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**Notice of Appeal.**

(Filed May 10, 1926.)

# In Chancery of New Jersey

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation,

Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,

Defendants.

On Supplemental Bill of Jersey City Water Supply Company filed June 6, 1924.

The complainant, The Mayor and Aldermen of Jersey City, a municipal corporation, hereby appeals from the final decree made by the Chancellor on the advice of Vice-Chancellor Vivian M. Lewis, in the above entitled cause on April 24th, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals, the last resort in all causes.

Dated April 29th, A. D. 1926.

THOMAS J. BROGAN,
Solicitor for Complainant.

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

THOMAS J. BROGAN,
Solicitor for Complainant.

Endorsed:

Service of a copy of the within Notice of Appeal is hereby acknowledged this 4 day of May, 1926.

HUMPHREY & SUMNER.
LINDABURY, DEPUE & FAULKS,
Solicitors for Defendants.

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**Petition of Appeal.**

(Filed May 6, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation,
Complainant-Appellant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants-Appellees.

On Appeal from the Court of Chancery.

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

The petition of The Mayor and Aldermen of Jersey City, a municipal corporation, complainants-appellants in the above entitled cause, respectfully show that:

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his

Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice Chancellor Vivian M. Lewis, bearing date of April 24, 1926, in a certain cause in said Court of Chancery wherein the said The Mayor and Aldermen of Jersey City, a municipal corporation, was complainant and the said Jersey City Water Supply Company, *et al.*, were defendants, in these respects:

That these complainants-appellants owe to the defendants-appellees, the said Jersey City Water Supply Company, the sum of five hundred thousand ($500,000) dollars with legal interest thereon from the seventh day of April, Nineteen Hundred and Twenty-four, and that they pay to the Morris Canal and Banking Company the sum of one dollar and that these complainants-appellants, the Mayor and Aldermen of Jersey City, a municipal corporation, further pay to the defendants-appellees, the said Jersey City Water Supply Company, its costs, in which costs there is included a counsel fee of seventy-five hundred ($7,500.00) dollars.

2. The petitioners appeal from the decree of the Chancellor because such decree is erroneous, both in law and in equity, contrary to the weight of evidence and is, in general, erroneous, improper and inequitable in that the entire contract between the parties has not yet been fulfilled and the aforesaid decree of the Court of Chancery awards full and final payment as though this same contract had been fulfilled.

The petitioners therefore pray that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that the petitioners may have such other relief in the premises as, to this Court, shall seem proper.

THOMAS J. BROGAN,
Solicitor for Complainant-Appellant.

**Answer.**

[Filed May 14, 1926.]

NEW JERSEY COURT OF ERRORS AND APPEALS.

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| THE MAYOR AND ALDERMEN OF JERSEY CITY, Complainant-Appellant, and JERSEY CITY WATER SUPPLY COMPANY, *et als.*, Defendants-Appellees. | On Appeal from Court of Chancery. |

The answer of Jersey City Water Supply Company, the above named defendants-appellees, to the petition of appeal of the above named complainant-appellant.

Said respondent not acknowledging all or any of the facts which, in the said petition of appeal, are contained to be true for answer thereto; nevertheless, says and admits that the decree was, on the 24th day of April, 1926, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated, but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced and this respondent is advised and believes that the said decree is agreeable to equity and prays that the same may be affirmed, the costs to be adjudged to this respondent.

HUMPHREYS AND SUMNER,
Solicitors for and of Counsel for
Jersey City Water Supply Co.,
Defendant-Appellee.

**Reasons.**

[Filed May 8th, 1926.]

NEW JERSEY COURT OF ERRORS AND APPEALS.

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| THE MAYOR AND ALDERMEN OF JERSEY CITY, Complainant-Appellant, and JERSEY CITY WATER SUPPLY COMPANY, *et als.*, Defendants-Appellees. | On Appeal from the Court of Chancery. Sat below— WALKER, C. LEWIS, V.C. |

The complainant-appellant, The Mayor and Aldermen of Jersey City, appeals from the decree of the Chancellor aforesaid upon the ground that the same is erroneous, in that:

1. The supplemental bill of complaint filed in the aforesaid matter fails to set out an equitable cause of action.

2. That the Chancellor failed to find that the matter in dispute was res adjudicata.

3. That there was no evidence before the Court on which the Court could predicate its finding.

4. That there was neither law nor equity to justify the finding for the defendants-appellees.

5. That the decree found was against the weight of evidence presented.

6. That in general, said decree made as aforesaid is erroneous, improper and inequitable.

7. That the release presented by the Water Company is ineffectual, invalid and ultra vires.

8. That the entire contract between the parties has not been fulfilled, and the decree of the Court of Chancery awards full and final payment, as though same had been fulfilled.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside, and for nothing holden, and that petitioner may have such other relief as to this Court shall seem proper.

THOMAS J. BROGAN,
Solicitor for Complainant-Appellant.

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**Order for Leave to File Supplemental Bill.**

[Filed June 6th, 1924.]

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, and others,
Defendants.

This matter being opened to the Court by Humphreys & Sumner, of counsel with the defendant Jersey City Water Supply Company, and it appearing that by the final decree in this cause there was

reserved to the defendant, Jersey City Water Supply Company, the right to file a supplemental bill to recover from the Mayor and Aldermen of Jersey City the sum of $500,000 mentioned in the said decree, whenever in the estimation of said Water Company, the same was or should be payable by the Mayor and Aldermen of Jersey City, and the said Jersey City Water Supply Company now claiming that by the abandonment of the canal between Dover and Montville under legislative sanction, such sum of money is now due by the Mayor and Aldermen of Jersey City to it, the said defendant, Jersey City Water Supply Company, and that it is necessary to bring the Fidelity and Deposit Company of Maryland, the Morris Canal and Banking Company, as trustee, and in its individual capacity, the State of New Jersey, and the Board of Conservation and Development as parties defendant in this suit:

It is thereupon on this second day of June, 1924, ordered, that the said defendant, Jersey City Water Supply Company, have leave to file a supplemental bill in this suit against the Mayor and Aldermen of Jersey City, the above named complainant, and against the Fidelity and Deposit Company of Maryland, and Morris Canal and Banking Company as trustee, and in its individual capacity, the State of New Jersey, and the Board of Conservation and Development, as defendants.

E. R. WALKER,
C.

Respectfully advised,

VIVIAN M. LEWIS,
V. C.

## Supplemental Bill Filed by Defendant Jersey City Water Supply Co.

[Filed June 16, 1924.]

IN CHANCERY OF NEW JERSEY.

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

The defendant, Jersey City Water Supply Company, a corporation of this State, by this its supplemental bill, filed by leave of the Court against the complainant, The Mayor and Aldermen of Jersey City, a municipal corporation of New Jersey, the Fidelity and Deposit Company of Maryland, the Morris Canal and Banking Company, a New Jersey corporation, as trustee, and in its individual capacity, the State of New Jersey, and the Board of Conservation and Development, respectfully shows that:

1. The complainant, The Mayor and Aldermen of Jersey City (hereinafter called "Jersey City"), on or about August 1, 1905, exhibited its original bill of complaint in this honorable Court against Patrick H. Flynn and this defendant (the last named hereinafter called the "Water Company") as defendants, praying (among other things) that the said defendants might be decreed to convey to it the water works constructed by them under a certain contract dated February 28, 1899, or so much of said water works as they were able to convey upon payment by Jersey City of such part of the consideration as might be ascertained to be due.

2. The defendant Patrick H. Flynn's proposal for a new water supply for Jersey City, which

formed part of the contract between him and Jersey City, dated February 28, 1899, a copy of which was annexed to and made part of said original bill, contained this representation or agreement:

"There will be tributary to this intake and storage reservoir the whole flow of the Rockaway River having a watershed and gathering grounds of 122½ square miles, including the waters of the Longwood Valley, Green Pond, Denmark Lake, Beach Lake, Split Rock Lake, Dixon's Pond, Shongum Lake, and other tributary streams."

Said contract of February 28, 1899, and the specifications therein referred to are printed in Volume 1 of the printed State of the Case in said original cause on cross-appeals from the decree hereinafter mentioned of June 4, 1908, at pages 17 to 71 of said volume (both pages inclusive) to which printed volume now on file at the State Library at the pages aforesaid, reference is made for the full particulars thereof.

3. On March 22, 1901, a statute was passed by the legislature of New Jersey, entitled "An Act to authorize Municipalities to modify the terms of any contract heretofore or hereafter made for a new water supply" (P. L. 1901, page 416), and the Morris Canal and Banking Company claiming that it had the right to divert from the Rockaway River and out of the watershed thereof at Boonton above the proposed reservoir so much of the waters of the Rockaway River as might be necessary for purposes of navigation east of Boonton over and above the waters brought into the said water-shed by its canal from Lake Hopatcong and elsewhere west of Dover, and further claiming that it did at times divert some of the waters of

the Rockaway River for such purposes, and Jersey City taking the position that this claim on the part of the Canal Company, if enforced, would prevent Flynn from carrying out his agreement to pass through his reservoir the whole flow of the Rockaway River, an agreement was entered into on July 8, 1901, pursuant to the authority of said statute above referred to, between Jersey City and the defendants, Patrick H. Flynn and the Water Company (the latter two therein called "The Contractors"). The said agreement recited (among other things) the original contract between Jersey City and Flynn for the new water supply for Jersey City, and the fact that Jersey City had since given notice of its acceptance of the option contained in said original contract to purchase said water supply on completion for the sum of $7,595,000, and also recited the assignment of the original contract by Flynn to the Water Company, and the claim above mentioned on the part of the Morris Canal and Banking Company, and that in the judgment of the Boards of Street and Water Commission and of Finance of Jersey City, the modifications therein provided for were needed to insure the construction of the works for such new water supply, and the delivery thereof to Jersey City, and provided (among other things) by way of modification of the original contract, as follows:

That the surety bond for $500,000 attached to the original contract, which by its terms was to remain in force so long as Jersey City should purchase water of the contractors by the million gallons, should continue in force for the benefit of Jersey City until the contractors should secure to Jersey City by contract the extinguishment of the claims, if any, of the Morris Canal and Banking

Company and its lessee or the entry of final judgment in the courts of the State of New Jersey adverse to such claim.

That the limit of time for the testing of the works and water supply after completion should be extended if desired by Jersey City, to a period not beyond January 28, 1905, and that in case of such extension, Jersey City should not be required to pay therefor the additional sum of $400,000, provided for in the original contract.

That Jersey City should upon the completion and acceptance of said works and water supply so contracted for, in case the claims aforesaid of Morris Canal and Banking Company, and its lessee, should not have been released or extinguished, be entitled to retain out of the purchase price of $7,595,000, the sum of $500,000 until the happening of any one of the following events:

(A) A final judgment or decree of the highest court of the State of New Jersey to which a test case might be carried that the Morris Canal and Banking Company had no legal or equitable right, by prescription or otherwise, to divert out of the water-shed of the Rockaway River at Boonton any of the waters out of the Rockaway River over and above the amount of water brought into the said water-shed by said Canal from Lake Hopatcong and elsewhere outside of the Rockaway River water-shed.

(B) The delivery of a valid release from the Morris Canal and Banking Company and its lessee vesting in said contractors for the benefit of Jersey City the first right to the whole flow of the Rockaway River into said storage reservoir

at Old Boonton, so far as the same might be required from time to time to furnish and deliver, with the storage provided for in the original contract and proposal, all the water said Jersey City might require up to seventy million gallons per day, it being the expressed intent thereof that such release should vest in Jersey City the first and paramount right to divert all the waters of the Rockaway River water-shed up to seventy million gallons per day as the same might be required.

(C) The abandonment under Legislative sanction by the Morris Canal and Banking Company and its lessee of the portion of the Morris Canal lying between Dover and Montville, and the surrender of all its rights to divert the waters of the Rockaway River above said proposed reservoir site.

Said agreement then provided, that upon the happening of any one of the said three events, Jersey City should pay over to the contractors said retained sum of $500,000 without interest. The agreement further provided that the bond of $500,000 attached to the original contract should also be held as additional security by Jersey City against the claims, if any, by said Morris Canal and Banking Company and its lessee.

The fourth paragraph of said agreement provided that whenever the contractors should deliver to Jersey City a valid release from the Morris Canal and Banking Company and its lessee, releasing all their rights to divert the waters of the Rockaway River water-shed out of said River above said proposed reservoir site, the same to take effect upon their abandonment of the navigation of said canal between Dover and Montville

under Legislative sanction, for a sum therein to be named and to be paid upon such abandonment, then there should be paid over by Jersey City to said contractors all of said sum of $500,000, except the amount named in said release, which last mentioned amount the contractors authorized Jersey City to pay to said Morris Canal and Banking Company and its lessee upon the actual abandonment aforesaid.

By the fifth paragraph of said agreement, it was provided (among other things) that the modifications in said agreement contained should not relieve said contractor or his sureties from furnishing and delivering to Jersey City the quantity and quality of water required by the original contract, nor from constructing the plant in accordance with the original contract as modified thereby; it being and remaining the duty of said contractors to furnish Jersey City with a water supply of seventy million gallons per day, and a plant capable of delivering fifty million gallons of water per day, and that said contract should not take effect until the sureties of the said Patrick H. Flynn should assent thereto in the form thereto annexed.

The sixth paragraph of said agreement provided that said contractors should convey to Jersey City upon the purchase of the plant and supply by Jersey City, and without additional compensation, all of their rights in the water of the Rockaway River water-shed.

The seventh paragraph of said agreement provided that the said contractors should not sell any water out of said Rockaway River water-shed at any time to any other person or corporation.

It was expressly provided by the eighth paragraph of the agreement that nothing therein con-

tained should be construed as an admission on the part of any of the parties thereto of any rights in the Morris Canal and Banking Company or its lessees to divert any of the waters of the Rockaway River water-shed East of Boonton.

Said contract of July 8, 1901, is printed in Volume 13 of the printed State of the Case in said original cause on an appeal by the Water Company from the decree hereinafter mentioned of November 15, 1910, and from the order hereinafter mentioned, dated December 3, 1910, as of November 15, 1910, and filed December 8, 1910, at pages 7038 to 7045, (both pages inclusive), to which printed volume now on file in the State Library at the pages above mentioned, reference is made for the full particulars thereof.

4. There was annexed to said contract an assent executed under the corporate seal of the Fidelity and Deposit Trust Company of Maryland and the hand of its President, in the words and figures following, that is to say:

"In consideration of the sum of One Dollar to it in hand paid, the Fidelity and Deposit Trust Company of Maryland, a corporation organized under the laws of the State of Maryland, the surety of Patrick H. Flynn, to The Mayor and Aldermen of Jersey City in the sum of $500,000 upon his contract of February 28, 1899, for a new water supply for said City (a copy whereof is hereto annexed), hereby assents to the modification of said original contract by the contract hereto annexed of even date herewith, made between The Mayor and Aldermen of Jersey City, of the first part, and Patrick H. Flynn and the Jersey City Water Supply Company, the assignees of said Patrick H.

Flynn, (of the second part) and agrees that its bond aforesaid shall stand as security for the performance of said original contract as modified this day."

5. Decree was entered in said original cause on June 4, 1908, whereby it was, among other things, ordered, adjudged and decreed, that the Water Company should convey and transfer to Jersey City the water works and the appurtenances thereof, with the water supply, water rights, lands, reservoir sites, rights of way, and all easements, as the same had been constructed and provided under the contract of February 28, 1899, and the supplements and additions thereto, and also the rights of the defendants in the water of the Rockaway River water-shed or the water flowing or that might flow therein to the extent of seventy million gallons per day as therein provided, upon payment by Jersey City to the Water Company of the contract price of $7,595,000, and upon payment of the contract price for water delivered pursuant to the contract, less certain deductions from and abatements of the said purchase price therein more particularly set forth.

6. By said decree, it was among other things provided, that there should be retained by Jersey City from the contract price, the sum of $500,000 as authorized by the contract between the City and the Company dated July 28, 1901, until the same should become due under the terms and conditions of the said contract (after the conveyance of the water works by the said defendants to the complainant).

Said final decree is printed in Book 7 of the printed State of the Case in said original cause

upon cross-appeals from the decree hereinbefore referred to of June 4, 1908, at pages 4159 to 4165 (both pages inclusive) to which printed volume now on file in the State Library at the pages above mentioned, reference is made for the full particulars thereof.

7. Both parties appealed from the said decree to the Court of Errors and Appeals, and that court by its decree bearing date March 18, 1910, struck out the aforementioned words, "After conveyance of the water works by the said defendants to the complainant"; but otherwise affirmed the said decree so far as above quoted; and the Chancellor afterwards upon said decree of the Court of Appeals being remitted to this Court, did on the 9th day of April, 1910, make the said change and other changes decreed by the said Court of Errors and Appeals, and in other respects did ratify and confirm said former decree of this Court.

The decree of the Court of Errors and Appeals of March 18, 1910, is printed in Volume 13 above mentioned of the State of the Case, on pages 6994 to 6995 (both pages inclusive) and the decree of this Court of April 9, 1910, is printed in same book at pages 6996 to 6998 (both pages inclusive), to which printed volume now on file at the State Library at the pages above mentioned, reference is hereby made for the full particulars of said decree.

8. On May 12, 1909, an instrument or deed of release was obtained from the Morris Canal and Banking Company and its lessee, Lehigh Valley Railroad Company, reciting the incorporation of the Canal Company, the lease of its canal and navigation works, and its property and effects to Le-

high Valley Railroad Company, the original contract between Jersey City and Patrick H. Flynn, for said water supply dated February 28, 1899, its assignment to the Water Company, the supplemental agreement dated July 8, 1901, between Jersey City, Flynn, and the Water Company, and particularly and at length the fourth paragraph thereof stated above, and that the Water Company had requested it (the Canal Company), to execute said release in conformity with said paragraph of said supplemental contract. After such recitations, the instrument continued: "Now, know ye, that we, the said Morris Canal and Banking Company, and Lehigh Valley Railroad Company, lessee of the Morris Canal and Banking Company, in consideration of the premises and of the sum of One Dollar to us paid upon the execution of this writing, and to be paid to us on such abandonment of navigation, have released, and by these presents do release unto The Mayor and Aldermen of Jersey City, their successors and assigns forever, all our rights to divert the waters of the Rockaway River water-shed out of said river above the proposed reservoir site mentioned in said supplemental agreement of July 8, 1901, upon which site there has since been erected a reservoir below Boonton by the Jersey City Water Supply Company under its contracts with Jersey City.

"This release to take effect upon our abandonment of the navigation of the Morris Canal between Dover and Montville under Legislative sanction, and upon the payment by The Mayor and Aldermen of Jersey City to us of the sum of $1.00 as hereinbefore provided upon such abandonment."

A copy of said deed of release is hereto appended, marked Exhibit 1, and made part hereof.

9. Said release was delivered to Jersey City June 5, 1909.

10. On July 20, 1910, the original cause came on upon exceptions of Jersey City to the report of Honorable William J. Magie, Special Master, made pursuant to said decree of June 4, 1908, and upon application of said Water Company to settle other matters reserved in said final decree, as corrected by the decree on remittitur herein dated April 9, 1910, and upon the hearing, the defendants offered in evidence, and there was received in evidence, said deed of release bearing date May 12, 1909, from the Morris Canal and Banking Company, and Lehigh Valley Railroad Company, its lessee, to The Mayor and Aldermen of Jersey City, and it was proved that said release was delivered to Jersey City on June 5, 1909.

11. On said hearing the counsel of the Water Company asked the Court on such proof to adjudge in the final decree, that the said deed of release was sufficient fulfillment of the terms of the fourth section of said contract of July 8, 1901, and that the said sum of $500,000 should no longer be retained by Jersey City, but should be paid over with the rest of the purchase price to the defendant, the Water Company.

12. A decree, however, confirming the report, was filed on November 16, 1910, whereby it was among other things, ordered, adjudged, and decreed, that the total deductions and reservations to be made by Jersey City from the sum of $7,595,000, the contract price for the water works mentioned in the said decree of June 4, 1908, were

determined by said court to be certain sums therein mentioned, including the reservation of the sum of $500,000 mentioned in the decree theretofore made in said cause on June 4, 1908.

Said decree was, however, expressly made without prejudice to the right of the Water Company to file a bill or supplemental bill to recover the sum of $500,000 mentioned in the decree of June 4, 1908, authorized to be retained as therein mentioned, whenever in the estimation of said Company the same was or should be payable by Jersey City.

A copy of said decree is printed in said Volume 13 of the printed State of the Case, at pages 7098 to 7107 (both pages inclusive), to which reference is made for the full particulars thereof.

13. On October 20, 1910, the matter again came before this honorable Court upon petition and affidavits of the Water Company, whereby the Company asked leave to introduce evidence relative to the said release from the Morris Canal and Banking Company to Jersey City, dated May 12, 1909, and for an adjudication that the same fulfilled the terms of the fourth paragraph of the agreement of July 8, 1901. Such proceedings were thereafter had, that the court adjudged that the question should not be passed upon at that time, but should be presented by supplemental bill, the court holding that the question was one of difficulty, and was a new controversy involving the large sum of $500,000, and that the signing of final order or decree in said suit should not be postponed until the final determination of that controversy, and ordering that the prayer of the petitioner should be denied, and that the sum of $500,000 mentioned in said decree of June 4, 1908, should be retained

as decreed in the decree of June 4, 1908, and in the decree of November 15, 1910, but without prejudice to the right of the Water Company to file a bill or supplemental bill to recover the said sum whenever in the estimation of the Company, the same was or should be payable by Jersey City.

A copy of said order is printed in said Volume 13 of the State of the Case, at pages 7108 to 7110 (both pages inclusive), to which reference is made for the full particulars thereof.

14. An appeal was taken by the Water Company to the Court of Errors and Appeals from said decree of November 15, 1910, and said order filed December 8, 1910, as of November 15, 1910, and on July 11, 1911, a decree of affirmance was entered by the New Jersey Court of Errors and Appeals, ordering, adjudging, and decreeing that the decree of the Chancellor and the said order of December 3, 1910 (filed December 8, 1910) should be in all things affirmed.

15. On July 26, 1919, the Water Company filed its supplemental bill in this Honorable Court against Jersey City and the Fidelity Deposit Company of Maryland, setting forth the above stated matters and proceedings, and praying that it might be adjudged that the deed of release from the Morris Canal and Banking Company and the Lehigh Valley Railroad Company fulfilled the terms of said contract of July 8, 1901, and that the said sum of $500,000 ought therefore no longer to be retained by Jersey City, and praying that the said decree might be directed to be forthwith carried specifically into execution by the payment by Jersey City to the Water Company of the said sum of $500,000 (less $1.00) with interest from

June 5, 1909, in accordance with the terms of said decree, and that Jersey City might be ordered to do and concur in all necessary acts for that purpose; and in that suit such proceedings were had, that by the final decree of this Honorable Court made on July 26, 1921, it was ordered, adjudged, and decreed that said supplemental bill of the defendant, the Water Company, should be and the same was thereby dismissed.

16. An appeal was taken by the Water Company to the Court of Errors and Appeals from said last mentioned decree of July 26, 1921, dismissing said supplemental bill, and said final decree was affirmed by said Court of Errors and Appeals upon the ground that the fourth paragraph of the contract of July 8, 1901, properly construed meant that the money should be surrendered to the Water Company as soon as a valid release was delivered, which should be presently effective; that is, one which should extinguish any future right of appropriation by the Canal Company, and that the said release which was executed and delivered, although following the form of the contract, did not comply with the manifest intent and purpose of the contract. That by its terms, it did not take effect until the abandonment of the navigation of the Canal between Dover and Montville under legislative sanction, and that legislative sanction had not been given; and that the release therefore was not effective when it was delivered, and might never be effective, for the legislature might never release the Canal Company from its public duty of operating the Canal between the points mentioned in the document, and that under then present conditions the instrument was not the valid release contemplated by the contract

since it never could become operative until the provision with relation to abandonment under legislative sanction had been fulfilled.

17. That since the dismissal of said supplemental bill of this defendant (the Water Company) the conditions relative to the Morris Canal have greatly changed, as a result of acts of the legislature of New Jersey, and proceedings had thereunder, and navigation of said canal between Dover and Montville has been actually abandoned under legislative sanction, and said release has been ratified and rendered effective, as will hereinafter more fully appear.

18. By an act of the legislature of New Jersey (Chapter 212 of the Laws of 1922; P. L. 1922, page 367), entitled "An Act to authorize the acquisition by the State of the Morris Canal (as defined in this act) in whole or in part, and all the stock of the Morris Canal and Banking Company, and the rights of all stockholders in said Company, and in said canal property and water rights, and all or any part of the right, title and interest of the Lehigh Valley Railroad Company in said canal property, and water rights by virtue of its lease of said canal from the Morris Canal and Banking Company, or otherwise; to provide for a commission authorized to negotiate and agree upon terms of settlement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, in relation to the said canal property and water rights, and to vest in said commission certain powers necessary for carrying out the terms of settlement, and to make such other provisions as may be necessary to effectuate the objects aforesaid," which act was approved March 11, 1922, af-

ter reciting therein the charter to the Morris Canal and Banking Company, by virtue of which the said canal was constructed and completed to the Passaic River about the year 1831, and that, by subsequent legislative authority, said canal was extended to the Hudson River about the year 1836; and after reciting the lease to the Lehigh Valley Railroad Company, dated May 4, 1871, of the canal, its works, property and appurtenances, and that it was desirable, among other things, that the State of New Jersey should acquire the said canal property and rights, and that the acquisition of the said property of the Morris Canal and Banking Company in whole or in part, and the right, title and interest therein of the Lehigh Valley Railroad Company and the other property described in the provisions of said act were deemed necessary for the public use of the State, and to effect the objects and purposes of said act, it was enacted (among other things) that William H. Spear of Jersey City, Hudson County, Frank H. Sommer of Newark, Essex County, and Louis Focht of Trenton, Mercer County, citizens of this State (Edward L. Young afterwards succeeding the said William H. Spear by appointment of the Governor), were appointed as Commissioners to negotiate and agree upon terms of settlement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, in relation to the matters in said act mentioned, who should possess and have authority to execute the powers therein provided, and that said Commissioners were authorized in behalf of the State of New Jersey to make such terms of settlement and agreement between the State and the Morris Canal and Banking Company, and the Lehigh Valley Rail-

road Company, as they might deem advisable to secure the transfer of said Morris Canal in whole or in part to the State of New Jersey, subject to the limitations in said act provided; that such settlement and agreement might include the grant by the State of any of said canal property or the State's rights therein to the Lehigh Valley Railroad Company, in consideration of the release by said Company of its rights in the remainder of said Morris Canal property, or upon other consideration in whole, or in part, and that said Commissioners should make and file their report under said act on or before December 1, 1922; that if the Commissioners should file a report fixing terms of settlement and agreement with said Railroad Company, and said Canal Company, then said Commissioners should proceed to carry out the terms of said settlement and agreement; and that said Commissioners were authorized and directed in that event to cause to be executed on behalf of the State, proper instruments in writing approved as to form by the Attorney General, signed by the Governor, and with the seal of the State thereto affixed, duly attested, conveying to the said Railroad Company or said Canal Company any and all right, title and interest of the State in said canal property agreed to be conveyed by said report of settlement and agreement, and to deliver such instruments to said Company or Companies upon receiving from them appropriate instruments in writing approved as to form by the Attorney General, to carry out on their part the terms of settlement as provided for in said report, and upon said companies performing any other things on their part to be performed; that the control and management of all the property,

real and personal, conveyed and transferred to the State by the Lehigh Valley Railroad Company or the Morris Canal and Banking Company, or otherwise acquired, pursuant to the terms of said act, should be vested in the said Board of Conservation and Development, subject to further action by the legislature; that if in order to carry out the terms of settlement and agreement made by the Commissioners, it became necessary to condemn any of the shares of stock of the Morris Canal and Banking Company not owned by the Lehigh Valley Railroad Company, the proceedings for such condemnation should be conducted by the Attorney General at the request of the Board of Conservation and Development, provided, however, that the estate, right, title and interest of the Morris Canal and Banking Company and Lehigh Valley Railroad Company, General Securities Company, or their successors or assigns, in and to the waters of Lake Hopatcong, and the lands under the same, together with the lock and dam at the outlet of the Lake, with the lands necessary for their maintenance, operation, and control should be vested in the State, and should be maintained as and for an aquatic public park, for boating, bathing, fishing, and winter sports, and that the lake level should be maintained for said purpose at the normal high water mark as then established, natural elements permitting.

