grantee, may if necessary, use such reasonable space at the landing place of the said pipe lines on the west bank of the said river, in addition to the said twenty-foot strip or right of way, as may be required for the work of piling, masonry and trussing to hold and anchor the said pipe lines in position, and to connect with the said pipe lines under the right of way herein granted, but after once being laid and connected the position of said pipe lines is not to be changed.

Fourth: The Grantee, at its own cost and expense, will install and maintain all necessary outlets and connections from the said pipe lines under the said right of way for furnishing water supply to the Grantor, its successors and assigns, upon the said premises owned by the Grantor, its successors or assigns, and lay and connect up a four-inch pipe line and connections from the said pipe lines to the plant of the Grantor, its successors and assigns. After the plant of the Grantor, its successors and assigns, has been so connected with the said pipe lines, and is receiving its water supply therefrom, the Grantee may, if it desires, and within ninety days thereafter, disconnect and take up the connections and pipe through which the said plant of the Grantor now receives its water supply from the pipe lines to the south of the said premises of the Grantor.

Fifth: The Grantee will install upon, and connect with, the said pipe lines, at such places on the said right of way, hereby granted as the Grantor may designate, two six-inch fire hydrants, and will maintain the same for the use of the Grantor, its successors and assigns, for protecting against fire any plant or plants of the Grantor, its successors and assigns.

Sixth: As a further consideration for the making of this agreement, the Grantee hereby agrees that it will furnish and deliver to the Grantor, its successors and assigns, the entire water supply needed for manufacturing, or other purposes, upon the said premises of the Grantor, its successors and assigns, either from the pipe lines to be laid under the said twenty foot strip or right of way or from such other pipe lines as may be laid for the water supply of the said

Grantee, its successors or assigns. For the period of twenty-five (25) years from the date hereof, the Grantee will furnish and deliver such water supply to the Grantor, its successors and assigns, at the agreed purchase price of one dollar and twenty cents ($1.20) per thousand cubic feet, meter measurement, bills therefor to be rendered and paid quarterly and the Grantee further agrees, as a further consideration for the making of this agreement, to credit and allow the Grantor, its successors and assigns, the sum of five thousand dollars ($5,000) on account of such water to be furnished, by deducting and allowing, from the amount of each quarterly bill rendered after the date hereof, for water furnished to the Grantor, its successors and assigns, the sum of one hundred and twenty-five dollars ($125), or if the amount of any such bill be less than one hundred and twenty-five dollars ($125), then the amount of such bill, until the entire sum of five thousand dollars ($5,000) has been credited and allowed. After the expiration of the said twenty-five (25) year period, the Grantee will furnish and deliver such water supply to the Grantor, its successors and assigns, at the same rates which the Grantee then charges for similar service within the City of Bayonne.

Each and all of the above covenants and conditions on the part of the Grantee (numbered "First" to "Sixth," both inclusive), are express conditions of the granting of this right and privilege, and (a) if the Grantee shall violate or fail in the performance of any of the said conditions, or if the said right of way shall at any time cease to be used by the Grantee, its successors or assigns, for the purposes herein described, then (at the option of the Grantor, its success-

ors and assigns, and without prejudice to, or limitation upon, any remedies at law and in equity, which the Grantor, its successors and assigns may have), any and all rights herein granted by the Grantor to the Grantee, and any and all right, title and interest in and to said right of way, and said premises, shall thereupon wholly cease and determine and revert to the Grantor, its successors and assigns (provided, however, that if there shall then be other satisfactory sources of supply from which the Grantee shall furnish the water supply to the Grantor, its successors and assigns as in paragraph "Sixth" hereof provided), the Grantee shall have the right to enter upon and remove the said pipe lines from the said twenty-foot strip or right of way, within three months after such reversion, restoring the surface of the said right of way after such removal.

It is expressly agreed that the waiver of, or redress for, one violation of any covenant or condition herein contained shall not prevent any subsequent act or omission, which would have originally constituted a violation, from having all the force and effect of an original violation. No provision of this agreement shall be deemed to have been waived by the Grantor, unless such waiver be in writing duly signed by it.

The Grantee for itself, its successors and assigns, hereby expressly agrees to indemnify and save the Grantor, its successors and assigns, harmless of and from any and all claims, suits, demands or liabilities of any kind, nature or description whatsoever, of or to anyone whomsoever, arising out of, or by reason of, the use of the said right of way by the Grantee, its successors and assigns, or by any act of, or omis-

sion by the Grantee, its successors or assigns, in connection with the said right of way or its use.

This agreement shall not restrict or affect the use or enjoyment of the Grantor, its successors and assigns, of the said twenty-foot strip or right of way, except that the Grantor, its successors and assigns, shall not make any use of the same which will interfere with its use by the Grantee for the purposes herein described.

IN WITNESS WHEREOF, the party of the first part has hereunto caused its corporate seal to be annexed and these presents to be signed by its president and attested by its secretary; and the party of the second part has hereunto set its municipal seal and caused these presents to be signed and attested by its proper municipal officers duly authorized thereto.

THE BLAST FURNACE PRODUCTS CORPORATION,

(SEAL) By CHARLES B. JAQUA,
President.

Attest:

E. C. STUCKLESS,
Secretary.

THE MAYOR AND COUNCIL OF THE CITY OF BAYONNE,

By.....

Attest:

Bill of Complaint—Schedule B.

Schedule "B"

By Commissioner Hosford.

WHEREAS on the application of the East Jersey Water Company (now known as the Passaic Consolidated Water Company) an order was made by the Public Utility Commissioners on the 27th day of March, 1923, increasing the rate to be paid for water by this City to said Water Company from $19.50 to $78 per million gallons, and

WHEREAS this City upon the filing of the said decision by the said Public Utility Commissioners, immediately instituted a suit in the Supreme Court to test the right of said Commission to increase the rate over and above that provided for in the contract made by the said Water Company with the New York and New Jersey Water Company, which contract was purchased by this City, from said last mentioned company by deed dated 6th day of September, 1918, which Court confirmed the said order, and thereupon this City appealed the case to the Court of Errors and Appeals, which Court by a unanimous decision filed on the 19th day of May, 1924, affirmed the judgment of the Supreme Court, and

WHEREAS the said increase in the rate to be paid by this City to said Water Company by the terms of the said order, became operative on the first day of January, 1923, and

WHEREAS the said increase in the rate to be paid by this City necessitates the revision of the rates heretofore charged consumers of said water supplied by the City.

THEREFORE, BE IT RESOLVED that the following rates be charged, and the same is hereby estab-

lished for water furnished by this City to consumers thereof:

For domestic use—$1.75 per 1,000 cu. ft. Said rate to be charged from Jan. 1, 1925.

For manufacturing use, under 500,000 cubic ft. per month, per 1,000 cu. ft.....$1.75

500,000 to 1,000,000 cu. ft. per month, per 1,000 cu. ft.....$1.65

All water in excess of 1,000,000 cu. ft. per month, per 1,000 cu. ft.....$1.50

All manufacturing plants located on the meadows on the West side of Newark Bay, (known as the Newark Meadows) per 1,000 cu. ft.....$1.75

The rates for all manufactories, including those located on the said Newark Meadows, are to be charged from January 1st, 1923, the said rates to be in force until all the money due the Water Company for the increased rates is paid.

Affidavit of W. C. Hemingway.

IN CHANCERY OF NEW JERSEY.

Between FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Complainant,* *and* CITY OF BAYONNE, a municipal corporation, *Defendant.*	*On Bill, etc.* *Affidavit.*

STATE OF NEW JERSEY,
COUNTY OF HUDSON. } *ss.*

W. C. HEMINGWAY, of full age, being duly sworn according to law, on his oath deposes and says:

I am the assistant to L. H. Korndorff, the Vice-President and General Manager of Federal Shipbuilding and Dry Dock Company, the complainant in the above entitled cause. Mr. Korndorff is now in California recovering from an operation, and in his absence as such assistant I am in charge of the shipbuilding and dry dock plant of said company located in the Town of Kearny, Hudson County, New Jersey, and mentioned in the said bill of complaint. I have been continuously in the employ of complainant at its said plant ever since prior to April, 1919, and am entrusted with its interests in this suit. I am familiar with matters and controversies involved therein. I have read said bill of complaint and thoroughly believe each and every allegation and statement made therein to be true.

Affidavit of W. C. Hemingway.

Complainant is a corporation of the State of New Jersey. It has owned each of the properties described in paragraph "4" of the said bill of complaint ever since prior to April, 1919, and still owns each thereof. The statements contained in paragraphs "5," "6" and "7" of said bill of complaint are true of my own knowledge, as are also the allegations of paragraphs "8," "9," "10" and "11" to the best of my knowledge and belief. The notice, of which a copy is set forth in paragraph "12" of said bill of complaint, was served on complainant on September 23, 1926. The statements contained in paragraph "13" of said bill are true of my own knowledge. Were the City of Bayonne to discontinue its water supply to the Kearny plant of complainant, not only would it be impossible to operate said plant but same would be liable to be destroyed by fire as the complainant's only source of water supply at said plant for fire prevention, or other purposes, is the supply it receives from the City of Bayonne, as stated in said bill of complaint.

W. C. HEMINGWAY.

Sworn and subscribed before me
this 5th day of October, 1926.

R. J. KEPLER,
Notary Public of New Jersey.
(SEAL) My Commission expires Mar. 12, 1930.

Affidavit of Charles W. Bryan, Jr.

IN CHANCERY OF NEW JERSEY.

Between	
FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Complainant,*	*On Bill etc.*
and	
CITY OF BAYONNE, a municipal corporation, *Defendant.*	*Affidavit.*

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } *ss.*

CHARLES W. BRYAN, JR., of full age, being duly sworn according to law, on his oath deposes and says:

I am the Plant Engineer of Federal Shipbuilding and Dry Dock Company, the complainant in the above entitled cause. I have held such position continuously since prior to April, 1919, and during all of said period have been in charge of new plant construction work at the Kearny plant of the complainant and also in charge of the maintenance of the buildings and equipment installed thereon.

I have read the bill of complaint herein and fully believe each and every of its allegations and statements to be true. On behalf of the defendant I had the oversight and supervision of the relocation and reconstruction of water pipe lines of defendant through complainant's Kearny and Jersey City properties following the making of the agreements mentioned in paragraph "6" of

said bill of complaint and of which agreements copies are attached to said bill. The water pipe lines of the City of Bayonne mentioned in paragraphs "5," "6" and "7" of said bill were relocated and reconstructed, as well as additional pipe lines of the defendant laid through the said properties of the complainant, in accordance with provisions of said agreements. The statements contained in paragraphs "11," "12" and "13" of said bill are true of my own knowledge.

CHARLES W. BRYAN, JR.

Sworn and subscribed before me
this 5th day of October, 1926.

R. J. KEPLER,
Notary Public of New Jersey.
(SEAL) My Commission expires Mar. 12, 1930.

Affidavit of Creighton M. Konkle.

IN CHANCERY OF NEW JERSEY.

Between FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Complainant,* *and* CITY OF BAYONNE, a municipal corporation, *Defendant.*	*On Bill, etc.* *Affidavit.*

STATE OF NEW JERSEY,
COUNTY OF HUDSON. *ss.*

CREIGHTON M. KONKLE, of full age being duly sworn according to law, on his oath deposes and says:

I am the Auditor of Federal Shipbuilding and Dry Dock Company, the complainant in the above entitled cause and as such have charge of its records and accounts. I have held said position continuously since prior to April, 1919, and during all of said time have performed my said duties at the Kearny plant of said company described in said bill of complaint. As such officer I am familiar with the matters in controversy in the above entitled suit. I have read the bill of complaint therein and thoroughly believe each and every of its statements and allegations to be true. I have examined a certified copy of proceedings had by the Board of Commissioners of the City of Bayonne in March and April, 1919, and know that it appears thereby that the agreements referred to in paragraph "6" of said bill

of complaint were authorized by resolution of the said Board finally passed on April 4, 1919. Payment of $150,000.00 by complainant to defendant, referred to in paragraph "7" of said bill of complaint was made on July 22, 1919, and from July 1, 1919 to August 31, 1926, complainant has obtained its entire water supply from the City of Bayonne pursuant to provisions of said agreements under which said payment of $150,000.00 was made. I am fully informed as to the controversies which have existed and still exist between complainant and defendant as to the amounts properly chargeable by the latter to the former for the water so furnished during said period. It has been part of my duty as Auditor of complainant to see that it has paid the proper amount from time to time due the defendant for the water so furnished and that no undue credits were taken by the defendant against the sum of $150,000.00 so paid in advance on July 22, 1919, as well as to see that said payments and credits represented the full amount which the complainant was obligated to pay for such water. Paragraph "8" fully states the controversies heretofore and now existing between complainant and defendant. I know this to be true because all of the bills rendered by defendant to complainant for water furnished during said period have been examined by me and also because of interviews which I have had from time to time in reference to the amount of such credits. The statements contained in paragraphs "9," "10," "11," "12" and "13" of said bill are true of my own knowledge. The notice, of which, a copy is set forth in paragraph "12" of said complaint was served upon me by a representative of the City of Bayonne at the

Affidavit of Creighton M. Konkle.

Kearny Plant of complainant on September 23, 1926.

CREIGHTON M. KONKLE.

Sworn and subscribed before me
this 5th day of October, 1926.
R. J. KEPLER,

Notary Public of New Jersey.
(SEAL) My Commission expires Mar. 12, 1930.

Certified to be a true copy of the original of the foregoing papers.

LINDABURY, DEPUE & FAULKS,
Solicitors of Complainant.

ORDER TO SHOW CAUSE.

IN CHANCERY OF NEW JERSEY.

Between		
FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation,	*Complainant,*	*On Bill, etc.*
and		*Order to Show Cause, etc.*
CITY OF BAYONNE, a municipal corporation,	*Defendant.*	

This matter being opened to the Court by Frederic J. Faulks, Esq., of counsel with the complainant and the Court having read and considered the bill of complaint herein and the affidavits filed in support thereof,

It is on this fifth day of October, 1926, on motion of Messrs. Lindabury, Depue & Faulks, solicitors for the complainant,

ORDERED, That the defendant, the City of Bayonne, show cause before the Chancellor at the Chancery Chambers in the City of Newark, on Tuesday, the nineteenth day of October, 1926, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue during the pendency of this suit pursuant to the prayer of said bill of complaint, and

IT IS FURTHER ORDERED that until the further order of the Court herein the said defendant, the City of Bayonne, its officers, servants, represen-

Order to Show Cause.

tatives and agents, and each thereof, absolutely desist and refrain from shutting off, diminishing or in any otherwise interfering with or taking any steps, actions or proceedings to shut off, diminish or interfere with the supply of water from the defendant to the complainant, and

IT IS FURTHER ORDERED, that a true copy of this order and bill of complaint and affidavits thereto annexed, which may be certified by complainant's solicitors, shall be served upon defendant within four days from the date hereof by delivering the same to the Director of Revenue and Finance or the City Attorney of the said City of Bayonne, personally, or by leaving the same at the office of either of said officers with the agent or person in charge of said office.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

ORDER FOR CONTINUANCE.

IN CHANCERY OF NEW JERSEY.

Between	
FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Complainant,*	*On Bill, etc.*
and	*Order for Continuance.*
CITY OF BAYONNE, a municipal corporation, *Defendant.*	

The parties to the above-entitled suit consenting thereto,

IT IS, on this nineteenth day of October, 1926, ORDERED that the hearing upon the Order to Show Cause made herein on October 5, 1926, be and the same is hereby continued until Wednesday, November 3, 1926, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancery Chambers in the City of Newark.

FURTHER ORDERED, that the restraint contained in the said Order to Show Cause shall be and the same is hereby continued until the further order of the Court.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

ORDER FOR CONTINUANCE.

IN CHANCERY OF NEW JERSEY.

Between FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Complainant,* *and* CITY OF BAYONNE, a municipal corporation, *Defendant.*	*On Bill, etc.* *Order for Continuance.*

The parties to the above-entitled suit consenting thereto,

IT IS, on this third day of November, 1926, ORDERED, that the hearing upon the Order to Show Cause made herein on October 5, 1926, be and the same is hereby further continued until Tuesday, November 16, 1926, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancery Chambers in the City of Newark.

FURTHER ORDERED, that the restraint contained in the said Order to Show Cause shall be and the same is hereby continued until the further order of the Court.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

STIPULATION.

IN CHANCERY NEW JERSEY.

Between

FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation,

Complainant,

and

CITY OF BAYONNE, a municipal corporation,

Defendant.

On Bill, etc.

Stipulation.

It is hereby stipulated and agreed that the order to show cause granted in the above-entitled cause shall be continued to Tuesday, November 16th, and that the restraint contained in the said order to show cause shall be and the same is hereby continued until the further order of the Court.

JAMES BENNY,
Solicitor for Defendant.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainant.

ORDER FOR CONTINUANCE.

IN CHANCERY OF NEW JERSEY.

Between	
FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Complainant,*	*On Bill, etc.*
and	*Order for Continuance.*
CITY OF BAYONNE, a municipal corporation, *Defendant.*	

The parties to the above-entitled suit consenting thereto,

IT IS, on this sixteenth day of November, 1926, ORDERED, that the hearing upon the Order to Show Cause made herein on October 5, 1926, be and the same is hereby further continued until Tuesday, November 23, 1926, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancery Chambers in the City of Newark.

FURTHER ORDERED, that the restraint contained in the said Order to Show Cause shall be and the same is hereby continued until the further order of the Court.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

ORDER FOR CONTINUANCE.

IN CHANCERY OF NEW JERSEY.

Between

FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation,

Complainant,

and

CITY OF BAYONNE, a municipal corporation,

Defendant.

On Bill, etc.

Order for Continuance.

The parties to the above-entitled suit consenting thereto,

IT IS, on this twenty-third day of November, 1926, ORDERED, that the hearing upon the Order to Show Cause made herein on October 5, 1926, be and the same is hereby further continued until Tuesday, November 30, 1926, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancery Chambers in the City of Newark.

FURTHER ORDERED, that the restraint contained in the said Order to Show Cause shall be and the same is hereby continued until the further order of the Court.

E. R. WALKER,

C.

Respectfully advised,

ALONZO CHURCH,

V.-C.

ORDER FOR CONTINUANCE.

IN CHANCERY OF NEW JERSEY.

Between FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Complainant,* *and* CITY OF BAYONNE, a municipal corporation, *Defendant.*	*On Bill, etc.* *Order for Continuance.*

The parties to the above-entitled suit consenting thereto,

IT IS, on this thirtieth day of November, 1926, ORDERED, that the hearing upon the Order to Show Cause made herein on October 5, 1926, be and the same is hereby further continued until Tuesday, December 7, 1926, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancery Chambers in the City of Newark.

FURTHER ORDERED, that the restraint contained in the said Order to Show Cause shall be and the same is hereby continued until the further order of the Court.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

ORDER FOR TEMPORARY INJUNCTION.

IN CHANCERY OF NEW JERSEY.

Between	
FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Complainant,*	*On Bill, etc.*
and	*Order for Temporary Injunction.*
CITY OF BAYONNE, a municipal corporation, *Defendant.*	

The Court by its order made herein on the 5th day of October, 1926, having required the defendant herein to show cause why an injunction should not issue during the pendency of this suit pursuant to the prayer of the bill of complaint, and therein having ordered the said defendant, its officers, servants, representatives and agents, and each thereof, to absolutely desist and refrain from shutting off, diminishing or in any otherwise interfering with or taking any steps, actions or proceedings to shut off, diminish or interfere with the supply of water from the said defendant to the complainant, and the hearing on said order to show cause and such restraint having been duly continued until this time and the parties consenting hereto,

IT IS, on this 7th day of December, 1926, ORDERED as follows:

1. That during the pendency of this suit and until the final decree herein the defendant, its

officers, servants, representatives and agents, and each thereof, shall be and it and they are hereby ordered to further absolutely desist and refrain from shutting off, diminishing or in any otherwise interfering with or taking any steps, actions or proceedings to shut off, diminish or interfere with the supply of water from the defendant to the complainant, provided that in the meantime the complainant shall pay the defendant for water hereafter delivered it at the following rates:

Under 500,000 cubic feet per month—$1.75 per 1,000 cubic feet.

500,000 to 1,000,000 cubic feet per month—$1.65 per 1,000 cubic feet.

1,000,000 or over cubic feet per month—$1.50 per 1,000 cubic feet.