19. That said Commissioners duly filed their report under said act on or before December 1, 1922, fixing terms of settlement and agreement with said Railroad Company and said Canal Company, and that on the 29th day of November, 1922, an agreement bearing that date was entered into between the said Frank H. Sommer, Louis Focht,

and Edward L. Young, Commissioners, acting on behalf of the State of New Jersey, under and by virtue of the authority of said last mentioned act, as party of the first part, and Morris Canal and Banking Company, and Lehigh Valley Railroad Company, as parties of the second part, duly executed under the hands and seals of said Commissioners, and under the corporate seal of the Morris Canal and Banking Company, and the hand of its President, and the corporate seal of Lehigh Valley Railroad Company, and the hand of its Vice President, whereby the parties to said agreement, in pursuance of, and in accordance with, authority conferred by said Act, agreed, among other things, as follows:

On behalf of the State of New Jersey, the said Commissioners agreed, among other things, as follows: "To institute and prosecute to completion when requested in writing by the Lehigh Valley Railroad Company, proceedings for the condemnation of any stock, consolidated or preferred, of the Morris Canal and Banking Company, the cost and expense of such proceedings, including the payment of the award for such stock, to be borne by said Railroad Company."

And the Companies agreed, among other things, as follows:

(1) That the Lehigh Valley Railroad Company would pay to the State of New Jersey in cash the sum of $875,000, in five equal annual installments, the first installment to be paid on the 15th day of December, 1922; subsequent installments to be paid on the 15th day of December in each year thereafter, until said principal sum was fully paid, and that interest should be paid annually on the

15th day of December in each year subsequent to December 15, 1922, at the rate of five per cent per annum, upon such part of the principal sum as remained unpaid.

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(5) That the companies would convey or cause to be conveyed to the State of New Jersey by deed of bargain and sale, with covenant by the Lehigh Valley Railroad Company against its own acts and the acts of the Morris Canal and Banking Company, all lands and right of way of the Canal Company between the Westerly shore or bank of the Hackensack River, in the Town of Kearny, and the Southerly line or side of Main Street, adjacent to Green's Bridge, in the Town of Phillipsburg, and further, all the right, title, and interest of said Companies or either of them, or of any subsidiary company, of, in and to all that part of the Canal property and its feeders between the said Westerly shore or bank of the Hackensack River, in the Town of Kearny, and the Southerly line or side of Main Street, adjacent to Green's Bridge, in the Town of Phillipsburg, together with all the lands which said companies last mentioned owned, which were appurtenant to or used in connection with the aforesaid part of the canal and its feeders, and also all lands, land under water, water and water rights, rights of flowage, pondage and diversion of water appurtenant to the canal, together with all rights of the Canal Company and of its lessee, the Lehigh Valley Railroad Company, or of any one claiming under them or either of them, appurtenant to, or used in connection with the canal, to take, use, impound, divert, sell, and dispose of water. The deed to be given to the State to embrace the surrender to the State by the Mor-

ris Canal and Banking Company and the Lehigh Valley Railroad Company of all the right and title acquired by or vested in said Companies or either of them to impound, divert or take water at any point within the State for any use or purpose in any way incident or pertaining to the canal or to the operation of the canal, its feeders, works or appurtenances.

That the aforesaid conveyance should be subject to the terms of the release given by the Morris Canal and Banking Company and its said lessee to The Mayor and Aldermen of Jersey City, dated May 12, 1909, referring to the release set forth in paragraph 8 hereof, and subject to the right of said Mayor and Aldermen of Jersey City continuously to maintain its drains, pipes and conduits down and along the inclined plane at Boonton and to conduct the same along the canal at a point below the first lock east of said plane so as to protect the water supply of said City from pollution; and also subject to the provisions of two certain contracts, namely, one made between the Lehigh Valley Railroad Company, the East Jersey Water Company, the Newark Aqueduct Board and the Mayor and Common Council of the City of Newark, dated September 24, 1889, relating to a supply of water for the City of Newark, and the second between the Morris Canal and Banking Company, the Lehigh Valley Railroad Company, and Patrick H. Flynn, dated November 21, 1898, relating to a supply of water from the City of Jersey City.

(6) That the said Companies would assign, transfer and set over to the State of New Jersey all personal and mixed property of the said Companies used in connection with said canal.

(7) That the Lehigh Valley Railroad Company would at its own expense maintain the said Morris Canal as a canal in the usual manner until the first day of March, 1923.

(8) That the Lehigh Valley Railroad Company would assign, transfer and set over to the State of New Jersey, or its nominees, on or before December 30, 1922:

(a) All of the shares of the capital stock of the Morris Canal and Banking Company owned by said Lehigh Valley Railroad Company, being 9,921 shares of consolidated stock, and 11,399 shares of preferred stock.

(b) All of the outstanding bonds of the Morris Canal and Banking Company, which said bonds were owned by said Lehigh Valley Railroad Company and had an aggregate par value of $500,000.

(c) All of the outstanding preferred scrip of the Morris Canal and Banking Company, which said scrip was owned by the said Lehigh Valley Railroad Company and had an aggregate par value of $42,080.50.

(9) That the Lehigh Valley Railroad Company would acquire and assign, transfer and set over to the State of New Jersey all of the remaining outstanding stock, consolidated and preferred, of the Morris Canal and Banking Company not then owned by said Lehigh Valley Railroad Company, and that if the said Lehigh Valley Railroad Company could not on or before March 1, 1923, purchase such remaining outstanding stock at a price satisfactory to it and it therefore became necessary to condemn said shares of capital stock in order to acquire the same, said company should

request the Board of Conservation and Development of the State of New Jersey to bring proceedings in the name of the State to condemn said stock, and said proceedings should be taken in accordance with sub-division 5 of the first section of said agreement, and in conformity with the provision of Chapter 212 of the laws of 1922 aforesaid. And that pending the acquisition, by purchase or condemnation, and the transfer of said remaining outstanding shares of consolidated and preferred stock of the Morris Canal and Banking Company, the said Lehigh Valley Railroad Company would continue to pay the dividends thereon in accordance with its existing guaranty.

(10) That the said Companies would assign, transfer and set over, or cause to be assigned, transferred and set over, to the State of New Jersey by a proper instrument in writing all existing leases, licenses and undertakings covering any part of any of the property to be conveyed or transferred to the State of New Jersey, and would deliver, or cause to be delivered, to the State of New Jersey all documents, maps, records, deeds and muniments of title relating to any of the property to be conveyed or transferred to the State of New Jersey.

(11) That the Lehigh Valley Railroad Company would execute and deliver to the State of New Jersey on or before March 1st, 1923, a proper instrument in writing releasing any and all claims of every nature and description which the said Company had or might have against the Morris Canal and Banking Company.

(13) That the said Companies agreed that any rents collected by them, or either of them, under

existing leases, undertakings or licenses, covering or relating to any of the property to be conveyed or transferred to the State of New Jersey under the terms of said agreement for any period extending beyond January 1, 1923, should be apportioned as of that date; that rents for any leasehold period prior to January 1, 1923, should be collected by and be the property of the Lehigh Valley Railroad Company.

(14) That the Lehigh Valley Railroad Company would, in each of the several deeds of conveyance and instruments of transfer to be delivered thereunder by said company to the State of New Jersey, covenant that the property and rights to be conveyed or transferred were free from encumbrances, except as the same might be encumbered by rights created by and existing under certain leases, agreements, and other writings more particularly referred to in said agreement and said mortgage securing an issue of bonds in the amount of $500,000, and any other encumbrances specifically set forth in said agreement.

(16) That the Lehigh Valley Railroad Company covenanted at its own expense to continue in possession and operate the canal and to maintain the same as thereinbefore provided under the existing lease until March 1, 1923, and the Morris Canal and Banking Company and the State of New Jersey covenanted that the existing lease should on that day be cancelled; the obligations of the Lehigh Valley Railroad Company for the payment of dividends on the outstanding stock to continue as thereinbefore provided.

(18) That the deeds of conveyance, instruments of assignment and transfer and other writ-

ings to be executed and delivered by the parties thereto in performance thereof, should be approved as to form by the Attorney General of the State of New Jersey and should be mutually delivered together with all documents, maps, records, deeds and other muniments of title at the office of the Board of Conservation and Development of the State of New Jersey in the City of Trenton on the first day of March, 1923, between the hours of 10 o'clock in the forenoon and 3 o'clock in the afternoon, except as any other time or times might thereinbefore have been specifically designated with respect to the delivery of any such conveyance, instruments of transfer and other writings.

20. The deeds of conveyance, instruments of assignment and transfers, and other writings to be executed and delivered by the parties to said agreement in performance thereof duly approved as to form by the Attorney General of the State of New Jersey have been mutually delivered, together with all documents, maps, records, deeds, and other muniments of title in pursuance of and as required by the terms of said contract.

21. By an act of the legislature of New Jersey, approved February 28, 1923 (Chapter 11 of the Laws of 1923; P. L. 1923, page 34), it was enacted that the title to all of the property and property rights acquired or to be acquired by the State of New Jersey under and by virtue of the agreement entered into under the authority of the act set forth in the 18th paragraph hereof, other than the shares of the capital stock, bonds and scrip of the Morris Canal and Banking Company should be, and the same was thereby vested in the

said Morris Canal and Banking Company in trust for the State of New Jersey.

22. By an act of the legislature of New Jersey, approved March 12, 1924, entitled, "An Act to authorize the abandonment of navigation upon the Morris Canal and providing for the dismantling of the canal and the disposition of portions of the property, the title to which is now held in trust for the State of New Jersey by the Morris Canal and Banking Company upon terms and compensation fixed by said Morris Canal and Banking Company, and providing for the review of said terms and compensation by the Board of Public Utility Commissioners of the State of New Jersey, and further providing for the management and control of such property pending the disposition thereof" (Chapter 229 of the Laws of 1924; P. L. 1924, page 506), it was, among other things, thereby enacted that the Morris Canal and Banking Company was thereby authorized and directed to discontinue the use as a means of transportation by water of that portion of the property, the title to which was vested in the said company in trust for the State of New Jersey, which had theretofore been used as a means of transportation by water, and which was located between the westerly shore or bank of the Hackensack River in the Town of Kearny and the southerly line or side of Main Street adjacent to Green's bridge in the Town of Phillipsburg, which portion of said property was referred to in said act as the "Morris Canal" or as the "Canal"; and to discontinue the use as a means of transportation of water to the canal of those portions of such property which had theretofore been used as feeders to the canal;

and for such purpose the said company was thereby authorized and directed to drain off the water from the canal and feeders, whenever and wherever such action might be taken, in its judgment, without the creation of insanitary conditions or the impairment of contract obligations; and that such portions of such property should be applied and were thereby dedicated, subject to certain limitations thereinafter provided, to the public use as public highways for the transportation and passage thereon of persons and property and for any and all other purposes of public highways.

By the seventh paragraph of said Act, the Morris Canal and Banking Company was authorized and directed, as soon as the water should have been drained off from the canal, to proceed promptly to remove such highway and road bridges as had theretofore been maintained by the said company at intersections of the canal with existing highways and roads, and to refill the canal bed at those points and to grade down the approaches and to replace such bridges with roadways connecting with the adjoining highways or roads and graded and paved or surfaced to conform to the adjoining highways or roads respectively.

The said Act contained other provisions and enactments, for the full particulars of which, reference is hereby directed to the statute itself.

23. Pursuant to the authorizations and directions of the said last mentioned act the Morris Canal and Banking Company has in fact discontinued the use as a means of transportation by water of that portion of the property, the title to which was vested in the said Company in trust for the State of New Jersey (which includes that

portion of the Morris Canal lying between Dover and Montville, which had theretofore been used as a means of transportation by water, and has discontinued the use as a means of transportation of water to the canal of those portions of said property which have heretofore been used as feeders to the canal, and has, as a physical fact, drawn off all the water from the canal and feeders and has ceased to divert any water whatsoever for canal purposes or other purposes whatsoever from the Rockaway River above the reservoir site at Boonton belonging to Jersey City, from which it obtains its water supply.

24. The only right or title (if any) which the Morris Canal and Banking Company or its lessee, the Lehigh Valley Railroad Company, ever possessed to divert any water from the Rockaway River was acquired by it (or them) by prescription for canal purposes only, that is to say, for use in its said canal as a means of transportation by water and for no other purpose, and such prescriptive right or title (if any) has been extinguished by the abandonment of the canal under legislative sanction as above mentioned.

25. By the abandonment under legislative sanction as above set forth by the Morris Canal and Banking Company and its lessee, the Lehigh Valley Railroad Company, of the portion of the Morris Canal lying between Dover and Montville, there remained in them no other rights whatsoever to divert the waters of the Rockaway River above Jersey City's reservoir site capable of surrender to any corporation, person, or persons whomsoever, such abandonment operating as a surrender to those as against whom such prescrip-

tive rights (if any) ever came into existence of all right to divert such water for any purpose whatsoever, the only purpose, if any, for which said rights were ever acquired, being for canal purposes, and the canal having been abandoned by legislative sanction, at all events between Dover and Montville, all such rights, if any, have necessarily ceased to exist.

26. The defendant, the Water Company, therefore submits that the said deed of release set forth in the eighth paragraph hereof has been ratified and made effective by legislative act and sanction, and by the abandonment of the canal under legislative sanction, and is both in form and in substance a fulfillment in good faith of the requirements of the fourth paragraph of the contract of July 8, 1901, the terms of which are set forth in the third paragraph hereof.

27. The defendant, the Water Company, further submits that for the reasons and on account of the facts above stated, event C stated in the third paragraph of the contract of July 8, 1901, has occurred, and that therefore, for that reason, the said sum of $500,000 should no longer be retained by Jersey City, but should be paid over to this defendant with interest, as hereinafter stated.

28. On or about April 7, 1924, this defendant, the Water Company, served upon Jersey City a notice, a copy of which is hereunto annexed, and hereby made a part hereof.

29. The Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, as surety under said contracts hereinabove recited has an interest in this

cause, and is on that account made a party defendant thereto.

30. The Morris Canal and Banking Company by reason of the fourth prayer hereinafter set forth in this supplemental bill of complaint has an interest in this cause, and is on that account made a party thereto both as trustee and in its individual capacity, and the State of New Jersey and the Board of Conservation and Development may also claim an interest therein on the same account, or for the same reason, and are therefore also made parties defendant to this bill.

This defendant is without adequate remedy in the courts of law, and therefore prays by way of supplemental bill:

1. That The Mayor and Aldermen of Jersey City, the Fidelity and Deposit Company of Maryland, the Morris Canal and Banking Company as trustee and in its individual capacity, the State of New Jersey, and the Board of Conservation and Development, may answer this supplemental bill of complaint, and each statement therein made.

2. That it may be adjudged and decreed that event C stated in the third paragraph of the contract of July 8, 1901, has happened and taken place, and that by reason thereof, Jersey City should pay over to this defendant said retained sum of $5000,000, with interest from April 7, 1924.

3. That it may be adjudged that the said deed of release does fulfill the terms of said fourth paragraph of said contract of July 8, 1901, the navigation of the canal between Dover and Montville having in fact been abandoned under legislative sanction, and that by reason thereof Jersey City

should pay over to this defendant said retained sum of $500,000, with interest as aforesaid.

4. That it may be adjudged and decreed that neither the Morris Canal and Banking Company as trustee, or in its individual capacity, nor the State of New Jersey, has now any legal or equitable right by prescription or otherwise to divert out of the water-shed of the Rockaway River at Boonton any of the waters out of the Rockaway River over and above the amount of water brought into said water-shed by said canal from Lake Hopatcong and elsewhere outside of the Rockaway River water-shed, and that for that reason event A stated in the third paragraph of the contract of July 8, 1901, may be adjudged and decreed to have taken place, and that Jersey City may be decreed to pay over to the defendant said retained sum of $500,000, with interest as aforesaid.

5. That for the reasons set forth in the second, third, and fourth prayers of this supplemental bill, or for any one or more of said reasons, it may be adjudged and decreed that said sum of $500,000 ought no longer to be retained by Jersey City, and that the said decree of June 4, 1908, set forth in the 5th and 6th paragraphs hereof, may be directed to be forthwith carried specifically into execution by the payment by Jersey City to defendant of the said sum of $500,000 (less $1.00) with interest from April 7, 1924, in accordance with the terms of the decree entered; and that Jersey City may be ordered to do and concur in all necessary acts for that purpose.

6. And that this defendant, the Water Company, may have such other and further relief as

the nature of the case may require, and to your Honor may seem meet.

7. That a writ of subpoena may issue, commanding The Mayor and Aldermen of Jersey City, the Fidelity and Deposit Company of Maryland, the Morris Canal and Banking Company as trustee, and in its individual capacity, and the Board of Conservation and Development to answer this bill of complaint, and to abide by such decree as this court may make in the premises, and that the Attorney General of the State of New Jersey, being attended with a copy of this bill, may appear and put in an answer thereto, and may in like manner stand to and abide by such order or decree in the premises as to your Honor shall seem meet.

HUMPHREYS & SUMNER,
Solicitors and of counsel with Jersey City Water Supply Company.

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EXHIBIT 1.

To all to whom these presents shall come, or may in anywise concern, we, Morris Canal and Banking Company, a corporation of the State of New Jersey, and Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, lessee of Morris Canal & Banking Company, send Greeting:

Whereas, Morris Canal & Banking Company was duly incorporated by an act of the Legislature of New Jersey, entitled: "An Act to Incorporate a Company to form an artificial navigation between the Passaic and Delaware Rivers," Passed December 31, 1824 (P. L. 158), and has all the powers, privileges, rights and authority given by the said

act, and the several acts amendatory thereof and supplementary thereto;

And whereas, said Canal Company, under legislative authority, by a lease dated the fourth day of May, Eighteen Hundred and Seventy-One, did let and demise the canal and navigation works, and its property and effects unto the said Lehigh Valley Railroad Company, as by reference to said lease will more fully appear;

And whereas, The Mayor and Aldermen of Jersey City entered into a contract with Patrick H. Flynn, dated February 28th, 1899, for the obtaining from the Rockaway River of a supply of water for said City, as by reference to said contract will more fully appear, which contract was afterwards assigned by the said Patrick H. Flynn to the Jersey City Water Supply Company;

And whereas, on the eighth day of July, Nineteen Hundred and One, the said Mayor and Aldermen of Jersey City entered into a supplemental contract with the said Patrick H. Flynn and said Jersey City Water Supply Company, therein called the "Contractors," the fourth paragraph whereof is in the following words:

> "Fourth: Whenever the Contractors shall deliver to Jersey City a valid release from the Morris Canal and Banking Company and its lessee, releasing all their rights to divert the waters of the Rockaway River water-shed out of said river above proposed reservoir site, the same to take effect upon their abandonment of the navigation of said canal between Dover and Montville, under legislative sanction, for a sum therein to be named and to be paid upon such abandonment, then there shall be paid over by Jer-

sey City to said Contractors all of said sum of five hundred thousand dollars, except the amount named in said release, which last mentioned amount the Contractors authorize Jersey City to pay to said Morris Canal & Banking Company and its lessee upon the actual abandonment aforesaid."

And whereas, the said Jersey City Water Supply Company has requested us to execute this release, in conformity with the said fourth paragraph of said supplemental contract,

Now know ye, that we, the said Morris Canal and Banking Company and Lehigh Valley Railroad Company, Lessee of the Morris Canal & Banking Company, in consideration of the premises, and of the sum of One Dollars ($1.00) to us paid upon the execution of this writing and to be paid to us on such abandonment of navigation, have released, and by these presents do release, unto The Mayor and Aldermen of Jersey City, their successors and assigns forever, all our rights to divert the waters of the Rockaway River watershed out of said river above the proposed reservoir site mentioned in said supplemental agreement of July 8th, 1901, upon which site there has since been erected a reservoir below Boonton by the Jersey City Water Supply Company, under its contracts with Jersey City.

This release to take effect upon our abandonment of the navigation of the Morris Canal, between Dover and Montville, under legislative sanction, and upon the payment by the Mayor and Aldermen of Jersey City to us of the sum of One Dollar ($1.00) as hereinbefore provided upon such abandonment.

To have and to hold the same unto the said The Mayor and Aldermen of Jersey City, their successors and assigns forever.

In witness whereof, we have caused our respective common seals to be hereunto affixed, and duly attested, and these presents to be signed and delivered by our respective Presidents, the 12th day of May, Nineteen Hundred and Nine (1909).

Morris Canal and Banking Company,
By E. B. Thomas,
President.

(Seal of M. C. & B. Co.)
Attest:
J. Wm. Robbins,
Assistant Secretary.

Lehigh Valley Railroad Company,
By E. B. Thomas,
President.

(Seal of L. V. R. R. Co.)
Attest:
J. Wm. Robbins,
Assistant Secretary.

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April 7, 1924.

To the Mayor of Jersey City, and the
Mayor and Aldermen of Jersey City:

Dear Sirs:

Please take notice that all the events have now occurred which are set out in the supplemental agreement of July 8, 1901, between the Mayor and Aldermen of Jersey City, Patrick H. Flynn, and Jersey City Water Supply Company, upon the occurrence of which there became due and payable the sum of $500,000 to the Jersey City Water Sup-

ply Company, which sum was retained by the Mayor and Aldermen of Jersey City from the contract price, under the terms and conditions in said supplemental agreement set forth, and we hereby demand that you pay to this Company the said sum of $500,000, with interest from the date hereof.

Jersey City Water Supply Company,
By Geo. F. Baker,
Vice President.

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**Subpoena Ad Resp.**

[Returnable June 30, A. D., 1924.]

NEW JERSEY, to wit, THE STATE OF NEW JERSEY, to The Mayor and Aldermen of Jersey City.

GREETING: Whereas a bill of complaint has lately been exhibited against you in our (Seal) Court of Chancery by Jersey City Water Company to be relieved touching the matters therein contained.

Therefore, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said court at Trenton, on or before the expiration of twenty days from and after the thirtieth day of June, 1924, and in default thereof such order or decree will be made against you as the Court shall think equitable and just.

WITNESS, his Honor, EDWIN ROBERT WALKER, Chancellor of our said State at Trenton, the nineteenth day of June, in the year of our Lord one thousand nine hundred and twenty-four.

THOMAS BARBER,
Clerk.

HUMPHREYS & SUMNER,
Sol'rs.

**Stipulation.**

[Filed July 28, 1924.]

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, and others,
Defendants.

On Bill, &c.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the time within which the complainant may answer the supplemental bill filed by defendant Jersey City Water Supply Company is extended to July 30th, 1924.

THOMAS J. BROGAN,
Solicitor for Complainant.

HUMPHREYS & SUMNER,
Solicitors for Defendant Jersey City Water Supply Co.

**Answer of Mayor and Aldermen of Jersey City.**

[Filed Aug. 4, 1924.]

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants.

} On Bill, &c.

*Answer of the Mayor and Aldermen of Jersey City to Supplemental Bill Filed by Defendant Jersey City Water Supply Company.*

This complainant, by way of answer to the supplemental bill filed herein, says:

1. The allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the supplemental bill are admitted.

2. The allegations of Paragraph 17 of the supplemental bill are denied.

3. The allegations of Paragraphs 18 and 19 of the supplemental bill are admitted.

4. Complainant has no knowledge or information upon which to form a belief as to the allegations of Paragraph 20 of the supplemental bill.

5. The allegations of Paragraphs 21 and 22 of the supplemental bill are admitted.

New Jersey State Library

6. The allegations of Paragraphs 23, 24, 25, 26 and 27 of the supplemental bill are denied.

7. The allegations of Paragraph 28 of the supplemental bill are admitted.

8. This complainant has no knowledge or information upon which to form a belief as to the accuracy of the allegations in Paragraphs 29 and 30 of the supplemental bill, and leaves defendant Jersey City Water Supply Company to make proof thereof.

The complainant, further answering the supplemental bill of complaint, says that:

The Court, as above set forth, found that the Morris Canal & Banking Company had a superior right to divert water from the Rockaway River, which right prevented the defendant Jersey City Water Supply Company and its assignors, from fulfilling its contract with the complainant, and the clear meaning of the Court's decree when it directed the retention of the sum of $500,000 by the complainant, is that this defendant, the Jersey City Water Supply Company, or its assignor, should be entitled to the sum of five hundred thousand ($500,000) dollars so retained on the contract as fully set forth in the bill, when the superior right of the Morris Canal & Banking Company to divert water from the flow of the Rockaway River as above set forth should not only have been extinguished, but when such right should be vested absolutely in its entirety in the complainant, The Mayor and Aldermen of Jersey City.

This complainant, further answering the supplemental bill of the Jersey City Water Supply Company, says that the release in question, which is marked "Exhibit 1" in the bill, is without con-

sideration, without efficacy legally and releases nothing unto nor conveys anything to the complainant, and that this complainant, under said release, would not receive consideration of any value for the sum prayed for by the Jersey City Water Supply Company.

This complainant, further answering, says that the release under and by virtue of the Morris Canal Act, approved March 12th, 1924, is without legal sanction of the statute itself and has no legal significance or substance.

This complainant, further answering, says that under and by virtue of the report of the Morris Canal Commission referred to in the defendant's supplemental bill, the State of New Jersey succeeds to all personal and mixed property of the Morris Canal & Banking Company and its assignee, whereas this Court and the Court of Appeals has decreed that said property rights of the Morris Canal & Banking Company, to wit, the superior right to divert water from the Rockaway River, should be granted, conveyed and set over with all the right, title and interest to the complainant herein.

This complainant, further answering the supplemental bill, says that under and by virtue of the Canal Act, approved March 12th, 1924, the Morris Canal & Banking Company or its trustee is still empowered to divert waters of the Rockaway River, which this complainant contends is a bar to the happening of the conditions mentioned in the agreement set forth in the supplemental bill, upon the happening of which the sum of five hundred thousand ($500,000) dollars should be paid to the defendant, Jersey City Water Supply Company.

This complainant, further answering, says that the Enabling Statute, approved March 12th, 1924, *i. e.*, the Canal Act, has not been complied with in that the canal has not been abandoned between Dover and Montville.

This complainant, further answering, says that there has been no actual abandonment of the canal by the Morris Canal & Banking Company, but that it still has the right to a diversion of water from the Rockaway River and that the superior rights of the said Morris Canal & Banking Company or its lessee have not been conveyed or set over to this complainant.

This complainant, further answering, says that the alleged release does not conform to the requirements of the Morris Canal Act of 1924 above referred to.

This complainant, further answering, says that any act of the Morris Canal & Banking Company or its lessee, the Lehigh Valley Railroad Company, as such is ineffectual under the Canal Act of 1924 above referred to, without the State's sanction, and that its present alleged abandonment and acts with relation to this complainant have not had the sanction of the State of New Jersey through its authorized officers and agents, and any such alleged act or transfer or release is without legal sanction and *ultra vires.*

WHEREFORE, this complainant prays that the supplemental bill filed by the defendant, Jersey City Water Supply Company, be dismissed, with reasonable costs and disbursements to this complainant.

THOMAS J. BROGAN,
Attorney for Complainant.

**Replication.**

[Filed Sept. 5, 1924.]

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, and others,
Defendants.

On Supplemental Bill.

The defendant, Jersey City Water Supply Company, joins issue on the answer of the complainant, The Mayor and Aldermen of Jersey City, to the supplemental bill of the defendant, Jersey City Water Supply Company.

HUMPHREYS & SUMNER,
Solicitors of Defendant,
Jersey City Water Supply Company.

I hereby consent to the above replication being filed as of time.

THOMAS J. BROGAN,
Solicitor of Complainant.

**Decree Pro Con.**

[Filed September 2, 1924.]

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, and others,
Defendants

On Supplemental Bill.

This case being opened to the Court by Humphreys & Sumner, of counsel with the defendant Jersey City Water Supply Company, and it appearing that process of subpoena for the Fidelity and Deposit Company of Maryland, the Morris Canal and Banking Company, as trustee and in its individual capacity, and the Board of Conservation and Development to appear and answer the supplemental bill of the defendant Jersey City Water Supply Company has been duly issued and returned served upon said defendants, and that the Attorney General of the State of New Jersey has been attended with a copy of said bill, to the end that he might appear and put in an answer thereto on behalf of the State of New Jersey.

And it further appearing that the said defendants, the Fidelity and Deposit Company of Maryland, the Morris Canal and Banking Company, as trustee or in its individual capacity, the Board of Conservation and Development, and the State of New Jersey, have not, nor has either or any of

them, appeared and answered the said supplemental bill within the time limited by law, or at any other time, but that they have wholly failed and neglected so to do,

It is thereupon on this 2nd day of September, in the year of our Lord One Thousand Nine Hundred and Twenty-four, on motion of Humphreys & Sumner, solicitors of the defendant, Jersey City Water Supply Company, ordered and decreed that the said defendant's supplemental bill be and the same is hereby taken as confessed as against the said Fidelity and Deposit Company of Maryland, the Morris Canal and Banking Company, as trustee, and in its individual capacity, the Board of Conservation and Development, and the State of New Jersey, to the end, that such decree may be made against them as the Chancellor shall think equitable and just.

E. R. WALKER,
C.

**Notice of Motion.**

[Filed November 5, 1924.]

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, and others,
Defendants.

} On Bill, &c.

TAKE NOTICE that we shall apply to the Chancellor of this State, at the State House in Trenton, on Wednesday, the fifth day of November next, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order referring the above cause to one of the Vice Chancellors to hear the same for the Chancellor, or for an order for the hearing of said cause by the Chancellor himself, if he shall so determine, and in the latter case to fix a time and place for the hearing thereof.

Yours, etc.,

HUMPHREYS & SUMNER,
Solicitors of Defendant, Jersey City Water Supply Company.

To

THOMAS J. BROGAN, Esq.,
Solicitor of the Complainant.

**Order of Reference.**

[Filed November 5, 1924.]

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, and others,
Defendants.

} On Bill, &c.

On motion of Humphreys & Sumner, solicitors of the defendant Jersey City Water Supply Company, and upon filing proof of the service of the notice of said motion upon Thomas J. Brogan, Esq., solicitor of the complainant, it is on this fifth day of November, 1924, ordered, that the above stated cause be referred to Hon. V. M. Lewis, one of the Vice Chancellors, to hear the same for the Chancellor, and to report thereon to him and advise what order or decree should be made therein.

E. R. WALKER,
C.

**Designation.**

[Filed February 18, 1925.]

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, and others,
Defendants.

On Supplemental Bill.

The above entitled cause having been referred to me to hear the same for the Chancellor and to report thereon to him and advise what order or decree shall be made therein, and due notice of the application for this order having been given to Thomas J. Brogan, Esq., solicitor for the complainant,

IT IS thereupon on this 3rd day of February, 1925, on motion of Humphreys & Sumner, solicitors for defendant, Jersey City Water Supply Company,

ORDERED that 17th and 18th days of June, 1925, at ten o'clock in the forenoon be, and it is hereby, fixed as the time, and the Chancery Chambers in the City of Jersey City as the place, for the hearing of the said cause.

VIVIAN M. LEWIS,
V. C.

**Amended Answer.**

[Filed March 31, 1925.]

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants.

On Bill, &c.

AMENDED ANSWER OF THE MAYOR AND ALDERMEN OF JERSEY CITY TO SUPPLEMENTAL BILL FILED BY DEFENDANT JERSEY CITY WATER SUPPLY COMPANY.

This complainant, by way of answer to the supplemental bill filed herein, says:

1. The allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the supplemental bill are admitted.

2. The allegations of paragraph 17 of the supplemental bill are denied.

3. The allegations of paragraphs 18 and 19 of the supplemental bill are admitted.

4. Complainant has no knowledge or information upon which to form a belief as to the allegations of paragraph 20 of the supplemental bill.

5. The allegations of paragraphs 21 and 22 of the supplemental bill are admitted.

6. The allegations of paragraphs 23, 24, 25, 26 and 27 of the supplemental bill are denied.

7. The allegations of paragraph 28 of the supplemental bill are admitted.

8. This complainant has no knowledge or information upon which to form a belief as to the accuracy of the allegations in paragraphs 29 and 30 of the supplemental bill, and leaves defendant, Jersey City Water Supply Company, to make proof thereof.

The complainant, further answering the supplemental bill of complaint, says that:

(a) The Court, as above set forth, found that the Morris Canal & Banking Company has a superior right to divert water from the Rockaway River, which right prevented the defendant, Jersey City Water Supply Company, and its assignors, from fulfilling its contract with the complainant and the clear meaning of the Court's decree, when it directed the retention of the sum of $500,000 by the complainant, is that this defendant, the Jersey City Water Supply Company, or its assignor, should be entitled to the sum of five hundred thousand ($500,000) dollars so retained on the contract as fully set forth in the bill, when the superior right of the Morris Canal & Banking Company to divert water from the flow of the Rockaway River as above set forth should not only have been extinguished, but when such right should be vested absolutely in its entirety in the complainant, The Mayor and Aldermen of Jersey City.

(b) This complainant, further answering the supplemental bill of the Jersey City Water Supply Company, says that the release in question, which

is marked "Exhibit 1" in the bill, is without consideration, without efficacy legally and releases nothing unto nor conveys anything to the complainant, and that this complainant, under said release, would not receive consideration of any value for the sum prayed for by the Jersey City Water Supply Company.

(c) This complainant, further answering, says that the release under and by virtue of the Morris Canal Act, approved March 12th, 1924, is without legal sanction of the status itself and has no legal significance or substance.

(d) This complainant, further answering, says that under and by virtue of the report of the Morris Canal Commission referred to in the defendant's supplemental bill, the State of New Jersey succeeds to all personal and mixed property of the Morris Canal & Banking Company and its assignee, whereas this Court and the Court of Appeals has decreed that said property rights of the Morris Canal & Banking Company, to wit, the superior right to divert water from the Rockaway River, should be granted, conveyed and set over with all its right, title and interest to the complainant herein.

(e) This complainant, further answering the supplemental bill, says that under and by virtue of the Canal Act, approved March 12th, 1924, the Morris Canal & Banking Company or its trustee is still empowered to divert waters of the Rockaway River, which this complainant contends is a bar to the happening of the conditions mentioned in the agreement set forth in the supplemental bill, upon the happening of which the sum of five hundred thousand ($500,000) dollars should be paid

to the defendant, Jersey City Water Supply Company.

(f) This complainant, further answering, says that the Enabling Statute, approved March 12th, 1924, *i. e.*, the Canal Act, has not been complied with in that the Canal has not been abandoned between Dover and Montville.

(g) This complainant, further answering, says that there has been no actual abandonment of the canal by the Morris Canal & Banking Company, but that it still has the right to a diversion of water from the Rockaway River and that the superior rights of the Morris Canal & Banking Company or its lessee have not been conveyed or set over to this complainant.

(h) This complainant, further answering, says that the alleged release does not conform to the requirements of the Morris Canal Act of 1924 above referred to, in this that the signatories or officers who executed the release in question no longer have any jurisdiction in the premises, to wit, the rights, privileges and prerogatives of the Morris Canal & Banking Company, but that said release, if it is to be legally efficacious, should have been executed by the proper officials of the State of New Jersey, as is directed by the statute of 1924.

(i) This complainant, further answering, says that any act of the Morris Canal & Banking Company or its lessee, the Lehigh Valley Railroad Company, as such is ineffectual under the Canal Act of 1924 above referred to without the State's sanction, and that its present alleged abandonment and acts with relation to this complainant have not had the sanction of the State of New Jersey through

its authorized officers and agents, and any such alleged act or transfer or release is without legal sanction and *ultra vires.*

(j) This complainant, further answering, says that the issues herein involved have been decided by the Court of Errors and Appeals of this State, and therefore, that the same now are *res adjudicata* in this Court.

WHEREFORE, this complainant prays that the supplemental bill filed by the defendant, Jersey City Water Supply Company, be dismissed, with reasonable costs and disbursements to this complainant.

(Sgd.) THOMAS J. BROGAN,
Attorney for Complainant.

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**Replication to Amended Answer to Supplemental Bill of Complaint Filed June 6, 1924.**

[Filed June 18, 1925.]

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,
and
JERSEY CITY WATER SUPPLY COMPANY,
Defendant.

Jersey City Water Supply Company, complain-

ant in the supplemental bill of complaint filed June 6, 1924, joins issue on the amended answer of the defendant, The Mayor and Aldermen of Jersey City, to said supplemental bill.

HUMPHREYS & SUMNER,
Solicitors of Jersey City Water Supply Company.

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**Memorandum-Opinion.**

[Filed April 8, 1926.]

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants.

On Supplemental Bill of Jersey City Water Supply Company.
On Pleadings and Proofs.

Messrs. HUMPHREYS & SUMNER, JOHN B. HUMPHREYS, J. EDWARD ASHMEAD, FREDERICK J. FAULKS, for the Defendant, Jersey City Water Supply Company.
Mr. THOMAS J. BROGAN, for the Complainant.

LEWIS, V. C.:

This matter is before the Court on a second supplemental bill filed by the Jersey City Water Supply Company, and is the latest phase of a long

drawn out litigation, which has been presented to the courts of this State in numerous aspects. It is sufficient for the present purpose to refer to the decisions of this Court and of the Court of Errors and Appeals, respecting the first supplemental bill filed by this defendant, covering the specific subject-matter of the present bill. See The Mayor and Aldermen of Jersey City *v.* Jersey City Water Supply Company, *et al.*, 93 N. J. Eq., 36—Aff. id., 620.

It will be noted from the discussions of the issues involved in the former supplemental bill by the respective courts, that the sole question under consideration was the propriety of decreeing payment to the Jersey City Water Supply Company of $500,000 (five hundred thousand dollars) which had been retained by the complainant until the same should become due under the terms and conditions of the main contract involved in the litigation pursuant to a former decree of this Court, which was later affirmed in that respect by the Court of Errors and Appeals. See Jersey City *v.* Flynn, 74 N. J. Eq., 104; 76 N. J. Eq., 607; Jersey City *v.* Jersey City Water Supply Company, 93 N. J. Eq., 620 at 622, *supra.*

This Court decreed the dismissal of the former supplemental bill on the ground that the condition of the fourth section of the main contract relating to the delivery by the contractors to Jersey City of a *valid release* from the Morris Canal and Banking Company, and its lessee, with respect to their rights in the waters of the Rockaway River watershed, had not been complied with by the release which those companies had theretofore delivered to Jersey City, which was to take effect only upon the abandonment of the navigation of the Morris

Canal between Dover and Montville, *under legislative sanction;* because it was not shown that such legislative sanction had been granted or obtained. The decree of this Court, as previously indicated, was affirmed by the Court of Errors and Appeals, and in this respect, Mr. Justice Trenchard, speaking for that court, at page 624 of the report, *supra,* after quoting from the fourth paragraph of the contract, as aforesaid, stated that:

> "Properly construed, that means that the money should be surrendered to the water supply company as soon as a *valid* release was delivered, which should be presently effective—that is, one which should extinguish any future right of appropriation by the canal company. Now, the so-called release which was executed and delivered, although following the form of the contract, does not comply with the manifest intent and purpose of the contract. By its terms *it does not take effect until abandonment* of the navigation of the canal between Dover and Montville *under legislative sanction.* Legislative sanction has not been given. The release, therefore, was not effective when it was delivered; it is not effective today, and may never be effective, for the legislature may never release the canal company from its public duty of operating the canal between the points mentioned in the document. Under present conditions the instrument, while in the form of a release, is not the valid release contemplated by the contract, since it never can become operative in the slightest degree until the provi-

sion with relation to abandonment under legislative sanction has been fulfilled.

"The supplemental bill of the water supply company was, therefore, properly dismissed."

It is now contended by the water supply company that the legislative sanction referred to has been given, through the medium of numerous acts of the Legislature of this State, subsequently enacted; and that all the terms, conditions and requirements exacted by that legislation have been complied with and performed.

Voluminous testimony has been taken upon the present hearing, and the various aspects of this final phase of the litigation presented by counsel have been exhaustively argued in accordance with their respective contentions.

I am satisfied, however, that the sole material issue now involved is that which was presented by the former supplemental bill; and that the condition which, in that suit, was decreed to be then unfulfilled, has now been fully complied with. It follows, therefore, that the release from the Morris Canal and Banking Company, and its lessee, delivered by the Water Supply Company to the City of Jersey City, and which was to take effect upon their abandonment of the navigation of said canal between Dover and Montville, *under legislative sanction, is a valid release* within the proper construction of the fourth section of the main contract, and an effective compliance with the provisions of that paragraph.

I will, therefore, advise a decree in accordance with these views and the prayer of the present supplemental bill.

The terms of the decree may be settled upon due notice to the respective counsel.

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**Decree.**

[Filed April 27, 1926.]

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation,

Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,

Defendants.

On Supplemental Bill of Jersey City Water Supply Company; filed June 6, 1924.

Docket No. p. .

This cause coming on to be heard on supplemental bill of complaint filed herein June 6th, 1924, by the defendant, Jersey City Water Supply Company, against the complainants, The Mayor and Aldermen of Jersey City, and other defendants, in the presence of John B. Humphreys, Esq., Frederic J. Faulks, Esq., and J. Edward Ashmead, Esq., of counsel with the said Jersey City Water Supply Company, and Thomas J. Brogan, Esq., and Edward P. Stout, Esq., of counsel with the said The Mayor and Aldermen of Jersey City, the said supplemental bill of complaint having been taken as confessed against the other defendants therein named, and the pleadings and proofs having been read and the arguments of the respective counsel having been heard and considered and it appear-

ing to the Court that the said Jersey City Water Supply Company is entitled to the relief sought and prayed for by it in its said supplemental bill of complaint,

It is on the 24th day of April, Nineteen Hundred and Twenty-six, 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 that the said The Mayor and Aldermen of Jersey City pay to the Morris Canal & Banking Company the sum of One Dollar and to the said Jersey City Water Supply Company the balance of the five hundred thousand dollars ($500,000.00) mentioned in said supplemental bill of complaint, with legal interest thereon from the seventh day of April, Nineteen Hundred and Twenty-four.

It is hereby further ORDERED, ADJUDGED and DECREED that the said The Mayor and Aldermen of Jersey City also pay to the said Jersey City Water Supply Company its costs of this suit to be taxed, in which costs there shall be included a counsel fee of $7,500.00, which is hereby allowed the said defendant.

E. R. WALKER,
C.

VIVIAN M. LEWIS,
V. C.

**Testimony.**

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, and others,
Defendants.

On Bill, &c.
On Supplemental Bill Filed by the Defendants.

Transcript of testimony taken in the above-entitled cause, at the Chancery Chambers, Paterson, New Jersey, on the seventeenth day of June, nineteen hundred and twenty-five, before Hon. VIVIAN M. LEWIS, Vice Chancellor.

APPEARANCES:

THOMAS J. BROGAN, Esq., and EDWARD STOUT, Esq., for the Complainant.
HUMPHREYS & SUMNER, Esqs., J. EDWARD ASHMEAD, Esq., and FREDERICK J. FAULKS, Esq., for the Defendants.

The Court: I have before me on this matter a motion for a bill of particulars, but owing to the stress of other litigation I have not been able to give it that consideration that I thought was due to it. Mr. Ashmead wrote to me, asking me to dispose of it. My view is, that the pleadings are in shape to go ahead today. That is my hasty view.

Mr. Brogan: I have no doubt the Court of

Errors and Appeals will outline what must be done.

The Court: Suppose we put in the proofs without unnecessary technical objection, and if there are any new issues raised opportunity will be given to each side.

Mr. Brogan: That is satisfactory.

Mr. Humphreys: As your Honor suggests, this is, I hope, the end, if there is to be an end, of this very long and protracted litigation. We shall show that the release has been obtained, and that the canal has now been abandoned physically and actually, under legislative sanction; and we shall claim we are entitled to be refunded in the sum of $500,000 at the present time. I do not intend now to go into the evidence upon which we shall rely to support this claim, as it may be voluminous in character, and it may not. We shall refer to the various statutes upon which we rely. The matter comes now before your Honor on the second supplemental bill, and we shall ask your Honor for a decree directing the payment of this $500,000 to the Jersey City Water Supply Company. What your Honor said in regard to the amended answer we rely upon. We considered the amended answer that had been filed, insufficient, and we applied for a further amended answer, but I understand your Honor has not fully determined that.

The Court: The proofs are largely documentary, I suppose.

Mr. Ashmead: We first offer the entire record in the proceedings had in the suit on the original bill. Those records are here, and I understand the practice of the court in which the case is pending is to simply make a formal offer, which I have made.

Second. We offer the entire record of the proceedings had in the suit of the first supplemental bill. Those proceedings, of course, were taken to the Court of Errors and Appeals, and we have here the record of the case in the New Jersey Court of Errors and Appeals.

State of the Case in the Court of Errors and Appeals is marked "Exhibit A-1."

Now, in this book we wish to make special offer of the following:

Mr. Brogan: In the last record from the Court of Errors and Appeals?

Mr. Ashmead: Yes. Offer of the testimony of Robert J. Bain, appearing at pages 44 to 46 in this book; book just offered—appearing at pages 44 to 46 of the State of the Case just offered.

The testimony of Edmund L. Gardiner, appearing at pages 46 to 59 of the State of the Case just offered, and the exhibits admitted in connection therewith on the hearing upon the first supplemental bill. "Exhibit A," being agreement between the Morris Canal and Banking Company and Lehigh Valley Railroad Company and Patrick H. Flynn, dated November 21, 1898, printed on pages 71 to 77 of the State of the Case just offered.

"Exhibit B," being agreement between Morris Canal and Banking Company and Lehigh Valley Railroad Company and Patrick H. Flynn, dated February , 1901; printed on pages 77 to 86 of the State of the Case just offered.

"Exhibit C," being letter from Patrick H. Flynn to the Mayor and Aldermen of Jersey City and others, dated March 30, 1901, and printed on pages 87-95 of the State of the Case just offered.

Unmarked exhibit, Schedule A, being agreement between Mayor and Aldermen of Jersey City and

Patrick H. Flynn, dated February 28, 1899, printed at pages 97-126 of the State of the Case just offered.

Unmarked Schedule B, being contract between the Mayor and Aldermen of Jersey City, Patrick H. Flynn and Jersey City Water Supply Company, dated July 8, 1901, printed on pages 127-134 of the State of the Case just offered.

"Exhibit X," Schedule C, being contract between the Mayor and Aldermen of Jersey City, Patrick H. Flynn and Jersey City Water Supply Company, dated March 31, 1902, printed at pages 134-138 of the State of the Case just offered.

"Exhibit Y," Schedule D, being agreement between East Jersey Water Company, New Jersey General Securities Company, Patrick H. Flynn, Jersey City Water Supply Company and Mayor and Aldermen of Jersey City, dated March 31, 1902, printed on pages 138-145 of the State of the Case just offered.

Unmarked Exhibit, letter from Morris Canal and Banking Company to Mayor and Aldermen of Jersey City, *et al.*, dated April 24, 1901, printed at pages 145-150 of the State of the Case previously offered.

The next seven exhibits to be offered, if the Court please, are the release and the letters that passed between the Railroad Company and the Jersey City Supply Company, sending a check for $25,000, which was paid by the Jersey City Water Supply Company to the Canal Company and the Railroad Company as a consideration for the release.

These exhibits are as follows: "Exhibit D-1," being release from Morris Canal and Banking Company and Lehigh Valley Railroad Company

to Jersey City, dated May 12, 1909, printed at pages 64-67 of the State of the Case previously offered.

"Exhibit D-2," being letter from Mr. Gardiner to J. F. Schaperkotter, General Solicitor, dated March 11, 1909, printed on pages 151-152 of the State of the Case previously referred to.

Letter of Collins & Corbin to Mayor and Aldermen of Jersey City, dated June 3, 1909, printed on pages 67-70 of the State of the Case previously offered.

"Exhibit D-3," collection voucher for $25,000, dated October 29, 1910.

"Exhibit D-4," letter from Schaperkotter, General Solicitor, to Mr. Gardiner, President, dated November 1, 1910, printed on page 154 of the State of the Case previously offered.

"Exhibit D-4½," letter from Mr. Gardiner, President, to Schaperkotter, General Solicitor, dated November 14, 1910; and $25,000 check dated November 15, 1910, printed on pages 155-156 of the State of the Case previously offered.

Letter from Schaperkotter, General Solicitor, to Mr. Gardiner, President, "Exhibit D-4½," dated November 16, 1910, and printed on page 157 of the State of the Case previously offered.

At this time, if the Court please, I would also like to call attention by reference to the chapter and pages of the statutes that have relation to this matter.

The Court: All right, Mr. Ashmead.

Mr. Ashmead: The charter of the Morris Canal and Banking Company, appearing P. L. of N. J., 1824, page 92, &c.; Chapter 207 of the Laws of 1901, page 416; Chapter 212 of the Laws of 1922.

Chapter 115 of the Laws of 1923.

Chapter 110 of the Laws of 1923.

Chapter 111 of the Laws of 1923.
Chapter 112 of the Laws of 1923.
Chapter 71 of the Laws of 1924.
Chapter 77 of the Laws of 1924.
Chapter 78 of the Laws of 1924.
Chapter 80 of the Laws of 1924.
Chapter 218 of the Laws of 1924.
Chapter 229 of the Laws of 1924.
And Chapter 75 of the Laws of 1925, pages 248, &c.

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FRANK G. McINTOSH, being duly sworn, testified as follows:

*Direct examination by Mr. Ashmead*:

Mr. Brogan: I reserve my right to object to any of the exhibits that have been offered, as incompetent.

The Court: I will let all the proof in.

Mr. Brogan: Before any testimony is put in, I want it understood that the objection is directed to the competency and materiality, etc., of the testimony.

Mr. Ashmead: We would like to have it clearly on the record that no question is raised as to the form of the proof or the absence of any original instrument—copies being used, subject to an opportunity on the part of either counsel to check.

Mr. Brogan: And to call for the production of originals, if need be; is that agreed to?

Mr. Faulks: Subject to its being understood that such call is only to be made if a comparison of a copy indicates it is not a true or correct copy of the original.

Mr. Brogan: I want to see the original, I want to see it; I don't want to close the door on myself.

*Direct examination*:

Q. Where do you reside? A. Clifton.

Q. By whom are you employed? A. At times by the Jersey City Water Supply Company.

Q. What is your business? A. I am assistant engineer.

Q. How long have you been engaged in that business? A. About 28 years.

Q. Have you had during that time any experience in taking photographs? A. Yes, sir.

Q. How long has your experience extended? A. About 25 years.

Q. That you have been taking photographs? A. Yes, sir.

Q. What has been the character of the photographs; what has been the character of the photographs that you have taken concerning the subject? A. Principally construction work.

Q. Did you take any photographs of the Morris Canal between Dover and Montville? A. I did.

Q. At what time did you take those photographs, on what date? A. Last October I took some; I had the dates recorded on the pictures.

Q. By referring to the photographs which I hand you, can you refresh your recollection on that? A. In October, 1924, and again in June, 1925.

Q. Now, I show you a package of photographs, marked "Exhibit A-1 for identification," and ask you what they are? A. They are pictures taken along the Morris Canal showing obstructions in the way of fills to the canal being used for navigation.

Mr. Brogan: I think the answer is very objectionable, and I ask that it be stricken out.

The Court: Let the first part stand and the latter part be struck out.

Q. Now, you take that package of photographs and begin at Dover, which I believe is the photograph marked "1," and take them up separately and describe what they are, and the points at which they were taken.

Mr. Brogan: Objected to; this gentleman may testify as to the physical condition, if he wants to, or he can offer the photographs and say they are true representations of the conditions that he pictured on such and such a day; but I submit he cannot do both.

Mr. Faulks: And I submit that he can.

Mr. Stout: And I say I don't think he ought to be permitted to read the photographs.

The Court: I will note the objection to it; you may take the testimony.

Q. Do these photographs truly represent the situation at the different points at which they were taken? A. On the dates noted on the photographs?

Q. Yes. A. Yes, sir, they do.

Q. Now, will you proceed with No. 1 and describe the point at which that is taken?

Mr. Brogan: This, of course, all goes over my objection.

The Court: Yes.

Q. And also what it shows? A. Photograph No. 1 was taken showing the fill; it was taken on October 10, 1924, showing the fill in Morris Canal at

East Clinton Street, Dover; the view was looking eastward.

Q. What portion of the picture indicates the former bed of the canal? A. At the left of the picture there is a stone wall, and to the right the embankment.

Q. Where is the fill indicated? A. Directly across from the left to the right of the picture.

Q. Where, in respect to the position of the fence? A. The fence is on the fill.

Q. Now, No. 2? A. That is a picture showing the fill across the bed of the canal on North Bergen Street, Dover, the view looking southeast—taken on October 10, 1924.

Q. Where, in that picture, is indicated the former bed of the canal?

Mr. Brogan: Objected to on the ground that it is incompetent.

The Court: Do you want to cross examine?

Mr. Brogan: He has not been qualified.

The Court: What is the object of the query?

Mr. Ashmead: To explain these pictures and show where the canal has been filled.

Mr. Brogan: This question postulates some kind of scientific knowledge.

Q. You have been along this canal? A. Yes, sir.

Q. And noted the physical condition of the canal at the time you took each of these photographs? A. Yes, sir.

*By the Court*:

Q. Can you tell from examination of these pic-

tures the location of the canal itself, where the waterway was? A. Yes, sir.

*Further direct*:

Q. How long have you been familiar with the Morris Canal? A. I cannot say definitely, but for the last 20 or 25 years, with portions of it.

Q. Well, between Montville and Dover? A. Yes, sir.

Q. You have frequently passed there during that period? A. Yes, sir.

Q. And you noted the physical condition at the time you took these photographs? A. Yes, sir.

Q. In the vicinity where the photographs were taken? A. Yes, sir.

Q. During this period of 25 years where have you lived? A. I lived at Boonton.

Q. How many years? A. Eight years.

Q. What was your business there? A. I was an assistant engineer for the Jersey City Water Supply Company.

Q. Did you have charge of the dam there? A. I did.

Q. Now, will you proceed with the question—where, in picture No. 2, is indicated the former bed of the canal? A. It shows very distinctly in the background, under the bridge.

Mr. Brogan: If the Court please, may I ask this gentleman a few questions that might clear up the situation?

The Court: Yes.

*Cross examination by Mr. Brogan*:

Q. You say you have been living in Boonton for eight years and have, as assistant engineer, had charge of a dam; where is that dam located? A.

It is located on the Rockaway River, on the outskirts of Boonton. I think part of it is in Hanover Township, and the other part is in the Town of Boonton.

Q. Who owns this dam? A. The Jersey City Water Supply Company owned it at the time I was there.

Q. Is it above or below Jersey City's dam? A. It is now the Jersey City dam, I believe.

Q. You are talking now about the dam which Jersey City acquired from the Jersey City Water Supply Company, or its assignor? A. Yes, sir.

Q. When, then, was this eight years of your time spent in and around Boonton? A. I went to Boonton in 1902, and I left there in 1910.

Q. And you had jurisdiction up to 1910, or had charge of this dam? A. From the time of its completion.

Q. When was that? A. I think that was in 1904.

Q. When was it turned over to Jersey City? A. That I cannot say.

Q. I mean, when did your duties with regard to it cease? A. It was in 1910; in February, 1910, I think it was.

Q. You went there in 1904; that was your initial work in that location? A. I went there in 1902.

Q. You stayed until the time you left, and having left, then where did you go? A. To Montclair.

Q. And you have been in Montclair since? A. No, sir, I have not.

Q. You did not go back on the Rockaway River watershed? A. I have been back there since.

Q. Working? A. No, sir.

Q. Your going back was in the nature of a visit, or an inspection—something of that character? A. I would not say so.

Q. Tell me what it is; what brought you back? A. At what time?

Mr. Brogan: Well, I submit, if the Court please, that this witness from his evidence, having gone there in 1902 and left in 1910, having had charge of the dam in its building, and then up to the time of its turning over to Jersey City, and then having left and gone to Montclair, and not having gone back to the *locus in quo* to do any work, is not qualified to give the intimate character of testimony that he has started to give.

The Court: I will receive it for what it is worth.

*Direct examination* (continued):

Q. What, on photograph 2, indicated the former bed of the canal? A. It is shown in the background of the picture, under the bridge.

Q. Is it shown anywhere in the foreground? A. In the lower left-hand corner a small portion of the picture shows the one bank.

Q. Where, on these photographs, is the fill indicated? A. The man in the picture is standing on the fill.

Q. How about this sign on which appear the figures "10"? A. That is the part I refer to.

Q. That is the part you refer to? A. Yes, sir.

Q. And this irregular pile of rock or dirt shown in the center of the picture, where does that lie with respect to the former bed of the canal? A. It would be in the bed of the canal—

Q. Now, proceed with photograph 3. A. Photograph No. 3 is taken from the same location as No. 2; it was taken June 11, 1925; but it shows the re-

moval, or rather the absence, of the Hudson Street bridge, which was shown in the picture No. 2.

Q. Where, in this picture, is indicated the former bed of the canal? A. At the center of the picture to the right is the one bank—to the left of that, along the buildings, is the other bank.

Q. And where, in this picture, is indicated the fill? A. For the entire distance between Hudson Street and North Bergen Street.