2. Complainant shall enter into a bond to the defendant in the sum of $75,000., with sufficient surety, said bond to be approved both as to form and surety by a Special Master of this Court, to secure to defendant the payment of any sums for water heretofore or hereafter delivered by defendant to the complainant and not paid for by the complainant, at such rate or rates as the defendant shall be found to be entitled to receive for said water by this Court or by any other Court having jurisdiction to determine the controversy existing between the said parties, as set forth in the bill of complaint herein.

E. R. WALKER,

C.

Respectfully advised,

ALONZO CHURCH,

V.-C.

Order for Temporary Injunction.

We consent to the making, entry and filing of the within order.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainant.

JAMES BENNY,
Solicitor for Defendant.

PETITION FOR LEAVE TO AMEND BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

Between FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Complainant,* *and* CITY OF BAYONNE, a municipal corporation, *Defendant.*	*On Bill, etc.* *Petition for Leave to Amend Bill of Complaint.*

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

The petition of Federal Shipbuilding & Drydock Company respectfully shows that:

1. The petitioner is the complainant in the bill of complaint herein.

2. The said bill of complaint has been filed in order that a decree may be made thereon enjoining and restraining the defendant from cutting off, interfering with or diminishing its supply of water to the petitioner and from taking any steps, actions or proceedings to interfere with its continuing the supply of water to the petitioner, and in order that this Court may by its decree settle and determine the rate or rates payable by the petitioner to defendant for the water heretofore furnished by defendant to the petitioner, or hereafter to be so furnished, under the agreements of

which a copy thereof is attached to said bill of complaint and made a part thereof.

3. At the time of the preparation and filing of said bill of complaint, the petitioner was erroneously informed as to the rates which the defendant is entitled to charge the petitioner for the water so furnished from February 1, 1925, if the petitioner's interpretation of said contracts and not that of the defendant is determined to be a true and correct interpretation thereof. In order to obtain a full determination of the controversy existing between the petitioner and the defendant as to such rates it is necessary for the petitioner to amend paragraphs 9 and 10 of its bill of complaint as follows:

9. At such last mentioned rates the total amount chargeable by defendant to complainant for the water so furnished complainant from July 1, 1919 up to and including August 31, 1926 is the sum of $147,206.09, or $2,793.91 less than the sum of $150,000., so paid by complainant to defendant in advance. At the rates so contended for by defendant the charges for the water so furnished during said period aggregate, according to defendant's contention, $192,227.13, being $42,227.13 in excess of said sum of $150,000. Complainant denies that it owes defendant said sum of $42,227.13 or any part thereof and claims and avers that under the said agreements so made between them complainant has paid in full for all of the water so furnished it, and in addition thereto said sum of $2,793.91.

10. Complainant has received no bill from defendant for any water furnished it since August 31, 1926 but from complainant's read-

ings of its meters it believes that at the rate properly chargeable for said month under said agreements the water furnished it by defendant is of the value of $1,669.65. Complainant is ready and willing at any time to pay defendant at said rate for the water furnished it by defendant during September 1926 or thereafter to be so furnished it, after applying against the proper charges therefor the sum of $2,793.91 so remaining unused out of the $150,000., paid by complainant to defendant on July 22, 1919. Complainant is also willing if required by this Honorable Court so to do to secure to defendant the payment of the sum of $42,227.13 so as aforesaid claimed by the defendant should it be found to be entitled thereto by this Court or by any other Court having jurisdiction to determine said controversy, and during the continuance of this suit to similarly secure payment to defendant of any amounts which may be in dispute pending the further furnishing of water to complainant by defendant.

4. No subpoena has been issued in the said suit and the defendant has not answered or otherwise pleaded to the said bill of complaint, but it has appeared in said suit and consented to the granting of a preliminary injunction therein pursuant to the prayer of said bill of complaint.

The petitioner therefore respectfully prays

1. That it may be permitted to amend its said bill of complaint in the manner above set forth.

Petition for Leave to Amend Bill of Complaint.

2. That it may also be permitted to issue a subpoena requiring the defendant to answer said bill of complaint as so amended.

And your petitioner will ever pray etc.

LINDABURY, DEPUE & FAULKS,
Solicitors of Petitioner, Federal
Shipbuilding & Drydock Company.

Dated February 7, 1927.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

C. M. KONKLE, of full age, being duly sworn according to law, on his oath says:

I am the Auditor of Federal Shipbuilding and Dry Dock Company, the petitioner in the foregoing petition named;

I have read the said petition and know the matters and things therein stated to be true.

C. M. KONKLE.

Sworn to and subscribed before
me this seventh day of Febru-
ary, 1927.

DOROTHY B. GOODEN,
Notary Public for New Jersey.
(SEAL) My commission expires Feb. 17, 1931.

ORDER GRANTING LEAVE TO AMEND BILL OF COMPLAINT, ETC.

IN CHANCERY OF NEW JERSEY.

Between

FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation,

Complainant,

and

CITY OF BAYONNE, a municipal corporation,

Defendant.

On Bill, etc.

Order Granting Leave to Amend Bill of Complaint, etc.

A petition having been filed herein by Federal Shipbuilding & Drydock Company, the complainant in the above entitled cause, whereby it asks leave to amend its bill of complaint therein, as hereinafter is permitted, and it appearing that no subpoena has been issued and that no answer or other pleading to the said bill of complaint has been filed but that the defendant has appeared in said cause, and upon good cause shown:

IT IS on this ninth day of February, 1927, ORDERED that the said Federal Shipbuilding & Drydock Company have leave to amend its said bill of complaint so that paragraphs 9 and 10 thereof will read as follows:

> 9. At such last mentioned rates the total amount chargeable by defendant to complainant for the water so furnished complainant from July 1, 1919 up to and including August 31, 1926 is the sum of $147,206.09,

or $2,793.91 less than the sum of $150,000. so paid by complainant to defendant in advance. At the rates so contended for by defendant the charges for the water so furnished during said period aggregate, according to defendant's contention $192,227.13, being $42,227.13 in excess of said sum of $150,000. Complainant denies that it owes defendant said sum of $42,227.13 or any part thereof and claims and avers that under the said agreements so made between them complainant has paid in full for all of the water so furnished it, and in addition thereto said sum of $2,793.91.

10. Complainant has received no bill from defendant for any water furnished it since August 31, 1926 but from complainant's readings of its meters it believes that at the rate properly chargeable for said month under said agreements the water furnished it by defendant is of the value of $1,669.65. Complainant is ready and willing at any time to pay defendant at said rate for the water furnished it by defendant during September 1926 or thereafter to be so furnished it, after applying against the proper charges therefore the sum of $2,793.91 so remaining unused out of the $150,000. paid by complainant to defendant on July 22, 1919. Complainant is also willing if required by this Honorable Court so to do to secure to defendant the payment of the sum of $42,227.13 so as aforesaid claimed by the defendant should it be found to be entitled thereto by this Court or by any other Court having jurisdiction to determine said controversy, and during the continuance of this suit to

similarly secure payment to defendant of any amounts which may be in dispute pending the further furnishing of water to complainant by defendant.

and that the said bill of complaint shall be and the same is hereby amended accordingly.

IT IS FURTHER ORDERED that the complainant have leave to issue a subpoena requiring the defendant to answer said bill of complaint as so amended and that a true but uncertified copy of this order shall also be served on the defendant.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

ANSWER.

IN CHANCERY OF NEW JERSEY.

Between

FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation,

Complainant,

and

CITY OF BAYONNE, a municipal corporation,

Defendant.

Answer.

The answer of the defendant, City of Bayonne, to the bill of complaint, as amended, filed by the complainant, is as follows:

1. It has no knowledge, but believes to be true the allegations contained in paragraph one of the complaint.

2. It admits paragraph 2 of the complaint.

3. It has no knowledge respecting the allegations contained in paragraph 3 of the complaint but believes the same to be true.

4. It has no knowledge respecting allegations contained in paragraph 4 of the complaint, but believes the same to be true.

5. It admits that it became necessary for the defendant to arrange to rebuild the said two water pipe lines and also to acquire a right of way through the properties of complainant for

Answer.

an additional and larger pipe line, but denies that any advantage accrued to it in re-locating the rights of way for such existing and proposed new water pipe line across complainant's properties.

6. It has no knowledge sufficient to form a belief as to the allegations contained in paragraph 6 or the complaint and relies upon complainant to produce the agreements therein referred to, and the terms and conditions therein set forth.

7. It admits the allegations contained in paragraph 7 of the complaint.

8. Defendant admits that it began to furnish complainant with water pursuant to the agreements made by it and the complainant, and that there is no disagreement between complainant and defendant as to the amount of water so furnished. Respecting the contentions of the complainant as to the current price of water sold to the complainant by the defendant or to other consumers, defendant does not answer, but leaves complainant to its proofs.

9. Defendant neither admits nor denies the allegations of paragraph 9 of the complaint, but leaves complainants to its proofs of the allegations thereof.

10. Defendant neither admits nor denies the allegations contained in paragraph 10 of the complaint, but leaves complainant to its proof of the allegations contained therein, and accepts the offer of the complainant to secure to the defendant the payment of the balance of $42,-227.13 claimed by it, and similarily securing the payment to the defendant of any amount that

may be in dispute concerning the furnishing of water to the complainant by the defendant.

11. Defendant admits the allegations contained in paragraph 11 of the complaint.

12. Defendant admits the allegations contained in paragraph 12 of the complaint.

Complainant is without sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 13 of the complaint.

CROSS PETITION.

1. The defendant is a municipal corporation of the State of New Jersey, incorporated by an Act approved March 10, 1869, entitled "An Act to Incorporate the City of Bayonne, in the County of Hudson and State of New Jersey, being Chapter 147 Laws of 1869." Its Charter was revised by an Act approved March 22nd, 1872 entitled "An Act revising the Act to Incorporate the City of Bayonne in the County of Hudson and State of New Jersey, approved March 10, 1869," and is known as Chapter 310 of the Laws of 1872.

2. At a special election held in the City of Bayonne, March 9, 1915, by a majority vote of its electors, the provisions of an act entitled "An Act relating to the regulation, and providing for the government of cities, towns, boroughs and other municipalities within this State, approved April 25, 1911, being Chapter 221 of the Laws of 1911, were adopted, and this defendant has ever since been governed by and under the amendments thereof and supplements thereto, and the general laws of the State applicable to all cities and by such part of its charter as still remains in force.

Cross Petition.

3. Subsequently on April 13, 1915, at an election regularly held, five commissioners were elected, and the commissioners so elected duly qualified and assumed office at the time fixed by law, and they and their successor commissioners have since administered and are now administering the affairs of said City.

4. By resolution passed July 18, 1919, the corporate title of said City was changed from "The Mayor and Council of the City of Bayonne," to "City of Bayonne," and as is required by law, a certified copy of said resolution was filed in the office of the Secretary of State on July 30, 1919.

5. By agreement dated July 12, 1895, the East Jersey Water Company, a Public Utility, contracted to furnish water to the New York and New Jersey Water Company for the supply of water to the City of Bayonne. The property of the New York & New Jersey Water Company was subsequently taken over by the City of Bayonne, together with the contract under which the East Jersey Water Company supplied the water to the New York and New Jersey Water Company, on or about May 3, 1918. Under the terms of this contract with the East Jersey Water Company, water was supplied to the City of Bayonne at a rate of $19.50 per million gallons of water on the average.

6. On February 25, 1922, the East Jersey Water Company and associated water companies filed with the Board of Public Utility Commissioners of this state, a proposed amendment providing for increase in rates then being charged, and on March 27, 1923, the said Board of Public Utility Commissioners permitted the

Cross Petition.

East Jersey Water Company and associated companies to file a schedule in rates to become effective January 1, 1923, which included a rate to the City of Bayonne of $78.00 per million gallons in the place and stead of the rate fixed in the contract of $19.50. This finding of the Board of Public Utility Commissioners was subsequently reviewed by the Supreme Court of this State, and the Court of Errors and Appeals, and was affirmed in each court.

7. To meet the rate thus permitted to be charged by the East Jersey Water Company to the defendant, it was obliged to increase its charges for water furnished to its consumers, and did by appropriate resolution in the month of February, 1925, fix the rate to be charged to all manufacturing plants located on the meadows on the west side of Newark Bay, known as Newark Meadows which included the plant of the complainant at $1.75 per 1,000 cubic feet, the said charges to be made and become effective from the date named in the decision of the Board of Public Utility Commissioners, viz: January 1, 1923. The said rate to remain in force and effect until all of the arrearages which were then due to the East Jersey Water Company from January 1, 1923, were paid.

8. That in accordance with the said resolution the officers of the defendant billed to the complainant all water consumed by it from January 1, 1923, at the rate of $1.75 and that in the aggregate amount the charges are $92,314.08 for water consumed during said period. That the total amount of charges for water consumed from July 1, 1919, at the rate of $1.20 per 1,000 cubic feet, the aggregate amount for water con-

Cross Petition.

sumed during the period from July 1, 1919, to December 31, 1922, was $99,912.05, making a grand total to August 31, 1926, of $192,227.08, deducting the $150,000 paid by complainant to the defendant, under its aforesaid contract, leaving a balance due and owing to the complainant of $42,227.03, for which this defendant has demanded payment, and payment thereof has been refused by the complainant.

This defendant therefore prays by way of cross petition:

(a) The bill of complaint filed against it by the complainant herein be dismissed.

(b) That this court may settle and determine the rate or rates payable by complainant to defendant for the water heretofore furnished by defendant to complainant.

(c) That this court may determine the amount which is legally due and owing to the defendant by the complainant, and by its order require the defendant to pay the same.

(d) That the defendant may have such further and other relief in the premises as may be agreeable and just.

JAMES BENNY,
L. EDWARD HERRMANN,
Solicitors for and of Counsel with Defendant.

REPLICATION AND ANSWER TO CROSS-PETITION.

IN CHANCERY OF NEW JERSEY.

Between FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Complainant,* *and* CITY OF BAYONNE, a municipal corporation, *Defendant.*	*On Bill, etc.* *Replication and Answer to Cross-Petition.*

The complainant joins issue on the answer of the defendant.

As to the counter-petition contained in said answer complainant says as follows:

1. It believes the allegations of paragraphs 1 to 4 inclusive to be true.

2. It has no knowledge or information sufficient to form a belief as to the allegations of paragraphs 5 and 6.

3. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 7. In further answer thereto it says as follows: Any attempt that may have been made in and by the adoption of the resolution therein referred to to make the same or any rate fixed or attempted to be fixed thereby retroactive to January 1, 1923, or to any time prior to February, 1925, was invalid and of no

effect as against the complainant. That by reason of the agreements between complainant and defendant for the supply of water by the defendant to the complainant, made a part of the bill of complaint herein, it was impossible and illegal for the defendant to fix a rate of $1.75 per 1,000 cubic feet for such water without fixing at least as high a rate to all other consumers of an equal quantity of water, which the complainant avers the defendant did not by said resolution do or attempt to do.

4. It denies the allegations of paragraph 8 save that it admits that the computations in said paragraph contained showing the amount of the defendant's claim are substantially correct and also that defendant has demanded payment as in said paragraph stated, and that such payment has been refused by complainant. It further says:

(a) Its bill of complaint herein should not be dismissed and that it is entitled to the relief therein prayed for.

(b) It joins in prayer (b) of the said cross-petition.

(c) It is not indebted to the defendant in any sum.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainant.

NOTICE OF APPLICATION FOR ORDER OF REFERENCE.

IN CHANCERY OF NEW JERSEY.

Between

FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation,

Complainant,

and

CITY OF BAYONNE, a municipal corporation,

Defendant.

On Bill, etc.

Notice of Application for Order of Reference.

To James Benny, Esq.,
Solicitor of Defendant:

TAKE NOTICE that on Tuesday, the 19th day of April, 1927, at the hour of 10 o'clock in the forenoon, or as soon thereafter as the matter can be heard, at the State House, at Trenton, we shall apply to the Chancellor for an order referring the above-entitled cause to one of the Vice-Chancellors of this Court, to hear the same for the Chancellor, and to report thereon to him and advise what order or decree should be made therein.

LINDABURY, DEPUE & FAULKS,
Solicitors of Complainant.

ORDER OF REFERENCE.

IN CHANCERY OF NEW JERSEY.

Between

FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation,

Complainant,

and

CITY OF BAYONNE, a municipal corporation,

Defendant.

On Bill, etc.

Order of Reference.

This matter being opened to the Court by Messrs. Lindabury, Depue & Faulks, solicitors of the complainant, and it appearing that James Benny, Esq., solicitor for the defendant, has consented hereto:

It is, on this 27th day of April, 1927, on motion of Messrs. Lindabury, Depue & Faulks, solicitors of the complainant, ORDERED that the above-entitled cause be referred to Hon. Alonzo Church, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor, and to report thereon to him and to advise what order or decree should be made therein.

E. R. WALKER,

C.

Order of Reference.

We hereby consent to the making, entry and filing of the above order.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainant.

JAMES BENNY,
Solicitor for Defendant.

A true copy.

THOMAS BARBER,
Clerk.

DESIGNATION.

IN CHANCERY OF NEW JERSEY.

Between

FEDERAL SHIPBUILDING AND DRY DOCK COMPANY, a corporation,

Defendant.

and

CITY OF BAYONNE, a municipal corporation,

Defendant.

On Bill, etc.

Designation.

This matter being opened to the Court by Messrs. Lindabury, Depue & Faulks, solicitors for the complainant, and James Benny, Esq., solicitor for the defendant, consenting hereto it is on this eleventh day of June, 1927, ORDERED that the 21st and 22nd days of September, 1927, at the hour of ten o'clock in the forenoon at the Chancery Chambers in the Industrial Office Building, No. 1060 Broad street, in the City of Newark, in the County of Essex and State of New Jersey, be and the same are hereby designated as the time and place for the hearing in the above-entitled cause.

ALONZO CHURCH,
V.-C.

I hereby consent to the making, entry and filing of the above order.

JAMES BENNY,
Solicitor for City of Bayonne, a Municipal Corporation, Defendant.

Opening.

IN CHANCERY OF NEW JERSEY.

Sept. 21, 1927.

Between

FEDERAL SHIP BUILDING & DRY DOCK COMPANY, a corporation,

Complainant,

and

CITY OF BAYONNE, a municipal corporation,

Defendant.

Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Messrs. Lindabury, Depue & Faulks (by Mr. Faulks) for complainant; James Benny and L. Edward Herrmann, for defendant.

Mr. Faulks: In an effort to save the Court's time and to reduce the size of the record as much as possible, I call counsels' attention to the fact that, in Paragraph 1 of the Bill of Complaint, it is alleged that the complainant is a New Jersey corporation known originally under the name of Federal Ship Building Company and since April, 1919, under the name of Federal Ship Building & Dry Dock Company. The answer, in effect, denies or requires proof of those allegations. We have certified copies of the charters and amendments. I assume you are willing to make the admission now?

Opening.

Mr. Herrmann: We will make such admission.

Mr. Faulks: I offer in evidence the four agreements, a copy of each of which is attached to the bill of complaint. I assume it will be agreeable to have copies substituted.

Mr. Herrmann: No objection.

The Court: All right. They will be received and marked.

Mr. Faulks: In order that it appear here on record what these agreements are, I will describe them very briefly.

The first is dated November 18, 1918, and is made between Federal Ship Building Company, City of Bayonne and New York Transit Company. This is the agreement under which there is a provision for a relocation of the rights of way on the Jersey City side of the Hackensack River.

The Court: That will be marked Exhibit C. 1.

(Agreement marked Exhibit C. 1.)

Mr. Faulks: I offer the second agreement, being headed "Agreement No. 2." It bears the same date, and it was made between Federal Ship Building Company and the City of Bayonne. This provides for the relocation of the right of way on the Kearny side of the river. That will be marked Exhibit C. 2?

The Court: That will be C. 2.

(Agreement marked Exhibit C. 2.)

Mr. Faulks: Yes. I offer third agreement, being the one headed "Agreement No. 3," bearing the same date, and made between Federal Ship Building Company and the City of Bayonne.

This is the agreement under which the $150,000 in question was paid in advance for water.

Opening.

The Court: That will be Exhibit C. 3.

(Agreement marked Exhibit C. 3.)

Mr. Herrmann: I should like to have that last statement eliminated or modified, because I think each of the agreements referred to is a hundred and fifty thousand dollars. Is that right?

Mr. Faulks: No. I am only trying to identify them, and I do not hold anybody by any description of them. I think you are in error.

Mr. Herrmann: That being the case, of course—

Mr. Faulks: I also offer in evidence the fourth agreement. That is Agreement No. 4, made November 15th, 1918, between the Blast Furnace Products Corporation and the City of Bayonne. That will be C. 4.

(Marked Exhibit C. 4.)

Mr. Faulks: This is the agreement under which the right of way through the Blast Furnace Corporation property on the Kearny side of the river was relocated.