Q. Where are these two streets that you mention— A. They are in Dover.

Q. I know, but you mentioned them in connection with this picture, which does not mean anything unless you indicate where they appear on the picture. A. Where the man is standing and the numbers "10," is the crossing of North Bergen Street, and at the far end of the fill is the crossing of Hudson Street.

Q. Where is that indicated on that picture? A. At about the center of the picture, on the right-hand end of it.

Q. What do you mean by the crossing of these streets? Do you mean across the former bed of the canal? A. The canal has been filled in, so that the street is open to drive across the bed of the canal.

Q. Now, proceed to picture 4. A. Picture 4 is taken on October 10, 1924; it is a view looking northwest, showing a fill in the Morris Canal at North Bergen Street in Dover.

Q. Now, what, in this picture, indicates the former bed of the canal? A. In the center of the picture a quantity of water has accumulated; on the left of the picture is the towpath; the bridge; and abutments defining the limits of the canal.

Q. Is the water that you have referred to, shown

in white in the center of the foreground of the picture? A. Yes, sir.

Q. What else is in the foreground of the picture there besides the towpath? Grass, or what? A. A growth—grass, weeds—

Q. Where is the fill indicated in this picture? A. In the background from the left to the right of the picture in front of the building.

Q. Just describe how it is indicated. A. There is an automobile at one end of the fill; at the other end the fill approaches the towpath where it disappears from view in the picture.

Q. What is that fill? A. Earth.

Q. Is it a roadway? A. Yes, sir, it is.

Q. Do you know that is used as a public highway? A. Yes, sir.

Q. Turn to photograph No. 5.

Mr. Brogan: Objected to as leading.

The Court: I think the objection may be noted.

A. Photograph No. 5 shows the site of the Morris Canal crossing stream in runway, a view looking south, taken June 11, 1925; the bed of the canal shows in the background of the picture; the one bank on the left is defined by the brush, trees, growing along the bank; the same condition applies on the right of the picture.

Q. Where is the fill indicated in that picture? A. The fill shown in the picture is beyond the wall —beyond the man standing at the concrete wall; that fill is not across the bed of the canal.

Q. Where is it? A. It is parallel with the canal.

Q. Where is the wall in reference to the former bed of the canal? A. The portion of the wall on the left of the picture is of the former construction; part of the wall across the bed of the canal

is shown as a smooth surface wall, which is concrete.

Q. I asked you where that wall was with respect to the former bed of the canal. The part of the wall in the center of the picture is directly across the bed of the canal.

Q. Now, turn to photograph 6, and describe that. A. That is a picture taken on the west bank of the Morris Canal, north of bridge No. 77; it is near Denville, view looking south; taken on October 15, 1924.

Q. And where, in the picture, is indicated the former bed of the canal? A. The growth of grass on the left of the picture shows the one bank; the bank on the right of the picture has been filled in as a roadway; the bridge in the background shows the line of the canal.

Q. Where is indicated the fill? A. From the figure 11 toward the man at the right of the picture.

Q. Where, on the right of the picture, was the former bank of the canal? A. I cannot say.

Q. Can you say whether it was as far as the man? A. I could not say.

Q. Turn to photograph 7 and describe that. A. That is the picture of the side of the Cedar Lake bridge over the Morris Canal at Denville; view is looking east; and the picture was taken June 11, 1925.

Q. What in that picture indicates the former bed of the canal? A. The growth of grass and weeds on the left, at about the line of the canal; the right bank had been filled in; I cannot say where the line of the canal is.

Q. Where, on that picture, is indicated the fill?

A. Directly in the center from left to right—back of the concrete wing wall.

Q. What is the location of that fill in respect to the former bed of the canal? A. It is directly across the bed of the canal.

Q. What is that fill used for, if anything? A. A highway.

Q. A public road? A. Yes, sir.

Q. Turn to photograph 8, and describe that. A. Photograph No. 8 shows the sewer construction in Morris Canal north from Peer's Lock, near Denville; this picture was taken October 10, 1924.

Q. Where, in the picture, is indicated the former bed of the canal? A. The picture does not show the lines of the canal, due to the construction of the sewer; the dirt was thrown to the right; the left bank was more or less torn.

Q. Cannot you tell me what indicates the former bed of the canal? A. The approximate location of the canal was directly through the center of the picture, from the bottom to the top.

Q. Where, in this picture, is indicated the fill? A. There is no fill across the canal in this picture.

Q. Is there any fill there across or lengthwise of the canal? A. Not in this picture.

Q. And the dirt on the right of the picture is that in the former bed of the canal or not?

Mr. Brogan: Objected to in view of the last two answers. Counsel is endeavoring to force the witness to say something which he has twice denied, and I submit it is not living up to our agreement that there is not to be any more leading of this character.

The Court: Cannot you reframe it?

Mr. Faulks: It is perfectly apparent that the witness is confused, your Honor.

The Court: Cannot you reframe that question?

Mr. Ashmead: Yes.

Q. What is the location of the dirt on the right-hand side of the picture in respect to the former location of the bed of the canal? A. I don't understand the question.

Q. (Question read.) A. I would say that was part of the bed of the canal, thrown on the bank.

Q. Where is the manhole in the immediate foreground of the picture indicated in respect to the former bed of the canal? A. That would be about in the center of the bed.

Q. Yes? A. And there is another manhole in the background, about midway of the picture.

Q. Now, turn to photograph 9 and describe that, please. A. Photograph 9 is a view taken to show the fill of the main road across the canal at Peer's Lock near Denville; the view is looking south, and it was taken October 10, 1924. In the center of the picture is shown the manhole which appeared in photograph No. 8.

Q. What on this picture indicates the former bed of the canal? A. Just past the manhole on the right.

Q. Do you understand my question? (Question read.) A. Just above the manhole on the right is a pile of tile, which is on the one bank; and to the left there is a growth of bushes which would indicate the other.

Q. And what, in the picture, indicates the fill? A. The earth which is placed across the bed of the canal, from the building on the right of the picture to the automobile on the left.

Q. And what is that fill used for? A. It is the main road, a public highway.

Q. Running from what point to what point? A. The road leading from Denville eastward towards Boonton.

Q. Turn to photograph No. 10 and describe that. A. Photograph No. 10 shows the fill in the Morris Canal at the same location as the previous picture taken at Peer's Lock near Denville, the view looking north—picture taken October 10, 1924. In the foreground of the picture is shown the walls of the lock; in the center of the picture is shown the fill across the canal.

Q. What is that fill used for? A. As a highway.

Q. What highway is that? A. The same one I referred to, leading from Denville eastward.

Q. Turn to photograph 11 and describe that. A. Photograph 11 is a view showing the fill on the site of the Morris Canal, south of Peer's Lock at Denville; this picture was taken June 11, 1925.

Q. What in this picture indicates the former bed of the canal? A. In the center of the picture both banks of the canal are shown through the opening of the trees.

Q. Now, where, in the picture is the fill indicated? A. The steam shovel is on part of the fill; and the fill extends to the right of the man standing in the picture; and it extends down as far as the trees that are shown in the center of the picture.

Q. What was the steam shovel doing? You were there. A. They were excavating dirt and loading it into the truck; taking it down to dump on this fill; this dirt was part of the bank of the canal; the lock that was there.

Q. Turn to photograph 12 and describe that. A.

That is a picture taken to show the fill in the Morris Canal at the site of a farm road bridge; the bridge is No. 82; the location of the bridge is west of Powerville; the view is looking east; picture taken October 10, 1924; the abutment of the bridge, the remains of it, show on the right of the picture; the lines of the canal are directly down the center of the picture, to the right of the man standing in the picture.

Q. Now, what indicates the former bed of the canal in this picture? A. The remains of the stone abutment on the right; and growth of grass and weeds and the location of the man standing indicate the banks on the left.

Q. What in this picture indicates the fill? A. The man is standing at one end of the fill; this fill extends across the canal into the pile of stones on the right.

Q. Is that fill used for anything? A. As a farm road; it is not a public highway.

Q. Turn to picture 13, and describe that. A. Picture 13 is a view showing the sewer construction in the bed of the Morris Canal, about 300 feet west of Bridge 84, which is above Boonton; the view is looking east; the picture was taken October 9, 1924.

Q. What, in that picture, indicates the former bed of the canal? A. The bed of the canal is not clearly defined there; in the immediate foreground, near the center of the picture, the left bank of the canal is shown; due to the sewer construction, the other bank is not clearly defined.

Q. What indicates the fill in this picture? A. The sewer manhole is approximately in the center of the canal bed; the material in the foreground

of that, which is nearly level with the surface of the ground, shows the fill in the bed of the canal.

Q. Turn to photograph No. 14 and describe that. A. Photograph No. 14 is the fill showing fill in the lock of the Morris Canal west of the Rockaway River at Powerville, past Boonton; the view is looking east towards bridge 84; it was taken October 9, 1924. The picture shows the walls of the lock and the gate at the end of it. Between these walls is shown earth which has been placed in the location nearly to the level surface of the ground.

Q. Turn to photograph 15 and describe that. A. Photograph 15 is the same location, which is a fill in lock of Morris Canal west of Rockaway River at Powerville above Boonton; the view is looking west from bridge 84, and was taken October 9, 1924. This picture shows the walls of the lock with earth fill between these walls.

Q. What indicates the former bed of the canal there? A. The masonry walls in the center of the picture; figure 7 is on one wall, and the other wall is shown in the center of the picture.

Q. What indicates the fill? A. In the center of the picture the earth is filled in to the level of the walls, and in the background the embankment was shown between these walls.

Q. Turn to photograph 19 and describe that. A. Photograph 19 is a view showing the sewer construction at top of Morris Canal, plane No. 7, east, at Boonton; the view is looking south, and was taken October 9, 1924. The bed of the canal is shown in the foreground at the center of the picture.

Q. How is it indicated? A. As a bank, parallel with the cable shown through the center of the picture; growth of grass on the side of it.

Q. And how is the fill indicated? A. The fill is thrown up on the right center of the picture; that would be to the right of the pole.

Q. And how about the dirt in the immediate foreground? A. I could not say that that is a fill.

Q. Turn to photograph 20 and describe that. A. Photograph No. 20 is a view of the sewer construction at the top of the Morris Canal, plane No. 7, east, at Boonton; the view is looking north.

Q. When was that taken? A. On October 9, 1924; and shows the end of the sewer in the center of the picture.

Q. How is the location of the former bank of the canal indicated? A. The bank of the canal is north of that—

Q. This is on the plane? A. Yes, sir.

Q. Turn to photograph No. 23. A. Photograph No. 23 was a picture taken to show an ownership notice which is tacked on plane house No. 7, east, at Boonton. Picture taken June 11, 1925.

Q. And photograph No. 24? A. Photograph No. 24 is a picture taken of the ownership notice on plane house No. 7; this picture was taken June 11, 1925, and was taken nearer by than the previous picture to make the printing more legible.

Q. Describe photograph No. 28. A. Photograph No. 28 is the site of proposed fill of Morris Canal on Main Street bridge at Boonton; the view is looking northwest and was taken October 9, 1924; the bank of the canal is shown on the left where the man is standing, and on the right it is defined by the end of the bridge and foliage, which grows on the edge of the bank.

Q. And what is in the center? A. That is a portion of this sewer that was laid in the bed of the canal.

Q. Describe photograph No. 29. A. Photograph 29 shows a fill in the Morris Canal at the side of Vreeland Avenue bridge in Boonton; the view is looking southeast, and was taken October 9, 1924. The limits of the canal bank are shown by the building on the left, and on the right by the embankment.

Q. And where is the fill in there? A. The fill is across the canal, where the man is standing in the picture. The fence is also on the fill. This fill does not show very clearly, because the grass and woods have grown on the dirt since it was placed.

Q. Was there any use being made of that fill at the time the picture was taken? A. It was a public road.

Q. Describe photograph No. 30. A. Photograph 30 shows the fill in the Morris Canal at the site of Vreeland Avenue bridge, Boonton; the view is looking northwest; this picture was taken October 10, 1924.

Q. And what in it indicates the former bed of the canal? A. The number on the fence, No. 4-A, indicates one bank, and the roadway on the left is on the other bank; the fill is directly across the canal, and it is a highway known as Vreeland Avenue.

Q. How is that fill indicated in the picture? A. The fence is on the fill.

Q. Describe photograph 33. A. Photograph 33 shows a fill on the main road, crossing Morris Canal plane No. 9, east, at Montville; the view is looking southeast, and it was taken October 9, 1924.

Q. What indicates the former bed of the canal there? A. The picture is taken on the plane; the bed of the canal is not shown in this picture.

Q. What indicates the fill? A. From the left of the picture, crossing it, towards the plane's house and in front of the bridge, that shows the dirt fill across the plane.

Q. Was that fill being used for anything while you were there? A. Not yet.

Q. What is its location with respect to highways? A. The main highway passes over the bridge, which is shown back of the fill.

Q. Describe photograph No. 34. A. That is a view showing the fill at the main road crossing of the Morris Canal on plane No. 9, east, at Montville; the view looking northwest. This picture was taken October 10, 1924; the picture is looking up the plane; in the center of the picture can be seen the fill beyond the highway bridge.

Q. And what is the location of that fill in respect to the former location of the canal bed? A. The bed of the canal is not shown on the picture; the picture is taken on the plane.

Q. In respect to the plane? A. That fill is directly across the plane.

Q. Describe photograph No. 35. A. Photograph No. 35 is the site of a road bridge crossing the Morris Canal between Towocko and Montville; the view is looking north, and was taken June 13, 1925.

Q. What, in this picture, indicates the former location of the bed of the canal? A. The foliage on the left of the picture is on the bank of the canal; the tree on the right is the other bank; a depression shown in the picture in the lower right-hand corner is about the center of the old bed.

Q. What indicates the fill? A. Through the center of the picture, from left to right, is a fill; a man is standing on the fill.

Q. And what is the location of the fill in respect

to the former bed of the canal? A. Directly across it.

Q. Is that fill being used for anything—when you were there? A. It is, I think, a private road.

Q. Describe photograph 36. A. Photograph No. 36, that is a fill in the Morris Canal at the site of the change bridge in lower Montville; the view is looking south, and was taken October 9, 1924; the fence shown in the picture is on the fill which crossed the bed of the canal at right angles; the number in the center of the picture, 2-A, is on the one bank, and the other bank is shown by a depression covered with grass and weeds.

Q. Was that fill being used for anything when you were there? A. It was a public highway.

Q. Describe photograph No. 37. A. That is a fill in the Morris Canal at the site of change bridge in lower Montville, if you look north; this was taken October 9, 1924.

Q. What in this indicates the bed of the canal—the former bed of the canal? A. The man standing in the center of the picture towards the right is on the one bank of the canal, and the trees on the left is about the location of the other bank.

Q. What indicates the fill? A. The fill is shown across the center of the picture with a fence on top of it.

Q. What is the relation of the fill in respect to the former bed of the canal? A. It is placed across the canal at right angles.

Q. Was that fill being used for anything at the time you were there? A. As a public highway.

Q. Describe photograph 38. A. No. 38, that was taken at the site of a road bridge crossing the Morris Canal at Towocko, view looking west, and was taken June 13, 1925.

Q. What, in this picture indicates the former bed of the canal? A. The natural depression indicates the bed of the canal; this fill crosses the canal at right angles; a man is standing on the fill—a man in the center of the picture.

Q. Is that fill being used for anything? A. That is used as a highway.

Q. Describe photograph No. 39. A. Photograph 39 is a picture of the site of the Ryerson bridge on the Morris Canal, 8/10 of a mile north of aqueduct at Mountain View—the view looking south—was taken October 9, 1924.

Q. What indicates the former bed of the canal in this picture? A. The man standing at the left center of the picture indicates the one bank, and the trees at the right are approximately the other bank.

Q. And what, if anything, indicates the fill? A. And the fill is placed at right angles across the bed of the canal, shown as a dry masonry wall, with a fence on top.

Q. And was that fill being used for anything? A. As a roadway.

Q. Describe photograph No. 40. A. No. 40 is also a view of the site of the Ryerson bridge on the Morris Canal, 8/10 of a mile north of the aqueduct of Mountain View, of a view looking north; taken October 9, 1924; this fill crosses the canal.

Q. What indicates the former location of the canal in this picture? A. No. 1, on the sign in the picture, indicates the one bank, and the trees on the left would indicate the other.

Q. And what indicates the fill? A. The fill is shown across the picture as a dry wall with a fence on top.

Q. And was that fill being used for anything? A. As a roadway.

Q. Describe photograph 41. A. Photograph 41 is a view of the site of the Morris Canal aqueduct crossing the river at Mountan View, if you are looking up-stream. This was taken June 10, 1925.

Q. Do you know how the bed of the canal—how the canal was carried over the river at this point? A. It was carried over the river in aqueduct.

Q. Where is that aqueduct? A. That has been removed.

Q. Is there anything in the picture to indicate its former location? A. At the right of the picture is shown the end of the canal after leaving the aqueduct, and in the center of the picture at the left are shown the remains of piers that carried the aqueduct.

Q. Describe photograph 42. A. No. 42—that is a view showing the site of the Morris Canal aqueduct crossing the Passaic River at Little Falls; the view is looking down-stream and was taken June 10, 1925.

Q. Now, how was the canal carried at this point? A. It was carried over the river by a stone arch bridge.

Q. Where was that located? A. At the center of the picture is shown the remains of one abutment, and directly across the stream from it is the remains of the other abutment.

Q. Now, generally, what portion of the canal, or between what points of the canal were these pictures taken? A. Between the crossing of the Morris Canal and the Passaic River at Little Falls and the canal basin at Dover or East Clinton Street.

Q. What is the location of Little Falls in respect to Montville? A. It is below Montville.

Q. How many miles? A. I don't know accurately.

Q. One, two, or how many? A. I don't know.

Q. You could not say whether it is one or ten? A. It is nearer ten than it is one.

Q. Now, I ask you again if each of these photographs are true representations of the subjects that appear in them as they were at the time the photographs were taken? A. They are.

Mr. Ashmead: I now offer these photographs in evidence.

Mr. Brogan: My first objection is this: Mr. Ashmead, the counsel for the company, made the statement that his bill was filed in June, 1924; these photographs show a condition of things that existed last week, last October; and in no case, if I am not mistaken, do they show the condition as of June, 1924, which is the issue that we are called upon to meet; and, therefore, we say that either the bill is premature or these pictures are not material to that bill.

The Court: I will receive them, noting your objection, and will deal with them when I deal with the question generally. I will receive them, noting Mr. Brogan's objection.

Mr. Brogan: This bill was not filed until June, '24.

The Court: After the legislation had taken action?

Mr. Brogan: Yes.

*Cross examination by Mr. Brogan:*

Q. We left off a few minutes ago when I was asking you some questions about your leaving the employ of the Jersey City Water Supply Company, and leaving your work, that of taking charge of the dam at the time the City of Jersey City took over this water works from the contractor; is that right? A. I did not leave the employ of the company at the time the city took over the works, no, sir.

Q. When did you leave the employ of the company, if at all? A. I was transferred, I think, in February, 1910; I am not positive of the date, but it was about that time.

Q. And, of course, I was addressing myself to your leaving the employ of the company, if you ever left its employ? A. Well, I would not put it that way, that I was entirely dismissed from its employ.

Q. Did you ever resign or quit the job? A. No, sir, I did not.

Q. Did you cease your connection with the company? A. I would not say so.

Q. Are you still in the employ of the Jersey City Water Supply Company? A. I testified today—at times.

Q. Were there intervals at which you left the employ of the Water Companies and went to work for other industries or interests? A. I work for the Associated Water Companies.

Q. And at times you were assigned to work for the Jersey City Water Supply Company; at other times for the East Jersey; at other times for allied companies? A. Yes, sir.

Q. And you are, at the present time, in the em-

ploy of the Jersey City Water Supply Company? A. Today I am, yes, sir.

Q. Now, Mr. McIntosh, who was with you, if anyone, when you took these photographs? A. I had two men with me.

Q. Who were they? A. Mr. John Ryle and Mr. Louis Schoonmaker.

Q. Now, how long is it prior to your present assignment or employment, that is, in the Jersey City Water Supply Company's employ; how long is it since you were in their employ before? A. I cannot say; I have been in their employ frequently in the last few years.

Q. How long has this present assignment been in being; how long has it existed, this present assignment, when did it begin? A. Last October, October, 1924.

Q. And before that time when was the last occasion on which you worked for them? A. I cannot say.

Q. Was it a year? A. I cannot say.

Q. Was it five years? A. I cannot say.

Q. You know where you were during the interval from 1910 to October, 1924, fourteen years, don't you— A. Yes, sir.

Q. Were you in the State of New Jersey at all times? A. With the exception when I left the State on a vacation, or something like that.

Q. Your work was in the State of New Jersey? A. Yes, sir.

Q. What was the last work you did for the Jersey City Water Supply Company prior to the present job, which had its initiation last October? A. I cannot say; I don't know.

Q. Could you tell us very generally what parts of the State you were in, in the main, since 1915,

at, let us say, 1920 on? A. Principally in the northern part.

Q. What location, what town or county? A. I live in Clifton, and I am employed from our office, which is located in Paterson.

Q. And since 1920, had you ever done office work generally for the various associated water companies? A. Yes, sir.

Q. And your work did not carry you very much into the field from 1920 up to last October, 1924? A. I have been out a great deal doing field work at times.

Q. Where was it, Mr. McIntosh? A. I did surveying for the Jersey City Water Supply Company at Boonton; I don't recall the dates.

Q. How long did that job last? A. I could not say.

Q. Is it possible you don't know whether you made a survey which took a month to do in the last four years? A. I cannot give you definite information; I don't recall it; I do not burden my mind with exact dates.

Q. I take it that from 1920 on, that you did not do any work for the Jersey City Water Supply Company up to October of last year in connection with the Morris Canal abandonment? A. I could not say that I did do anything in regard to the Morris Canal.

Q. Now, who did the fixing up or the selecting of the sites where you were to take these photographs—Mr. Schoonmaker, Mr. Ryle or yourself? A. I don't know who selected the sites.

Q. Who was the boss of the outfit? A. Mr. John H. Cook.

Q. Was Mr. Cook with you at the time you took the photographs? A. No, sir.

Q. Which of you three, Ryle, Schoonmaker or yourself, was in authority? A. I was.

Q. And did you get a list of places to photograph, or did you take your photographs haphazardly wherever they suggested themselves to you? A. I did not.

Q. Which was it? A. I took them in a systematic order.

Q. Upon whose direction? A. Mr. Cook's.

Q. Written? A. No, sir.

Q. Will you please tell us, Mr. McIntosh, just what transpired between Mr. Cook and yourself, so that you knew what he wanted, etc.? A. Mr. Cook told me what he wanted.

Q. When did he tell you? A. I cannot tell you the dates.

Q. Would he telephone you twice a day, or would you call him up, or would he give you a written memorandum of the places you were to photograph? A. No, sir, he would not.

Mr. Brogan: I submit the witness can make a more responsive answer than that.

The Court: It may be possible that he can.

A. Mr. Cook indicated to me what he wanted and took me over the ground; he did not indicate to me in what order to take the pictures; he left that to my judgment. I would have to take the pictures according to the light; the light conditions are not favorable at all times of the day.

Q. What is the distance along the Morris Canal from Dover to Montville? A. I don't know.

Q. Approximately; don't you know whether it is two miles, or twenty-two miles? A. I know it is more than two miles, but I don't know the distance.

I have never been over the canal directly between those points.

Q. Would you say to me how long the conditions that you have photographed here were maintained, or were in existence, at the time you took the photographs? A. I could not.

Q. Would you tell me if the conditions that you have shown on pictures that were taken in October, 1924, still obtain, or don't you know? A. They do in most cases.

Q. If I show you some pictures which you took, and I am right, am I not, that you were familiar with the layout when you took the pictures—if I show you some of these pictures and cover up the titles, can you identify the localities? A. I think I can.

Q. Isn't it a fact that in each instance, in answer to Mr. Ashmead's questions, that your first response was a reading of what was printed on these photographs? A. Yes, sir, because I put those titles on in about as condensed a form as I could.

Q. Now, will you direct your attention for a moment to photograph 8, and tell me what place that is? A. It shows the sewer construction in the bed of the canal up-stream from Peer's Lock near Denville.

Q. And what direction are you looking there, north, south, east or west? A. Northerly; I cannot say it is northeast; it is generally north.

Q. Now, I direct your attention to a picture No. 12, and ask you if you can tell me where that is? A. That is a picture of a farm road crossing between Denville and Powerville; I don't remember the number of the bridge.

Q. And in which direction are you looking? A. Oh, the easterly, southeasterly, possibly.

Q. It says here that this is a picture of fill in Morris Canal at site of Farm Road bridge No. 82, west of Powerville; have you been going up and down the banks of the canal between these designated points since last October down to the present time? A. Portions of them I have.

Q. What portions didn't you traverse? A. That is a hard question for me to answer.

Q. Perhaps it would be easier for you to answer what portions you did traverse? A. Those in the vicinity of the pictures that I took; that is as near as I can answer that.

Q. In other words, you have gone back again and again to those points where you took photographs? A. From time to time.

Q. For what purpose? A. To know the conditions.

Q. Now, as I understood you a few minutes ago, you said that you had not been in and around the canal by way of employment from 1920 until you undertook this assignment in 1924, October, with the exception of making some surveys around Boonton; is that right? A. Yes, sir.

Q. What was the nature of your employment from 1920 on, with respect to the Jersey City Water Supply Company; what were you employed to do by that company? A. As an assistant engineer.

Q. And to do what particular kind of work; what was your assignment? A. I had no assignment.

Q. Well, you wish us to understand that you never had any employment with the Jersey City Water Supply Company that had for its object or duties anything in connection with the Morris Canal? A. I don't know that I did do anything between the dates that you ask for, but I have worked for the Jersey City Water Supply Com-

pany at times; just when I cannot recall—it was in the nature of engineering work—making surveys.

Q. But you never had anything to do or assigned to you to do by the Jersey City Water Supply Company or any other water company of this allied group where your duties were concerned, directly or indirectly, with the Morris Canal; that is true, isn't it—except the making of these photographs? A. In that period of time since 1920 it is true.

Q. Since 1910—since ever? A. Well, since 1910, yes.

Q. Ever—you never had anything to do with the Morris Canal, did you? A. Not as the Morris Canal Company.

Q. As an employee of the Jersey City Water Supply Company, or any other water company of this allied group, you never had any work to do with relation to the Morris Canal; is not that the fact? A. I cannot say that it is.

*By the Court*:

Q. But you have observed the conditions of the Morris Canal? A. Yes, sir.

*Further cross*:

Q. In other words, I just wanted to get the facts from you, Mr. McIntosh. As I understand it now, in order to reduce your testimony to two or three questions and two or three answers, you have never been in the employ of the Morris Canal and Banking Company? A. I have not.

Q. You have never been in the employ of the Jersey City Water Supply Company and have never been assigned by the Jersey City Water Com-

pany to do anything with regard to, or with relation to the Morris Canal and Banking Company, except take these photographs? A. I have not.

Q. You have never been in the employ of any of the allied water companies that are in this group, and been assigned by any of those companies to do anything with relation to the Morris Canal and Banking Company or its property? A. No, sir.

Q. And you have never made any special observations up to the time you took these photographs of the canal or those properties, other than the casual observation of any other engineer or passer-by like yourself? A. That is so.

Q. How, then, Mr. McIntosh, comes it that you testify with such particularity as to the location of the bed of the Morris Canal, and as to these various changes at these different points? A. That was the object of taking the photographs, to show the change in the condition of the bed of the Morris Canal.

Q. And you are willing to testify with the particularity that you have,—as you have said to me upon my examination of you,—that your observation of the canal was that of the ordinary man, and you were never assigned or employed to make any special or extraordinary inspection or examination?

The Court: Leave out the word "special."

Mr. Brogan: All right.

*By the Court*:

Q. Were you not specially employed to examine the conditions of the canal? A. Yes, sir.

*Further cross*:

Q. But not until October, 1924? A. That is right.

Q. And you don't know where the banks and the bed of this stream lie between Dover and Montvilel from any survey or any study made by you prior to the time of taking these photographs? A. No, sir.

Q. And at the time you made these photographs, there was no longer, as you say, any of the old canal evidences like water, towboats on the path, they were not there? A. The boats were there, and the flow lines of the canal were there in most cases, but there was no water.

Q. Mr. McIntosh, just one more question: Have you any information, or do you know any more about the Morris Canal property between these two points than any other casual observer? A. That is a hard question for me to answer.

The Court: That calls for a conclusion on his part, doesn't it?

Q. Do you know any more about the Morris Canal between these two points, Dover and Montville, than your observation has given you?

Mr. Faulks: I do not.

*Redirect examination by Mr. Ashmead*:

Q. In Mr. Brogan's examination he spoke of certain men being with you. I notice that in these pictures there are men standing,—indicated standing on the fill; who are those men? A. Mr. Ryle and Mr. Schoonmaker appear, one or the other of them, in nearly every picture.

Recess to 2 P. M.

AFTER RECESS.

DR. HENRY B. KUMMEL, being duly sworn, testified as follows:

*Direct examination by Mr. Faulks:*

Q. Where do you reside? A. Trenton, New Jersey.

Q. Do you hold any official position or positions, or office or offices, in the State of New Jersey? A. I do.

Q. What are they? A. I am the State Geologist.

Q. How long have you been State Geologist? A. Since 1901, continuously to date. I am director of the Department of Conservation and Development. I have been connected with the department since its formation in 1915. I have been director since the first of January, 1923.

Q. And as such director, are you under the control of the members of the board who have charge of the activities of the Conservation Department? A. Yes, sir.

Q. Have you any office with the Morris Canal and Banking Company? A. I have.

Q. What office do you hold in the company? A. I am the general manager of the Morris Canal & Banking Company.

Q. How long have you held that office? A. A little over two years, ever since the State took over the canal property.

Q. Are you familiar with the Acts of the Legislature of the State of New Jersey, over which the State has taken over the Morris Canal? A. I am.

Q. How long have you been familiar with the canal itself? A. I first made the acquaintance of the canal in 1893, when, as an assistant on the State Geological Survey, I was doing detail geological

work in Warren and Sussex Counties and Morris County, and I tramped along the canal.

Q. Do you know from what point to what point the canal formerly extended? A. Yes, sir.

Q. Have you any map with you that shows its former location and extent? A. I have.

Q. Have you now produced the map to which you refer? A. This is the map.

Q. How is it entitled? A. The general title is "State of New Jersey, Department of Conservation and Development, Division of Geology, Henry B. Kummel, State Geologist, Atlas Sheet 42."

Q. Is that one of the official maps of the Department of Conservation and Development of the State of New Jersey? A. It is.

Q. Prepared by geological surveys made by officials of the State? A. Yes, sir.

Q. Is the location of the former Morris Canal indicated on that map? A. It is, yes, sir.

Q. How? A. On this copy of the map it is indicated by a heavy red line. On the map as printed, it was indicated by a faint blue, broken blue line; for the sake of distinctness, under my direction, the line of the canal was marked over in red ink; I have verified that marking and know that it correctly represents the course of the canal.

Q. So that the red marking follows the faint blue marking? A. It overlies the faint blue marking and exactly represents the course of the canal.

Q. Are you familiar with the canal from one terminii to the other? A. Yes, sir.

Q. Will you just state very briefly on the record, please, the route of the canal as it was heretofore located and maintained? A. Starting at Phillipsburg, it extended in a general northeasterly direction, passing through Washington, Warren County,

the outskirts of Hackettstown, Waterloo, Stanhope and Netcong, Kenville, Dover, Rockaway, Boonton, Montville, Mountain View, Little Falls, Paterson, Clifton, Bloomfield, Newark; across the meadows to Jersey City—terminating at the Hudson River; it passes through Warren, Sussex, Morris, Passaic, Essex and Hudson Counties.

Q. Is there also indicated on this map, Doctor, and if so, how, the various water-sheds in the northern portion of the State through which the canal formerly extended? A. The map shows the water-shed or the line between the water-sheds of the Delaware and the Raritan, at the point where the city line crosses the canal. Also the line separating the Raritan water-shed from the Rockaway water-shed, where it crosses the canal; also the line separating the Rockaway water-shed from the Passaic water-shed, where that line crosses the canal. These lines have been extended for several miles in each direction from the canal to show their general trend.

Mr. Faulks: I offer this map in evidence and ask that it be marked. Do you want to see it, Mr. Brogan?

Mr. Brogan: Yes (Mr. Brogan examines it).

Mr. Brogan: No objection.

(Marked "Exhibit F-1."

Q. Have you also produced other sheets of the same geological survey showing the portion of the canal as it was located between Dover and Montville? A. I have, yes, sir.

Q. What sheets of the State Geological Survey have you produced? A. The Dover-Stanhope sheet, and the Boonton sheet. These two sheets

have been pasted together along their margin where they join.

Q. Have these maps any numbers? A. No, sir, they are known by name.

Q. But they are official maps of the State of New Jersey? A. Yes, sir.

Mr. Faulks: And are designated as follows, I read from them: "(1) State of New Jersey, Department of Conservation and Development, Dover-Stanhope sheet," and then in the upper corner of that map, "Division of Geology—Henry B. Kummel, State Geologist."

From the other I read: "Geological Survey of New Jersey, Boonton Sheet," and in the same left-hand corner, "Henry B. Kummel, State Geologist."

Mr. Faulks: I offer those two maps as one exhibit, and ask that they be marked.

(Marked "Exhibit F-2.")

Q. Does this combined map show the City of Dover and the Township of Montville? A. It shows the City of Dover, the Village of Montville, and the western portion of the Township of Montville.

Q. And does it show the route of the canal between the City of Dover and the Village of Montville? A. It does.

Q. And how is this route indicated on this combined map? A. It is indicated by a series of alternating black and blue dashes or blocks to make one continuous line. It is also indicated by the words "Morris Canal," which appear at points along the line.

Q. Doctor, you have said that you are familiar with the canal as it heretofore existed between its westerly and easterly terminii; and are also familiar with the legislation under which the State has taken over the canal. Have you produced the various instruments that have been delivered to and received by the State under that legislation? A. I have them here.

Q. Before asking you to produce and identify those instruments, I want to ask you another parallel question or two with regard to your duties as general manager of the Canal Company; what have they been? Just tell us in your own way what the duties of your position are, and what contact you have had with the various steps in the State acquisition of the canal. A. They have been what the term "general manager" implies. All questions relating to the management of the property—the making of leases of the houses along the property—the determination of what was to be done in maintaining the bridges—the banks—the drainage of the canal; in their last analysis have come to me for determination. I have also been in charge of the financial affairs of the canal. I have had the approval of all bills incurred, both in maintenance and in dismantlement work.

Q. Who are the directors of the Morris Canal and Banking Company, now the State has taken over the canal? A. The members of the Board of Conservation and Development have been elected by stockholders' vote—have been elected the directors of the Morris Canal and Banking Company.

Q. And under their control and supervision you have had the actual charge of the details of the work? A. Yes, sir.

Q. Now, I subpoenaed you to produce an agree-

ment entered into between Frank H. Sommer, Louis Focht and Edward L. Young, commissioners, acting for the State of New Jersey and the Morris Canal and Banking Company, and the Lehigh Valley Railroad Company, dated November 29, 1922; have you that with you? A. Yes, sir, I have.

Q. I direct your attention, Doctor, to a copy of Chapter 212 of the Laws of the State of New Jersey for the year 1922, entitled "An Act to authorize the acquisition by the State of the Morris Canal, etc." I won't read the rest of the title, as it is very long. I also call your attention to the fact, that by the second section of that Act, William H. Speer, of Jersey City, Frank H. Sommer, of Newark, and Louis A. Focht, of Trenton, were appointed as commissioners to negotiate and agree upon terms of settlement with the Morris Canal and Banking Company, and the Lehigh Valley Railroad Company, in relation to the matters mentioned in such Act, and with the powers therein described.

Q. Was this agreement that you have produced, made by the commissioners, so designated in this Act of 1922?

Mr. Brogan: Objected to as incompetent. He does not know. The agreement speaks for itself.

*By the Court*:

Q. Were you present when any such agreement was made? A. I was not.

Mr. Faulks: The only purpose of the question is, that the act appointed the three gentlemen whose names I have just mentioned, and one of them was William H. Speer, of Jersey City, Judge Speer, who sub-

sequently resigned, and in whose place the Governor appointed Mr. Young. The agreement appears to have been made by Messrs. Young, Sommer and Focht, and I simply want to account for the change in names.

Mr. Brogan: We will stipulate that; there is no use wasting time on that.

*Further direct*:

Q. This agreement which you have produced at my request, Doctor, is produced from where? A. From the files of the Department of Conservation and Development.

Q. How did it get into the custody of that department? A. It was filed with the department on the first of December, 1922—immediately after the agreement was signed. A duplicate copy was at the same time filed with the Secretary of State.

Q. Has it been in the possession of the Department of Conservation and Development ever since then? A. Yes, sir, it has.

Q. And has the duplicate original remained on deposit with the Secretary of State, as far as you know? A. As far as I know.

Mr. Faulks: I offer this agreement in evidence, being an agreement made between Frank H. Sommer, of Newark, Essex County, Louis Focht, of Trenton, and Edward L. Young, of Jersey City, Hudson County—commissioners appointed and acting under the statute enacted by the Legislature of the State of New Jersey, approved March 11, 1922, entitled, "An Act to authorize the acquisition by the State of the Morris Canal, etc."; acting on behalf of the State of New Jersey as party of the first part, and Morris

Canal and Banking Company, a corporation of the State of New Jersey, and Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, as parties of the second part; said agreement being dated November 29, 1922, and also the sheets attached thereto, being the report of the said commissioners to the State of New Jersey and the Board of Conservation and Development of the State of New Jersey, dated December 1st, 1922.

Mr. Faulks: Do you wish to see that, Mr. Brogan?

Mr. Brogan: I merely wish to reserve my right to object to this as the case develops, on the ground that it is not relevant.

The Court: I will note the objection.

Mr. Faulks: This is an original document of the State, and I suggest it be not physically marked, but the next number be given to it, and that we substitute a copy.

The Court: That will be perfectly satisfactory.

Mr. Faulks: Mr. Brogan suggests that hereafter we will refer to this as the "Sommer's agreement."

The Court: That will be done.

Q. By referring to Section 5 of the Sommer's agreement, you will not that it provides for a certain conveyance to be made by the Morris Canal and Banking Company, and the Lehigh Valley Railroad Company to the State of New Jersey, such conveyance to be made by a deed of the kind therein mentioned. Was that deed executed and delivered to the State of New Jersey? A. Yes, sir, it was.

Q. Have you produced it? A. I have it here.

Q. Where did you obtain this deed from? A. I obtained it first from the Attorney General on the date on which it was signed and passed from the grantors to the grantee.

Q. You were present at that time? A. I was present at the transfer of this deed.

Q. Do you remember the date? A. The 28th of February, 1923.

Q. And after you had obtained the deed, what did you do with it? A. I had it recorded in the six counties through which the canal passes; and then, after it was returned, it was deposited with the State Treasurer, and has been now produced from his files.

Q. I note that on the last page of this deed where the signatures appear, the following: "Approved as to form, Thomas F. McCran, Attorney General." Do you recognize Mr. McCran's handwriting? A. I do; I also saw him sign it.

Mr. Faulks: I now offer in evidence the deed just referred to by the witness, being a deed dated February 28, 1923, between Morris Canal and Banking Company, a corporation of the State of New Jersey, and Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, party of the first part, and the State of New Jersey, party of the second part, which appears from the various endorsements on its cover to have been recorded as stated by the witness.

"Exhibit F-3" (not physically marked).

Mr. Brogan: I make the same objection as to its relevancy.

Q. Doctor, I next direct your attention to the fact that Section 6 of the Sommer's agreement provides that the Canal Company, and the Lehigh Valley Railroad Company, will assign, transfer and set over to the State of New Jersey all personal and mixed property of the said companies used in connection with the Morris Canal; and also the fact that Section 10 of the said agreement provides that the said companies will assign, transfer and set over, etc., all existing leases, licenses, and undertakings covering any part of the property to be conveyed or transferred to the State of New Jersey, and will deliver or cause to be delivered to the State of New Jersey all documents, maps, records, deeds and muniments of title relating to any of the property to be conveyed or transferred to the State of New Jersey. Pursuant to this provision of the Sommer's agreement, were any other instruments executed by the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, and delivered to the State? A. There were.

Q. Have you produced them? A. I have here a bill of sale of personal property, and the assignment of leases.

Q. Was this delivered to you at the same time that you have said that the deed last offered in evidence was delivered to you? A. Yes, sir.

Q. This also, I note, was approved as to form by Thomas F. McCran, Attorney General? A. Yes, sir.

Q. From where do you produce this bill of sale today? A. From the files of the State Treasurer.

Q. It reached there in the same way that the deed referred to did? A. Yes, sir.

Mr. Faulks: I offer in evidence the instrument just produced by the witness, being a bill of sale and assignment of leases of Lehigh Valley Railroad Company and Morris Canal and Banking Company, dated March 1, 1923; the bill of sale being made to the State of New Jersey; and I ask that it be received in evidence.

Mr. Brogan: Same objection. May I see that a second?

Mr. Faulks: Surely.

(Mr. Brogan examines it.)

"Exhibit F-4" (not physically marked). A copy is to be substituted.

The Witness: May I correct my testimony in one respect: I testified a few moments ago, that these transfers took place on the 28th day of February. The transfer took place on the first of March, 1923.

Q. Referring to this bill of sale which has just been received in evidence, I understood you to say that this covered the personal and mixed property of the companies; it appears that in addition to transferring such properties to the State this instrument also undertook to convey to the State all the right, title and interest of the companies, or either of them, in the all existing leases, licenses and undertakings covering any part of any of the Morris Canal property conveyed and transferred to the State of New Jersey in accordance with the terms and provisions of the Sommer agreement. Did you mean to say otherwise when you said that they conveyed the personal and mixed property? A. It is my recollection that I said that it conveyed the personal and mixed prop-

erty, and was also an assignment of leases; that was the case whether I stated it or not.

Q. The following or seventh paragraph of the Sommer's agreement provides that the Lehigh Valley Railroad Company will, at its own expense, maintain the Morris Canal as a canal, in the usual manner, until the first day of March, 1923; do you know whether on or since that date the canal has been maintained as a canal?

Mr. Brogan: I think the question in that form is objectionable; it calls for a conclusion; I don't think he can conclude; I think it is for your Honor to conclude from the testimony.

*By the Court*:

Q. What changes have taken place since that period?

Mr. Faulks: I propose to do all that, your Honor.

The Court: I think he can answer it.

A. It has been maintained as a canal since March 1st, 1923.

*Further direct*:

Q. For how long since then? A. For a little over a year.

Q. From that date? A. Yes, sir, from that date—after I took charge of it.

Q. Now, Section 8 of the same agreement provides that the Lehigh Valley Railroad will assign, transfer and set over to the State of New Jersey, or its nominees, all the shares of the capital stock of the Morris Canal and Banking Company owned

by the Lehigh Valley Railroad Company, stating the number of such shares; has that been done? A. Not completely.

Q. I am speaking now only of the shares owned by the Lehigh Valley Railroad? A. It has been done.

Q. The Lehigh Valley shares have gone over to the State? A. Yes, sir.

Q. When did that occur? A. The transfer took place on the date called for in the agreement, which was December 30, 1922.

Q. And the transfer was made on or about that date? A. Yes, sir.

Q. The same section of the Sommer's agreement provides that all the outstanding bonds of the Morris Canal and Banking Company, which said bonds are owned by the said Lehigh Valley Railroad Company, and have an aggregate par value of $500,000, should be assigned, transferred and set over to the State of New Jersey as of the date just mentioned; was that done? A. It was, yes, sir.

Q. Did the bonds and the certificates of stock come into your possession? A. They did.

Q. And have remained in the custody of the Board of Conservation and Development ever since that time? A. They have.

Q. Is the same thing true with regard to the script mentioned in the same section of the Sommer's agreement? A. Yes, sir.

*By the Court*:

Q. What has not been turned over, Doctor? A. About 426 shares of stock; 213 shares of preferred stock, and 213 shares of consolidated stock.

Q. Do you know who are the owners of that stock? A. I have the records, but I could not give

the names at this time; they are minority stockholders who have not yet sold their stock to the Lehigh Valley Railroad Company to be transferred to the State.

*Further direct*:

Q. Those are some of the minority shares that are referred to in paragraph 9 of the Sommer's agreement? A. Yes, sir, they are.

Q. Have proceedings been instituted for the condemnation of those shares?

Mr. Brogan: I object to that as incompetent.

The Court: It cannot do any harm; it is not the best evidence.

Mr. Brogan: Objection withdrawn.

A. I know proceedings have been started; I have been served with papers in connection with them.

*By the Court*:

Q. How far, if you can tell the Court, have those proceedings gone?

Mr. Brogan: I must insist that I shall object to that. If there is a condemnation pending, he knows; but the other things I submit he does not know.

*Further direct*:

Q. Section 16 of the Sommer's agreement provides that the Lehigh Valley Railroad Company was to continue in possession and operate the canal until March 1, 1923; and that the Canal Company and the State of New Jersey covenanted that the

existing lease of the canal to the Lehigh Valley Railroad Company should on that day be cancelled; have you with you any agreement showing a cancellation of a lease, pursuant to the terms of the legislation and of this agreement?

Mr. Brogan: I don't want to be captious, but I submit that this witness may be asked to produce any papers he has relative to this thing.

Q. Have you, and have you produced any instrument by which the lease heretofore made of the Morris Canal to the Lehigh Valley Railroad Company, has been cancelled?

Mr. Brogan: Same objection, sir.

The Court: Have you produced, he says, and he can answer "Yes" or "No"; I will allow him to answer that.

A. I have such an instrument here.

Mr. Faulks: The witness has produced and handed me an instrument, entitled "Agreement made and delivered this 28th of February, 1923, by and between the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, party of the first part—hereinafter referred to as the Railroad Company—and the Morris Canal and Banking Company, a corporation of the State of New Jersey, party of the second part—hereinafter referred to as the Canal Company."

This instrument, I find upon examination, to be a copy and not the original, but it attempts to show that the original was executed for the Lehigh Valley Railroad Company by E. E. Loomis, President, that the corporate seal was attested by D. G.

Band, Secretary, and other corresponding officers of the Morris Canal and Banking Company also executed it on its behalf.

Q. From where do you produce this copy of this instrument? A. From the Treasurer's files.

Q. Treasurer of the State of New Jersey? A. Yes, sir.

Q. Do you know how it reached there? A. I deposited it there.

Q. Where did you get it? A. It was given to me on March 1st, 1922, when the other papers relating to the case were handed to me.

Q. And was delivered at the same time? A. At the same time, yes, sir.

Q. And it was then by you delivered to the State Treasurer? A. Yes, sir.

Mr. Faulks: Counsel for Jersey City advised me that they make no point of objection to the fact that this is a copy rather than the original, subject to their right to check it as against the original.

Mr. Brogan: And a general objection as to relevancy, materiality and competency of these various instruments.

Mr. Faulks: Upon that understanding I will offer this copy of the instrument referred to, in lieu of the original.

("Exhibit F-5," but not marked physically.)

Q. Now, did the State obtain any other papers from the Morris Canal and Banking Company, or the Lehigh Valley Railroad Company at this same time? A. It did, a number of other papers.

Q. Was there delivered to you on behalf of the State any release from the Lehigh Valley Railroad

Company to the Morris Canal and Banking Company? A. Yes, sir.

Q. Have you that with you? A. I have.

Mr. Faulks: Witness produces and I offer, an instrument of release from Lehigh Valley Railroad Company to Morris Canal and Banking Company, dated March 1, 1923, and which has written on it, "Approved as to form, Thomas F. McCran, Attorney General." I ask that that be received and marked.

(Marked "Exhibit F-6.")

Mr. Brogan: Same objection.

Q. Apart from any title papers or similar documents that may have been called for by the Sommer's agreement, were there any other general instruments of transfer or conveyance delivered to you at that time? A. Yes, sir.

Q. What were they, please? A. I have a deed here to the State, covering what is commonly known as the Little Basin in Jersey City.

Q. And what else? A. Another deed covering another portion of the Little Basin. A third deed from the Real Estate Company of the State of New Jersey, covering a portion of the Little Basin.

Q. Were those delivered to the State of New Jersey? A. They were.

Q. At the same time that you have referred to before? A. Yes, sir.

Q. Have they been in the possession of the Board of Conservation and Development ever since then? A. No, sir; as they were recorded they were taken over by me to the State Treasurer.

Q. And they are now produced from the State Treasurer's office? A. They are.

Mr. Faulks: I offer these three instruments, one being an indenture dated February 28, 1923, between Morris Canal and Banking Company, a corporation of the State of New Jersey; the Lehigh Valley Railroad Company of New Jersey, a corporation of the State of New Jersey, and the Lehigh Valley Railroad Company, an incorporation of the State of Pennsylvania, party of the first part, and the State of New Jersey, of the second part; bearing on its face the words, "Approved as to form, Thomas F. McCran, Attorney General," which deed, for the purposes of identification, I will point out, was recorded in the office of the Register of Hudson County on March 5, 1923, in Book 1470 of Deeds, at page 544. Also an indenture bearing the same date, made between the Morris Canal and Banking Company, a corporation of the State of New Jersey, and Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, party of the first part; and the State of New Jersey, party of the second part, similarly indorsed with the approval of the Attorney General and recorded in the office of the said Register in Book 1468 of Deeds, at page 528.

Also an indenture bearing the same date, made between the United Real Estate Company, a corporation of the State of New Jersey and the State of New Jersey; similarly indorsed and recorded in the said Register's office in Book 1470 of Deeds, at page 542.

Q. Dr. Kummel, have any payments been made by the Lehigh Valley to the State of New Jersey

since the Sommer's agreement was executed? A. They have.

Q. What such payments have been made? A. Three payments, one each, on the 15th day of December—on or about the 15th of December, 1922-1923 and 1924, together with interest at the rate of 5% on the unpaid balance, which was still due the State from the principal sum of $875,000.

Q. Is the Lehigh Valley Railroad Company in default as to any of the payments agreed to be made to the State in and by such agreement?

Mr. Brogan: Objected to as incompetent. Payments were not made to this gentleman, therefore, he is not competent to testify. I object on the ground that it is not the best evidence.

The Court: The objection will be sustained.

Mr. Faulks: Do you want the checks produced, Mr. Brogan?

Q. Do you know in fact whether these payments have been made or not? A. I think I can say that I know they have been made.

Q. What is the basis of your knowledge? A. The State Treasurer has been forbidding me to spend the money.

*By the Court*:

Q. To what extent? A. Practically to the entire extent of the payments.

Mr. Brogan: My objection goes further than that; I object to this as being called upon by counsel to state a conclusion.

The Court: I shall sustain the objection.

Mr. Brogan: Being in default calls for a legal conclusion; I do not want to put this gentleman, Mr. Faulks, to the trouble of bringing up the State Treasurer, or any such person.

The Court: He is able to testify to that, subject to your objection; I am entitled to take it, subject to your objection; it is merely for convenience. I think it will facilitate the matter, and I will permit it for the present.

Mr. Faulks: If there is any objection to my question as to whether there has been any default in the cash payments to be made by the Lehigh Valley Railroad Company to the State, pursuant to the terms of the Sommer's agreement, I will withdraw it.

Mr. Brogan: I will agree to this question, if this will answer your purpose, that certain payments were due on certain dates; and that on or about those dates they were or were not paid. But there are other considerations in my mind which would make for a default.

The Court: I understood the purport of the question was, the word "default" was connected with the payment of the cash, and that is all.

Mr. Brogan: If that is all, I have no objection.

*By the Court*:

Q. Doctor Kummel, you may be able to give us a better answer for your reasons for not knowing that the Lehigh Valley is not in default in the payments—you said, because you had been spending

the money; is there any other reason? A. The Appropriation Bill, which was passed by the Legislature last March, appropriated to the Canal Company for its use, $175,000, which had been received by the State Treasurer from the Lehigh Valley Railroad on December 15, 1924. The Appropriation Bill of the previous year appropriated the same principal sum, together with the interest which had been paid on December 15, 1923. Without being able to refresh my memory, I know this, that the successive appropriation bills appropriated to the department three payments which had been made by the Lehigh Valley Railroad Company on the specific dates on which they became due. It is a matter which can be verified by reference to the laws.

*Further direct*:

Q. I ask you whether or not the payments called for by the Sommer's agreement to be made by the Lehigh Valley Railroad Company to the State of New Jersey thus far due have been made?

Mr. Brogan: No objection to that question.

A. They have.

Q. Now, these papers that you have produced from the different State offices, and which have been offered in evidence, were delivered to you as the Director of the Board of Conservation and Development on March 1st, 1923; is that the date that you gave? A. March 1st, 1923.

Q. How active have you been since that time, Doctor, with regard to the property of the Morris Canal and Banking Company? A. I immediately took charge of the property, and on the first of

April, or thereabouts, I was formally elected by the Board of Directors of the Canal Company as General Manager; and as I have said before, I have been in active charge of the canal ever since.

Q. Up to what date did the Morris Canal and Banking Company operate the canal? A. Do you mean the old company?

Q. Yes; I mean before the State took over the Canal Company. A. The physical transfer of the property to the custody of the State was not made until March 23rd, on which date the Board of Conservation and Development become responsible for the maintenance of the canal, and on that date all the old employees became responsible to my direction.

Q. Now, did the Lehigh Valley Railroad Company, as the lessee of the canal, operate it or have anything to do with this property after March 1st, 1923? A. They have had nothing to do with it since then.

Q. Have any of the former officers or directors of the Morris Canal and Banking Company had anything to do with the canal, or operated it on behalf of the Canal Company since March 1st, 1923? A. The old Board of Directors did not submit their resignations until the first Monday in April, 1923, at the date of the annual stockholders' meeting, at which time their resignations were submitted, and the Board of Conservation and Development, as custodians of the stock which had been transferred to the State, elected the new Board of Directors.

Q. Have any of the old officers of the company had anything to do with the canal, or operated the canal, since that time? A. The old officers and the old directors have had nothing to do with the

canal since the annual meeting on the first Monday of April, 1923.

Q. Now, since the members of the Board of Conservation and Development of the State became the directors of the Canal Company, and since you, under their control and supervision, have acted as the General Manager of the Canal Company, I want you to tell the Court, in your own way, as far as possible, as to just what has been done with the canal, either by way of operation or non-operation, or by way of abandonment or any physical changes; I don't think it is necessary to ask a specific question after a specific question—

Mr. Stout: I object; it seems to me the question should be defined to the physical change during that period; and what variations, if any, have taken place on the canal.

The Court: Objection overruled.

A. From the time the present directors took control until after the adjournment of the Legislature in March, 1924, the Canal Company maintained the canal from the west bank of the Hackensack River to the outskirts of Phillipsburg, as a navigable waterway, under the same force of employees as had been in charge for many years previous.

Q. To what extent, if any, was there any navigation conducted on the canal during that period? A. During that period the only boats that went through any portion of the canal were the scows and boats owned by the Canal Company for purposes of repairing the canal, or carrying materials from one point of work to another. There were no tolls received for the passage of any boats during that time.

Q. No freight transported, except for the purposes you have mentioned? A. No freight was transported except property of the Canal Company, and very little of that. In March, 1924, the Legislature passed several bills, which were the result of the recommendation of the committee appointed, in part by the Governor, and in part chosen—

Mr. Stout: Don't the laws speak for themselves?

The Court: Objection overruled.

A. (Continued.) —carrying out the recommendations of this committee.

Q. They passed certain bills? A. Yes, sir.

Q. What was thereafter done? A. One of these bills directed the Canal Company—

*By the Court*:

Q. Tell us what you did in consequence of the passage of this legislation; what did you do yourself, or those under you? A. We served notice on various parties along the canal, that in a short time the water would be drawn from the canal. Shortly thereafter, within thirty or sixty days, varying at different points along the canal, the water was drawn from the canal; and immediately an engineering force was employed to make plans for the removal of the bridges, and their replacement by fills across the canal, to carry the highways across the canal at grade.

*Further direct*:

Q. Were there many highways which theretofore had crossed the canal by means of bridges? A. There were 146 bridges, for which the Canal Com-

pany was responsible, which were owned by the Canal Company and which the Canal Company must remove. In addition to that, there are probably 30 or 40 additional bridges, which are owned either by counties, municipalities, or by private parties. The Canal Company is under no obligation to remove those bridges. In connection with the draining of the water from the canal openings were made in the bank of the canal at various points—

Q. Before you go into that, tell us about what was done in the way of removing bridges owned by the Canal Company— A. As soon as plans and specifications could be drawn up for the removal of the bridges and other dismantling work along various sections of the canal, contracts were entered into providing for the removal of the bridges and other dismantling work. Some of these contracts have been completed; others are still in process of completion. About July, 1924, an agreement was made with the City of Dover to turn over to that municipality the section of the canal within the Town of Dover, lying east of Sussex Street.