Mr. Herrmann, in view of what was said upon the opening, I imagine that you will be willing to stipulate that these agreements actually took effect as of July 1st, 1919. I mean by that that water was supplied by the defendant to complainant under them the first time beginning as of that date?

Mr. Herrmann: Yes.

Mr. Faulks: I call your Honor's attention to the fact that Agreement No. 3 has attached to it as a part thereof a map or blue print, purporting to show property owned by the Federal Ship Building Company, at the time the agreements were made, both in Jersey City and in the Town of Kearny, and showing also the location of the

main by which Bayonne was then supplied with water as the same existed at that time and as it was supposed to be reloacted under these four agreements.

Are you willing to stipulate that, Mr. Herrmann?

Mr. Herrmann: Yes.

Mr. Faulks: There will be no necessity, therefore, for proving ownership. And it should also appear on the record that this same map shows the property then owned by the Blast Furnace Products Corporation referred to in Agreement No. 4.

CHARLES W. BRYAN, JR., sworn for the complainant.

Direct examination by Mr. Faulks.

Q Will you state your name, Mr. Bryan? A Charles W. Bryan, Junior.

Q And are you connected with the complainant, Federal Ship Building & Dry Dock Company? A I am.

Q What position? A Plant engineer.

Q And how long have you held that position? A Since July or August, 1917.

Q Have you been continuously located at the company's Kearny plant since that time? A I have.

Q You are familiar, then, with the conditions which existed there in 1918 and 1919 with regard to the water mains by which Bayonne receives its water supply, coming from Kearny near the intersection of Kearny avenue and the Belleville Turnpike? A I am, sir.

Charles W. Bryan, direct.

Q The same thing is true with regard to the property then owned, or thereafter acquired by the complainant, in Jersey City? A Yes.

Q Does this blue print, attached to Exhibit C. 3, show the location of the mains that then extended through these Kearny and Jersey City properties? A It does.

Q And, also, does it correctly show the proposed relocation thereof, as provided for in the four agreements, C. 1 to C. 4? A It does, sir.

Q When the complainant acquired this Jersey City tract, was it all in one holding, or in various holdings? A It was in a number of holdings, probably eight or nine.

Q And, generally speaking, what were the dimensions or locations of the various strips that made up that entire tract? A The strips were a series of narrow strips running—the boundaries of which ran parallel to the Central Railroad and the highway.

Q And from where to where? A From the Morris Canal to the Hackensack River.

Q At that time were any of those strips owned by the City of Bayonne? A Yes, sir.

Q Can you indicate on this map entitled "Survey of Jersey City for the New Jersey Title Guaranty & Trust Company, S. Dunham, May 24, 1918," where this twenty foot strip was located? A Yes, sir.

Q Please read into the record from this map whatever may be necessary to clearly indicate such location. A The part in question is recorded on this map as "Part Eight-B, D19606." Do you wish it described by the boundaries?

Q Well, it lies between the lot shown on the map in the name of R. Louise Flack, and the lot there shown in the name of Standard Oil Co. of N. J., does it not? A Yes, sir.

Mr. Herrmann: Bayonne is willing to concede the fact that this right of way was formerly owned by it and abandoned and relocated on the shore map.

Mr. Faulks: I am not going to spend any time on it, but I think, perhaps, for the upper court to get the picture, it would be necessary to portray the situation as it exists.

Mr. Herrmann: We will admit all of it.

Mr. Faulks: I offer this map in evidence and ask leave to substitute a copy for it.

The Court: No objection; it will be received.

(Map marked Exhibit C. 5.)

Q That shows, Mr. Bryan, that this twenty foot strip extends from east to west from the Morris Canal to the Hackensack River and then under the river at an angle or two toward the Kearny shore of the river. A It does.

Q What was located on that strip, at the time that the Federal Ship Building Company acquired the remainder of the Jersey City holdings? A Two thirty-inch water mains.

Q And they extended, also, under the river, and through the Kearny property of the complainant, as indicated on the map Exhibit C. 3? A Yes, sir.

Q Were all those water mains rebuilt and relocated, following July, 1918, in accordance with the provisions of the four agreements, C. 1 to C. 4? A Yes, sir.

Q Mr. Bryan, what was the character of the business carried on by the Federal Ship Building Company on this Kearny property at the time these agreements were made? A Engaged

in the construction of steel cargo vessels and including boilers, machinery, and so forth, that made up the complete vessel.

Q Well, was that an extensive business, at that time? A It was very extensive.

Q Did the ship building plant, which had been built there and was then in use, cost a large amount of money?

Mr. Herrmann: I object. It is not relevant to the issue.

The Court: Why is it relevant?

Mr. Faulks: I think that your Honor ought to have the picture of the situation which existed there. I do not want to go into too much detail as to the volume of business. I do want to show that we had a very substantial plant there, that we carried on a very large volume of business and employed a large number of men and generally conducted an extensive business in the use of which a large amount of water was necessary and is still necessary.

Mr. Herrmann: I will concede that. We will present figures showing the amount of water that was used.

Mr. Faulks: Well, we can only be governed by the pleadings. The answer says they know nothing about it.

However, that concession makes it unnecessary, I think, to examine this witness any further.

The Court: That is all, sir.

Creighton M. Konkle, direct.

CREIGHTON M. KONKLE, sworn for the complainant.

Direct examination by Mr. Faulks.

Q State your full name, please, Mr. Konkle. A Creighton M. Konkle.

Q Are you also connected with the Federal Ship Building & Dry Dock Company? A I am.

Q In what capacity? A Auditor.

Q And where is your office located? A At the plant in Kearny.

Q And how long have you held that position there? A Since October, 1917.

Q You are familiar, then, in a general way, at least, with the making of these agreements, C. 1 to C. 4? A Yes, sir.

Q Is it part of your duty as auditor of the complainant to audit and pass upon the payments of bills rendered to the company? A It is.

Q And does that include bills received for any water that may be consumed in the carrying on of its business or maintenance of its business? A Yes, sir.

Q After these agreements had been made, did the Federal Ship Building Company pay the City of Bayonne the sum of one hundred and fifty thousand dollars, that it is provided it should be so paid, in advance, for water? A It did.

Q Have you the letter accompanying the check by which such payment was made, the letter acknowledging receipt of the check?

Mr. Herrmann: Bayonne admits the payment and receipt.

Mr. Faulks: The payment and receipt, but I want to show the circumstances under which the payment was made, the letter forwarding the check and letter acknowledging the receipt of it.

The Court: Well, the contents of the letter may throw some light on it.

The Witness: I have those; yes, sir.

Q Will you produce them, please? A (Witness produces letters.) You want these attached?

Q I can read them now and you can substitute copies after.

The Court: You want to introduce those in evidence, do you?

Mr. Faulks: I think so; yes, sir.

The Court: Is there any objection to them?

Mr. Herrmann: I would like to see them, first.

(Letters handed to Mr. Herrmann.)

Mr. Herrmann: No objection.

The Court: Let them be marked, then.

Mr. Faulks: I offer in evidence a letter sent by the Federal Ship Building Company to the Board of Commissioners of the City of Bayonne, N. J., dated July 22nd, 1919, and a letter addressed to the Federal Ship Building Company by Alexander Miller—Axel Miller, treasurer of the City of Bayonne, under date of July 26th.

I ask that that be marked.

The Court: Copies may be substituted.

(Letters marked Exhibits C. 6 and C. 7.)

Creighton M. Konkle, direct.

Q Mr. Konkle, following the payment of the hundred and fifty thousand dollars by the Federal Company to the City of Bayonne, did you from time to time receive, in the course of your duties, bills from Bayonne for the water furnished by it to the Federal Company? A Yes, sir.

Q At what rates were the first of these bills rendered? A A dollar twenty.

Q A dollar and twenty cents per one thousand cubic feet? A Per one thousand cubic feet.

Q When did the company discover that a lesser rate was being charged to the consumers of an equal quantity of water, located within the City of Bayonne? A I think that was the fore part of 1923.

Q And did it then bring that matter to the attention of the city? A Yes, sir.

Mr. Faulks: I don't think it is necessary to encumber the record with those letters, Mr. Herrmann, in view of the fact that no question was raised that we discovered the matter at that time and did bring it to the attention of the city, which, I understand, is the case.

Mr. Herrmann: Why, I think they ought to be before the Court.

Mr. Faulks: I am offering no objection, if you want them to go in.

The Court: I suppose they might throw some light on the matter.

Mr. Faulks: It simply shows we discovered this fact. It states our contention and theirs.

The Court: That is more argumentative than anything else.

Mr. Faulks: I do not think they are really of any aid.

The Court: Well, let them be marked, if Mr. Herrmann wants them in.

Mr. Faulks: I think all he said was that they discovered it in the early part of 1923.

Q Did the company thereupon communicate with the City of Bayonne on this subject? A They did.

Q And was that done by a letter, which I show you, dated July 25, 1923, addressed by—signed by L. H. Korndorff, vice-president and general manager? A That is right.

Q And subsequently, did the company communicate with the City again, on the same subject by a letter, which I show you, dated December 7, 1923? A That is right.

Q And is the further letter, which I show you, signed Eugene T. Sharkey, dated the 12/29/23, the reply which the company received from the City of Bayonne to these communications? A That is right.

Q Was there any other in reply, that you know of? A I know of no other.

Mr. Faulks: I offer these letters in evidence and ask that they be marked.

(Three letters marked Exhibits C. 8, C. 9 and C. 10.)

Mr. Faulks: Will you look, Mr. Herrmann, please, and see whether you have any objection to this being offered without the production of the minutes? I agreed with

Mr. Benny that the minutes need not be produced. He said to use copies.

Mr. Benny: I have copies of the minutes here.

Mr. Herrmann: We agree to copies being admitted.

Mr. Faulks: What is the date of that?

Mr. Benny: November 11, 1919.

Mr. Faulks: Well, subject to an opportunity on the part of counsel for the defendant to confirm their accuracy by reference to the official minutes of the City, I offer in evidence a letter addressed ~~to~~ by J. William Griffin, superintendent, to Honorable Bert J. Daley, Director of Revenue and Finance, Bayonne, N. J., dated November 11, 1919, the letter being apparently written on the letterhead of J. William Griffin, Superintendent of Water Supply.

And also I offer the resolution proposed by Commissioner Daley and passed by a unanimous vote of the Commissioners of the City of Bayonne at a meeting held on or about November 13th, or November 20th, with reference to the subject matter of this communication.

The Court: All right. Let it be marked.

Mr. Herrmann: Of course, subject to examination?

The Court: Oh, yes.

Mr. Faulks: I so stated.

That might be given one number rather than two.

(Papers marked Exhibit C. 11.)

Q Mr. Konkle, have you with you a letter that was sent by the City of Bayonne to the Federal Company, some time early this year, with regard to rates then being charged by Bayonne for water? A Yes, sir.

Q Will you produce it, please? A (Letter produced by witness.)

Mr. Faulks: I offer in evidence a letter addressed to Mr. C. N. Konkle, Auditor, Federal Ship Building Company, Kearny plant, N. J., dated January 24, 1927, signed "J. H. Twomey, Chief Clerk" and written on the stationery of the Department of Revenue and Finance of Bayonne, N. J., and substitute a copy.

The Court: No objection; it will be received.

(Paper marked Exhibit C. 12.)

Mr. Herrmann: Is that written by a chief clerk?

Mr. Faulks: Signed "J. H. Twomey, Chief Clerk."

Mr. Herrmann: I must object to that on the ground he must be shown to have authority. I don't know how important the letter is.

The Court: I will allow the letter to be introduced in evidence and, if it is written without authority, why, it does not amount to anything.

Mr. Faulks: If your Honor please, counsel have agreed to stipulate into the record the following facts, subject, however, to any objection with regard to their relevancy, competency and materiality: One, The amount

of water furnished by the defendant to the complainant during each month from July, 1919, to July, 1927, both inclusive, was as shown on the statement now to be offered in evidence and marked Exhibit C. 13, this schedule being headed "Schedule A. Monthly Water Consumption of the Federal Ship Building & Dry Dock Company of Kearny, New Jersey, July, 1919, to July, 1927."

Two. During each month from July, 1919, to January, 1925, both inclusive, the defendant furnished water at the rate of one dollar for one thousand cubic feet. to The consumers within the City of Bayonne have a quantity of water equal to that furnished by defendant to complainant during such months.

Three. For the water so furnished to the said consumers within the City of Bayonne during each month from January, 1923, to January, 1925, and the said consumers have, subsequent to the passage of a resolution of which a copy is attached to the bill of complaint herein, Schedule B, paid the defendant the difference between said rate of one dollar per one thousand cubic feet at the following rate: When the monthly consumption was less than five hundred thousand cubic feet, one dollar seventy-five per one thousand cubic feet; when the monthly consumption was in excess of five hundred thousand cubic feet, but not in excess of one million cubic feet, one dollar sixty-five per one thousand cubic feet; when the monthly consumption was in excess of one million cubic feet, one dollar fifty cents per one thousand cubic feet.

Four. During each month from February, 1925, to July, 1927, both inclusive, the defendant has furnished water at the said last-mentioned rates to the said respective consumers in the City of Bayonne.

The next one I am not sure we will agree on, but I think I had better start to read it and see if we cannot agree on it.

While we seem to be proceeding slowly, we are really saving a great deal of time, your Honor.

Mr. Herrmann: In the absence of Mr. Griffin I cannot admit that.

Mr. Faulks: All right.

Five. During each month from February, 1925, to August, 1927, both inclusive, the defendant furnished water to such other consumers located on the Kearny meadows at the rate of one dollar seventy-five per one thousand cubic feet.

It is rather unfortunate that we cannot complete that picture by agreeing on two other matters, but apparently we are unable to do it.

Q Mr. Konkle, applying the rate of one dollar per one thousand cubic feet from the period from July 1, 1919, to January 1, 1925, and with a sliding scale rate referred to in the Twomey letter, received in evidence as Exhibit C. 12, to all the water delivered by the City of Bayonne to the complainant, how much of the payment of one hundred and fifty thousand dollars made in advance, under the agreement C. 1 to C. 4, had been used up at the end of August, 1926?

Mr. Herrmann: Just a moment. I object to that, unless it can be shown that such a rate was in effect during that period.

Mr. Faulks: Well, that is our conception of the case. Our contention is, as has been stated by Mr. Herrmann himself, that those are the rates that, under these agreements, we are entitled to receive water for during that period. I am simply asking the witness to state, of those rates, how much of the initial payment had been used up.

The Court: I will allow it.

Mr. Herrmann: Your Honor please—

The Court: I will allow the question.

Mr. Herrmann: Might I be heard before your Honor rules on it?

The Court: Certainly.

Mr. Herrmann: There were two classes of rates. I see what Mr. Faulks is trying to do, but I think while we are doing it, we should get it accurately. From 1919 to January 1, 1923, there was one set of rates; from January 1, 1923, up to the present time, there was another set of rates. He should put both rates in, to be accurate.

The Court: Well, I will allow the question.

A As I understand your question, from January, 1919, to the end of January, 1925, one set; the dollar rate and the sliding scale from that—(interrupted).

Mr. Faulks: That is going to encumber it, if you state it that way. Strike out my original question.

Q Mr. Konkle, is the complainant's contention that it is entitled to receive water payable under Agreements C. 1 to C. 4 at the following rates correct; at the rate of one dollar per one thousand cubic feet, from July 1, 1919, to a period to January 1, 1925; from January 1, 1925, and thereafter, at the sliding scale rate described in Exhibit C. 12, as long as that rate continued in force? A I think with the exception of January, 1925. I think the first rate goes to the end of January, 1925, and the other begins February 1, 1925.

Q All right. Substitute February 1, 1925, for January 1, 1925, and then answer the question. A Yes, sir.

Q Now, upon the assumption that that is the rate at which the complainant is entitled to receive water from defendant, had the one hundred and fifty thousand dollars paid in advance been used up— A No, sir.

Q —by August 31, 1926? A No, sir.

Q Upon that basis, how much of said sum remained to be still credited to the water bills? A $2,793.91.

Q Now, taking what we understand to be the City's contention, namely, that the agreements required the complainant to pay the defendant for said water at the rate of one dollar and twenty cents from July 1, 1919, to January 1, 1923, and after that date at such last mentioned sliding scale rates, had the one hundred and fifty thousand dollars paid in advance been entirely used up by August 31, 1926? A Yes, sir.

Q And how much in excess of that amount? A I don't believe I have that figure, Mr. Faulks, of the sliding scale rate, during that period, the latter period.

Creighton M. Konkle, cross.

Q I show you, to refresh your recollection, copy of the amendment made to the bill of complaint, under the order of February 9, 1927, and ask you if, after looking at it, you can state such amounts. A (Counsel confers with witness.)

Mr. Faulks: The witness says the amendment in question does not refresh his recollection, but he is prepared to state the amount according to his understanding.

The Court: Well, how much is it?

The Witness: $42,227.13.

The Court: Is that right?

Mr. Herrmann: I think that is the amount we claim, $42,227.13.

The Court: All right. Is there anything further?

Mr. Faulks: I think not, sir.

The Court: That is all—

Mr. Herrmann: Just a few questions.

The Court: Very well.

Cross examination by Hr. Herrmann.

Q I show you some bills and letters and would ask you to identify these as being on the stationery of the Federal Ship Building Company.

The Court: Do you want to introduce those in evidence?

Mr. Herrmann: I would like to offer them in evidence, if there is no objection.

Mr. Faulks: Well, I do object, because I do not see their relevancy.

The Court: I will allow them in evidence and decide whether they are relevant or not when it comes to determining the case.

Mr. Herrmann: I think it would be well to have them marked as one lot instead of individually.

(Bundle of papers marked Exhibit D. 1.)

Q The name signed to this, "C. M. Konkle;" is that your name? A Yes, sir.

Q And the bills which have been shown to you were audited by you? A Statements?

Q Yes. A They are not bills; they are just statements of account.

Q Well, the accounts were audited by you? A Not personally; no.

Q Well, under your direction? A Under my direction.

Mr. Herrmann: That is all.

The Court: That is all.

Mr. Faulks: That is all, sir.

Mr. Stalling.

WILLIAM F. STALLING, sworn for the complainant.

Direct examination by Mr. Faulks.

Q Your name, please. A William F. Stalling.

Q What position do you hold with the City of Bayonne? A Water purveyor.

Q And what are your duties as such? A Take charge of water meters.

Q Do you know the rate charged by the City of Bayonne for water furnished the consumers within and without the City? A I do.

William F. Stalling, direct.

Q You have been subpoenaed to produce all books, records, cards, contracts and other documents or writings in your possession and control, or in the possession or control of the City of Bayonne, showing the rate or rates charged and paid and how from such rate or rates can be computed the water in excess of 541,000 cubic feet furnished by the City of Bayonne in each and every month, since and including July, 1919, to any person, firm or corporation either within or without the City of Bayonne. Please produce the records showing the rates charged to the consumers located on the Kearny meadows during the period from July, 1919, to December 31, 1919.

Mr. Herrmann: I am prepared to stipulate—Mr. Faulks has asked for this period—that during each month from July, 1919, to December, 1919, both inclusive, the defendant furnished water to the consumers other than complainant located on the Kearny meadows a quantity of water equal to or less than that furnished by the defendant to the complainant, during each said month, at the rate of one dollar per thousand feet. That is very short, and Mr. Faulks has asked for that stipulation, I assume.

I will further stipulate, to save the time of the Court, that during each month from January, 1920, to January, 1925, both inclusive, the defendant furnished water to such other consumers located on the Kearny meadows at the rate of one dollar twenty cents per thousand cubic feet.

Mr. Faulks: That makes it unnecessary to pursue that subject further.

The Court: All right.

William F. Stalling, direct.

Q Now, Mr. Stalling, it is a fact, is it not, that such large consumers, located within the City of Bayonne, as the Standard Oil Company, Babcock & Wilcox Company, Pacific Coast Borax Company, the Tidewater Oil Company, and possibly others, are charged at the rate of one dollar fifty cents for one thousand cubic feet, in each month where the total consumption exceeds one million cubic feet. Where it is between five hundred thousand and a million cubic feet they are charged one dollar sixty-five, and where it is less than five hundred thousand cubic feet they are charged one dollar seventy-five per thousand cubic feet? A That is correct.

Q And those concerns use approximately the same amount of water, more or less, that the Federal Ship Building does? A That is correct.

Q And they are also large consumers? A Yes.

Mr. Faulks: That is all.

The Court: That is all, sir.

What else is there? It seems to me that this case is practically one to be decided on these points of law: 1. Whether this rate was retroactive and the other one is the construction of the contract as to whether or not this complainant is entitled to the same benefits as the Standard Oil and all these other people are.