Mr. Brogan: I don't think he ought to be permitted to testify to the contents of agreement.

The Court: If you want to object you may do so, and I shall sustain the objection.

Mr. Brogan: This goes, it seems to me, to one of the material elements in this case.

The Court: Don't tell us anything about what the agreements contain. There were agreements made by the City of Dover.

Q. What was done as a result of the arrangements with the City of Dover? A. The City of

Dover has partly filled up the basin in that city—has removed several bridges which crossed the canal; has filled up the canal on the line of the street on which those bridges were located, and surfaced the roads across the canal at those points; in the section between Rockaway and Boonton, numerous bridges have been removed; the canal has been filled at those points; the public highways have been extended across the canal at grade—on these fills.

*By the Court*:

Q. Have you yourself been there at Dover? A. I have, frequently.

Q. I mean, since these agreements were entered into? A. Yes, sir; I am testifying now to what I have actually observed, personal inspection of the work.

*Further direct*:

Q. Are there any canal boats at all operating in that section now? A. No, sir.

Q. How much territory is there filled in, about Dover? A. About one-half to one-third of the basin which had an area of two or three acres, has been filled; that is, the basin at Dover. The other fills in Dover are limited primarily to that section of the canal which lies within the boundary line of the highways which cross it. The intervening stretches of the canal between the successive highways has not been filled. In the section between Rockaway and Boonton most, if not all, of the bridges have been removed, and the highways have been extended across. The work on that section is nearly completed, according to the report from our engineer, who has had supervision of that

work. A contract has recently been let for the dismantling work of the canal from the foot of the plane at Boonton to Mountain View. Some work has been done on that section; some bridges have been removed, but from my personal observation I am not able to state how much progress has been made on this contract.

Mr. Brogan: I think that ought to be stricken out. We understood that this witness was to testify and we were not to make any technical objection so long as what he said was within his own personal knowledge and observation.

The Witness: Everything that I have testified to is the result of my own knowledge. I stated that a contract had recently been entered into for the dismantling work.

The Court: Don't tell us what that contract provides for. You can get that through some other witness.

The Witness: I have testified as to conditions between Rockaway and Boonton. East of Boonton the bridge at Vreeland Avenue, located about half-way between Boonton and Montville, has been removed. The canal has been filled at that point, at a level with the surface of the ground on either side. A fill has been made across the plane at Montville, but the road has not been shifted as yet to that fill; there is no road as yet across that fill; there is no road across there. The aqueduct which formerly carried the canal across the Pompton River at Mountain View has been removed. The stone arch aqueduct which formerly carried

the canal across the gorge of the Passaic River at Little Falls, has also been removed.

Q. Are you below Montville? A. Fifteen miles below. That sums up the work which has been accomplished.

*Further direct*:

Q. Now, I am going to ask you with some more detail with regard to the changes which have, of your own knowledge, been made in the section of the canal lying between Dover and Montville, since you became the general manager of the canal company in April, 1924. In the first place, let me ask you, Dr. Kummel, whether these changes that you have just been testifying with regard to, were all between Dover and Montville, with the exception of the bridge or aqueduct at Little Falls; were the others all within that section? A. The aqueduct at Mountain View, and the aqueduct at Little Falls are East of Montville, but the other changes are all between Dover and Montville.

Q. I show you a group of photographs that have been received in evidence and marked "Exhibit A-1"; how frequently have you been over the portion of the canal lying between Dover and Montville during your period of managership just referred to? A. Probably twelve or fifteen times since we commenced the work of dismantling.

Q. How many times have you been there this spring? A. Four or five times.

Q. And are you, as a result of your visits to that section of the canal, and the observations which you have made while there, are you familiar with the conditions on the ground, and the changes, if any, which have been made? A. I am, except those which have been made the last three weeks.

Q. To any extent that that section of that canal may have been filled or its equipment removed during the period of your managership, had such filling been removed, or such equipment reinstalled at any time up to the time of your last visit to that section of the canal which you fixed as about three weeks ago? A. I have lost the thread of your question, Mr. Faulks.

Q. (Question read.) A. I don't understand that.

The Court: How many witnesses have you?

Mr. Faulks: We have only one more witness, but I shall be some time with him and with the other witness.

The Court: How many witnesses shall you have, Mr. Brogan?

Mr. Brogan: I don't know.

The Court: We shall have to adjourn now until to-morrow morning.

Adjourned to 10 o'clock, June 18, 1925.

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Continuation of the taking of testimony in the above-entitled cause, at the Chancery Chambers, Paterson, New Jersey, on the eighteenth day of June, nineteen hundred and twenty-five, before Hon. VIVIAN M. LEWIS, Vice Chancellor.

Same appearances as before noted.

DR. HENRY B. KUMMEL resumes the witness stand.

*Direct examination (continued) by Mr. Faulks:*

Mr. Faulks: At the time of adjournment yesterday I just put to Dr. Kummel a question which, perhaps, was not clear, and in

any event, was not answered; I withdraw that question.

Q. Dr. Kummel, are you familiar with the changes which have been made in the canal? By that, I mean, of course, the Morris canal, since the State took charge of that canal? A. I am.

Q. Now, first, if you will tell us what you know with regard to such changes as have occurred during that period in a portion of the canal lying between Dover and Montville, and in that connection describe to the Court what, if anything, has been done in the way of draining off the water from that section of the canal—the making of any fills or across that section of the canal; and anything else which bears upon the ability to conduct navigation upon the canal. In answering this question, you may use the photographs in evidence as "Exhibit A-1," to any extent that you may find them helpful. A. In the City of Dover at least three highway bridges have been removed, which formerly crossed the canal. The streets at those points have been extended across the canal by fills, and permanent pavements have been made on those streets. The basin in Dover has been filled in part. Between Rockaway and Boonton at least five public highways have been extended across the canal by fills; the bridges at those points having been removed, and the approaches graded down. The lock just above Powerville, known as No. 9 East, has been filled up. The canal bed at that point being completely filled. The lock known as Peer's Lock No. 8 East, according to my recollection, has also been filled. The aqueduct which carried the canal over the Rockaway River a short distance east of Peer's Lock, has been completely removed. The canal bank has been

permanently opened at a number of points to drain the canal into adjacent water—

Mr. Brogan: I object to the word "permanently" and ask that it be stricken out.

*By the Court*:

Q. Has been opened? A. Yes, sir; on some sections of the canal between Rockaway and Powerville the embankment of the canal on the towpath side has been lowered; the dirt which was removed from the top has been deposited on the adjacent portion of the canal bed. Other dirt has also been, from other sources, has been deposited, in order to make a temporary roadway along those sections of the canal, about ten or twelve feet in width.

Mr. Brogan: I wonder if it is distinctly understood that Dr. Kummel is only permitted to testify he actually knew from his own knowledge, from his own inspection.

*By Mr. Brogan*:

Q. Were you present when the dirt was removed from the towpath and spread in the so-called bed of the canal? A. Not present at all times while that was being done; I was present and saw the steam shovel at work and doing that work at certain sections. I also saw the trucks engaged in hauling dirt from other points to some sections of the canal.

Mr. Brogan: All right, sir.

*Further direct*:

Q. My question, Doctor, called only for matters as to which you have personal knowledge, and

please bear that in mind. I want you to tell everything that you do know; everything that you have observed with regard to matters about which you are now asked to testify, and nothing else. You were coming down the canal, I think, telling of the different changes in that section? A. I think I have covered the most important changes of which I have personal knowledge, between Dover and Boonton, or between Dover and Montville, except that between Boonton and Montville the bridge on Vreeland Avenue, midway between Boonton and Montville, has been removed. The canal has been filled at that point; and a fill has been made across the plane No. 9, at the Village of Montville.

Q. Has any of this work that you have just been describing been done by Jersey City under any contract? A. It has been done by Jersey City or its agent.

Q. Under a contract? A. Under an agreement with the Canal Company.

Q. Have you such agreement with you? A. I have.

Q. Will you produce it, please? A. (Witness produces it.)

Mr. Faulks: I presume you are familiar with it, Mr. Brogan? (Handing it to Mr. Brogan.)

The witness produces, and I offer in evidence, agreement made between Morris Canal and Banking Company and Mayor and Aldermen of Jersey City, dated July 23, 1924.

("Exhibit F-7½.")

Mr. Brogan: You don't want, that, do you, just immediately?

The Witness: No, but be sure and let me have it back again.

Q. Now, Doctor, I wish you would take these pictures, "Exhibit A," and examine each of them in turn, and state whether or not they correctly show the conditions obtaining at the place shown in each of the pictures, as of the date on which they were taken, insofar as you are able to do so from your own personal knowledge, and also the extent to which there have been any changes in the canal at each of such places since the picture in question was taken.

Mr. Brogan: I object to parts of the question. It is a mere duplication of testimony.

The Court: I think he can answer it, Mr. Brogan, and if it is not responsive, you may cross examine him on that point.

Mr. Brogan: Mr. McIntosh says he took them. We are cluttering up the records.

Mr. Faulks: The doctor says he has been over this section of the canal time and time again; he has had the supervision of the work done there, and has been over it as recently as three years ago.

Mr. Brogan: And Mr. McIntosh went there, and he says it was a true representation of the canal at that time.

Mr. Faulks: I will withdraw the question.

The Court: I think you have gone over those pictures very thoroughly. I don't think you have to proceed much further along that line.

Mr. Faulks: The question is withdrawn, and I suggest that the discussion with regard to it be stricken out.

The Court: Yes.

*Further direct*:

Q. Referring to pictures admitted in evidence yesterday as "Exhibit A-1," have you visited the portion of the canal shown on the picture marked "Exhibit A-1," and which it has been testified to shows the condition at a certain time at East Clinton Street, Dover? A. I am not able to give you the exact date, but it was sometime in the latter part of April or early in May that I was last in Dover and went over this section of the canal—May of this year.

Q. Can you tell us what changes, if any, had been made at that part of the canal between October 10, 1924, and the time of your visit? A. I know of none.

Q. Had the fill which had been placed there prior to October 10, 1924, been removed? A. It had not.

Q. In order to save time I will ask you the general question as to whether or not any of the fill that has been placed in the canal since the State took it over, has been removed up to this time. A. No part of the fills made along the line of public or private highways crossing the canal has been removed. Some material which was placed in the portions of the bed of the canal in the course of construction of the sewer between Rockaway and Powerville, may have been shifted, and, perhaps, removed from certain portions in the process of clearing up that work.

Q. I next direct your attention to picture No. 4, showing the locality of the canal at North Bergen Street, Dover, the view looking northwise. This picture shows a bridge over the old bed of the canal; do you know whether or not that bridge

has been removed? A. I would not want to testify of my personal knowledge that that bridge has been removed. I am not certain enough about the streets, by name, to be able to assert that.

Q. To enable you to refresh your recollection on that matter, I show you a picture No. 2, which also contains a view of a bridge; can you tell now whether that is the bridge that formerly spanned the canal at North Bergen Street, Dover, and if so, whether or not it has been removed? A. It is my belief that that bridge has been removed and the fill made at that point.

Q. I now show you picture No. 5 bearing the legend, "Site of Morris Canal crossing stream in Rockaway, looking south," the evidence being that this picture was taken June 11, 1925; do you recognize the location shown in that picture? A. From my own personal recollection, I would not want to testify that I identify that place.

Q. I show you picture No. 6, and ask you if you can identify the location shown on that picture? A. I would not recognize it without the title.

Q. Well, the title is, "Roadway of west bank of Morris Canal North of bridge 77, near Denville"; does that enable you to recognize it? A. Not from the picture; I cannot visualize in my mind that particular locality on the canal.

Q. I show you picture No. 10, and ask you if you recognize the location shown there? A. Yes, sir.

Q. Where is that? A. That is the locality known as Peer's Lock.

Q. How recently have you seen the location shown on that picture? A. Sometime during April.

Q. And can you tell us how the conditions shown

on the picture compare with those which you observed at that time? A. My recollection is, at the time I saw it in the spring, the lock had been completely filled and the roadway on which the automobile stands, and which crosses the canal at right angles, was further along towards completion than is shown in the picture.

Q. How soon after the State took the canal over was the draining off of the water of the canal begun? A. About 14 months.

Q. And in what month would that place this? A. That would place it in April, 1924.

Q. Will you tell the Court to what extent—where the draining off of the water in this particular section of the canal we are considering at this moment, namely, between Dover and Montville, began, and how it progressed, and to what extent the water has now been drained off or from that portion of the canal? A. I cannot give in detail all the points at which the overflow gates were located by which it was possible to drain that section.

Q. I don't expect it in such detail; I want to know generally how it was done, and how far it has been accomplished. A. Wherever there were gates in the bank of the canal between Dover and Powerville, those were opened, and the water was drained through them into the adjacent watercourses. Thereafter, under the direction of the supervisor of that section, a ditch was commenced at various points along the canal to drain the shallow pools, which would not drain of their own accord. The locks at Dover, and just above Powerville were opened so that the water from the higher levels would flow through them and flow out through the lower level. The aqueduct across the

Rockaway River east of Peer's Lock, was opened by knocking a hole in the bottom so that the water drained into the Rockaway River from that section of the canal at that point.

Q. Now, to what extent did those various actions result in the water being withdrawn from the section of the canal lying between Dover and Powerville? A. It practically drained that section of the canal.

Q. Now, thereafter, was the canal also drained between Powerville and the foot of plane 7 in Boonton? A. In parts.

Q. Explain to what extent. A. At Powerville the canal crosses the millpond which is formed by the dam at Powerville. On the east side of that pond there is a lock which regulates the flow of the water from the pond into the canal. The gates of that lock are not tight, and they permitted considerable water to leak from the river into that section of the canal from Powerville down to Lock No. 12 east, which is located on the outskirts of Boonton, just adjacent to where West Main Street crosses the Rockaway River. At that point there is another lock, the gates of which were opened to allow the water to drain out of that section as fast as it came down; but there has always been some water in that section. Below that lock there is a section of the canal—

Q. You say there has always been some water—how much? A. One or two feet.

Q. Enough to permit navigation on the canal at that point?

Mr. Brogan: I object to that question.

The Court: I think that calls for a conclusion; I don't think this witness is qualified to answer that.

Mr. Faulks: Who would be?

The Court: An engineer.

Mr. Faulks: I should say that that was a question that anyone might answer.

The Court: The quality of the answer is not the best.

Mr. Faulks: It seems to me that the amount of water—

The Court: Supposing we receive it, subject to the objection, and note my remark about it, and let him proceed, and he can answer, but I don't think it will impress the Court very seriously.

A. When the canal was full in boating days, it had a depth of five feet.

Q. How long is that section of the canal that you have just described as having some water in it? A. Without referring to my maps, I should say not over a mile, perhaps only a fraction of a mile.

Q. Now, go on to the section below that you were starting to tell us about. A. Below Lock No. 12 east, where there is a drop of about 12 feet, there is a section of the canal 1,500 or 1,800 feet in length, which extends to the head of plane 7 east, that being the plane at Boonton. Just below Lock 12 there is a dam across the Rockaway River, which forms a millpond. The level of the water in that millpond is at the height of the water in the canal below the lock, extending to the head of plane No. 7. There are gates in the canal by which water can be received into this lower section of the canal; and for part of the time since April, 1924, water has been received into that section of the canal as far as the head of the plane No. 7 east.

Q. Is that part of the canal included in the work that has been done by Jersey City under the contract which has been offered in evidence this morning? A. It was included in the work which was done by Jersey City.

Q. Now, then, if you will go on with your recital as to the extent to which the water has been drained off below the foot of plane 7 in Boonton. A. The water in this section below plane 7 east was not drained off as soon as it was in the other sections, but it was done sometime during the summer of 1924. My recollection is, that it was done some time in July. It is now dry except for natural drainage, which finds its way into the canal; that applies to the section from the foot of plane 7 east, to the head of plane No. 8.

Q. Is the head of plane 8 above or below Montville? A. It is just west of the Village of Montville, about a quarter of a mile, between Montville and Dover.

Q. You say there is some drainage water in there; how much? A. Natural drainage—a brook about a foot wide and a few inches deep.

Q. Now, will you continue with your recital as to the drawing off of the water—as to the amount of water remaining in the canal east of the ponds that you last mentioned, so as to bring it some considerable distance below Montville? A. Between plane 8 and plane 9 there is a very short level of the canal,—only a few hundred feet. I am not able to testify as to the conditions there. I have reason to believe there is no water in it, but I cannot say that I have seen it recently. The section below plane No. 9, which is the plane right in the Village of Montville, is practically dry, except here and

there for a little water due to seepage of ground water or rain water which it collects in it.

Q. Have you described the conditions with regard to which I have been inquiring, to a point below Montville? A. Yes, sir, I have.

Q. I think I failed to ask you the approximate length of the section of the canal in or near Boonton above the head of plane 7, in which there is water; did you give that? A. I think I stated there was a section of 1,500 or 1,800 feet.

Q. I beg your pardon; I did not remember that; you told how the water entered the canal at that point—what becomes of it after it is admitted to the canal? A. At the head of the plane there is a flume on the westerly bank of the canal, which leads down through the mills established in the gorge below the Boonton Falls. The water passes through these mills, being utilized by them for water power; and emerges as a tailrace near the foot of the plane.

Q. Where does it go from that tailrace? A. At present it all goes into the Rockaway River.

Q. None of it returning to the canal? A. No, sir, none of it returning to the canal.

Q. What is there there, if you know, to prevent the water returning from the raceway to the canal? A. There is a dam across the end of the tailrace.

Q. Do you know how long ago that was built? A. I know it was built a number of years ago, but I am not able to give you the exact date without referring to certain agreements.

Q. Do you know when it was altered so that the water in the raceway could no longer return to the canal?

Mr. Brogan: I object to that as leading, and also calling for a conclusion.

The Court: Change the form of the question.

Q. Do you know whether or not the dam at the end of the raceway has been reconstructed so as to prevent any of the water in the raceway from returning to the canal?

Mr. Brogan: That is predicated upon a conclusion; I object to it.

The Court: Objection overruled.

A. I know it only by reports that have come to me.

Q. You have no personal knowledge? A. I have no personal knowledge.

Q. Is the point at which the water that thus flows through this 1,500 feet long section of the canal and passes by the flume down to the raceway and back into the Rockaway River, above or below the intake of the Jersey City reservoir at Boonton? A. It is above the intake.

Q. So the water returns to the river above that point? A. Yes, sir.

Q. Are you also familiar with the changes which have been made in the other sections of the canal which have been acquired by the city, I mean from Dover to Phillipsburg, and from Montville to the Hackensack River? A. I am.

Q. Will you describe those, please?

Mr. Brogan: Objected to as immaterial.

The Court: It might become material; the Court will allow it; the Court might want to consider it.

Mr. Brogan: The photographs have been taken six months, and a year after the filing of the bill.

A. West of Dover the canal has been drained by opening at all of the discharge points into the adjacent watercourses; at some points, owing to the fact that the bed of the canal is somewhat irregular, there are shallow pools which do not drain out naturally. Many of these have been either filled or have been subsequently drained by ditching to the nearest watercourses; openings have been made at a number of points in the bed of the canal where conduits pass under the canal, carrying streams; by opening holes from the bed of the canal into these conduits it has been possible to drain sections of the canal which would not be drained by the discharge gates. Bridges on public highways have been removed at Washington, at Kenville, and the canal has been filled at that point. A solid fill has been made across the portion of the canal known as the Hopatcong feeder, by which water was formerly drawn from Lake Hopatcong and carried to the main canal. This fill prevents the passage of any water from Lake Hopatcong into the canal. The old dam at Lake Hopatcong has been taken down and a new dam built, by which all the discharge from Lake Hopatcong must go into the Muscanetkong River, the original outlet of the lake. Between Kenville and Lake Hopatcong on highway route No. 5, the canal, which at that point was carried on the hillside, above the public road, and where the public road ran through a viaduct under the canal, has been cut in two by the State Highway Commission in the construction of a new road, a short distance south of the old viaduct; the grade of the new road is approximately ten or fifteen feet below the bottom of the canal where they cross. East of Montville, as I testified before—

Q. You have described the conditions from Dover up to Phillipsburg; just before you leave that, let me ask you to make it clear as to the amount of water that remains in any part of that section of the canal. I think you have stated it, but I am not sure. A. In general, that section of the canal has been as completely drained as is possible until—

Mr. Brogan: I ask that that be stricken out.

The Court: Strike it out.

*By the Court*:

Q. Drained dry, would you say? A. Not absolutely dry; it has been drained except for local shallow pools—

Q. What do you mean by "local"? A. By "local" I mean "small," limited in extent.

Q. You don't know how the water gathers? A. Seepage and the rainfall primarily.

*Further direct*:

Q. What do you mean when you say those pools are shallow? A. Three inches—four inches—five inches—a maximum, perhaps, of a foot, which depends upon the amount of rain we have had recently.

Q. What about the feeders to the canal, other than the one which formerly came from Lake Hopatcong? A. The other feeder is the Pompton feeder, which extended from a point below Pompton Lake to Mountain View. This feeder brought down water from the Pompton River to the main canal at Mountain View. At least three highway bridges, which crossed this feeder, have been removed, and the canal filled at those points and

the permanent roadways established across those fills. The old lake at the head of the feeder—

Mr. Brogan: I object to the word "permanent."

A. I withdraw the word "permanent." At the head of the Pompton feeder—the lock by which the flow into the feeder was formerly regulated has been filled; steel sheet piling has been driven across the line of the canal at that point, and a wide fill made to prevent any water from Pompton River getting into the feeder.

Q. Will you describe, in the same general way, the changes, if any, which have occurred in the canal east of Montville to the Hackensack River in Kearny? A. At least one bridge on a public highway, and located east of Montville, has been removed, and the canal filled at that point. The aqueducts at Mountain View and at Little Falls have both been removed. These aqueducts carried the canal across Pompton River and Passaic River. The canal, through this entire section has been drained, ditched, where necessary, to prevent the accumulation of water.

Mr. Brogan: I object to that. I don't think that kind of an answer is responsive.

*By the Court*:

Q. Did you see them ditch it? A. Yes, sir, I saw the gangs at work on one or more occasions, and I have seen the ditches which were dug.

Q. Where did you see it done—at how many places? A. I have seen it at so many places that it is very difficult to specify any particular—

Q. Along a distance of miles? A. In the aggregate, yes.

Q. Now, do you know what is the ditching done for, if you know? A. My instructions to the supervisor were, to ditch the canal wherever it was necessary to drain off the stagnant water.

*Further direct*:

Q. Proceed, doctor— A. I think that comprehends the work that has been accomplished so far east of Montville.

Q. How much water is there in any section of the canal east of Montville? But before you go into that, have there been any changes made in the canal by the City of Newark? A. Not so far as I have observed; I know of some by hearsay.

Q. How much were you there in the section of the canal that was formerly located in Newark and generally throughout the canal from Montville east to the Hackensack River in Kearny; describe the water remaining in the canal in that section, as you have in the western section of the canal. A. So far as my observation has gone—and I have seen this section of the canal at intervals—the only water is the storm waters which accumulate after storms, and are being drained off through these openings which the Canal Company has made.

Q. Now, doctor, tell us about the condition of the bed of the canal between Dover and Montville, in parts thereof which have not been filled—I mean, with reference to any overgrowth or undergrowth, or anything of that kind, as to the appearance and condition of the canal in that section in the points where it has not been filled or where the water has not been withdrawn beyond the extent that you have stated. A. At many points along this stretch of the canal last fall there was a heavy growth of weeds and grass. I have not seen it recently

enough this spring to be able to state that that grass and growth has yet attained any height this year. It was killed during the winter.

Q. Has anything been done by the Canal Company to effect its removal? A. No, sir.

Q. Dr. Kummel, have you examined the title papers which were delivered to the State by the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, its lessee, in relation to the rights, if any, which those companies, or either of them, had on July 8th, 1909, to divert the waters of the Rockaway River above the Boonton reservoir?

Mr. Brogan: I should like to hear that question.

Q. (Question read.) A. Not for that particular purpose.

Mr. Brogan: That is not responsive.

Q. I ask you whether you had examined those papers in so far as they had to do with the right of the companies mentioned to divert the waters of the Rockaway River on July 8, 1909?

Mr. Brogan: I object to the question on the ground that it is immaterial. What bearing has it upon the issue in this case, whether this witness has examined certain legal papers—he is not a lawyer, admittedly. It has no bearing whatever. It is incompetent, irrelevant and immaterial.

The Court: I will note your objection to it and allow it for the present.

A. I cannot answer that question "Yes" or "No."

Q. Can you tell us from your knowledge of the

title papers of those companies by any other investigation which you may have made, whether or not those companies, or either of them, have, since July 8, 1901, granted any right to anyone, or attempted so to do, to divert water from the Morris Canal?

Mr. Brogan: Objected to.

The Court: Do you mean since he has been in office?

Mr. Faulks: Yes, from his examination.

Q. (Question withdrawn.) Since you have been in office, Dr. Kummel, as managing director of the Morris Canal and Banking Company, have you been able to ascertain whether or not the Morris Canal and Banking Company, or the Lehigh Valley Railroad Company, its lessee, has, since July 8, 1901, granted or attempted to grant any rights to divert water from the Morris Canal?

Mr. Brogan: I suppose he can answer "Yes" or "No."

A. Yes, sir.

Q. What have you found to be the fact?

Mr. Brogan: Objected to as incompetent; and secondly, it is not the best evidence.

The Court: If it is objected to on the ground that it is not the best evidence, I shall sustain the objection.

Mr. Faulks: And then establishing purely a negative, which can only be done in this way. Now, we say we expect to have Dr. Kummel testify that there has been one temporary right granted, which has been cancelled by the company, since he came into

office. It is a question of whether the grant was a valid or an invalid one. They are in his possession; he has them here.

The Court: That is the best evidence then. You may note the objection to it on the ground that it is immaterial and incompetent, and let him answer it.

Mr. Brogan: At this time I don't think this man should be permitted to testify to the contents of a document that he admittedly has with him.

Q. The question, is, Dr. Kummel, whether there has been a grant of any kind—any grant of the kind mentioned, made since July 8, 1901. A. One was made, yes.

Q. Have you the document here by which it was made? A. I have.

Q. Please produce it. A. (Witness produces it.)

Mr. Faulks: Witness produces an agreement made under date of December 4, 1917, between Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, for itself and on behalf of the Morris Canal and Banking Company, lessor, parties of the first part, and the Wharton Steel Company, a corporation of the State of New Jersey, party of the second part.

The Court: I don't believe we had that in the last case at all, did we?

Mr. Faulks: No, sir. I offer this instrument in evidence and ask that it be given the next number.

"Exhibit F-8" (not physically marked).

Mr. Brogan: That is subject to the same general objection.

Mr. Faulks: I call you Honor's attention to the fact that by the sixth clause of this sixth section of this agreement, the contract embodied therein is made terminable at any time upon thirty days' written notice.

Q. I now ask you, Doctor, whether or not any notice of the termination of this contract has, in fact, been given? A. Yes, sir, it has.

Q. Have you such notice with you? A. Yes, sir, I have, a duplicate.

Q. This paper which you have handed me is dated March 19, 1924, and is addressed to Replogle Steel Company and Wharton Steel Company, Dover, N. J., and is signed "by order of the Board of Directors of the Morris Canal and Banking Company, Henry B. Kummel, General Manager." Is the signature, Henry B. Kummel, to which I have just referred, your signature? A. Yes, sir.

Q. How was this notice served? A. By me personally, on the secretary of the company.

Q. About when, in connection with the date it bears, namely, March 19, 1924? A. It was served on March 20, 1924.

Q. At the foot of the notice appears the following: "Service of the above notice is hereby acknowledged on this 20th day of March, 1924, Replogle Steel Company, by S. H. Bell, Secretary." Did Mr. Bell, as secretary, sign that in your presence? A. He did.

Q. And delivered it to you at that time? A. He did.

Mr. Faulks: I offer this in evidence and would like to have it given the next number.

"Exhibit F-9."

*Dr. Henry B. Kummel, cross.*

Q. Is that the only grant that has been made by either of these companies, since July 8, 1901? A. The only grant of which we have any record in our files.

*By the Court*:

Q. Has that been cancelled? A. It has.

Q. When was it cancelled? A. March 20, 1924.

Q. After the legislative action? A. Yes, sir; and before I drew off any water from the canal.

The Court: Has the act of the Legislature been put in evidence?

Mr. Faulks: Yes, they are all public acts, and I have called attention to them on the record.

The Court: I don't think this will be as voluminous as the last case.