Mr. Herrmann: Those are the only two.

The Court: I do not see that you need any other facts.

Mr. Faulks: We rest. I don't know what Mr. Herrmann may have.

Mr. Herrmann: I want to call Mr. Hosford to prove the sending out of the notice.

The Court: Oh, yes.

Mr. Herrmann: I think that affects the second proposition your Honor stated.

The Court: It might, yes. Let us have that.

HARRY HOSFORD, sworn for the defendant.

Direct examination by Mr. Herrmann.

Mr. Herrmann: Mr. Faulks has agreed that if Mr. Hosford went on the stand he would testify that, after the Board of Utility Commissioners handed down its report in March, 1923, Commissioner Hosford was Director of Revenue and Finance, and at the time directed that a notice be attached to all bills sent out, reading as follows: Important Notice. The Board of Public Utility Commissioners have recently granted to the East Jersey Water Co. an increased rate, effective January 1, 1923. An appeal has been taken to the Supreme Court to review the action of said Board. This bill is at the old rate, not at the increased rate, and, in the event that the increased rate is sustained by the Supreme Court, an additional amount will have to be charged in accordance with increased rates for all water used since January 1, 1923. That subsequently, when the Supreme Court affirmed the decision of the Board of Public Utility Commissioners, he directed that a notice be sent out as follows and at-

tached to each bill sent out: Important Notice. The Supreme Court has affirmed the decision of the Board of Public Utility Commissioners granting the increased rate to the East Jersey Water Company, effective January 1, 1923. An appeal has been taken to the Court of Errors and Appeals to review the decision of the Supreme Court. This bill is at the old rate, not at the increased rate, and in the event that the increased rate is sustained by the Court of Errors and Appeals, an additional amount will have to be charged in accordance with said increased rates for all water used since January 1, 1923.

Mr. Faulks: By the way, I understand counsel for the defendant stipulates that Mr. Konkle, complainant's auditor, if recalled, would testify that such notices were attached to the bills received by the complainant for water furnished it by the defendants during the months of March, April and May, 1923, and November, May and June, 1924, and to no other such bill. And that the water bill dated—water bill in the sum of $1,826.76—I guess that is the easiest way to identify it—now to be offered in evidence by the complainant, was received by it from the defendant, and at the time of its receipt bore on the reverse side of it "Void for 1924 Year," which now appears thereon.

Is that satisfactory to Mr. Herrmann?

Mr. Herrmann: Yes.

The Court: That is the end of the case?

Mr. Faulks: That completes the case.

HACKENSACK RIVER

Pierhead and Bulkhead Line

Former Exterior Line

Former Exterior Line

N 27°80'00"E 332.32

Approved by Secty of War Dec. 7 1907

Adopted by Riparian Commissioners

Former Exterior Line

Former Exterior Line

Area 2.063 Acres

Filling

Fills

Sound

Dock

Air

Water

Marsh

Creek

Bridge

D.J. July 30. 1908

N 14°45'00" E. of

Lincoln Highway

Essex and Hudson

Morris Canal and Banking Co

L.V.R.R. Co. of N.J. Lessee.

CANAL BASIN

AVE

Delaware Lackawanna & Western R.R. Co. of N.J.

Center Line

Grant to Mayor and Aldermen of J.C. July 8 1861

Area 8.649 Acres

Area 12.10 Acres

Grant to Jas. Sanders Pres. Adm.

Area 8.667 Acres

1768 Acres

1539 Acres

1821 Acres

1638 Acres

Grant to Mayor and Aldermen of J.C. July 8 1861

Co. F. Cont 3
G. 19611
1A 1B

Area - 6.1 Acres

Mayor and Aldermen of Jersey City
G. 19610
2 3 4

Area - 5.2 Acres

County Block - 572
City - 1751

Henry Byrne
G. 19603
5

Area - 4.3 Acres

Estate of James A Vredenburg
G. 19608
6A

17/Acres

Estate of James A Vredenburg
G. 19607
6B

13 Acres

Estate of James A Vredenburg
G. 19608
7A

32 Acres

A Louise Floscine
G. 19607
8A

3.5 Acres

Stamford Oil Co. Inc. N.J.
G. 19605
9

26/Ac

Estate of I.I. Vondenberg
G. 19604
10

13/Ac

Estate of Robert Davis
G. 19603
H

Area - 20.0 Acres

County Block - 572
City - 1746

Water Located

SPOIL

Pipes

MORRIS CANAL

WATER ST

BANK

WEST ST

BENNETT ST

CLAREMONT AVE

VALE AVE

CLARKE AVE

EGE AVE

VIRGINIA AVE

BOYD AVE

WILLIAMS AVE

CLENDENNY AVE

Survey
At Jersey City, N. J.
for
The New Jersey Title
Guarantee & Trust Co.
Scale: 1 inch = 100 feet

May 7th, 1908.

Sheets
19603
19604
19605
19606
19607
19608
19609
19610
19611

Note: Bearings are according to Map of N.Y. Harbor Lines Board - Approved Dec. 7. 1907.

Complainant's Exhibits.

Exhibit C. 1.

Agreement No. 1 annexed to Bill of Complaint as a schedule which by stipulation is not required to be reprinted.

Exhibit C. 2.

Agreement No. 2, etc. (same as above.)

Exhibit C. 3.

Agreement No. 3, etc. (same as above.)

Exhibit C. 4.

Agreement No. 4, etc. (same as above.)

Exhibit C. 5.

Map.

Complainant's Exhibits.

Exhibit C. 6.

July 22, 1919.

Board of Commissioners,
City of Bayonne, N. J.

Dear Sirs:

We enclose herewith our check for One hundred and fifty thousand ($150,000.00) dollars, as an advance payment for water, said payment being made pursuant to and in accordance with one of the agreements between this company and the City of Bayonne, under date of November 18, 1918, being "Agreement No. 3" of the minutes of the meeting of your Board of Commissioners held on April 4, 1919.

Kindly acknowledge receipt of this advance payment for water, noting that your acceptance of the same is in accordance with the terms of this letter.

Yours very truly,

FEDERAL SHIPBUILDING COMPANY

V. P. & G. M.

LHK:LS

Complainant's Exhibits.

Exhibit C. 7.

DEPARTMENT OF
REVENUE AND FINANCE
BAYONNE, N. J.

July ~~26th~~ 22nd, 1919.

Messrs. Federal Shipbuilding Company,
Kearny, N. J.
P. O. Box-618, Newark, N. J.

ATTENTION:—Mr. Robert McGregor.

Dear Sir:—

Received under even date, from Federal Shipbuilding Company, their check dated July 2nd, 1919, being for the amount of One Hundred Fifty Thousand—00/100 Dollars ($150,000.00), as an advance payment for water, said being made pursuant to and in accordance with one of the agreements made between said Federal Shipbuilding Company and the City of Bayonne, N. J., under date of Nov. 18th, 1918, being "Agreement No. 3" of the minutes of the meeting of the Bayonne, N. J., Board of Commissioners, held on April 4th, 1919, and so accepted by the City of Bayonne, N. J.

Yours truly,

Axel Miller (Signed)
TREASURER

A.M./--

Complainant's Exhibits.

Exhibit C. 8.

FEDERAL SHIPBUILDING COMPANY
KEARNY, N. J.
P. O. BOX 618, NEWARK, N. J.

July 25, 1923.

City of Bayonne,
Bayonne, New Jersey.

Gentlemen:—

To our surprise we have recently ascertained that the rate of $1.20 per thousand cubic feet which you have charged us for water since June 30th, 1919, under the contract between us dated November 18, 1918, pursuant to which we on July 3rd, 1919 paid you $150,000. in advance for water, is in excess of the rate provided for by such contract. As you know, this contract expressly provides that all of the water to be furnished from time to time is to be charged for at the current price of water sold by the City at such times to consumers of an equal quantity. We now learn that during all such period water has been supplied by you to even much smaller consumers at the rate of $1.00 per thousand cubic feet. The statements heretofore furnished us by you covering the period from June 30, 1919, to April 30th, 1923, show that we have been charged at such $1.20 rate $105,842.40, when the charges at such $1.00 rate would have amounted to only $88,201.99, or $17,640.41 in excess of the contract price. The City has therefore clearly overcharged the difference between these two sums or $17,640.41, for the repayment of which indebtedness we ask it to arrange at the earliest possible time.

Complainant's Exhibits.

We have been of great aid to the City in the protection and development of its water supply and have dealt very generously with it in extending such aid both financially and in matters of rights of way for the city's lines. We do not anticipate that you will question the claim that we thus make, let alone compel us to resort to litigation to establish it, but if we are wrong about this we must then ask you to regard this as a demand for the immediate repayment to us of the above mentioned sum of $17,640.41, so that we may proceed to establish our claim by suit.

Asking the favor of an early reply, we remain,

Yours very truly,

L. H. Konndorff

VICE PRESIDENT AND GENERAL MANAGER.

LHK/ACM.

Exhibit C. 9.

FEDERAL SHIPBUILDING COMPANY
KEARNY, N. J.

December 7th, 1923.

City of Bayonne,
Bayonne, N. J.

Dear Sirs:

We beg to call your attention to the fact that we have had no direct reply to our letter of July 25th, 1923, in which we pointed out that we had then recently ascertained that the rate of $1.20 per 1000 cubic feet which the City of Bayonne had been charging us for water since June 30, 1919,

Complainant's Exhibits.

under the contract between us dated November 18, 1918, was in excess of the rate provided for by such contract.

We understood from a talk that Commissioner Hosford had with one of our representatives shortly after such letter was sent that the former intended to ask the City Attorney for an opinion as to the validity of the claim we there made, and that while no reply would be made to our letter until such conference, in due course we would thereupon be advised as to the position which the City would take with regard thereto. However, we have heard nothing from you in regard to the matter since then and would appreciate the favor of an early reply.

We would also call your attention to the fact that the amount of the overcharge claimed in our letter of July 25th will be increased by the extent of the overcharge made in bills for the period subsequent to April 30, 1923.

We are so confident that the position which we have taken with regard to the rates properly chargeable to us under such contract is the correct one that we are hopeful that the City will view the matter as we do and without further delay render us amended bills under the contract in accordance therewith. If, however, it declines to do so we intend to preserve our rights in the matter and to enforce them by proper legal proceedings for the purpose when the first opportunity arrives to do so.

Yours very truly,

L. H. KONNDORFF,
Vice-President and General Manager.

Complainant's Exhibits.

Exhibit C. 10.

12/29/23

L. H. Korndorff, Esq.
Vice President and General Manager,
Federal Shipbuilding Co.,
Kearny, N. J.

Dear Sir:

Replying to your letter of the 7th inst. I wish to state that the City of Bayonne construes that section of the contract, under which you claim to have been overcharged, to mean that it is obligated to furnish your Company at the minimum market rate paid by meadow consumers, and not to mean consumers supplied from any other section of its entire pipe line.

The City of Bayonne construes the words "its said pipe lines" to mean that part of its entire pipe line which runs through the Hackensack meadows.

Very truly yours,

E. T. SHARKEY.

S/S

Complainant's Exhibits.

Exhibit C. 11.

November 11, 1919.

Hon. Bert J. Daly, Director of Revenue and Finance, Bayonne, N. J.

Dear Sir:

It has been brought to my attention that the consumers of water located on the Kearny Meadows, and taking their water from the Bayonne City pipe lines, have been paying for water at various rates. The rates established have been $1.50, $1.20 and $1.00 per thousand cubic feet, regardless of the quantity used.

On investigating this matter I find that the Federal Shipbuilding Company, the Blast Furnace Products Company, as well as The Foundation Company, are the only concerns, as far as I can learn, that have a contract for a stated price. The Federal Shipbuilding Company's contract calls for a price equal to the price of water charged to consumers in Bayonne for like quantities. The Blast Furnace Products Company calls for $1.20 per M. cubic feet, and the Foundation Company $1.00 per M. cubic feet. Several of the consumers on the meadows have been charged at the rate of $1. per M. cubic feet.

I have instructed the Water Department to make a uniform charge of $1.20 per M. cubic feet for all water consumed on the meadows outside of those, who have a contract for a lesser amount.

Trusting this will meet with your approval, I am,

Yours respectfully,

J. WILLIAM GRIFFIN,
Superintendent.

Complainant's Exhibits.

Exhibit C. 11—Continued.

By Commissioner Daly:

Whereas, at the time the City purchased the property of the New York and New Jersey Water Company, it was found that various rates were charged to consumers of water on the Kearny meadows; and

Whereas, The rates ranged from One ($1) to One and 50-100 ($1.50) Dollars per thousand cubic feet; therefore be it

Resolved, that all water sold on the Kearny Meadows other than that sold to County for Municipal purposes, shall be at the rate of One and 20-100 ($1.20) Dollars per thousand cubic feet. This does not include water sold under contract.

Adopted

Ayes—Commissioners Daly, Devlin, Smith, Talbot and Mayor Axford.

Nays—None.

Complainant's Exhibits.

Exhibit C. 12.

DEPARTMENT OF
REVENUE AND FINANCE
BAYONNE, N. J.

January 24th, 1927.

Mr. C. M. Konkle, Auditor,
Federal Shipbuilding Company,
Kearny, N. J.

Dear Sir:

Confirming telephone conversation of this P. M., relative to rate charged by us, beg to advise this rate is figured as follows:

Any consumption up to 500,000 cubic feet, is figured at $1.75 per 1,000 Ft.

Any consumption over 500,000 Ft. and under 1,000,000 Ft. is figured at $1.65 per 1,000 Ft. In other words if they used 600,000 Ft. the whole 600,000 Ft. would be figured at $1.65.

Any consumption over 1,000,000 Ft. is figured at $1.50 per 1,000 Ft. and this whole 1,000,000 Ft. is figured at $1.50.

We are enclosing herewith corrected bill for December, 1926, showing credit due you on overpayments of your account for September, October and November, 1926, as follows:

		Paid	Should be
September,	1,113,100	$1,869.65	$1,669.65
October,	1,138,400	1,907.60	1,707.60
November,	869,100	1,484.02	1,434.02
		$5,261.27	$4,811.27

Of course this payment in September includes your deduction of $793.91, which I am not in a position to pass upon, and which I have been in-

structed to let stand for the present, and we are enclosing herewith bill showing credit of $450.00.

Yours very truly,

(Signed) J A. TWOMEY
Chief Clerk.

Exhibit C. 13.

SCHEDULE A

Monthly Water Consumption of the Federal Shipbuilding & Dry Dock Company, Kearny, New Jersey.
July 1919 to July 1927.

Month		Consumption Cu. Ft.
July	1919	3,667,980
August	1919	3,205,370
September	1919	2,821,770
October	1919	2,309,560
November	1919	1,385,700
December	1919	2,416,400
January	1920	3,100,000
February	1920	2,900,000
March	1920	3,100,000
April	1920	2,648,500
May	1920	2,092,230
June	1920	2,198,329
July	1920	2,710,200
August	1920	2,710,200
September	1920	1,997,900
October	1920	1,785,300
November	1920	2,001,200
December	1920	2,508,500
January	1921	3,534,600

Complainant's Exhibits.

February	1921	3,322,700
March	1921	2,696,900
April	1921	2,154,300
May	1921	2,043,100
June	1921	2,113,600
July	1921	2,323,800
August	1921	1,728,200
September	1921	1,724,900
October	1921	1,031,600
November	1921	1,060,700
December	1921	1,345,300
January	1922	2,228,900
February	1922	1,493,400
March	1922	1,279,400
April	1922	682,400
May	1922	622,365
June	1922	693,285
July	1922	1,045,610
August	1922	703,700
September	1922	806,700
October	1922	775,000
November	1922	905,200
December	1922	1,386,000
January	1923	1,373,300
February	1923	1,202,700
March	1923	1,478,600
April	1923	886,600
May	1923	709,500
June	1923	864,200
July	1923	833,000
August	1923	844,700
September	1923	926,800
October	1923	1,261,900
November	1923	1,006,700
December	1923	1,331,700
January	1924	2,765,200
February	1924	2,340,600

Complainant's Exhibits.

Month		Consumption Cu. Ft.
March	1924	1,707,800
April	1924	1,065,500
May	1924	1,109,600
June	1924	1,082,000
July	1924	1,395,900
August	1924	1,320,000
September	1924	1,522,300
October	1924	1,134,900
November	1924)	
December	1924)	2,779,200
January	1925	2,113,000
February	1925	1,846,000
March	1925	1,386,500
April	1925	1,856,600
May	1925	1,299,300
June	1925	541,300
July	1925	666,100
August	1925	662,600
September	1925	826,800
October	1925	832,900
November	1925	604,200
December	1925	905,200
January	1926	1,355,900
February	1926	1,340,500
March	1926	1,198,600
April	1926	915,700
May	1926	763,600
June	1926	774,100
July	1926	923,400
August	1926	895,900
September	1926	1,113,100
October	1926	1,138,400
November	1926	869,100
December	1926	1,470,600
January	1927	974,900

36217

1925
WATER BILL
CITY OF BAYONNE

SERIAL NUMBER

LOT HOUSE NO.

SHIP BLDG CO 6 IN MI 2 IN.

FEDERAL SHIPBLDG CO
BOX 618
NEWARK N J

URE CORRECT ENTRY ON OUR RECORDS,
IS BILL WHEN REMITTING BY CHECK.
TS WILL BE MAILED ONLY WHEN
LY REQUESTED.

MAKE ALL INQUIRIES AND COMPLAINTS CONCERNING WATER
AT THE
OFFICE OF WATER DEPARTMENT

This Bill is Up To This Date

This Bill Is Up To This Date

MAKE ALL INQUIRIES AND COMPLAINTS CONCERNING WATER AT THE

OFFICE OF WATER DEPARTMENT
CITY HALL, BAYONNE, N. J.

OFFICE HOURS: 9 A. M. TO 4 P. M. SATURDAYS 9 A. M. TO 12 M.

MAKE ALL CHECKS, EXPRESS OR MONEY ORDERS PAYABLE TO CITY OF BAYONNE

1925

WATER BILL

Ex C 14

OWNER .....

SERIAL NUMBER .....

BLOCK LOT HOUSE NO.

FEDERAL SHIP BLDIG CO 6IN ME 21A

1915 FEDERAL SHIPBLDG CO 1925
293 BOX 618
NEWARK N J

TO **CITY OF BAYONNE,** DR.

FOR WATER SUPPLIED TO PREMISES DESCRIBED ABOVE

ARREARS FROM TO AMOUNT OF ARREARS $.....

INTEREST " " " OF INTEREST $.....

Interest will be added to all bills unpaid 15 days from date of mailing

PLEASE EXAMINE YOUR BILLS TO SEE IF BLOCK AND LOT NUMBERS ARE CORRECT, AND COMPARE WITH CITY MAP. THE CITY OF BAYONNE CANNOT BE HELD RESPONSIBLE FOR NOR RETURN MONEY PAID IN ERROR [illegible] PROPERTY.

36217

1925

WATER BILL

CITY OF BAYONNE

Ex 14

SERIAL NUMBER

BLOCK LOT HOUSE NO.

FEDERAL SHIP BLDIG CO 6IN ME 21A

1915 FEDERAL SHIPBLDG CO
293 BOX 618
NEWARK N J

TO INSURE CORRECT ENTRY ON OUR RECORDS, SEND THIS BILL WHEN REMITTING BY CHECK. RECEIPTS WILL BE MAILED ONLY WHEN SPECIALLY REQUESTED.

NO REDUCTIONS ALLOWED ON ACCOUNT OF LEAKS OR WATER WASTED.

DATE	NEW READING	DATE	OLD READING	CONSUMPTION (CUBIC FEET)	AMOUNT	ARREARS	TOTAL	DATE	TOTAL	DISTRIBUTION
9/30/22	24314100	8/30/22	22791800	1522300	1826.76	—	$1826.76	9/30/22	$1826.76	WATER SUNDRY INTEREST

DON'T FAIL TO BRING THIS BILL

REPORT CHANGE OF OWNERSHIP

WATER DEPARTMENT CITY OF BAYONNE

RATES

For Domestic Use .....$1.75 per 1,000 cu. ft.
Manufacturing use:
Under 500,000 cubic feet per month... 1.75 "
500,000 to 1,000,000 cubic feet per month 1.65 "
1,000,000 or over cubic feet per month 1.50 "

Void for 1922 year

NOTICE TO CONSUMERS

Meters are the property of the consumer and *must* be protected from frost and other injury, thereby saving cost of a new meter. Meters will be tested when requested by the owner, for which a charge of two (2) dollars will be made for each meter, (including 5/8", 3/4" and 1") if found to be registering within 3% of requirements. If meter is found over registering no charge will be made.

In case of frost or bad leak, any licensed plumber may remove meters from the service line, but *not from the premises*, without permission of this department. Licensed plumber or owner must report meter removal to this department within 24 hours of removal.

Failure to receive bill does not relieve the owner from liability of penalties.

Water rent is a lien on property, and any contract for the payment of water rents by tenants can in nowise affect the City of Bayonne.

When water is shut off for the non-payment of water rents, it will not be turned on again until all charges (including penalty) are paid.

A change of ownership, giving address, must be reported to the Water Department.

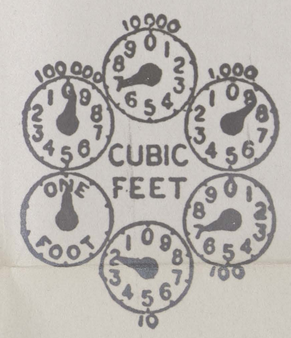
Consumers are requested to see that all taps and fixtures are closed when not in actual use. *Especially nights and Sundays.*

Wilful waste of water, or waste by fixtures out of order, will be sufficient cause for stopping the supply to any premises.

No owner or tenant will be allowed to supply water to other persons or families, or to permit any connection to be made on his premises for the supply of other premises without permission in writing from the Water Department.

No additions to, or alteration whatever, in or about any tap, pipe or water cock, shall be made, or caused to be made, by any person, without permission first had in writing from the Water Department.

The Water Department, and every person by them delegated for that purpose, shall have free access, at all proper hours, to all parts of every building, or other place where water is delivered, or consumed.



Instructions for Reading Water Meters.

This ilustration shows the dial on the regular register of a 5/8 inch meter. This is known as a "one cubic foot dial." It is read in the same way as the register of a gas or electric meter. The best method of reading is, from low to high. When a hand or pointer is between two figures the lesser of the two must always be taken. If there is any doubt as to the correct reading of any indice, refer to the next lower indice.

For example: In the illustration the hand in the 100,000 indice points between the 9 and the 0, hence the 100,000 indice must be read as indicating 9. In the 10,000 indice the hand seems to indicate 7 exactly, while by referring back to the 1,000 indice next lower we find its hand has not reached the 0; therefore the 10,000 indice must be read as indicating 6 instead of 7, and the entire reading of the register as shown would be 96,872 cubic feet.

This Bill is Up To This Date

MAKE ALL INQUIRIES AND COMPLAINTS CONCERNING WATER AT THE

OFFICE OF WATER DEPARTMENT
CITY HALL, BAYONNE, N. J.

OFFICE HOURS: 9 A. M. TO 4 P. M. SATURDAYS 9 A. M. TO 12 M.

MAKE ALL CHECKS, EXPRESS OR MONEY ORDERS PAYABLE TO CITY OF BAYONNE

1925

WATER BILL

Ex C 14

OWNER

SERIAL NUMBER

BLOCK	LOT	HOUSE NO.
FEDERAL SHIP BLDIG CO 6IN ME 21A		
1915		
293		

FEDERAL SHIPBLDG CO
BOX 618
NEWARK N J

1925

TO CITY OF BAYONNE, DR.

FOR WATER SUPPLIED TO PREMISES DESCRIBED ABOVE

ARREARS FROM TO AMOUNT OF ARREARS $

INTEREST " " " OF INTEREST $

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3621 7

1925

WATER BILL

CITY OF BAYONNE

Ex 14

SERIAL NUMBER

BLOCK	LOT	HOUSE NO.
FEDERAL SHIP BLDIG CO 6IN ME 21A		
1915		
293		

FEDERAL SHIPBLDG CO
BOX 618
NEWARK N J

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NO REDUCTIONS ALLOWED ON ACCOUNT OF LEAKS OR WATER WASTED.

DATE	NEW READING	DATE	OLD READING	CONSUMPTION (CUBIC FEET)	AMOUNT	ARREARS	TOTAL
9/30/25	22314100	6/30/25	22191800	122300	126.76	—	$ 126.76

DATE	TOTAL	DISTRIBUTION
9/30/25	$ 126.76	WATER
		SUNDRY
		INTEREST

DON'T FAIL TO BRING THIS BILL

REPORT CHANGE OF OWNERSHIP

WATER DEPARTMENT CITY OF BAYONNE

RATES

For Domestic Use	$1.75	per 1,000 cu. ft.
Manufacturing use:		
Under 500,000 cubic feet per month	1.75	"
500,000 to 1,000,000 cubic feet per month	1.65	"
1,000,000 or over cubic feet per month	1.50	"

Void for 1925 year

NOTICE TO CONSUMERS

Meters are the property of the consumer and *must* be protected from frost and other injury, thereby saving cost of a new meter. Meters will be tested when requested by the owner, for which a charge of two (2) dollars will be made for each meter, (including 5/8", 3/4" and 1") if found to be registering within 3% of requirements. If meter is found over registering no charge will be made.

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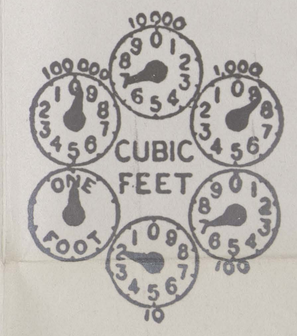
Wilful waste of water, or waste by fixtures out of order, will be sufficient cause for stopping the supply to any premises.

No owner or tenant will be allowed to supply water to other persons or families, or to permit any connection to be made on his premises for the supply of other premises without permission in writing from the Water Department.

No additions to, or alteration whatever, in or about any tap, pipe or water cock, shall be made, or caused to be made, by any person, without permission first had in writing from the Water Department.

The Water Department, and every person by them delegated for that purpose, shall have free access, at all proper hours, to all parts of every building, or other place where water is delivered, or consumed.



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For example: In the illustration the hand in the 100,000 indice points between the 9 and the 0, hence the 100,000 indice must be read as indicating 9. In the 10,000 indice the hand seems to indicate 7 exactly, while by referring back to the 1,000 indice next lower we find its hand has not reached the 0; therefore the 10,000 indice must be read as indicating 6 instead of 7, and the entire reading of the register as shown would be 96,872 cubic feet.

Defendant's Exhibits.

February	1927	646,900
March	1927	651,900
April	1927	596,600
May	1927	516,600
June	1927	563,000
July	1927	648,800

10

Exhibit D. 1.

368-2 2 M 10-20-22

Remit Direct To Treasury Dept.
Monthly Statement

City of Bayonne—Water Account

In Account With The
FEDERAL SHIPBUILDING COMPANY
Kearny, N. J.
P. O. Box 618, Newark, N. J.

20

Terms: February 1923.

Advance payment in accordance with the terms of Contract dated November 18th 1918.	150,000.00	
Water furnished from July 1st, 1919 to Jan. 31, 1923 as per previous statement rendered		101,560.91
Feb. 28		1,443.24
		103,004.15

30

40

Defendant's Exhibits.

Feb. 28	Balance account water to be furnished		46,995.85

The above is the last of 45 monthly statements received by defendant from complainant, the prior ones being identical in form and by stipulation are not required to be printed, a summary thereof being submitted instead. This summary follows:

Acknowledgements

	1919		
July	31		4,401.58
August	31		3,846.44
Sept.	30		3,386.12
Oct.	31		2,771.47
Nov.	30		1,662.84
Dec.	31		2,899.68
	1920		
Jan.	31		3,720.00
Feb.	29		3,480.00
March	31		3,720.00
April	30		3,178.20
May	31		2,510.68
June	30		2,637.99
July	31		3,252.24
August	31		3,252.24
Sept.	30		2,397.48
Oct.	31		2,142.36
Nov.	30		2,401.44
Dec.	31		3,010.20
	1921		
Jan.	31		4,241.52
Feb.	28		3,987.24
Mar.	31		3,236.28

Defendant's Exhibits.

Apr.	30	2,585.16
May	31	2,451.72
June	30	2,536.32
July	31	2,788.56
August	31	2,073.84
Sept.	30	2,069.88
Oct.	31	1,237.92
Nov.	30	1,272.84
Dec.	31	1,614.36
1922		
Jan.	31	2,674.68
Feb.	28	1,792.08
Mar.	31	1,535.28
Apr.	30	818.88
May	31	532.92
June	30	1,045.86
July	31	1,254.73
August	31	844.44
Sept.	30	968.04
Oct.	31	930.00
Nov.	30	1,086.24
Dec.	31	1,663.20
1923		
Jan.	31	1,647.96
Feb.	28	1,443.24

OPINION.

IN CHANCERY OF NEW JERSEY.

Between

FEDERAL SHIPBUILDING & DRY-DOCK COMPANY, a corporation,

Complainant,

and

CITY OF BAYONNE,

Defendant.

Opinion.

Lindabury, Depue & Faulks, and John Milton, for complainant.

James Benny and L. Edw. Herrmann, for defendant.

CHURCH, Vice-Chancellor:

This is a suit for the construction of certain contracts made between complainant and defendant in relation to water obtained by complainant, hereafter referred to as the Company, from defendant, hereafter referred to as Bayonne. When the agreements were made Bayonne was receiving its water supply from the East Jersey Water Company through two mains extending through Kearny and Jersey City and thence to Bayonne. Some water was being sold by Bayonne to consumers on the Kearny Meadows including the company.

Prior to the making of the agreements now to be construed the portion of the mains located in Kearny were on rights of way through land owned by the company. Bayonne desired to

replace the existing mains by larger ones and an additional main. As a result the agreements now in controversy were entered into. In general, the agreements provided that Bayonne's rights of way through the company's properties should be relocated. The cost of replacing the old mains, which was estimated at $500,000 should be arranged for in the following manner. The company was to pay Bayonne in advance $150,000 for water to be taken by the company as needed which amount was to be first applied by Bayonne toward defraying such cost and then when this sum had been expended the company was to pay the bills therefor not to exceed an additional amount of $350,000. That Bayonne would furnish water to the company at the same rates as it did to other consumers of a substantially equal amount. The agreements recite that this arrangement was "to the mutual benefit of the parties hereto."

The company paid the $150,000 "pursuant to and in accordance with the agreement providing for such payment." The mains were rebuilt and relocated. Bayonne began to supply the water and is still supplying it.

As of January 1, 1923, the Board of Public Utilities of New Jersey increased the rate that Bayonne was required to pay to the East Jersey Water Company.

In February, 1925, two years later, Bayonne by resolution, sought to increase the rate to be paid by the company for all water theretofore furnished as well as for water thereafter furnished.

There is no dispute as to the quantity of water involved, the sole difference is as to the con-

struction of the rate clauses governing the prices to be paid by the company.

The company contends that under the agreements it is entitled to receive water from Bayonne at the same rates as Bayonne currently charges consumers of an equally large quantity of water, either in Kearny or Bayonne. Bayonne contends that it can fix any rate provided said rate does not exceed that charged to any other equally large consumer in Kearny.

The company objects to a retroactive increase. Bayonne maintains the contrary.

Under agreement No. 3 it is provided as follows:

> "The company agrees * * * (b) to purchase from the city and to pay in advance for the same at the time of the commencement of the work to be done by the city as hereinafter described, water of the value of $150,000, to be furnished and delivered from time to time to the company from the pipe lines and water plant of the city as needed by the company to be measured by meter and charged for at the current prices of water sold by the city at such times for consumers of an equal quantity."

This is a general clause and I do not see how it can be limited to equally large consumers in Kearny. It seems to me that the water must be furnished at the same price as was currently charged by Bayonne to any other consumers of equal quantity either within or without Bayonne.

All water furnished to any consumer must of necessity be furnished "from the pipe lines

and water plant of the city." That is exactly what this clause provides.

Bayonne itself seems to have construed the agreement in this way. In 1919 the City Commissioners unanimously adopted the following resolution:

> "Resolved that all water sold on the Kearny Meadows other than that sold to county for municipal purposes shall be at the rate of $1.20 per thousand cubic feet. This does not include water sold under contract." From this it appears that Bayonne recognized its obligation under the agreement above referred to and realized that it could not alter the rate. What has heretofore been said relates to the rates to be paid for water paid for in advance under agreement No. 3.

The clauses providing for rates to be charged after the water paid for in advance under agreement No. 3 had been consumed are contained in agreements Nos. 1 and 2.

The clause in each of these agreements which is to be construed is as follows:

> "The city, its successors and assigns in so far as it and they shall from time to time have the legal right so to do shall furnish to the Shipbuilding Co., its successors and assigns upon demand in writing, water from the pipes laid on said rights of way hereby granted to the city by the Shipbuilding Co. at the minimum market rate paid by any consumer of an equal quantity of water from said pipe lines so long as said pipes shall remain upon said rights of way or any part thereof."

The circumstances surrounding the making of these contracts should be considered. They state that the "mutual benefit of the parties" requires the relocation of the water mains. To accomplish this object Bayonne sought and the company gave substantial financial aid. It is natural to suppose that the company expected to receive in return the same favorable terms as might be granted any other large consumers; and on the contrary it is impossible to believe that the company, when it advanced so large a sum of money, contemplated that it should pay for water any price that any other large consumer on the Kearny Meadows—who had concontributed nothing—was charged, although other equally large consumers in Bayonne were charged a lower rate. I do not believe either party to the contract ever intended any such thing.

The resolution of Bayonne attempting to retroactively increase the rate to be paid by the company is void. First, because it attempts to destroy rights vested in the company by the contract.

The authority given to Bayonne to make the contract is contained in Section 9 of Article XXXII of the Home Rule Act of 1917 (1924 Cumulative Supplement to Compiled Statutes, Vol. 2, p. 2299), which provides that—

> "The governing body may enter into a contract with any person or persons, corporation or corporations, to supply such person or persons, corporation or corporations with water for fire protection, manufacturing and irrigation and other special purposes, at rates and upon conditions to be designated by said governing body, and upon

> any such contract being entered into the person or persons, and corporation or corporations shall pay to the municipality the rate and all other charged stipulated therein, instead of the usual rates charged in the municipality; * * *"

No power is reserved to Bayonne in this statutory enactment to retroactively increase a rate fixed by contract made pursuant thereto. In Amarillo Gas Co. *v.* City of Amarillo, 208 S. W. 239 (Tex. Ct. of Civ. App., 1919), the Court said:

> "One of the first questions suggested in the consideration of appellant's rights in the premises is whether the appellant can rightfully apply the rates fixed by the new ordinance to the gas consumed by its customers before the ordinance went into effect. * * * There was an implied contract between the gas company, and the consumer using gas prior to November 18th, that such gas would be paid for at the rate established by the ordinance then in effect. Any law that would retroact so as to change the substantial rights and obligations of this contract as to transactions already had under it would be to that extent unconstitutional and void. * * * The rates established by the new ordinance did inevitably make a substantial change in the rights and obligations of the consumer, and we conclude cannot be applied to the gas consumed prior to the time the ordinance took effect."

Apart from Section 9 of Article XXXII of the Home Rule Act of 1917, governing the

making of contracts for the supply of water, the only authority that Bayonne has for supplying water is found in Section 8 of the same article (1924 Cumulative Supplement to Compiled Statutes, Vol. 2, p. 2299), which reads as follows:

> "The governing body of every municipality providing and supplying water for the public and private use of such municipality and its inhabitants, may make, enforce, amend and repeal all such ordinances, resolutions and regulations as said body may deem necessary and proper for the distribution, supply, use and protection of the said water and the safety, security and protection of the said buildings, machinery, canals, aqueducts, reservoirs and other works and appurtenances thereto; for the installation and protection of meters, and for fixing and collecting the water rents or prices for water, and for imposing penalties in addition to cutting off the water for non-payment thereof."

A municipal corporation, being a creature of the State, possesses only such power as the State confers upon it. Breninger *v.* Belvidere, 44 N. J. L. 350; State, Terhune *v.* City of Passaic, 41 N. J. L. 90, 93. And in construing a grant of power to a municipality any fair reasonable doubt concerning the existence of the power is resolved against the municipality and the power is denied. Meday *v.* Rutherford, 65 N. J. L. 645, 648.

The last quoted provision of the Home Rule Act grants no power to Bayonne to make retroactive water rents and prices established in ad-

vance for the service to be rendered. See Jones *v.* Town of Bloomfield, 69 Atl. 1106.

Moreover, the resolution in addition to attempting to retroactively increase the company's contract rate also attempts to discriminate against it in two important respects by (1) seeking to increase it from $1.00 to $1.75 per 1,000 cubic feet while only increasing the rate of all consumers in Bayonne taking water "for manufacturing use" to a sliding scale rate of from $1.50 to $1.75 per 1,000 cubic feet; and (2) seeking to so increase the company's rate from January 1, 1923, while making no increase whatever for water taken "for domestic use" prior to January 1, 1925.

Its contract with Bayonne entitled it to the same rate as is currently charged other equally large consumers, who as the record shows, are some of those taking water from it "for manufacturing use." Nor could those taking water "for domestic use" thus be effectively given the right at the expense of the company to have their old and smaller rates continued for two years after that of the company was sought to be increased.

For the reasons above stated I am of the opinion that the construction placed on the contracts as above is the correct one, and the only reasonable one to be deducted from the contracts themselves and the circumstances surrounding their making and carrying out. This, as I understand the testimony and the briefs leads to the fixing in the decree of the following rates:

From July 1, 1919, to February 1, 1925, $1.00 per 1,000 cubic feet. From February 1,

1925, until Bayonne shall change the rate to other equally large consumers for water supplied from said pipe lines, a sliding scale of from $1.50 to $1.75 per 1,000 cubic feet.

I will advise a decree accordingly.

FINAL DECREE.

Filed May 15, 1928.

IN CHANCERY OF NEW JERSEY.

Between FEDERAL SHIPBUILDING AND DRYDOCK COMPANY, a corporation, *Complainant,* *and* CITY OF BAYONNE, *Defendant.*	*On Bill, etc.* *Final Decree.*

This cause coming on to be heard in the presence of Frederic J. Faulks, Esquire, and John Milton, Esquire, of counsel with complainant, and James Benny, Esquire, and L. Edward Herrmann, Esquire, of counsel with defendant, and the pleadings and proofs having been read and the arguments of the respective counsel having been heard and the Court having considered said pleadings, proofs and arguments, and it duly appearing that by three agreements each dated November 18, 1918, to which the complainant and defendant were parties and which went into effect on or about April 4, 1919, it was agreed between the parties that the water supply mains of the defendant then extending through lands of the complainant located in part in the Town of Kearny on the westerly shore of the Hackensack River and in part in the City of Jersey City on the easterly shore of said river, should, in the mutual interests of the parties, be relocated,

enlarged and reconstructed in the manner therein provided, and that to enable the defendant to accomplish such result the complainant thereby granted the defendant certain rights of way through its said lands for the laying and maintenance of said relocated and enlarged water mains and in addition thereto agreed to purchase from the defendant and pay in advance for the same at the time of the commencement of the work of relocating, enlarging and reconstructing said mains, water of the value of $150,000., which amount was to be applied by the defendant toward defraying the cost of such work, and the complainant further agreed to assume and pay the remainder of the cost of said work up to but not in excess of the sum of $350,000., in consideration whereof the defendant agreed that so long as said relocated and enlarged mains should remain upon said rights of way, it would supply water therefrom to the complainant for use on its said lands upon the following terms, viz., for water paid for by complainant in advance at the current prices of water sold by the defendant from time to time to consumers of an equal quantity of water from the pipe lines and water plant of the defendant, and for water thereafter supplied the complainant at the minimum market rate paid by any consumer of an equal quantity of water from said pipe lines; and it further appearing that following the execution of said agreements and pursuant to the terms thereof the complainant paid the defendant the said sum of $150,000., so agreed to be paid by it in advance for water to be furnished and delivered to it from time to time by the defendant; that following such payment said water supply lines were relocated, enlarged and reconstructed

Final Decree.

in accordance with said agreements, and the complainant fully performed all its obligations thereunder; that the defendant on July 1, 1919, began to furnish complainant with the water so paid for in advance and has continued ever since to furnish complainant with water pursuant to said agreements; that a controversy arose between the said parties as to the rates properly chargeable by the defendant for water furnished to the complainant prior to August 31, 1926, and for water thereafter to be supplied to it under said agreements, as a result of which the defendant claimed that the complainant was then substantially in arrears for the water so therefore supplied to it while the complainant claimed that at the rates fixed by said agreements it had not then consumed all of the water so paid for by it in advance; that thereupon the defendant threatened to cut off complainant's water supply; that in order to prevent irreparable injury to it through such action, the complainant filed its bill herein praying among other things that the defendant might be enjoined and restrained from cutting off, interfering with or diminishing said water supply and that this court might settle and determine the rate or rates payable by complainant to defendant for the water theretofore furnished by the defendant to complainant or thereafter to be so furnished under said agreements, and by its decree determine and adjudge the rights of the parties with respect to the subject matter of this suit so that the said controversy between them might be finally settled and determined; and it further appearing that that the defendant filed an answer and cross-petition herein consenting to and requesting this court to settle and determine in this suit the rate

Final Decree.

or rates payable by complainant to defendant for the water theretofore furnished by defendant to complainant or thereafter to be so furnished under said agreements and to determine and adjudge the rights of the parties as aforesaid,

It is, on this 15th day of May, Nineteen Hundred and Twenty-eight, on motion of Messrs. Lindabury, Depue & Faulks, solicitors of the complainant, by Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, Adjudged and Decreed, and the said Chancellor by virtue of the power and authority of this court, doth hereby Order, Adjudge and Decree as follows:

(1) That under said agreements complainant is obligated to pay defendant for all water furnished by defendant to complainant from July 1, 1919, to, but not including February 1, 1925, at a flat rate of $1.00 per 1,000 cubic feet, and no more.