Mr. Brogan: I want to enter a further general objection against the introduction into evidence of this agreement between the Wharton Steel Company and the Lehigh Valley Railroad Company, in this respect, that the paper is immaterial, because the making of this contract by the Lehigh Valley Railroad Company in regard to the canal property, and the permission given to divert water to the Wharton Steel Company, is *ultra vires*.

*Cross examination by Mr. Brogan*:

Q. Dr. Kummel, what property does the canal company now own? A. Strictly speaking, the canal company owns no property. The canal company holds, as trustee for the State, certain prop-

erty. Now, with that to make matters clear, I will answer your question.

Q. Your agreement of 1924, which you have just submitted to me, between Jersey City and the Morris Canal and Banking Company, does not recite that you are a trustee for the State of New Jersey, does it? A. I don't recall .

Mr. Ashmead: That speaks for itself.

A. The agreement was made between the Morris Canal and Banking Company and the Mayor and Aldermen of Jersey City.

Q. Do you mean to say that the Morris Canal and Banking Company, at the time that that agreement was made, actually owned no property? A. Strictly speaking, that is correct.

Q. What do you mean by "strictly speaking"? It is either correct or it is not correct. A. Well, it is correct.

Q. Now, you have not touched the Morris Canal east of the Hackensack River, Dr. Kummel. A. We have no right, title or interest in the Morris Canal east of the Hackensack River, except the Little Basin in Jersey City; the State has no right, title or interest in it.

Q. Does your knowledge extend far enough to say whether or not this, too, has been dried up? A. I know nothing about that section of the canal from the east bank of the Hackensack River to the west edge of the Little Basin.

Q. So far as you know, there may be rights in that part of the property to navigate on the canal? A. As far as I know.

Q. Now, what leases were mentioned and were intended when they were referred to in the bill of sale that was put in evidence by you under Mr.

Faulks' direction? A. The leases, easements and agreements which were enumerated in "Schedule A" attached to the Sommer's agreement.

Q. Will you tell us from that list the kind and character of those leases affecting this property between Dover and Montville? A. (No answer.)

Mr. Brogan: I want to eliminate the license privileges of erecting wires, etc., and take up only lease which are really important.

Mr. Faulks: I want to object to the question in so far as it calls for any statement with regard to any leases or licenses or other rights or instruments given or effective before July 8, 1901, that being the date of the contract under which the release was given by the canal company and the Lehigh Valley Railroad Company to Jersey City. I am talking about the contract under which the release was given. Sections 3 and 4 of that contract are printed on pages 129, 130 and 131 of the State of the Case on the first supplemental bill, which has been offered and received in evidence. If your honor will turn to page 130 of the State of the Case, near the bottom of the page, you will find Paragraph (C) of Article 3, reading as follows:

"The abandonment under legislative sanction by the Morris Canal and Banking Company, and its lessee, of a portion of the Morris Canal lying between Dover and Montville; and the surrender of all its rights to divert the waters of the Rockaway River above said proposed reservoir site."

Now, it was upon the happening of that event, or either of the events set forth in Paragraphs A and B of Article 3, that the Jersey City Water Supply Company became entitled to retain $500,000. Now, it is our contention, and we think it is entirely clear, that the rights referred to there are the rights which the Canal Company or its lessee had in such portion of the canal at the time this instrument was executed. Of course, in addition to that, we rely upon Article 4, which has merely to do with the abandonment of navigation on the same part of the canal, and the giving of the release prescribed for therein. That was the sole basis for the first supplemental bill, as I understand it. That release was given in accordance with the provisions of the contract of July 8, 1901. Jersey City entered into this contract with Flynn in 1898, we will say, for the building of these waterworks. Flynn undertook to build them, and Jersey City claimed that he had not complied with the contract, and instituted this original suit, Mayor and Aldermen of Jersey City against the Jersey City Water Supply Company, practically for specific performance. That was the big case. And that was heard, and I think it was Vice Chancellor Stevens who decided that in some respects Flynn had not complied with his contract, and a certain sum should be withheld, and that money for someone to be withheld, was this sum of $500,000. The parties in the meantime had entered into this agreement of July 8, 1901, and that contained certain

four definite stipulations as to four alternatives, under any one of which, sooner or later, the Jersey City Water Supply Company was to become entitled to the $500,000. When the first supplemental bill was heard before your Honor, the position taken by the Jersey City Water Supply Company was that an effective release had been given. Your Honor held, and the Court of Errors and Appeals held that that release did not and could not become effective until the canal was abandoned by legislative sanction.

Now, we say that that has been done, and that, therefore, we are entitled to the $500,000 under Article 4. But we say that quite apart from that, and as a separate right, we are entitled to the return of that money under Paragraph C of Article 3, which said that we were to have that money when two things occurred:

(1) The abandonment under legislative sanction by the Canal Company and its lessee of the portion of the Morris Canal lying between Dover and Montville, and the surrender of all of its right to divert the waters of the Rockaway River above said proposed reservoir site. What the parties did was to sit down that day and make a settlement agreement, and by Paragraph C of Article 3, they said, when that portion of the canal is abandoned by legislative sanction, and the rights which the Canal Company now has in the Rockaway River are surrendered, then you are entitled to this $500,000. Therefore, we say, it is en-

tirely immaterial in this case what rights the Canal Company may have had prior to that date, or you have given to anyone else prior to that. This was the settlement of a dispute upon the happening of certain definite events, one of which was to pay a named sum. Now, they said, "We know that the Canal Company has made various claims, but we will sit down now and make this agreement: 'Whatever rights they may have on this date shall be surrendered, and the canal is to be surrendered.'" That is the third alternative, and that is the objection.

Mr. Brogan: In answer to that, I say there is no force to the contention of the counsel; either that, or I don't understand it. It is granted that they sat down on July 8, 1901, and made this agreement; they agreed (reading) that all the rights of the Morris Canal and Banking Company and its lessee—it seems to me that that means that no matter when acquired, or at what period of time at all, either before or after—are to be turned over to Jersey City or surrendered up, and that they must all be extinguished at the happening of this event certain. It means that. It honestly means that.

The Court: Is that the object of your offer?

Mr. Brogan: Yes, sir.

Mr. Faulks: That argument does not in anywise tend to support the question, to make the question a proper one. I gather from what Mr. Brogan says that there is no difference between us as to the date.

The Court: I will let the question stand, subject to your objection.

Mr. Faulks: The objection is, that the evidence sought to be adduced by this question is incompetent, irrelevant and immaterial, and I ask that that objection be continued to subsequent questions.

The Court: Yes.

*Further cross*:

Q. Are there any agreements outstanding and in existence between the Morris Canal and Banking Company or the Lehigh Valley Railroad Company and other parties, affecting the canal property between Montville and Dover?

Mr. Faulks: Objected to, on the ground, in addition to the ground that I mentioned before, on the ground that it is not proper that Dr. Kummel should construe unmentioned instruments in any such broad way as this. I have no desire to be technical. If he wants to refer to any particular document, I have no objection.

The Court: The objection will be overruled; I think myself, the question is a proper question in view of the answer of the defendant, Jersey City, in this matter.

A. There are.

Q. I notice one of these agreements provides for the turning over of all personal and mixed property; was there any such mixed property, and what was it? A. I shall have to ask you to tell me just what you mean by "mixed property."

Q. I don't know—it is your agreement—the agreement that you produced provided for the

turning over of certain definite things, securities, bonds, stocks, etc., and certain personal and mixed property. A. The property that was turned over in addition to the stocks, bonds, scrip, and the right, title and interest of the State in the canal and the buildings on them, consisted of certain old canal boats and scows; certain office furniture located at the various offices along the canal, 21 miles; a certain amount of tools and feed; etc.

The Court: You don't need to go into all that detail; there was no such thing as mixed property.

A. (Continued.) I think I have indicated in general terms everything in the way of property that was turned over to the State.

Q. Who made this atlas sheet that you produced in the beginning of your testimony; who was the draftsman of that map? A. The coloring on the map was put on—

Q. I mean the lines, the map; who was the draftsman of the map you produced, known as the Atlas Map? A. I have no idea.

*By the Court*:

Q. Don't you know? A. The survey was made originally under the direction of C. C. Vermeule, 40 years ago, more or less.

Q. You described certain places and distances by your own lines? A. Yes, sir, that is correct.

Q. Where is that map filed—in the State House with you at Trenton? A. Yes, sir.

Q. Now, as I understand you, Doctor, it was to the effect that the canal was open as a canal up to March, 1924,—a year after you took hold? A. I testified that it was maintained as a canal up

until after the adjournment of the Legislature in 1924.

Q. When did they adjourn in 1924, do you know, the Legislature? A. Some time previous to March 20, but I am not able to give the exact date.

Q. And up to some time after that adjournment, the canal property was maintained as a canal? A. Yes, sir.

Q. So could we say it was maintained until April 1, 1924, or later? A. Until at least April 20, 1924.

Q. April 20, 1924— A. Yes, sir.

Q. Now, when did you first receive the payments of money from the Morris Canal or the Lehigh Valley of that $875,000? A. The first payment was made on or about December 15th, 1922.

Q. Now, these various changes that have been made in the canal bed, the taking down of bridges, the making of a fill and roadway across those spaces which formerly had been accommodated by a bridge, all these things were done under whom? A. Under the immediate supervision of C. C. Vermeule, our consulting and directing engineer for the dismantling of the canal, and under my general supervision.

Q. You have had this work done by employees of the State, have you, or by contract or what? A. By contract.

Q. And what time was it that you got this canal so well drained out that only 1500 or 1800 feet of waterway remained, and a few storm water puddles, I think you called them, between Dover and Montville; when did you complete that job? A. It was completed by July or August, 1924; some portions were completed earlier than that.

Q. Could you tell me the date in August or July, roughly now?

Mr. Faulks: Objected to as immaterial.
The Court: Objection overruled.

A. I am unable, from memory, to give you the exact dates any closer than the latter part of July or early part of August.

Q. Well, that you are certain of? A. I am very certain that the last section was drained sometime during mid-summer of 1924.

Mr. Brogan: I want to call the Court's attention to the testimony under cross examination of the witness which is produced by the Jersey City Water Supply Company, to the effect that this drying-up process was not completed until the last of July or the first of August, 1924; and I ask the Court to bear that in mind.

Q. Dr. Kummel, did I understand you to say yesterday or this morning, that the force of men that formerly had been Canal Company's employees were taken up by the State until March or April of 1924? A. With the exception of the superintendent, the entire force of employees was taken over on March 1st, 1923, and many of them are still in our employ—some have been laid off.

Q. How many men were there in all? A. Approximately 50 to 60.

Q. That is, you took over in the name of the State the list of 50 or 60 men, and they then became State employees? A. Yes, sir.

Q. And you kept them all intact until April of 1924? A. I would not say "intact"; we may have laid off some men on the approach of winter, because during the winter we did not keep such a working force as in the summer.

Q. How many of those men have you still? A. Roughly, I should say 40 to 50 employees.

Q. So you pretty nearly have them all? A. Perhaps not exactly the same persons.

Q. What are their general duties? A. Laborers along the canal; after the 20th of April, 1924, they were engaged primarily in ditching at various points, and in making repairs on the bridges, which were not be immediately taken down. And in the Newark section in cleaning up the bed of the canal, getting the rubbish out of it.

Q. What were they doing during the summer, spring, fall and winter, 1923? A. That was before the water was drained from the canal. During that time their duties, in addition to making the repairs on the bridges, were to watch the banks; when water was in the canal it was constantly patrolled, every section was, once or twice a day, by men whose duty it was to see that the banks were in order, to prevent encroachments upon it; and the other force was engaged in various jobs to keep the property up to the condition in which we received it.

Q. Have you those exhibits which I have asked you to produce? A. Yes, sir.

Q. Dr. Kummel, if you know, will you tell us whether or not the State has disposed of any of the canal property between Dover and Montville since the time of its acquisition by the State? A. It has made an agreement with the City of Dover to deed to Dover that section of the canal property lying east of Sussex Street. The deed has not yet been actually given, but an agreement saying what the State was to do and assigning Dover to do certain things, has been signed.

Q. Have you such an agreement with you here? A. I don't think I have it; I can produce it.

Q. Didn't I ask for that, doctor? A. I did not understand it; if it was listed in your subpoena I have it.

Q. It may not be listed, but I think it is within the terms. A. I did not understand that it was, or I should have brought it.

Mr. Brogan: May I have the privilege, after getting the testimony of the doctor, of continuing cross examination if it should be necessary?

Mr. Faulks: I object to that, of course. We want this case concluded, your Honor.

The Court: What is the ground upon which you base your application, Mr. Brogan? Is it on the ground that the testimony is technical?

Mr. Brogan: Yes.

The Court: It may be possible, of course, upon a consideration of his testimony, that you might abandon any further cross examination?

Mr. Brogan: Yes. I think at the present time that I am through.

Mr. Faulks: I want to be heard before your Honor rules on that.

Mr. Brogan: I will withdraw the application. I will make him my own witness for anything I want. I think the doctor is a real neutral.

Mr. Faulks: I move to strike out the question put to Dr. Kummel in the early part of his cross examination, to which I objected, and which had to do with the question of

whether or not there were certain rights either of the Canal Company or somebody else still outstanding, and which was permitted to be answered over objection, by the mere two words,"there are." (See page 118 of the testimony.) Now, the situation with regard to this suit is this—that in this second supplemental bill under which the case is now being heard, there was an answer to the allegations of the bill, a statement that there were such rights or something of that kind. Months age we applied to your Honor to either compel a more specific answer or the furnishing of a bill of particulars; to one or the other of which we felt that we were clearly entitled, and that it would be a violation of the rules of pleadings and a denial of justice to require us to meet claims as to which we were in nowise advised. Your Honor took that view and directed an amended answer to be filed, giving that information. For some reason, which no doubt was satisfactory to Jersey City, an answer was filed which in nowise complies with that allegation, which is a mere copy of the general answer originally filed; and the addition of a single defense of *res adjudicata.* We have since asked that your Honor's prior direction be complied with. For good and sufficient reasons you have not been able to deal with that matter, but you have stated that we were not to suffer by reason of your inability to decide that question. Now, where do we find ourselves?

The Court: You find yourself in this situation, that there are some outstanding rights as raised by the answer.

Mr. Faulks: I don't know that we find ourselves in that position.

The Court: Your evidence says so.

Mr. Faulks: Dr. Kummel says so, and that without being required to identify or produce any documents whatsoever. We certainly ought not to be left in that position, where any witness, ours or anyone else's, over objection is permitted to construe perhaps one of several hundred instances and say that they have or have not such and such an effect. We were not permitted to do it yesterday.

The Court: It is a question of the cross examination directed to your witness for the purpose of developing a fact which is alleged by the answer.

Mr. Faulks: But it is to be developed by legal evidence, and not by two words constituting nothing but a pure conclusion as to the effect of, perhaps, several hundred documents.

The Court: I will hold the testimony and refuse to strike it out.

Mr. Faulks: We are entirely in the dark.

*Redirect examination by Mr. Faulks*:

Mr. Brogan: I would like to see some order made for my relief by which the complaint might be amplified, so that they would tell us what the prescriptive rights are.

Mr. Faulks: I want to make it perfectly clear to your Honor; I feel, and my associates feel, that in view of this development that we are put in the position that your Honor said we would not be put in, namely,

that we have been met with proof, if it be proof—I don't think it is—without any specification of what it was to be and constituting a surprise to us.

The Court: There is no proof developed yet.

Mr. Faulks: Two words.

The Court: I want to get the whole thing before the Court.

Mr. Brogan: Must not counsel brush away any doubt as to whether there are any outstanding rights in anyone?

Mr. Faulks: I have gone over the case with Dr. Kummel, but I have no idea what documents he is going to refer to.

The Court: If you have within your knowledge, Mr. Brogan, any points of outstanding agreements—if you have those within your knowledge, I will now make an order for you to amend your answer; are you willing to make him your witness and examine him on that point?

Mr. Brogan: I don't think I should be thrust into that position. I should like to read this letter, which need not be taken down by the stenographer. (Reads letter.)

You see these gentlemen have had ample opportunity of going over this case.

The Court: I don't think there is grave injustice in this matter. Now, Mr. Faulks, if you wish to desist, you need not examine him on the redirect.

Mr. Faulks: I have not any idea what documents the doctor may say are included within his two words "there are." And the

only way that I can approach the matter, if compelled to do so, is by asking him what documents he referred to. Now, I think we are put in a position where your Honor said we would not be put. (Continues argument.)

*By the Court*:

Q. What did you mean by your answer "There are"? (See p. 118 of the testimony.) A. Counsel asked me where there were agreements which affected the canal property between Dover and Montville, and I said, "There are agreements which affect the property, which affect the canal between Dover and Montville; there are agreements covering, giving permission to carry electric light wires across the canal. There are agreements for putting sewer pipes underneath the canal. A large number of agreements."

Q. There are no agreements, as I understand it, which provide for the maintenance of a canal, the waters of the canal, the maintaining of the waterway? A. To my knowledge, there are no agreements in existence which obligated the Canal Company to maintain a canal between Dover and Montville.

Mr. Faulks: I don't think the witness has answered the last part of your Honor's question.

The Witness: There is an agreement by which a third party has acquired a right to utilize a short section of the canal for the purpose of carrying water from the Rockaway River to mills which he may establish along that section of the canal.

Q. Have you the agreement with you? A. I have, yes, sir.

The Court: Do you want that agreement produced, Mr. Faulks?

Mr. Faulks: If I am required to go into the matter, I probably shall. Is your Honor's ruling that I shall examine him on redirect?

The Court: Yes.

Mr. Faulks: In view of that, I would like to reserve, if I may, not only my general objection—

The Court: My ruling is that you suit yourself; I don't want to try your case.

Mr. Faulks: If I re-examine the witness on redirect in regard to this instrument, I think it ought to be done upon the understanding that I am not waiving the objection that I made, or the further objection that I made, that anything that may have occurred —or my earlier objection, based upon the fact that anything that may have occurred prior to February, 1901, is not material.

The Court: Those motions stand on the record; they are not disturbed. I don't think you need to emphasize them.

Recess to 2 p. m.

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AFTER RECESS.

DR. HENRY B. KUMMEL resumes the witness-stand.

*Redirect examination by Mr. Faulks:*

Q. Just before recess, in answer to the question of the Court, you spoke of some agreement under which a mill owner, as I understood you, was entitled to use part of the bed of the former Morris Canal to have some water reach his mill. To what

agreement did you refer? A. I referred to an agreement between William Scott and wife and the Morris Canal and Banking Company, dated August 11, 1829.

Q. Is that one of the instruments which is listed in Schedule A of the Sommer's agreement? A. It is not listed in the schedule, but it is referred to by another agreement which is listed in the schedule.

Q. And what is that other agreement? A. An agreement with the trustees of the estate of J. C. Lord and others.

Q. Have you now produced a certified copy of an indenture made by William Cott and wife to the Morris Canal and Banking Company under date of August 11, 1829? A. I have.

Mr. Faulks: Under your Honor's ruling, and subject to the reservations which I have been permitted to make, I offer this instrument to which the witness has just referred.

(Marked "Exhibit F-9.")

Q. You have said now, in effect, Dr. Kummel, that this is an instrument which, in your opinion, affects some portion of the property of the Morris Canal lying between Dover and Montville?

Mr. Stout: It seems to me the instrument speaks for itself.

Q. What portion of the property of the Morris Canal do you understand this instrument to affect? A. The portion of the canal immediately above plane No. 7 at Boonton.

Q. Is that the portion of the canal which in your direct testimony of this morning you mentioned

as still having water in it which passed through a flume to a raceway below, and reached the Rockaway River at a point above the intake to the Jersey City reservoir at Boonton? A. Yes, sir, it is.

Q. Now, is there nay other agreement presently existing or effective, which, from your knowledge, or in your opinion, in anywise affects the same portion of the canal company's property? Presently existing or effective, is part of the question. A. There is an agreement entered into by Silas Cook with the Morris Canal and Banking Company, under date of June 8, 1849.

Q. Is that agreement still in effect?

Mr. Brogan: May it please the Court, it seems to me that that does call for a legal conclusion, whether it is still in effect.

The Court: I think this is proper redirect.

*By the Court*:

Q. In effect—if you know? A. No, sir, it is not. As I understand the subsequent agreement made with the assigns of Silas Cook.

*Further redirect*:

Q. Have you that subsequent agreement? A. Yes, sir.

Q. Please produce it. A. The subsequent agreement to which I referred is an agreement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company and John H. Capstick and others, dated December 30, 1905.

Mr. Faulks: I offer in evidence the two agreements, agreements produced by the witness—the first being one between Silas Cook, or other, between the Morris Canal

and Banking Company and Silas Cook, dated June 8, 1849, and the other between Morris Canal and Banking Company and Lehigh Valley Railroad Company, lessee of the work and franchises of the Morris Canal and Banking Company, parties of the first part, and John H. Capstick and Thomas Capstick; and dated December 30, 1905.

("Exhibit F-10" and "Exhibit F-11" [not physically marked].)

Mr. Faulks: I note that by the first-mentioned of these two agreements, namely, the one between Morris Canal and Banking Company and Silas Cook, it is provided that, subject to certain conditions therein contained, the Canal Company granted and conveyed unto Silas Cook, his heirs and assigns, the right and privilege to use the said canal for conducting the waters of the Rockaway River from the foot of plane No. 7 east to the west waters at the road bridge above the head of plane 8 east, so as to pass a stream of water the size of 12 inches square, without head, to the mill point of the said Silas Cook.

Q. By reason of the changes which have been made in the canal since the State took it over, has that water been prevented from flowing to the point where it formerly left the canal to go to the Cook mill?

Mr. Brogan: Objected to as immaterial.

The Court: Objection overruled.

A. Since August or July of 1924, no water from the Rockaway River has entered the section of the

canal below the foot of plane No. 7 to be fed down to the mill ponds referred to in that agreement.

Q. And is that by reason of the changes which have been made above that point in the canal, as detailed by you this morning? A. It is.

Q. Where does the water now go which under that agreement was provided to go to the Silas Cook mill? A. It goes into the Rockaway River above the intake of the Jersey City reservoir at Boonton.

Q. Now, were there any other agreements affecting the property of the Morris Canal and Banking Company between Dover and Montville, other, I mean, than licenses for carrying wires over your piers under the canal, that were in effect at the time that the State took over the canal property? A. There are two which were in effect at the time we took over the property, in addition to those which I have testified to already.

Q. Have you produced them? A. I have.

> Mr. Faulks: The witness produces an agreement made the 19th day of February, 1869, between the Morris Canal and Banking Company and the Port Oram Iron Company; also an agreement entered into under date of April 15, 1896, between the Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey.

Q. Referring to the first of these two agreements, I notice that it contains a provision for its termination upon the giving in writing of a notice of discontinuance; has any such notice been given? A. It has.

Q. Have you that notice with you? A. I have.

Mr. Faulks: The witness produces a notice dated March 19, 1924, addressed to Port Oram Iron Company and Wharton Steel Company at Wharton, N. J., signed on behalf of the Morris Canal and Banking Company by Henry B. Kummel, General Manager.

Q. Is that your signature, Henry B. Kummel? A. Yes, sir.

Q. Did you cause that notice to be served upon the Port Oram Iron Company? A. I served it personally upon the secretary of the Port Oram Iron Company.

Q. I observe that at the foot of this notice there is the following service of the above: "Service of the above notice is hereby acknowledged this 20th of March, 1924, Replogle Steel Company, successors, by S. H. Bell, Secretary." Did you personally serve Mr. Bell? A. Yes, sir.

Q. Did you see him write what I have just read? A. I did.

Q. And is the Replogle Steel Company the successor to the Port Oram Iron Company? A. That is my understanding.

Mr. Faulks: I offer in evidence the agreement with the Port Oram Iron Company just referred to, and the notice of cancellation of said agreement.

Mr. Brogan: Subject to my general objection.

Mr. Faulks: And ask that this be given the next number.

"Exhibit F-12" (not physically marked).

Q. Referring to the agreement entered into between the Lehigh Valley Railroad Company and

the Central Railroad Company of New Jersey, under date of April 15, 1926, I observe that by Section 3 thereof it is provided "that this license and privilege is accepted upon the terms that it is to be operated only during the pleasure of the party of the first part (that is, the Lehigh Valley), and that without such license and privilege to lay and maintain said water pipes, shall be revoked or withdrawn, that it will within sixty days after notice to that effect is given, remove from the property of the party of the first part the said water pipes, and leave the surface of the ground in as good condition as it was before the pipe was laid." Has any notice been given of the right to terminate this agreement? A. Yes, sir.

Mr. Faulks: Produce it, please. The witness produces copy of a letter addressed to Mr. W. G. Bessler, President Central Railroad Company of N. J., Liberty Street, New York City, dated March 19, 1924; and copy of a notice of the same date addressed to the Central Railroad Company of New Jersey, Liberty Street, New York.

Q. Was that notice sent by you to the Central Railroad Company of New Jersey? A. It was sent by registered mail.

Q. Has the exercise of whatever rights the Railroad Company had under that agreement actually ceased?

Mr. Brogan: Objected to as calling for a conclusion.

The Court: The objection is overruled.

A. It has, yes, sir.

Q. How do you know, Dr. Kummel, that the exercise of the privilege referred to has actually

ceased? A. We have ceased delivering water to them as called for by that agreement; they applied to the Canal Company for permission to lay a pipe under the canal, in order that they might supply their engine with water from another source.

Q. A source entirely independent of any water heretofore used by the canal?

Mr. Brogan: Objected to as calling for a conclusion.

The Court: The objection is overruled.

A. From a different source.

Mr. Faulks: Let me offer the last-mentioned agreement, namely, the one with the the Central Railroad Company and the letter and notice terminating it.

"Exhibit F-13."

Q. Do you know, Dr. Kummel, whether or not the use of the privileges given to Port Oram Iron Company by agreement dated February 19, 1869, and those given the Wharton Steel Company by an agreement that was made in 1917 and offered in evidence this morning, have also actually ceased? A. They have, yes, sir.

Mr. Brogan: Of course, it is understood that all this is subject to the same objection?

The Court: Yes.

Q. Dr. Kummel, are there any other agreements affecting the property of the Canal Company between Dover and Montville, other than those merely permitting wires to be maintained or pipes to be laid under the canal agreements of that character, other than those that you have enumerated and produced here this afternoon? A. Not to my knowledge, not in our records.

The Court: Mr. Brogan, do you want to make him your witness later?

Mr. Brogan: Yes.

The Court: It is understood that Dr. Kummel will appear at the next hearing, if there is one, without the reservice of the subpoena *duces tecum* which was served on him for this hearing; he being given two or three notices by letter.

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JOHN H. COOK, being duly sworn, testified as follows:

*Direct examination by Mr. Faulks:*

Q. Mr. Cook, where do you reside? A. Passaic, New Jersey.

Q. Are you connected with the Passaic Consolidated Water Company? A. Yes, sir, I am the president of that company.

Q. Is the Jersey Water Supply Company one of the companies that is affiliated with the Passaic Company? A. Only in that both are controlled by the New Jersey General Security Company.

Q. Have you ever been connected with the Jersey City Water Supply Company? A. I have been —a good many years ago.

Q. In what capacity? A. I operated the works which took water from the Boonton reservoir to Jersey City, from May 23, 1904, to October 10, 1911.

Q. Have you ever been an officer of the Jersey City Water Supply Company? A. I was made vice-president of that company sometime in 1924.

Q. Do you still hold that office? A. I am still vice-president.

Q. Now, you say that you operated the works of the Jersey City Water Supply Company at one time? A. I did for about seven years.

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Q. What works were they? A. They consisted of an intake gatehouse at the dam, and a concrete conduit and connecting steel pipe lines under the valleys between Boonton and Jersey City, at Summit Avenue.

Q. Are they part of the waterworks that, under the contract made between Mr. Flynn and the City of Jersey City, Flynn undertook to build for Jersey City? A. They are, yes, sir.

Q. And you operated them during several years before Jersey City took them over? A. From the time the water was turned on through that pipe and until the time that the works were turned over to Jersey City, in all probability, in October, 1911.

Q. You are familiar, then, with the condition of the canal at Boonton and in the vicinity of Boonton? A. I have been for many years.

Q. Are you familiar with the conditions which have been maintained along the canal between Dover and Montville? A. Yes, sir.

Q. And for how long have you been familiar with that part of the canal? A. I should think it might be fifteen or twenty years; it is a long time.

Q. How frequently have you observed those conditions? A. I had driven up along that canal from Paterson to Dover many times; I could not say how many times; perhaps 100 times in the last twenty years, and have paid particular attention to the canal at different points, because the canal had, as I believed, a considerable influence on the water supply business of Northern New Jersey, particularly that of the Associated Water Companies.