(2) That under said agreements complainant is obligated to pay defendant for all water furnished by defendant to complainant from and including February 1, 1925, to the date of this decree at the following rates paid by other equally large consumers, for an equal quantity of water supplied to them by defendant in any month during said period, and no more, namely:

When the monthly consumption was less than 500,000 cubic feet, $1.75 per 1,000 cubic feet.

When the monthly consumption was in excess of 500,000 cubic feet but not in excess of 1,000,000 cubic feet, $1.65 per 1,000 cubic feet.

Final Decree.

When the monthly consumption was in excess of 1,000,000 cubic feet, $1.50 per 1,000 cubic feet.

(3) That until the defendant shall change its present rates for water supplied by it to the other equally large consumers, the complainant shall pay for all water hereafter supplied to it by defendant in any month at the following rates presently paid by other equally large consumers for equal quantities of water supplied to them by defendant in any month, and no more, namely:

When the monthly consumption is less than 500,000 cubic feet, $1.75 per 1,000 cubic feet.

When the monthly consumption is in excess of 500,000 cubic feet but not in excess of 1,000,000 cubic feet, $1.65 per 1,000 cubic feet.

When the monthly consumption is in excess of 1,000,000 cubic feet, $1.50 per 1,000 cubic feet.

(4) That so long as the said agreements shall remain in force the defendant shall not charge the complainant for water hereafter supplied to it by defendant in any month any higher or greater rate than the minimum rate that the defendant shall charge any other equally large consumer whether within or without its municipal limits for equal quantities of water supplied to any such consumer by defendant in such month.

(5) That so long as the said agreements shall remain in force and the complainant shall pay the defendant for water hereafter supplied to it by defendant at the same rates as are paid by such other equally large consumers for equal quantities of water supplied to them by defend-

ant in any month, the defendant, its officers, agents, servants and representatives, and each thereof, shall be and it and they are hereby ordered to absolutely desist and refrain from shutting off, diminishing or in anywise interfering with or taking any steps, actions or proceedings to shut off, diminish or in anywise interfere with the supply of water by the defendant to the complainant.

(6) That a counsel fee of $2,500 be and the same is hereby allowed to the complainant to be included in the complainant's taxed costs.

(7) That the defendant pay to the complainant its costs of this suit to be taxed including the said counsel fee of $2,500.

E. R. WALKER,
C.

Resectfully advised,

ALONZO CHURCH,
V.-C.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

FEDERAL SHIPBUILDING AND DRY DOCK COMPANY,
Complainant-Respondent,

and

CITY OF BAYONNE, a municipal corporation,
Defendant-Appellant.

BRIEF ON BEHALF OF APPELLANT.

The proceeding involves the construction of clauses in three agreements (Exhibits C. 1, C. 2, C. 3), under which appellant supplies water to respondent. The appellant obtains its water supply for itself and its inhabitants from the East Jersey Water Company. Prior to the making of these agreements with the respondent, appellant obtained its supply from the East Jersey Water Company through two pipe lines extending easterly through the Town of Kearny and thence under the Hackensack River through Jersey City to Bayonne. The pipe lines located in Kearny were located on rights of way through lands owned by the respondent, upon which it operated a large shipbuilding yard. Appellant supplied water to respondent and other consumers along these pipe lines prior to the making of the agreements involved herein.

It became necessary to relocate these pipe lines upon the lands of the respondent, and after negotiations, the three agreements involved herein were entered into and in addition to providing for the relocation of said pipe lines and specifying the rights of the parties with respect

to the construction, maintenance, repair, operation and removal of said pipe lines and fix the rights of use in said right of way as relocated, the agreement provided for the supplying of water from said pipe lines to respondent. The pertinent clauses respecting the supplying of water in each of the agreements are as follows:

AGREEMENT No. 1, Exhibit C. 1.

> 3. The City for itself, its successors and assigns, covenants and agrees to and with the Shipbuilding Company, its successors and assigns, as follows:
>
> FIRST: The City, its successors and assigns, insofar as it and they shall from time to time have the legal right so to do, will furnish to the Shipbuilding Company, its successors and assigns, upon demand in writing, water from the pipes laid on said rights of way hereby granted to the City by the Shipbuilding Company, at the minimum market rate paid by any consumer, of an equal quantity of water from said pipe lines, so long as said pipes shall remain upon said rights of way or any part thereof.

AGREEMENT No. 2, Exhibit C. 2.

> The City, for itself, its successors and assigns, covenants and agrees to and with the Shipbuilding Company, its successors and assigns, as follows:
>
> First: The City, its successors and assigns in so far as it and they shall from time to time have the legal right so to do will furnish to the Shipbuilding Company, its successors and assigns, upon demand in writing, water from the pipes laid on said right of way hereby granted to the City by the Shipbuilding Company, at the minimum market rate paid by any consumer of an equal quantity of water from said pipe lines so long as said pipes shall remain upon said right of way or any part thereof.

AGREEMENT No. 3, Exhibit C. 3.

The company agrees:

(a) * * * (b) To purchase from the City and to pay in advance for the same at the time of the commencement of the work to be done by the City as hereinafter described water of the value of $150,000 to be furnished and delivered from time to time to the Company from the pipe lines and water plant of the City as needed by the Company, to be measured by meter and charged for at the current prices of water sold by the City at such times for consumers of an equal quantity.

Although dated November, 1918, these agreements actually became effective July 1, 1919, and appellant has since supplied water to respondent in the quaitities shown on Exhibit C. 13. The respondent paid to appellant $150,000 required to be paid by said agreements as an advance payment for said water, and against this amount appellant charged respondent for the water consumed monthly. Respondent furnished to appellant a statement each month, showing the amount due to appellant which was credited against the advance payment of $150,000 made by respondent. Forty-five of these monthly statements covering the period from July 1, 1919, to March 1, 1923, prepared by respondent, were received by appellant. By stipulation only one of these statements is printed, Exhibit D. 1, and tabulation is furnished instead of the statements, which are identical in form. The last statement, the copy of which is printed, was submitted on February 28, 1923. Throughout this period respondent calculated the amount due to appellant by applying the rate of $1.20 per M. cubic feet which was the minimum rate paid by all other consumers from the pipe lines on the Kearny Meadows.

On March 27, 1923, in a proceeding instituted by East Jersey Water Company to increase its rates, the Board of Public Utility Commissioners increased the rate that Bayonne was required to pay for water obtained by it from $19.00 per M. gallons (the rate which it was then paying under contract) to $78 per M. gallons. The increased rate was allowed to become effective as of January 1, 1923. The order of the Board thus increasing the rate was reviewed by the Supreme Court in proceedings instituted by the appellant. At the same time the Director of Revenue and Finance of appellant continued to bill its consumers including respondent at the then existing rate. Attached to each bill sent out by the Director of Revenue and Finance was a printed notice to the consumer that the Board of Public Utility Commissioners had increased the rate to Bayonne, and that an appeal from said order had been taken by Bayonne to review the order, and that in the event that the Supreme Court sustained the increased rate that the rate to respondent and other consumers would have to be charged to respondent and other consumers from the time said increased rates to Bayonne became effective (Case, pp. 119-120).

The Supreme Court affirmed the order of the Board of Public Utility Commissioners. Appellant appealed to the Court of Errors and Appeals. When the Supreme Court affirmed the order of the Board the Director of Revenue and Finance of appellant continued to send bills for water consumed to respondent, and all other consumers, notifying it and them that the Supreme Court had affirmed the decision of the Board of Public Utility Commissioners granting the increased rate to the East Jersey Water Company, effective January 1, 1923; that appellant had

taken an appeal to the Court of Errors and Appeals to review the decision of the Supreme Court, and that the bill was rendered at the old rate and not at the increased rate, and that in the event that the increased rate was sustained by the said Court, an additional amount would be charged in accordance with the increased rates for all water used since January 1, 1923 (Case, p. 120).

The Court of Errors and Appeals sustained the Supreme Court, and thereafter Bayonne designed a schedule of rates to its consumers, calculated to absorb the increase which it was required to pay and made the new rate effective as of January 1, 1923, the date fixed by the Board as the date when the increased rate to the city became effective.

To accomplish this the governing body of appellant on February 10, 1925, passed a resolution fixing the following schedule of rates:

For domestic use, $1.75 per 1,000 cu. ft.
Said rate to be charged from January 1, 1925.

For manufacturing use, under 500,000 cu. ft. per month, per 1,000 cu. ft.....$1.75

500,000 to 1,000,000 cu. ft. per month, per 1,000 cu. ft..... 1.65

All water in excess of 1,000,000 cu. ft. per month, per 1,000 cu. ft..... 1.50

All manufacturing plants located on the meadows on the west side of Newark Bay, (known as the Newark Meadows) per 1,000 cu. ft..... 1.75

The rates for all manufactories, including those located on the said Newark Meadows, are to be charged from January 1, 1923, the said rates to be in force until all the money due the Water Company for the increased rates is paid (Case, pp. 59 and 60).

By the application of these rates to the water consumed by the respondent up to and including August 31, 1926, there was due to appellant $42,-227.13 in excess of the sum of $150,000, advanced payment made by respondent. Appellant rendered statements in accordance therewith to respondent and it refused to pay. On September 23, 1926, appellant through its city attorney notified respondent that unless said amount was paid within fifteen days thereafter, appellant would cease supplying respondent with water. Respondent, thereupon, filed the bill of complaint herein.

Respondent contends that

(a) Under its agreements, it is entitled to receive water from appellant at the same rates as it currently charges consumers of an equally large quantity of water, whether such consumers be located in Kearny or within the City of Bayonne.

(b) That the resolution of governing body of appellant increasing rates as of January 1, 1923, is illegal, and that it should only be required to pay any increased rate from September 1, 1926.

The Court of Chancery by its decree adjudged:

1. That rates fixed by the decree of the Court of Chancery are arbitrary and unreasonable and not in accord with the evidence.

2. That respondent under said agreement was obligated to pay to appellant for all water furnished from January 1, 1919, to but not including February 1, 1925, at a flat rate of $1.00 per thousand cubic feet and no more.

3. That under said agreement respondent was obligated to pay appellant for all water furnished from and including February 1, 1925, to date of this decree.

The following rates paid by other equally large consumers for an equal quantity of water supply to them by appellant in any month during said period, and no more.

When the monthly consumption was in excess of 500,000 cubic feet but not in excess of 1,000,000 cubic feet, $1.65 per 1,000 cubic feet.

When the monthly consumption was in excess of 1,000,000 cubic feet, $1.50 per 1,000 cubic feet.

(3) That until the defendant shall change its present rates for water supplied by it to the other equally large consumers, the complainant shall pay for all water hereafter supplied to it by defendant in any month at the following rates presently paid by other equally large consumers for equal quantities of water supplied to them by defendant in any month. and no more, namely.

When the monthly consumption is less than 500,000 cubic feet, $1.75 per 1,000 cubic feet.

When the monthly consumption is in excess of 500,000 cubic feet but not in excess of 1,000,000 cubic feet $1.65 per 1,000 cubic feet.

When the monthly consumption is in excess of 1,000,000 cubic feet, $1.50 per 1,000 cubic feet.

(4) That so long as the said agreements shall remain in force the defendant shall not charge the complainant for water hereafter supplied to it by defendant in any month any higher or greater rate than the minimum rate that the defendant shall charge any other equally large consumer whether within or without its municipal limits for equal quantities of water supplied to any such consumer by defendant in such month.

Appellant contends that:

(a) That respondent is entitled to be charged under said agreements the minimum rate paid by

any consumer of an equal quantity of water from its pipe lines on the meadows as distinguished from any consumer of an equal quantity of water within the city limits.

(b) That the respondent is entitled to pay the increased rate fixed by appellant in February, 1925, from January 1, 1923, the date specified by the Board of Public Utility Commissioners, when the increased rate fixed by it should become effective.

POINT I.

The Court of Chancery erred in decreeing that so long as said agreement shall remain in force appellant shall not charge respondent for water hereafter supplied to it by appellant in any month any higher or greater rate than the minimum rate that appellant shall charge any other equally large consumer whether within or without its municipal limits for an equal quantity of water supplied to any such consumer by appellant in such month.

The agreements under which water is furnished to the respondent by the applicant definitely fixes the rate as "the minimum rate paid by any consumer or an equal quantity of water from said pipe lines."

The agreements are primarily designed to specifically cover the condition under which Bayonne would relocate its *pipe lines* over the property of the respondent. One of these conditions was that it should, insofar as it had the legal right so to do, furnish water to the respondent *from the pipes* laid on the right of way granted to it by respondent at the minimum market rate paid by any consumer of a like quantity of water from said *pipe lines.*

Every water system is made up of at least three distinct parts, viz:

(a) The supply: (b) the pipe lines leading from the supply to the locality served and (c) the distribution system in the locality served, consisting of mains and connections to the properties of the consumers.

In cases involving municipal systems, where the pipe lines passed through other municipalities, water can be furnished to residents in the municipalities through which the pipes are laid only under such restrictions as are imposed by the legislature.

P. L. 1917, pp. 435, 438;
P. L. 1920, p. 113;
P. L. 1922, p, 270.

The contracts involved in the instant case, however, have heretofore been construed by the Court of Chancery as not coming within these provisions of law, but rather as contracts made by the city as part of a plan, by which it secured additional rights. Vice-Chancellor Lane exhaustively analyzed the applicability of the pertinent legislation in reaching this determination in his opinion in *Town of Kearny* v. *City of Bayonne*, 90 N. J. E. 499, affirmed in 92 N. J. E. 627. He said:

> "It appears to be the well established rule that power in a municipality to furnish water to its inhabitants must be rested upon direct legislation. 19 Rul. Cas. L. tit. 'Municipal Corporations' S 96 (at p. 788) and that the grant of power generally to provide a water supply for the inhabitants of a municipality does not carry with it the right to furnish water to inhabitants of other territories. Child *v.* City of Columbia, 87 S. C. 566; 70 S. E. Rep. 296; 34 L. R. A. (N. S.) 542; Farwell *v.* City of Seattle,

Supreme Court Washington, 86 Pac. Rep. 217; Kearny *v.* Jersey City, 78 N. J. Law 77; affirmed 79 N. J. Law 599; East Newark *v.* New York and New Jersey Water Supply Co., 67 N. J. Eq. 265; Baylies *v.* Borough of North Arlington, 80 N. J. Law 124; Rehill *v.* East Newark and Jersey City, 73 N. J. Law 220; affirmed 74 N. J. Law 849.

By article 32 of chapter 152 of the laws of 1917 every municipality is given power to provide a supply of water or an additional supply of water for the public and private uses of the municipality and its inhabitants. By sub-division d of section 1 of this article every municipality is given power to purchase, condemn or otherwise acquire the necessary lands and rights or interests in lands, and water rights and rights of flowage or diversion, within or without such municipality, for such purpose. By section 14, power is given to increase the capacity of any water works, plant or plants, to extend any system of water distribution either within or without the municipality, to lay additional mains or lateral connections, to relay or enlarge existing mains and pipes, as the governing body of the municipality shall deem necessary. By section 30 it is made lawful for the governing body of any municipality to enter into all contracts and agreements and do any and all other acts and things necessary to provide water for the public and private uses of such municipality and its inhabitants in accordance with the provisions of article 32. I am of the opinion that power to enter into the agreements and contracts challenged may be rested upon the provisions of article 32 heretofore referred to and that reliance need not be placed upon the provisions of section 16 under the terms of which any municipality is given the power to supply dwellers in other municipalities through which its mains may pass with water and for that purpose to lay mains in the streets, &c., provided the consent of the municipality, the dwellers in

which are to be supplied, be first given. A municipality, having power to enlarge its plant, to relocate its pipes, to acquire locations for such purposes, and to enter into contracts which may be necessary to carry out the purpose of supplying its inhabitants with water, may, I think, contract, as part consideration for the grant to it of rights of way for its mains, to furnish water from such mains, to the owners or occupants of tracts through which the rights of way run.''

We contend that for the purposes of this case, however, it is immaterial whether the rights of the city to make the contracts with the respondent was derived under the statutes or as a consideration for relocating its pipe lines over the lands of the respondent.

We submit that the Court below mistakenly construed the contracts to mean that the rate which respondent is alleged to pay is the minimum which any other consumer of an equal quantity, whether within or without the municipal limits in any month.

In contracts C. 1 and C. 2 the language is ''*at the minimum market rate paid by any consumer of an equal quantity of water from said pipe lines so long as said pipe lines shall remain upon said rights of way or any part thereof.*''

''To purchase from the city * * * water * * * to be furnished and delivered * * * from the pipe lines and water plant * * * to be measured by meter and charged for at the current prices of water sold by the city at such times for consumers of an equal quantity.''

These contracts were simultaneously executed and therefore, must be read and construed together. We contend that the city was entitled to charge to the respondent the minimum market

rate charged to any consumer of an equal quantity of water, "from said pipe lines" as distinguished from consumers within the municipal limits.

We submit that the classification "*consumers of an equal quantity of water from said pipe lines*" was designed to segregate these consumers from the *inhabitants of the city or consumers within the city limits.*

While the agreements are dated November, 1918, water was not supplied to respondent thereunder until July, 1919. The advance payment of $150,000 was made as required by the agreements, and at the end of each month the auditor of respondent furnished the city with a statement showing the credit to which the city was entitled. This amount was derived by applying the rate of $1.20 per M. cu. ft. to the quantities of water shown by the meter to have been consumed during the month. The $1.20 rate was the minimum rate paid by consumers of an equal amount on the Kearny Meadows or on the "pipe lines." Through inadvertence it was subsequently discovered that Foundation Company, one of the consumers on the pipe line, was a customer for the six-month period July, 1919, to January 1, 1920, and by its contract with the city was charged the rate of $1.00 per M. cu. ft. instead of $1.20. To this extent the respondent is entitled to credit on the water consumed during this period. A tabulation of the credits for water consumed by respondent from July, 1919, to March, 1923, is shown in Exhibit D. 1.

Respondent in July, 1923 (Exhibit C. 8), for the first time questioned the rate thus charged and sent a communication to the city requesting a reduction of the rate from $1.20 to $1.00, the

current rate paid by consumers within the city. A further communication (Exhibit C. 9) was addressed by respondent to the city. December 7, 1923, and on December 29, 1923, the city denied the contention of respondent stating that the rate charged to and paid by the inhabitant consumers did not apply, and that the city interpreted the contracts to mean the minimum rate charged to consumers from its pipe lines, viz: consumers in the "Meadows" (Exhibit C. 10).

The record does not disclose that respondent did anything further after this until January 24, 1927, when its auditor presumably engaged in a telephone conversation with the chief clerk in the Department of Revenue and Finance of the city. Said chief clerk addressed a letter to said auditor and respondent offered the letter in evidence. Objection was made to its admission in evidence, upon the ground that it was not shown to have been authorized by the city. The Court allowed it as evidence stating, "if it is written without authority why it does not amount to anything."

We submit that the letter is incompetent and in the absence of proof showing that its writing was authorized by the city and should not bind the city as having any bearing upon the intent or meaning of the contract.

Other than this isolated testimony no testimony was offered to assist the Court in reaching its conclusion. The learned Vice-Chancellor, however, in his opinion indicated that the circumstances surrounding the making of the contracts should be considered and said:

> "The circumstances surrounding the making of these contracts should be considered. They state that the 'mutual benefit of the parties' requires the relocation of the water mains. To accomplish this object Bayonne

sought and the company gave substantial financial aid. It is natural to suppose that the company expected to receive in return the same favorable terms as might be granted any other large consumers; and on the contrary it is impossible to believe that the company when it advanced so large a sum of money, contemplated that it should pay for water any price that any other large consumer on the Kearny Meadows who had contributed nothing was charged, although other equally large consumers in Bayonne were charged a lower rate. I do not believe either party to the contract ever intended any such thing.''

We urge that there is no evidence to support any such reasoning; there is nothing in the case to show that a greater benefit was derived by the city than by the company under the agreements and therefore should not be assumed by the Court as an aid in deriving a proper interpretation of the language used in the agreements.

We contend that under the agreements the respondent is obligated to pay *''the minimum market rate paid by any consumer of an equal quantity of water from said pipe lines so long as said pipes shall remain upon said rights of way or any part thereof,''* which is the language of the agreements. That such consumers constitute those located on the Kearny Meadows through which the pipes are laid, and that the language identifies these consumers as a class, and distinguishes them from the consumers of an equal quantity of water within the city limits taking their water from the distribution system within the city limits.

These rates are as follows:

July, 1919, to January 1, 1920, $1.00 per M. cu. ft.

January, 1920, to January 1, 1923, $1.20 per M. cu. ft.

January, 1923, to date, $1.75 per M. cu. ft.

POINT II.

The Court of Chancery erred in fixing the rates which respondent is obligated to pay under its own construction of the language of the agreements.

The learned Vice-Chancellor in effect interprets the agreements to mean that the city can charge only the minimum rate which it charges any other equally large consumer, whether within or without its municipal limits for equal quantities of water. The rates which he finds the company is obligated to pay, however, do not follow this view.

The record shows that the minimum rates paid by such consumers are as follows:

July, 1919, to January, 1923, $1.00 per M. cu. ft.

January, 1923, to date

$1.75 per M. cubic feet when monthly consumption less than 500,000 cu. ft.

$1.65 per M. cu. ft. when monthly consumption in excess of 500,000 cu. ft., but not in excess of 1,000,000 cu. ft.

$1.50 per M. cu. ft. when monthly consumption in excess of 1,000,000 cu. ft. (Case, p. 112).

These are the rates charged by the city and paid by the consumers, yet the Court finds that the respondent is only obligated to pay the following rates for the periods indicated:

July, 1919, to but not including February 1, 1925, $1.00 per M. cu. ft.

February 1, 1925, to date of decree.

When monthly consumption less than 500,000 cu. ft., $1.75 per M. cu. ft.

When monthly consumption in excess of 500,000 cu. ft. not in excess of 1,000,000 cu. ft., $1.65 per M. cu. ft.

When monthly consumption in excess of 1,000,000 cu. ft., $1.50 per M. cu. ft.

In fixing the periods during which the rates fixed should be charged the learned Vice-Chancellor presumably disregarded the fact shown by the record, that the other consumers were charged and paid rates during the same periods differing from those which he fixed, although he finds that the respondent is obligated to pay such rates as are charged and paid by other consumers, with respect to the respondent, he finds that rates charged by the city are retroactive and therefore as to the period January 1, 1923, to February 1, 1925, illegal. As to the resolution passed by the governing body of the city, he said:

> "The resolution of Bayonne attempting to retroactively increase the rate to be paid by the company is void. First, because it attempts to destroy rights vested in the company by the contract" (Case, p. 140).

He bases this finding upon the theory that the power to make the agreements was conferred upon the city by Section 9, Article XXXII of the Home Rule Act, 1917: (1924 Cumulative supplement to compiled statutes, Vol. II, p. 2299), that no power is reserved in this statute to a municipality to retroactively increase a rate fixed by a contract made pursuant thereto.

As we have above shown the Court of Chancery has, in an earlier proceeding, had these same agreements before it for consideration, and has held that they were not entered into pursuant to the power conferred by this statute, but under the

general powers of the municipality, as contracts for relocating its pipe line (*Kearny* v. *Bayonne, supra*).

We cannot see the force of the reason of the learned Vice-Chancellor. It does not appear to us to be of any importance whether the agreements were made by virtue of the legislation he suggests or by virtue of the powers possessed by the municipality generally. Neither do we believe the cases relied upon by the Court are applicable to the present case. Here we are dealing with a specific contract made by the city with an industrial company for the sale and purchase of water as an incident to and as part of the consideration for the relocation of pipe lines. The rate fixed in these agreements is definite insofar as it is restricted to the minimum rate charged to any other consumer of a like quantity of water. In *Amarillo Gas Co.* v. *Amarillo,* cited by the Court below, the power of the municipality reviewed was the legislative power while in the present case the power exerted by the city is its proprietory power. In the exercise of the former a municipality is restricted by definite legal limitations; but in the exercise of the latter it is governed by the same rules as govern private corporations.

This distinction was succinctly stated by our Supreme Court in a recent case, *Lehigh Valley R. R. Co.* v. *Mayor & Aldermen of Jersey City* (Aug. 16, 1927), 138 Atl., p. 467.

Mr. Justice Campbell, writing the opinion of the Court, said:

"Our conclusion is that a charge for water furnished by a municipality to an owner or occupant of lands is not a tax, but is the subject of a contract, the sale of a commodity, creating the relationship of seller and pur-

chaser as between the municipality and the consumer. Jersey City *v.* Morris Canal & Banking Co., 41 N. J. Law 66; Ford Motor Company *v.* Kearny, 91 N. J. Law 671; 103 A 254.

This seems to be universally conceded. 40 *Cyc.* 796, par. E.; 19 R. C. L. 764 S 69; Supp. No. 4, p. 1288; 27 R. C. L. 1434 §50; Supp. No. 3, p. 1554; Supp. No. 4, p. 1796; 43 Corpus Juris, p. 70, §6, and page 183 §180. All the cases cited under the foregoing hold that a municipality has two classes of powers (1) Legislative and governmental by virtue of which it exercises a governmental and police power and controls its people; and (2) proprietary and business by which it acts and contracts for the private advantage of itself and its inhabitants. In the exercise of the proprietary and business powers the municipality is governed by the same rules as control an individual or business corporation under like circumstances.

This principle was asserted and the rule applied in this State in Karpinski *v.* Borough of South River, 85 N. J. L. 208, 88 A 1073, and Olesiewicz *v.* Camden, 100 N. J. L. 326; 126 A. 317, in holding the municipality liable for damages for negligence growing out of works and operations carried on under its business and proprietary powers.

The providing of water for extinguishing fires and electricity for lighting streets and public places are governmental functions while the distribution of water and furnishing of electricity to its inhabitants, for a price, is the exercise of a private or proprietary function by the municipality and is governed by the same rules as apply to private corporations."

Applying the same rules as apply to private corporations, the transaction here involved meets every requirement. When the Board of Public Utility Commissioners increased the rate to the city from $19.00 per million gallons to $78.00 per

million gallons, and ordered the rate to be collected for all water consumed beginning January 1, 1923, the governing body of the city, believing the increase unwarranted, took appropriate legal steps for final review of the Board's order, thus protecting the consumers. It notified its consumers that the increased rate had been imposed and that while it would continue to charge the consumers at the existing rate, if the increased rate was sustained by the Courts an additional amount would have to be charged for water consumed since January 1, 1923.

In conformity with the notice, upon the final determination of the rate by this court in February, 1925, it passed a resolution with appropriate preambles setting up a new schedule of rates designed to absorb the increase, which it was required to pay by the order of the Board. These rates were charged to and were paid by all consumers excepting respondent. Clearly the resolution, although passed February, 1925, cannot be said to be retroactive, in view of the notice which was sent by the Director of Revenue and and Finance to the consumers. There can be no doubt that if a private corporation pursued the same course our courts would safeguard its rights in enforcing the consumers to pay the new rate, from the date specified in the notice, if they continued to use the water after such notice.

We submit that the Court below erred in the finding that the resolution of February, 1925, was retroactive. We contend that the rate made effective thereby as of January 1, 1923, was legal

and valid and that the respondent is obligated to pay such increased rate from that date and not as found by the Court from February 1, 1925.

Respectfully submitted,

JAMES BENNY,
L. EDWARD HERRMANN,
Of Counsel with Appellant-Defendant.

New Jersey Court of Errors and Appeals

Between

FEDERAL SHIPBUILDING AND DRY-DOCK COMPANY, a corporation,
Complainant-Respondent,

and

CITY OF BAYONNE, a municipal corporation,
Defendant-Appellant.

On Appeal from Decree in Chancery.

This appeal brings under review a final decree of the Court of Chancery, dated May 15, 1928. The decree will be found on pages 145 to 150 of the record, and the opinion of Vice-Chancellor Church, on which it is based, at pages 136 to 144. The appellant and the respondent are, for convenience, hereinafter respectively referred to as "Bayonne" and the "Company".

By its said decree, the Court below construed the rate provisions of a series of agreements simultaneously entered into by the parties, under which Bayonne obligated itself to supply water to the Company at the rates therein provided for. It also enjoined Bayonne from cutting off such water supply if the Company continued to pay it therefor, at the rates thus established as those which these agreements required the Company to pay Bayonne from time to time for such supply.

Statement of the Case.

The appellant's brief contains so many inaccurate and misleading statements of fact that an

independent Statement of the Case and of the issues involved is essential.

The suit involves the construction of the before-mentioned series of agreements between the Company and Bayonne (Exs. C-1, C-2 and C-3; Schedule A annexed to Bill of Complaint, Rec., pp. 18 to 52). Although dated in November, 1918, these agreements actually went into effect July 1, 1919 (Rec., p. 100).

At the time they were made, Bayonne was obtaining the entire water supply for itself and its inhabitants from the East Jersey Water Company through two mains extending easterly through the Town of Kearny and thence under the Hackensack River through Jersey City to Bayonne. Some of this water was then being sold by Bayonne to consumers located on the Kearny meadows, including the Company. Except for the replacements and additions to these mains hereinafter referred to, this situation remains unchanged.

Prior to the making of the agreements in question, the portion of these mains located in Kearny extended on rights of way through a large tract of land fronting on the Hackensack River owned by the Company, on which it operated a large shipbuilding yard requiring the use of large amounts of water which it obtained from such mains (Rec., p. 104; Ex. C-13, Rec., pp. 130-133). After being carried under the Hackensack River to the Jersey City side thereof, these mains extended westerly on a twenty foot strip of land owned by Bayonne dividing two other large tracts of land fronting on the Hackensack River and also owned by the Company, and thence on rights of way over the southerly of these tracts toward Bayonne. Agreement No. 3 (Ex. 3) has attached thereto a map showing the location of

these mains both as originally laid out and as re-located and added to under the agreements in question (Rec., p. 51; pp. 100-101).

In 1919 Bayonne's water needs required that the two existing mains be replaced by new and larger ones, and also an additional main, and Bayonne requested the Company's consent thereto. As a result of negotiations the parties concluded it would be to their mutual interest to have the new mains relocated and this, among other things, was provided for by these agreements.

Briefly stated, the agreements provided as follows: (1) Bayonne's existing rights of way and mains through the Company's said properties should be re-located largely along the Company's outside property lines, the old rights of way surrendered and the old mains located thereon removed. (2) The cost of replacing the two existing mains with two new ones, which was estimated to be $500,000, should up to that amount be provided in the following manner: (a) The Company was to pay Bayonne in advance $150,000 for water to be taken by the Company from Bayonne as needed, which amount was to be first applied by Bayonne toward defraying such cost, and (b) when this sum had been expended, and as the work progressed the Company was to pay the bills therefor from time to time rendered Bayonne up to, but not in excess of, an additional amount of $350,000. (3) When the existing mains had been removed from such twenty foot strip in Jersey City owned by Bayonne, this strip should be sold and the Company afforded an opportunity to purchase the same so that its holdings on the Jersey City side of the river would consist of one large tract instead of two tracts separated by such strip. (4) To the extent it was legal so to do, Bayonne would furnish water to the Company

for use on its said properties *at the same rates as it currently did to other consumers of a substantially equal amount.*

The agreements recite and plainly show that they were "to the mutual benefit of the parties hereto". They provide for no preferential rates to the Company, as the latter was required to pay the same rates as Bayonne currently charged its other equally large consumers. The rate provisions of all three of the agreements will be quoted and discussed in our argument and to avoid repetition, we refrain from quoting them here. It is important, however, to now point out that these provisions, although accurately quoted on pages 2 and 3 of the appellant's brief, are thereafter constantly mis-quoted and mis-recited therein.

Following the execution of the agreements, the Company made to Bayonne the stipulated payment of $150,000 in advance for water "pursuant to and in accordance with the agreement providing for such payment" (Exs. C-6 and C-7; Rec., pp. 122-123), and the mains were re-built and re-located in accordance with the agreements. Pursuant to the agreements, and on July 1, 1919, Bayonne began to supply water thereunder to the Company for use in its shipbuilding business conducted on its said Kearny property, and thereafter continued so to do. From month to month, up to January 1, 1923, Bayonne rendered statements to the Company showing the amount of water supplied it, and the amount that by reason thereof Bayonne had credited itself with against the $150,000 of water so paid for by the Company in advance. These credits were at the rate of $1.20 per 1,000 cubic feet which the Company understood was the rate paid by all other equally large consumers supplied by Bayonne, both within

the city limits and on the Kearny meadows. During all of this time, the rate paid by all such consumers located in Bayonne was, in fact, only $1.00 per 1,000 cubic feet. Upon learning of this, the Company promptly challenged the right of Bayonne to charge it such higher rate (Exs. C-8 and C-9; Rec., pp. 111, 124-126).

As of January 1, 1923, the Board of Public Utility Commissioners materially increased the rate that Bayonne was required to pay the East Jersey Water Company for the water thereafter delivered by it to Bayonne. The latter contested such increased rate to it both in the Supreme Court, and in this Court. In June, 1924, this Court finally established the validity of such increased rate.

In February, 1925, more than two years after this increased rate took effect, Bayonne, by resolution adopted by its governing body, sought to largely increase the rate to be paid by the Company for all water so theretofore furnished it since January, 1923, as well as the rate to be paid by the Company for water thereafter furnished it under said agreements. As will be hereinafter pointed out, this resolution, in addition to endeavoring to retroactively and substantially increase the rate to the Company, also attempted to discriminate against it in favor of other consumers, both during such earlier and such later period (Schedule B annexed to Bill of Complaint; Rec., pp. 59-60). The company refused to recognize such retroactive and discriminatory rates as valid against it and sought without success to have these resulting differences amicably determined (Rec., pp. 107-109; Exs. C-8, C-9 and C-10, Rec., pp. 124-127).

On September 23, 1926, Bayonne claiming that up to August 31, 1926, it had furnished the Com-

pany with water at the stipulated agreement rates of a value of $192,227.03 and that, therefore, after crediting the sum of $150,000.00 so paid in advance for water, there was a balance due from the Company to the City of $42,227.03, gave the Company written notice that unless this amount was paid within fifteen days it would thereupon discontinue supplying it with water (Par. 12 of Bill of Complaint; Rec., p. 15). According to the Company's construction of Agreement No. 3, it had received from Bayonne up to August 31, 1926, water at the stipulated rates of a value of only $147,206.09, or $2,793.91 less than the sum of $150,000.00, so paid by the Company to Bayonne in advance (Par. 10 of Bill of Complaint as Amended; Rec., p. 84). The Company thereupon filed its Bill of Complaint herein to prevent the shutting off of its water, and to secure a judicial construction of the rate provisions of the agreements in question.

There is no dispute between the parties as to the quantity of water involved, and their differences are solely as to the proper construction of the rate clauses of the agreements governing the prices the Company is required to pay for water heretofore or hereafter supplied it thereunder. The Company has paid Bayonne for the water supplied to it both before and since the institution of this suit at the rates which it contends are fixed by the agreements, and has voluntarily secured payment to Bayonne of such additional amount, if any, as may be determined to be due in this suit.

The following are the two principal differences between the parties and account for the amount thus in dispute as to the value of the water so delivered up to August 31, 1926:

(1) The Company contends that under the agreements, it is entitled to receive water from Bayonne at the same rates as Bayonne currently charges consumers of an equally large quantity of water, whether such other consumers be located in Kearny or within the City of Bayonne. Bayonne, on the other hand, claims that the rate it charges equally large consumers within Bayonne has no bearing upon the rate the Company is required to pay, and this notwithstanding there are numerous such other consumers, but that it can fix any rate it desires for the water it furnishes the Company, provided such rate does not exceed the one it currently charges any other equally large consumer in Kearny.

(2) The Company claims that Bayonne could not validly increase its rates to it retroactively and discriminatorily as it attempted to do by the resolution of February, 1925, above referred to. Bayonne contends to the contrary.

The learned Vice-Chancellor, in a lucid and convincing opinion sustained the Company in both of its contentions and advised a decree accordingly.

On behalf of the Company, we respectfully submit that said decree should be affirmed for the following reasons.

ARGUMENT.

I.

Under Agreement No. 3, pursuant to which $150,000 was paid by the Company in advance for water, Bayonne was only entitled to charge the Company for such water the same rate as it currently charged other equally large consumers within the city limits.

This clause will be found on page 2 of Agreement No. 3 (Ex. C-3, Rec., pp. 42-43) and reads as follows:

> "The Company agrees * * * (b) to purchase from the City and to pay in advance for the same at the time of the commencement of the work to be done by the City as hereinafter described, water of the value of $150,000, to be furnished and delivered from time to time to the Company *from the pipe lines and water plant of the City* as needed by the Company, to be measured by meter and charged for at the current prices of water sold by the City at such times for consumers of an equal quantity." (Italics ours.)

We submit it is too clear to admit of question that the water to be furnished and delivered to the Company by Bayonne under this clause was required to be furnished and delivered at the same rate as was currently charged by Bayonne to any other consumers of an equal quantity, whether located within or without Bayonne. This is exactly what the language just quoted provides, for the water furnished or delivered by the City to any consumer located within its limits could be furnished and delivered only "from the pipe lines and water plant of the city." Agreement

No. 3 shows that the mains in question constitute part of the City's water works plant. All of the City's water—whether delivered to consumers located on the meadows or to consumers within the city limits— necessarily came "from the pipe lines and water plant of the City" (Ex. C-3, Rec., pp. 40-41).

To adopt Bayonne's contention that if it charged other consumers located along the section of its mains extending through the Kearny meadows several times as much as it did equally large consumers located within Bayonne, the Company would thereby be obligated to pay it such larger rate, would not only require writing something into the clause in question which is not there, but something which is directly contrary to its terms. Moreover, if Bayonne's construction of this clause is sound, at any time when it was not supplying to another consumer in Kearny an amount equal to that currently supplied the Company, it could charge the latter any rate it desired, although it was currently charging all other equally large consumers in Bayonne a much smaller rate for water "from the pipe lines and water plant of the city."

The proofs show that during the time the $150,000 of water so paid for in advance was supplied to the Company there were a number of other equally large consumers located in Bayonne to whom Bayonne then sold water at certain definitely stipulated rates. Among such were the Standard Oil Company, The Babcock & Wilcox Company, and the Tide Water Oil Company (Rec., p. 118). The water supplied each of these other large consumers admittedly came from "the pipe lines and water plant of the city." Moreover, there is nothing in the case to show or even indicate that when the agreements were made

there were, or that at any time since then there have been, consumers located without the city limits using any such large amount of water. If there were none, the rate clause in question would be meaningless unless it means just what it clearly states, viz., that the Company was to have the water which it paid for in advance at the same rate as Bayonne currently charged any other large consumers of water "from the pipe lines and water plant of the city."

Bayonne, contrary to its contention herein, has directly, definitely and solemnly placed the same construction upon this Agreement as the Company always has and still does. This appears from Ex. C-11 (Rec., p. 128). Under date of November 11, 1919, the Superintendent of Water Supply of Bayonne wrote to the Director of Revenue and Finance of Bayonne saying that rates varying from $1.00 to $1.50 per 1,000 cubic feet were being charged to consumers on the Kearny meadows; that "*The Federal Shipbuilding Company's contract calls for a price equal to the price of water charged to consumers in Bayonne* for like quantities", and that he had instructed the Water Department to make a uniform charge of $1.20 for all water used by consumers there, other than to those who had a contract for a lesser amount. As a result of this communication the Director of Revenue and Finance thereupon introduced a resolution which was unanimously adopted by vote of all of the City Commissioners of Bayonne in which, after reciting that the rates charged to consumers of water on the Kearny meadows ranged from $1.00 to $1.50 per 1,000 cubic feet, it was—

> "RESOLVED, that all water sold on the Kearny Meadows other than that sold to County for Municipal purposes, shall be at

the rate of One and 20-100 ($1.20) Dollars per thousand cubic feet. This does not include water sold under contract'' (Rec., pp. 109, 128-A).

Exhibit C-11 was received in evidence without objection and upon the hearing below no effort was made by Bayonne to overcome its apparently controlling effect. Nor is this most important evidence referred to in Bayonne's brief in this Court. Instead of endeavoring to meet it Bayonne attempts to minimize its effect by drawing attention to Exhibit C-12 which it contends was erroneously admitted in evidence over its objection. Exhibit C-12 has no bearing whatever upon the question of the proper construction to be placed upon the rate clause under consideration. Even if it did, all of the material facts contained therein were testified to without objection (Rec., p. 118), and Bayonne therefore was in no wise prejudiced by the admission of the exhibit.

Bayonne also attempts to escape the effect of the words ''the pipe lines and water plant of the city'' by ignoring them, for instead of frankly discussing the meaning thereof it refers to these words throughout its brief as if they read ''from said pipe lines'', and sometimes does so in italics or in quotation marks (see Appellant's Brief on pages 8, 12 and 14). Nothing could more plainly indicate, than does this deliberate practice, that Bayonne recognizes the adverse effect on its appeal of the actual words of the agreement and the construction it gave them prior to the institution of this suit.

We deem it unnecessary to say anything further on this point, except that in view of the circumstances under which the agreements were made it is idle to assume that they would have been made at all if Agreement No. 3 was intended

to mean what Bayonne now, contrary to its solemn declaration, claims it means as to the rates it is free to charge the Company for the water so paid for in advance.

II.

Under Agreements Nos. 1 and 2, which fix the price to be paid by the Company from time to time for water furnished it by Bayonne after the water paid for in advance had been used, it is also clear that Bayonne is only entitled to charge therefor the same rate as it may currently charge other equally large consumers within the city limits.

The clauses providing for the rates to be charged after the water paid for in advance under Agreement No. 3 had been consumed are contained in Agreements Nos. 1 and 2 (Exs. C-1 and C-2; Rec., pp. 18-40). No. 1 is the agreement granting Bayonne the relocated and enlarged rights of way over the Company's Jersey City property, and Agreement No. 2 the one covering the similar new grants over the Company's Kearny property. The pertinent clause in each of these agreements is the same and reads as follows:

> "The City, its successors and assigns, in so far as it and they shall from time to time have the legal right so to do, will furnish to the Shipbuilding Company, its successors and assigns, upon demand in writing, water from the pipes laid on said rights of way hereby granted to the City by the Shipbuilding Company, at the minimum market rate paid by any consumer of an equal quantity of water from said pipe lines, so long as said pipes

shall remain upon said rights of way or any part thereof.''

The same reasoning and principles as we have seen must control any proper construction of the clause considered under the foregoing point are equally applicable here. This will be found to be so from (1) the provisions of the agreements themselves and (2) the circumstances surrounding the parties when they were made, which have already been outlined. The water from the pipe lines laid on the rights of way granted by the Company is the only water provided by Bayonne for its consumers either within or without the city limits. The pipe lines laid on these rights of way are an integral part of the very pipe lines and water plant from which all of the water supplied Bayonne comes and is still furnished, whether for use within or without Bayonne (Rec., pp. 40-41). The water supplied within the city limits necessarily comes ''from the said pipe lines'' just as much as does the water which may be furnished to the Company.

Bayonne's claim that the agreements provide that the Company should have only the same wholesale rate as might be given to any equally large consumer on the Kearny meadows who like it might take water from the pipe lines there, but not the same wholesale rate as may be given all equally large consumers of water from them in Bayonne, is unsupported by anything in the agreements themselves. The basis for any such claim is the strained and technical one that while the Company takes its water from the pipe lines laid on its rights of way, the consumers in Bayonne do not receive their water ''from said pipe lines'' because although this water comes through them it is not taken by such other consumers directly

from them. But there is no proof of this. And even if there were it would have no bearing upon a proper construction of these clauses or in anywise tend to support such an argument, even if consideration be given only to the very terms of the agreements themselves.

But were the contrary true, when consideration is given to the circumstances surrounding the parties at the time of the execution of their agreements, any such argument necessarily fails.

"The mutual benefit of the parties" (so states the agreements) required the replacement of the existing mains by means of which the Company and other meadow consumers, as well as all of the inhabitants of Bayonne, obtained water, with new mains. To accomplish this Bayonne sought and obtained the financial aid of the Company in the large way stated. The Company was willing to give this aid in order to be certain that it would always be entitled to obtain water from the new mains upon the same favorable terms as might be granted any other large consumers of water from them. It is inconceivable that under the circumstances the Company would have been satisfied with an agreement that would have left it entirely at Bayonne's mercy as to the rates it should thereafter pay, or that Bayonne should have desired it to agree to pay more for the water supplied to it from the new mains, the cost of which was so largely being borne by the Company, than would other equally large consumers supplied therefrom in Bayonne who were contributing nothing toward this cost. The cost to Bayonne of the water supplied from these pipe lines to consumers within the city limits necessarily exceeds the cost to it of the water it may supply the Company therefrom, by whatever pumping and maintenance expense is incurred in trans-

porting the water between the Company's property and Bayonne. If the water supplied to equally large consumers in Bayonne is not taken by them directly from the pipe lines (which, as already stated, does not appear) there is also added to the cost to Bayonne of this water that of laying and maintaining any distribution systems which may be needed to reach such consumers. No reasonable presumption will permit of the view that as a term of agreeing to advance Bayonne $150,000 and to bear the remainder of the cost of changing the lines up to the expected amount thereof, viz., $350,000 more, the parties ever intended that to the extent that the Company might take water from these mains it should pay therefor any price that any other large consumer on the Kearney meadows who had contributed nothing to their cost was charged, although every other equally large consumer in Bayonne was charged a substantially lower rate.

Moreover, the situation of the parties when the agreements were made readily accounts for the different language used in the rate clause of these agreements Nos. 1 and 2 and the rate clause of Agreement No. 3. It is apparent that they contemplated when the agreements were made that the $150,000 of water to be paid for in advance under Agreement No. 3 would be consumed within a short time, and that it is only because of the falling off in the shipbuilding industry which has occurred since 1920 that this has taken several years longer than was anticipated. This appears from Ex. C-13 showing that in July, 1919, when the agreements took effect the Company used 3,667,980 cubic feet of water, while by April, 1922, its consumption had been reduced to 682,400 cubic feet, and in only four months since then has exceeded 2,000,000 cubic feet. On the basis of the

consumption of July, 1919, the $150,000 of water paid for in advance if charged for at the rate then in force, viz., $1.00 per 1,000 cubic feet, would have been entirely used up by November, 1922. It was natural, therefore, that because of the payment for this water in advance and of the other large financial and other aid given Bayonne by the Company in replacing and adding to its water lines that for this limited amount of water the Company should only pay Bayonne the same rate as the latter charged any of its other consumers of water from its pipe lines and water plant.

The situation, however, with reference to the water to be furnished under Agreements Nos. 1 and 2 was different because under their provisions Bayonne was obligated to furnish water to the Company, its successors and assigns, "so long as said pipes shall remain upon said rights of way or any part thereof". In entering into this possibly perpetual obligation Bayonne naturally desired to limit its obligation in two respects. One, that it should only be required to furnish this water to the Company in so far as it should "from time to time have the legal right so to do"; the other, that it should not agree to supply the Company with water at any particular rate from a source other than the one then used. It was inevitable that at some future time Bayonne's needs would require a new supply, new mains and a new water plant. It, therefore, was careful that the clause under consideration should not govern the rate the Company might be required to pay for water furnished it from any such new source. There was, however, no reason why it should not agree that for any water taken by the Company from the pipe lines then being relocated and enlarged at its expense the Company should only pay the same rate as Bayonne might charge *any*

other equally large consumer of water "from said pipe lines", whether located within or without Bayonne.

III.

The resolution adopted by the governing body of Bayonne on February 10, 1925, seeking to retroactively increase the rates required to be paid by the Company for all water theretofore furnished it after January 1, 1923, is void and of no effect as against the Company.

(a) *Because it attempts to ignore and deprive the Company of rights vested in it by its contract with Bayonne.*

No question of the validity of rates fixed by the Public Utility Commission is in anywise involved in this suit. Bayonne is not a public utility and the Public Utility Commission has never attempted to regulate its water rates.

The water furnished the Company between January 1, 1923, and February 10, 1925, was paid for by it in advance and its rights as to the rate at which it was to be furnished was fixed by contract, viz., by Agreement No. 3 (Rec., pp. 40-51). This rate was therefore not subject to such regulation as may have been open to Bayonne in the case of water it supplied otherwise than by contract. The rate fixed by this agreement for this particular amount of water was the one "charged for at the current prices of water sold by the City at such times for consumers of an equal quantity." The agreement itself so expressly provides (Ex. C-3; Rec., pp. 42-43). This was $1.00 per 1,000 cubic feet. The resolution in question attempted to increase such rate to $1.75 per 1,000 cubic feet retroactively from January 1, 1923.

After the agreements were made no increase in the rate charged anyone was made prior to the passage of this retroactive resolution. From January, 1923 to January, 1925, both inclusive, Bayonne rendered all of its consumers bills at the rates in force when the agreements were made. Those rendered all of its equally large consumers (other than the Company) during this period were at the rate of $1.00 for 1,000 cubic feet. Leaving aside for the moment the effect of the notices which Commissioner Hosford directed should accompany these bills, there can be no question that during all of this period the rate of $1.00 charged in these bills was the current rate.

Bayonne does not, and, of course, could not successfully contend that the increase in the East Jersey Water Company's rates to Bayonne in January, 1923, in itself worked an increase in the rate currently charged by Bayonne for the water it supplied anyone. And the Company does not question that this increased cost of water to Bayonne in turn caused it to increase its rates to its consumers in February, 1925, or that the Company must pay such increased rate from that time on. But the fact remains that Bayonne did not either increase its rates or attempt so to do to anyone prior to the passage of the resolution in question in February, 1925. *The resolution itself provides "that the following (new) rates be charged, and the same is hereby established"* (Rec., pp. 59-60). The rates in force when Bayonne made its agreements with the Company continued to be its current rates until the date when they were increased by this action. Until this was done on February 10, 1925, Agreement No. 3 expressly gave the Company the right to have its water at the same rate currently charged "other consumers of an equal quantity."

In entering into the Agreements under consideration Bayonne was not undertaking or exercising any governmental function. Bayonne's brief so states at page 9 thereof. Its authority to make these agreements was contained in Section 9 of Article XXXII of the Home Rule Act of 1917 (1924 Cumulative Supplement to Compiled Statutes, Vol. 2, p. 2299), which provides that—

> "The governing body may enter into a contract with any person or persons, corporation or corporations, to supply such person or persons, corporation or corporations with water for fire protection, manufacturing and irrigation and other special purposes, at rates and upon conditions to be designated by said governing body, and upon any such contract being entered into the person or persons, and corporation or corporations shall pay to the municipality the rate and all other charges stipulated therein, instead of the usual rates charged in the municipality; * * *."

No power is reserved to Bayonne in this statutory enactment to retroactively increase a rate fixed by contract made pursuant thereto. In *Amarillo Gas Co.* v. *City of Amarillo,* 208 S. W. 239 (Tex. Ct. of Civ. App., 1919), a case directly in point, the Court said:

> "One of the first questions suggested in the consideration of appellant's rights in the premises is whether the appellant can rightfully apply the rates fixed by the new ordinance to the gas consumed by its customers before the ordinance went into effect, * * *. There was an implied contract between the gas company, and the consumer using gas prior to November 18th, that such gas would be paid for at the rate established by the ordinance then in effect. Any law that would

retroact so as to change the substantial rights and obligations of this contract as to transactions already had under it would be to that extent unconstitutional and void. * * * The rates established by the new ordinance did inevitably make a substantial change in the rights and obligations of the consumer, and we conclude cannot be applied to the gas consumed prior to the time the ordinance took effect."

(b) *Because quite apart from any contract obligation Bayonne could not retroactively increase its rate to the Company or to consumers within Bayonne.*

Apart from Section 9 of Article XXXII of the Home Rule Act of 1917, governing the making of contracts for the supply of water, the only authority that Bayonne has for supplying water is found in Section 8 of the same Article (1924 Cumulative Supplement to Compiled Statutes, Vol. 2, p. 2299), which reads as follows:

> "The governing body of every municipality providing and supplying water for the public and private use of such municipality and its inhabitants, may make, enforce, amend and repeal all such ordinances, resolutions and regulations as said body may deem necessary and proper for the distribution, supply, use and protection of the said water and the safety, security and protection of the said buildings, machinery, canals, aqueducts, reservoirs and other works and appurtenances thereto; for the installation and protection of meters, and for fixing and collecting the water rents or prices for water, and for imposing penalties in addition to cutting off the water for nonpayment thereof."

It is elemental law that a municipal corporation, being a creature of the State, possesses only such

power as the State confers upon it. *Breninger* v. *Belvidere,* 44 N. J. L. 350; *State, Terhune* v. *City of Passaic,* 41 N. J. L. 90, 93. And that in construing a grant of power to a municipality any fair reasonable doubt concerning the existence of the power is resolved against the municipality and the power is denied. *Meday* v. *Rutherford,* 65 N. J. L. 645, 648.

The last quoted provision of the Home Rule Act grants no power to Bayonne to make retroactive water rates, but only the power to fix and collect the water rents and prices established in advance for the service to be rendered. *Jones* v. *Town of Bloomfield* (N. J. Chan. 1908), 69 Atl. 1106 (Not Officially Reported).

(c) *Because the resolution in addition to attempting to retroactively increase the Company's contract rate also attempts to discriminate against it in two important respects by (1) seeking to increase it from $1.00 to $1.75 per 1,000 cubic feet while only increasing the rate of all consumers in Bayonne taking water "for manufacturing use" to a sliding scale rate of from $1.50 to $1.75 per 1,000 cubic feet; and (2) seeking to so increase the Company's rate from January 1, 1923, while making no increase whatever in the rate for water taken "for domestic use" prior to January 1, 1925* (Rec., pp. 59-60).

For neither of such discriminations against the Company is there any warrant. Its contract with Bayonne entitled it to the same rate as Bayonne currently charged other equally large consumers, who as the record shows, are some of those taking water from it "for manufacturing use" (Rec., p. 118). Nor could those taking water "for domestic use" thus be effectively given the right at the ex-

pense of the Company to have their old and smaller rates continued for two years after that of the Company was sought to be increased.

(d) *The notices of the proposed increase in rates relied upon by Bayonne in support of its resolution of February 10, 1925, were of no effect.*

By referring to pages 119 and 120 of the Record it will be seen that it was stipulated that—

> "If Mr. Hosford went on the stand he would testify that, after the Board of Public Utility Commissioners handed down its report in March, 1923, Commissioner Hosford was Director of Revenue and Finance, and at the time directed that a notice be attached to all bills sent out, reading as follows: 'Important Notice. The Board of Public Utility Commissioners have recently granted to the East Jersey Water Company an increased rate, effective January 1, 1923. An appeal has been taken to the Supreme Court to review the action of said Board. This bill is at the old rate, not at the increased rate, and, in the event that the increased rate is sustained by the Supreme Court, an additional amount will have to be charged in accordance with increased rates for all water used since January 1, 1923.' That subsequently, when the Supreme Court affirmed the decision of the Board of Public Utility Commissioners, he directed that a notice be sent out as follows and attached to each bill sent out: 'Important notice: The Supreme Court has affirmed the decision of the Board of Public Utility Commissioners granting the increased rate to the East Jersey Water Company, effective January 1, 1923. An appeal has been taken to the Court of Errors and Appeals to review the decision of the Supreme Court. This bill is at the old rate, not at the increased rate, and, in the event that the increased rate is sustained by the Court of Errors and Ap-

peals, an additional amount will have to be charged in accordance with said increased rates for all water used since January 1, 1923.' ''

There are several reasons why the effect Bayonne apparently seeks to have given to these notices cannot be given to them. First: The stipulation just quoted merely recites that Mr. Hosford directed such notices to be sent, and except in the respect about to be mentioned, there is no proof that any of them were ever sent. Second: In the case of the Company such notices were attached only to a very few bills, and a bill rendered it on September 30, 1924, on a 1925 billhead, bore the notation that the increased rates provided for in the resolution of February 10th of that year were ''void for the 1924 year'' (Ex. C-14; Rec., p. 132). Third: Assuming that no such notation had been made and that at Commissioner Hosford's direction one or the other of such notices accompanied every bill rendered during the two year period that elapsed between the decision of the Board of Public Utility Commissioners increasing the rate to Bayonne and the passage of the resolution by Bayonne increasing its rates to its consumers, the sending of these notices would have been of no effect. And this for each of the following reasons:

(a) Bayonne was not governed by Commissioner Hosford but by a Board of five Commissioners and such action by him would therefore have been a nullity. Even if it had been within the power of Bayonne to reserve the right to retroactively increase its rates in case the Public Utility Board's decision was finally upheld, nothing short of a resolution duly adopted by the Commissioners of Bayonne at a meeting thereof duly held could have been effective for this purpose.

(b) The notices even if their promulgation had been so authorized by the Commission were entirely too indefinite to have any legal effect. They neither stated that any increase would be put into effect, or if so, what the increase would be. As already appears the new rates were not "established" until the adoption of the resolution of February 10, 1925 (Rec., pp. 59-60). *In Jones* v. *Town of Bloomfield, supra,* Vice-Chancellor Emery held that the fact that Bloomfield had rendered its bills currently at the old flat rate, which would be increased by the new meter rate, even though this had been done inadvertently, was determinative that Bloomfield had not effectively elected to put the new rate in force, and that no retroactive charges thereunder could be collected. In the present case, Bayonne also rendered its bills currently to its consumers including the Company at the old rate during all of this two year period—not inadvertently, but deliberately. The resolution adopted by Bayonne in February, 1925, constituted the first exercise of any election on its part to increase its water rates and such election could clearly not antedate the exercise thereof.

(c) There is no proof that Bayonne's regulations governing the supply of water to its inhabitants contained any reservation of a right to retroactively increase rates, and its contracts with the Company gave it no such right as against the Company. In *Jones* v. *Town of Bloomfield, supra,* the regulations under which Bloomfield *supplied* water to its inhabitants contained the following provision:

> "The town of Bloomfield hereby expressly reserves the right at any time to set and maintain a meter on any service pipe and to charge the meter price for all water deliv-

> ered through any service pipe according to the amount indicated by said meter.''

Yet notwithstanding that Bloomfield's attempt to collect the increased rate retroactively had the benefit of the water in question not being supplied under a contract but pursuant to such reserved power, both of which features are absent in this case, it was enjoined from so doing.

IV.

The Court of Chancery did not err in determining the rates which the agreements, according to the Company's construction thereof, required it to pay. The decree appealed from in fact determined such rates strictly in accordance with such construction and with the undisputed evidence.

Bayonne's contention to the contrary is founded upon the fallacious claim that *subsequent* to the passage of the retroactive resolution of February 10, 1925, the rates thereby changed were paid ''by all consumers excepting respondent'' for the period from January 1, 1923, to February 1, 1925. The basis for this claim is Paragraph 3 of the stipulation appearing at page 111 of the Record. There is no warrant for such claim, however, either in that stipulation or in anything else in the record. By referring to page 111 of the Record it will be seen that such payments were made *only* by the equally large consumers of water *within the limits of Bayonne*—not by (1) any equally large consumers *without the limits of Bayonne*, or (2) any other industrial consumers (whether located within or without Bayonne) of a smaller

quantity, or (3) any consumers whatever of water supplied for "domestic use". Furthermore, it appears by another stipulation at page 117 of the Record that none of the consumers located on the Kearny meadows have paid the increased rates provided for in the resolution of February 10, 1925, for any of the water furnished them between January, 1923 and January, 1925.

Furthermore, all of the water furnished the company during this period was part of the $150,000 of water paid for in advance and the rate which the company was obligated to pay therefor was the one prescribed by Agreement No. 3, viz., the rate charged "*at the current prices of water sold by the city at such times* for consumers of an equal quantity". The rate currently charged for the water sold during this period to the other large consumers was $1.00 per 1,000 cubic feet and not the higher sliding scale rate of from $1.50 to $1.75 that was "hereby established" by the resolution adopted in February, 1925. The only rate in existence during such period was the one currently charged such other consumers. The mere fact that following the passage of such resolution the large industrial consumers located within the limits of Bayonne voluntarily saw fit to pay it the difference between the rates theretofore currently charged them and the new rates for the water furnished them two years before such new and higher rates were established, in no wise changed the Company's contract obligation, limited as it was to the rates "currently charged". These are the rates which the learned Vice-Chancellor properly determined the Company was obligated to pay.

CONCLUSION.

For the reasons above stated we respectfully submit that the decree of the Court of Chancery should be affirmed.

Respectfully submitted,

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October Term, 1928.

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