Q. Now, have you observed the changes which

have been made in the canal since the spring of 1924? A. I have, yes, sir.

Q. I am referring now to the portion of the canal lying between Dover and Montville. A. I have.

Q. On one occasion or more? A. On many occasions.

Q. Will you state, in a general way, without taking too much time, what changes you have observed there, using, insofar as you may find it helpful to do so, the photographs which have been received in evidence? A. Many roadways have been filled in across the canal where there were formerly bridges; bridges were removed and the highway has been continued over a fill across the canal at a number of places that I have observed, up and down the canal. For example, coming up from Montville there is a heavy fill across the plane close to the road, and entirely, at the present time at least, stopping off the plane; and as you continue up the canal at plane No. 7, there has been more or less of construction going on there; and I observed last fall that the canal was empty from the dam at the head of Boonton Falls down to the head of plane No. 7, and continuing up to Powerville, the bridge across the river, just above the paper mill dam there has been gone for a great many years; and at Powerville the lock has been filled and a considerable area in the canal has been filled beside the lock; and at Peer's Lock, which is on the road between Split Rock Pond and Denville, there has been a very large area of the canal filled at that point, and the fill has extended from the road easterly towards the wooden flume that used to carry the canal across the Rockaway River. This flume has been re-

moved and a concrete structure carrying the sewer is across the river where the old timber flume was. When I was there, about eight or ten days ago, the steam shovel was tearing out the masonry of the old lock which was right near the building there at Peer's Lock, so-called, and continuing up the canal to Dover I observed, since about October, or April in fact, 1924, that the old basin there at Dover, which was below the lock where the water entered from the river had been more or less filled in—I should say an acre or two of that basin had been filled in, and from time to time, as I have been there, I have observed that the road, some streets, have been filled across the basin, or across the canal, so that roads now, and the filling that created the road, entirely cut off the canal.

Q. Now, at this earlier time that you have just referred to, and which you place as about April, 1924, how much water was there then in the portion of the canal that you referred to, that is, from Powerville, west, towards Dover? A. Why, at certain places in the canal there did not seem to be much of any water in it, and then, at some other places there was more. I could not say definitely that the canal was as dry as it is now from in April, 1924.

Q. How dry is it now? A. It is dry with the exception of a ditch which is about, perhaps, 18 inches or two feet wide, that runs along through the bottom of the canal, which takes in rain water or any water of that kind that gets into the canal through certain openings that are in the canal banks which permit that water to enter some other watercourse.

Q. Is that true as to the entire section of the

canal lying between Dover and Montville? A. So far as I have observed it; I have not walked over every foot of it.

Q. How about the 1,500 feet or so in length west of and above the upper end of plane No. 7? A. That section of the canal now conducts the water from the millpond, which is above the dam at the head of Boonton Falls, to the water power plant of what is called now the Cooper-Lord property, which is just, I should say, south of the canal at Boonton.

Q. Is the property which you have just referred to as the Cooper-Lord property, the property described or mentioned in the deed which has been introduced in evidence this afternoon, as a deed made between William Scott and the Morris Canal and Banking Company in 1829?

The Court: Have you examined the deed?

The Witness: Yes, sir. I have seen the deed, read it, and I believe it is the property referred to in that deed.

*By the Court*:

Q. Could you be certain of it, if you saw the deed itself? A. I am as certain of it now as a man can be.

*Further direct*:

Q. Is the water maintained at present in the section of the canal to which I have just referred? A. There was water in it when I saw it a week ago.

Q. State again how the water now reaches that part of the canal, that section of the canal? A. It comes through high gates,—that are in a small wood building at the end of this dam, which is at

the head of Boonton Falls, and the water proceeds down this 1,500 feet or so and is taken out and operates a waterpower from raceways that are on this so-called Cooper-Lord property.

Q. How is it taken out of the bed of the canal? A. There is an intake there which is made of planks and timber in the usual way and proceeds through the different raceways, finally reaches the lower raceway, and from this it goes into the Rockaway River through certain waste gates.

Q. How much of that water that thus passes through the bed of the canal for a distance of approximately 1,500 feet reaches the Rockaway River again above the point of intake to the Jersey City reservoir at Boonton? A. All of it.

Q. Is it physically possible for any of it to get back into the canal after it leaves it through this aperture that you have just described? A. It is not.

Q. Why not? A. Because there is a dam across the end of the lower raceway which prevents any water from getting below that point into the canal or in any other place.

Q. Who built that dam? A. It was under my direction; laborers did it; but I stood around there; it was under my direction.

Q. You are thoroughly familiar with that dam? A. I certainly am; I stood around night and day while it was being dug, and while it is not exactly the same as it was when I built it, I have observed it off and on for fifteen years, and sometimes quite frequently it is a stronger and more secure dam, and more of a dam than it was when I built it, because it has been reinforced by an earth embankment on the down-stream side.

Q. What effect does that dam have on the ability of any of the water returning to the canal? A. It stops it; it makes all water that comes down through the Cooper-Lord property, or any place above that point, go into the river, and thus go into the reservoir of the Jersey City Water Supply Company.

Q. Mr. Cook, of your own knowledge, do you know whether any of the water in the Morris Canal that formerly may have gone to the Silas Cook mill under the agreement which has been introduced here in evidence this afternoon, and which was made, I think, in 1849, still goes in that course? A. It does not.

Q. Why not? A. Because this dam which is at the foot of this tailrace, prevents any water from coming down the canal in that way. The only water that is in that stretch of canal below the foot of No. 7 plane is some sewage or something of that kind, that comes in very small quantities down that stretch of canal.

Q. What do you mean? A. It might be, maybe, 100,000 gallons a day, a very small quantity.

Q. What is the size of the stream? A. It is about, I should say, offhand, it might be a foot wide and an inch or two deep.

Q. Do I understand that is the natural flow from the hillside there at Boonton? A. If there had never been any canal built there, and observing the contour map, that water would have followed down into a little brook that ran along approximately on the location of the canal as it is at present below plane No. 7.

Q. I don't understand quite the nature of that flow of water, the nature of that stream; is it the natural flow of surface water from the hill on

which Boonton is located? A. Yes, sir, if there were not any houses there it would be rain that fell on the hills or grass, and ran down into the little valley of this brook; there was a brook there before the canal was there, I imagine.

Q. What have you observed as to the amount of water that is in the former bed of the canal—strike that out. I don't think, Mr. Cook, that you have described the changes, if any, which you have observed in the portion of the canal that formerly ran between Boonton and Montville; have you covered that? A. I started down at Montville. There is a roadway filled across the canal, below Montville, a little ways, that appears to be a farm road, so it has been filled in comparatively recently, I would say within the last two or three months; and then the next obstruction in the canal that is evident, is this fill across the plane that I have spoken of, and at the present time that stretch of the canal between the foot of plane No. 7 and Montville is empty of water, except this little measly stream that I speak of that comes from house drains, or something of that kind.

Mr. Brogan: I ask that that characterization be stricken out.

The Court: Strike it out.

Q. Since these changes have been made in the canal that you have testified to, where does all of the water of the Rockaway watershed above the reservoir at Boonton flow? A. All the waters flow into that Boonton reservoir belonging to Jersey City.

Mr. Brogan: I think that that answer of his is an absolute legal conclusion.

The Court: Objection overruled.

Mr. Faulks: I want to offer one more instrument that I meant to offer in connection with the papers that were offered this afternoon while Dr. Kummel was on the witness stand. This is a certified copy of a deed made by United Real Estate Company, a corporation of the State of New Jersey, to John H. Capstick and Thomas Capstick, of the Township of Montville, Morris County, New Jersey, under date of December 13, 1905.

The Court: Mark it in evidence, subject to objection.

Mr. Faulks: For the information of the Court, I will say this is the deed that is called for by the so-called Capstick agreement.

(Marked "Exhibit F-14.")

*Cross examination by Mr. Brogan*:

Q. Where is the exact location of this 1,500 or 1,800 feet of canal property where the waters are diverted and then shunted back into the river? A. It starts at the gatehouse, which is at the end of this dam which is at the head of Boonton Falls, and proceeds from there to the head of plane No. 7 in Boonton.

Q. So that, as I understand that situation, the waters of the Rockaway River are diverted into this portion of the Morris Canal, and according to your testimony, as I understand it, are again shunted back into the Rockaway River? A. Above the reservoir of Jersey City, yes, sir.

Q. And you say that none of this water is lost as to the Rockaway River or to Jersey City? A. I say that.

Q. There is a certain amount of seepage that must find its way into the earth and embankments

on the off-side of the canal from the Rockaway River, isn't there? A. In any supply of that kind, any water that is produced by the rainfall in any water sewage, is eventually tributary to that river, and in this particular case, any water that falls upon the watershed of the Rockaway River, must of necessity get into the Boonton reservoir. There are certain things that limit the quantity of water that flows in a stream: for instance, evaporation; but as we understand, the indestructibility of matter, any water that falls upon that Rockaway River watershed, must go down to the Boonton reservoir, aside from things like evaporation, etc., the plants that take it up, but that is common to any watershed.

Mr. Brogan: I move that that be stricken out, and that the question be read again.

The Court: Let it stand.

Q. (Question read.) A. Probably not.

Q. Is that the best answer you can give? A. Yes, sir.

Q. Now, this diversion of this amount of water into the Morris Canal in the places that you have described, that action or diversion takes place under and by virtue of the so-called Scott agreement; is that right? A. I should say from hearing what I have heard today, that that was a legal matter, and not a matter for me to say; I don't know why it is done, perhaps, but I know that it is done.

*Redirect examination by Mr. Faulks:*

Q. Mr. Brogan, in one of his recent questions, has referred to some possible seepage on what he calls the far or off side of the canal bank in this section above the head of plane No. 7; is that bank

of the same height as the bank on the other side? A. It is, or higher.

Q. Where is it in relation to the hill on which the Town of Boonton is situated? A. It is on a sort of a shoulder of the hill.

Q. If there was any seepage there, where would that water go? A. As I have examined it, I conclude if there were any, which I say there is not, probably it would proceed underneath the canal, and go down into the valley of the river, which is very close at hand.

Q. Are you an engineer? A. Yes, sir.

Q. What kind of an engineer? A. I am a hydraulic engineer, particularly familiar with the the uses of water for power purposes.

Q. How long have you been engaged in the practice of that profession? A. Almost fifty years.

The Court: Will you admit his qualifications?

Mr. Brogan: I admit he is good.

Q. Now, with reference to these photographs, who, if you know, gave the directions as to the taking of these photographs and where they should be taken? A. I did. I picked out the places where they should be taken, perhaps the day before they were taken; and I pointed out to the photographer what I wanted him to show, and he varied the times of taking these pictures, because the light was better for him at one time than at another during the day; but I was not with him when he took the pictures.

Q. Who was the photographer? A. Mr. McIntosh, who testified yesterday.

Mr. Faulks: We rest.

Mr. Brogan: If the Court please, I have

listened in vain for any testimony as to the prescriptive rights alleged by the Water Company, and which is the sole ground upon which they filed the supplemental bill.

The Court: Are you going to rest, Mr. Brogan?

Mr. Brogan: No. I want to get this testimony written up; I want to examine it, and want the opportunity to put in such testimony as I desire at a date satisfactory to the Court and the engagements of my friend on the other side.

Mr. Faulks: Do you think that is a fair request?

The Court: I think it is fair to have the testimony written up, in view of the importance of the litigation. Mr. Brogan told me the other day that he would not be ready entirely to proceed today.

Mr. Faulks: It seems to me that this motion ought not to be granted. This case was set down several months ago for these days.

The Court: The Court will want the testimony written up to write its opinion.

Mr. Faulks: I don't think it is proper that they should come here without any witnesses, and then calmly say, "Now, we would like to have the testimony written out and see what proofs we can get together to meet it at some distant day.

The Court: The rules of this Court are so broad, as you know, that, supposing I should find a decree for you today and Mr. Brogan should come in subsequently and ask to have it opened up after reading the testimony, I doubt very seriously whether

I could deny his request, or whether the Court would sustain such a view.

Mr. Faulks: Why doesn't he proceed to put in his case?

Mr. Brogan: I have no witnesses. I believe that some of the allegations and some of the proofs are susceptible of rebuttal. I do not expect to have any witnesses, but I may require some testimony.

The Court: I will set it down peremptorily for conclusion on one day. I think I will set it down for an early day in September to finish it. How will that suit you? Are you going to be away in September?

Mr. Faulks: No, that suits me. We will do whatever your Honor thinks should be done.

The Court: I think the case is of such importance, that I think Mr. Brogan is entitled to give it due consideration.

Mr. Faulks: We are not desirous of in any way inconveniencing the Court.

The Court: Why isn't it a fair suggestion, that when you have got the testimony from Mr. Roberts, that you examine and notify the Court, and the Court will fix the earliest day possible; then the argument can come later.

(After further discussion.)

The Court: I will now fix a day in early September, which will be the last day I will give Mr. Brogan to appear. I will fix September 9th, at the Paterson Court House; that will give you a chance to get on at the October term.

Mr. Ashmead: I would like to mention

this: that when Mr. Brogan filed his amended answer and we had this motion pending before your Honor, we did not file a formal replication. I suppose we should file a formal replication.

The Court: Yes.

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Continuation of the taking of testimony in the above-entitled cause, at the Chancery Chambers, Paterson, New Jersey, on the ninth day of September, nineteen hundred and twenty-five, before Hon. VIVIAN M. LEWIS, Vice Chancellor.

APPEARANCES:

THOMAS J. BROGAN and EDWARD STOUT, Esqs., for the complainants.

HUMPHREYS and SUMNER, Esqs., J. EDWARD ASHMEAD, Esq., and FREDERICK J. FAULKS, Esq., for the defendants.

Mr. Faulks: We would like to offer just a little more evidence. It will be very brief. We ask leave to reopen for that purpose.

Mr. Brogan: Of course, we are to continue with the cross examination of Dr. Kummel under our arrangement.

The Court: Yes.

DR. HENRY B. KUMMEL resumes the witness-stand for further cross examination.

*Cross examination (continued) by Mr. Brogan:*

Q. Have you got the so-called Cooper-Lord agreement of 1888? A. I have.

Mr. Brogan: I would like to offer that in evidence, if the Court please.

Mr. Faulks: We object to the admission in evidence of this agreement, if your Honor

please, on the ground that it is irrelevant and immaterial and incompetent under any issue in this case. It appears on the face of the agreement itself that it never became effective.

The Court: Let it be marked for identification.

(Marked "Exhibit B. A. 1 for identification.")

Dr. Kummel: I would rather not leave that here.

Mr. Brogan: All right, Doctor.

Q. Doctor, you are familiar with the course of the Morris Canal and the course of the Rockaway River as opposite one to the other? A. I am, yes, sir.

Q. The canal and the river intercept or cross each other at various places? A. They do.

Q. Would you tell us whence the canal derives its waters for the westerly path, I will say, for its westerly half? A. From Lake Hopatcong and some tributaries of the Musconetcong River.

Q. Now, where does the Morris Canal first cross the Rockaway River, working westerly on towards the east? A. At Dover.

Q. Is that the Blackwell Street crossing at Dover? A. Sussex Street.

Q. Is there another crossing other than Dover? A. The canal across the Rockaway River between Rockaway and Powerville, but at that point it crossed on an aqueduct above the river, so that the waters of the river and the canal did not commingle at that point. The canal crossed the river at Powerville, entering the river on one side and leaving it on the other.

Q. Is there not also a crossing at Boonton Falls? A. No, sir, there is no crossing at that point, but by reason of a dam in the river, the river has been raised to a level, so that the water from the river can be taken into the canal.

Q. Have you seen the river at Boonton Falls recently? A. Not within three or four weeks.

Q. At that time was there any water running down the river over the Boonton Falls? A. I do not recall distinctly. If there was, it was very little.

Q. Where was the flow of the river going? A. Into the short section of the canal, immediately above the plane.

Q. How many gallons of water would you say were being by-passed into the canal at this point? A. I have absolutely no idea.

Q. It is, however, beyond dispute, that the whole dry flow of the river was going into the canal at this point; there is no question about that? A. Practically the whole dry flow was going into the canal at that time.

Q. What is the volume or the size of this section of the canal at this point which receives the whole dry weather flow of the Rockaway River? A. It is the normal section of the canal.

Q. You and I know that maybe the course does not— A. Approximately 40 to 45 feet in width at the water line when the canal is full, and approximately five feet deep when the canal is full at boating level.

Q. I am talking to you, Doctor, about at the section of the canal just at the point where the flow of the river is diverted into the canal; it is a good deal more than five feet today, isn't it? A. I don't think so.

Q. Maybe you and I are not talking about exactly the same point. A. I am speaking about the point between the head of the plane at Boonton, and the bridge at Boonton Falls.

Q. I am speaking of the point which is immediately east—immediately this side of the bridge; and you say that is five feet deep? A. I have never measured the water at that point, but the canal was constructed to be maintained a depth of five foot when it is full to boating level; I have no knowledge at the present time as to whether it is above or below boating level.

Q. Do you know how the canal got its right to take the water out of Lake Hopatcong, Doctor? A. I have no positive knowledge; I have drawn inferences as to how it obtained its right; the Canal Company purchased a large tract of land at the outlet to the original lake, including a site for a dam; and constructed a dam at that point, which raised the water of the original lake five feet or more, and in virtue of that, by raising that lake level, and its control of the dam, it proceeded to divert the water.

Q. How about the crossing in Dover, Doctor; just describe that to us, physically? A. The canal comes to the southerly side of the river, at which point there is a lock, by which the boats going east were dropped down to the level of the river. At that point there is a dam across the river which creates a small pond into which the boats were passed from this lock. The boats cross this small pond in the river and entered a lock on the northerly side of the river, and then into the canal.

Q. Do you know who owned the land at that point? A. That section of the canal was constructed through land belonging to McFarland.

Q. Who is he? A. He was a large landowner in that vicinity, and I believe at that time was a director of the Morris Canal and Banking Company.

Q. And the company, the Morris Canal Company, from what you read, had the privilege or permission to cross at that point?

Mr. Faulks: I object to that—

Mr. Brogan: The question is withdrawn.

Q. Under what arrangements, then, was the crossing made?

Mr. Faulks: I think it should appear whether or not that arrangement was made.

The Court: The objection will be overruled.

A. As far as I know, there was no arrangement made with McFarland.

Q. From your study and reading the minutes, etc., of the Morris Canal and Banking Company, of which you are a director, was part and parcel of the Morris Canal and Banking Company's organization?

Mr. Faulks: Objected to as calling for a conclusion.

The Court: The objection will be sustained.

Q. You have already testified, haven't you, that McFarland was a director in the Morris Canal and Banking Company? A. He was, so far as I know; his name appears among the directors at that time, in the list of directors.

Q. Now, Dr. Kummel, below the diversion place of Scott and his successor, Cooper-Lord, you have diverted water, haven't you, as late as July and August, 1924?

Mr. Faulks: I object to that question, if your Honor please; it is based upon the assumption that there is a diversion place. It already clearly appears in the testimony of this witness and other evidence in the case, that there is no diversion place; that the water that the doctor has referred to this morning, as had been taken into the bed of the canal across the plane at Boonton, returned to the river, and all enters the reservoir below Boonton. The uncontradicted evidence is to that effect.

The Court: The objection will be overruled. I think it is proper.

A. During July and a part of August, 1924, the section of the canal immediately below the plane at Boonton, to a point about halfway to Montville, carried some water, which was discharged at the gates which formerly existed, into the brook, flowing down through Montville; this water was derived in part from a brook, which entered the canal near the lock below the plane, and was, I believe, part sewage, which was discharged into the canal by the Town of Boonton; and there may have been a small amount of water from the river.

Q. Was there or was there not, Doctor? A. Personally I cannot say whether there was water or not from the river.

Q. Who would know whether there was or was not? A. Mr. Heaton, the supervisor in charge of that district, who resides at Boonton, and who had the regulating of the water there. My instructions to him at that time were, that some water should be kept in the canal level below the plane, to supply one foot of flow, which the owners of the mills

at Montville were entitled to receive; and I told him to regulate the water at that point accordingly. Just how that was regulated, I have no positive knowledge myself.

Q. Let me refresh your recollection: Isn't it a fact that the Attorney General told you for the present to keep the water running in that canal bed until you were differently advised by him; and didn't you, as a consequence of that advice, run water out of the Rockaway River— A. Repeat that question.

Q. Didn't the Attorney General advise you that, pending his opinion to the contrary, to run your stream of water through the Morris Canal on the way to Montville and below the Cooper-Lord lay-out, or property? A. He advised me not to drain that section of the canal so that we could not deliver the required amount of water to the mill owners at Montville.

Q. And did not whatever water was used in consequence thereof run along the course of the canal up to as late as August, 1924, and find its way to the Lower Rockaway below the Jersey City dam at Boonton? A. It did, yes, sir.

Q. Dr. Kummel, you are a member of the Board of Conservation and Development? A. I am director of the department but not a member of the Board.

Q. And as such you are a member of the organization that is running the affairs of the Morris Canal and Banking Company? A. Yes, sir.

Q. And whatever work you are doing, you are doing under and by virtue of Chapter 229 of the 1924 Laws, called the "Dismantling Act?" A. Yes, sir.

Q. Under this Dismantling Act, so-called, in

Section 1 your Board is authorized to proceed with dismantling certain of the canal properties and its feeders? A. Yes, sir.

Q. And you are not to discontinue, as I understand it, the feeders where it would create, in the judgment of the Board, an unsanitary condition? A. I do not think that that is quite a correct statement of the law, Mr. Brogan.

Q. Has the Board, as a matter of record, has the Board discontinued the use of feeders in all places along the canal? A. Yes, sir, it has.

Q. Are you familiar with the sanitary condition that exists adjacent to the Rockaway River at Boonton? A. In a general way, yes, sir.

Q. Is Boonton a sewered town? A. Not at present.

Q. Where does its sewage go to? A. A good deal of it discharges into the Morris Canal.

Q. Well, does it still discharge into the bed of the Morris Canal? A. So far as I know, it does, unless they have made changes very recently.

Q. Have you any applications made to you under and by virtue of this law, Chapter 229, 1924, to flush out the Morris Canal? A. I have not, no, sir.

Q. To your Board of Conservation and Development? A. No, sir.

Q. Have you, since August, 1924, flushed out the canal between Boonton and any point east? A. Not to my knowledge.

Q. Would you say that it had not been done? A. I feel pretty confident that it has not been done.

Q. Will you describe, Dr. Kummel, for us, how the canal bisects or intersects the Rockaway River at Powerville? A. The canal reaches the west-

erly side of the Rockaway River—enters the pond in the river, which has been caused by a dam at the mills at Powerville. The canal entered this pond through a lock on the westerly side; the boats crossed the pond and entered a lock on the easterly side, and then into the canal.

Q. Now, Dr. Kummel, I don't know whether or not I made myself plain a moment ago; it is your testimony that no request or application was made to the department of which you are a director, to flush the Morris Canal at Boonton, or east of Boonton? A. I am very certain that no application has been received by the Department of Conservation and Development, or by the Morris Canal and Banking Company, or by myself, to flush out the canal. Certainly, such flushing has not been directed to be done by either the Board of Conservation and Development or the directors of the Canal Company, or by myself.

*Redirect examination by Mr. Faulks*:

Q. In what watershed, Dr. Kummel, is Lake Hopatcong? A. Part of the Delaware watershed.

Q. You have testified this morning, in answer to some of Mr. Brogan's questions with regard to points or places where the Rockaway River and the Morris Canal formerly intersected; although you have for the most part testified in the present tense; for instance, you spoke of the locks at Powerville just a moment ago. Do they still exist? A. The lock on the western side of the river at Powerville is filled up completely and obliterated; the site of which is almost obliterated; at least, the marks of its former presence are entirely gone.

Q. What about the aqueduct that you mentioned, by which the canal in the past was carried over

the river; does the place still exist? A. No, sir, it has been destroyed.

Q. What is the existing situation at Dover where the basin formerly existed; where the river crossed the canal at that point? A. The pond in the river still exists, because the dam which caused it has not been removed.

Q. Is there any crossing of the canal and the river at that point now? A. I think there is as much as there ever has been.

Q. What filling, if any, has been done of the canal at that place? A. At a number of points in the canal, just east of the crossing, the bridges which formerly carried the streets over the canal, have been removed, and the canal filled; and the streets across the canal on solid fills.

Q. Now, the first matter as to which you were interrogated this morning, was in regard to the admission into what was formerly the bed of the canal of water from the Rockaway River at some point near Boonton; where is that point with regard to the top of the old plane No. 7; the point of intake from the river where you said that the water might or might not have a height of five feet? A. That is about one-eighth of a mile north of the head of the plane just where the West Main Street bridge crosses the Rockaway River at Boonton Falls.

Q. What was the number of that plane? A. Plane No. 7 east.

Q. On your direct examination, Doctor, you said, speaking of the admission of water to the old canal bed at that point, that "there was a flume there on the westerly bank of the canal, which leads down through the mills established in the gorge below the Boonton Falls, the water passes

through these mills, being utilized by them for water power, and emerges as a tailrace near the foot of the plane"; now, is this the same place that you have referred to in your cross examination this morning? A. Yes, sir, it is.

Q. That is the race that leads the water to the Cooper-Lord mills? A. It is, yes, sir.

Q. Now, where does the water go from that race? A. It enters the Rockaway River.

Q. You testified before on your direct examination, that at present all that water crossed into the Rockaway River, and that none of it returned into the canal; does that situation still obtain?

Mr. Brogan: I objection to the question; counsel has practically covered the same ground.

The Court: I will note your objection to it; let him answer the question.

Mr. Brogan: It calls for a conclusion on the part of the witness.

The Court: I will allow the question to stand.

A. It did, in the middle of the summer when I saw the place last; I have no doubt it so obtains at present.

Q. And at that time where did this water go? A. It went into the Rockaway River.

Q. And from there, where? A. In the Jersey City reservoir.

Q. You were also asked this morning with regard to some consultation with, or advice from, the Attorney General with regard to the shutting off of the water that was formerly used for the operation of some small water wheel; and I understood you to say that that consultation and ad-

vice—the action that followed it, was in August or July of 1924. Isn't it a fact, Doctor, that on April 9, 1924, that water was entirely shut off under advice received by you from the Attorney General, and that, thereafter, no water was allowed to go through; so that, from that date, Jersey City received the entire benefit of the full flow of the Rockaway River for its reservoir.

Mr. Brogan: I object to the question; it calls for a conclusion, to wit, this part where the witness is asked to state whether Jersey City received the full flow of the river at that point.

The Court: Objection overruled.

A. It is my recollection at the present time, although I have not refreshed my memory by reference to the correspondence, that we did not finally cut off the entire flow to the Montville Mills, until some time in August; if, on the other hand, my direct testimony last June is to the effect that it was cut off at an earlier date, I can only say now that I was mistaken a few moments ago in my response to Mr. Brogan's question; because, when I testified in June, I had just gone recently—immediately before that time, I had gone over our records, and had consulted the correspondence and orders I had written.

Q. Let me see if I cannot refresh your recollection, Doctor; don't you remember that on or about March 17, 1924, you caused a notice to be sent to each of any possible water users in connection with the canal, with the exception of any such users under the Cook agreement, that the water would be drained from the canal within thirty days thereafter?

Mr. Brogan: Might I have that question read? I could not follow it.

Q. (Question read.) A. I sent notices to all the water users, but in some cases the time was longer than thirty days; it was a written notice.

Mr. Faulks: They are all in evidence. The Doctor testified last June that that water had been shut off; I think he testified that that had been done under the advice of the Attorney General. There was also put in evidence an agreement that had subsequently been entered into between the Morris Canal and Banking Company and Cook's successors in interest, the Capsticks. Now, a question seems to have arisen between us as to when this actual disconnection was made, this actual severance of that supply; and Mr. Brogan has, on his cross examination, indicated the truth in regard to that; the Doctor has placed the time at some time in July or August, 1924. Now, we are very clear that it was earlier than that. That is our information from the witness himself.

*By the Court*:

Q. Have you any record with you which would enlighten us on the question, by referring to your papers; can you give us anything that would fix a date? A. I can only say that I wish to stand on my direct testimony as to the date, instead of the latter; because my memory was clear on that point.

Mr. Brogan: No one has said that the Doctor on his direct testimony testified that there was an actual shutting off of this

water in April. Dr. Kummel has told me repeatedly that this water ran through there in July and August, 1924. Now, the Doctor says, "What I testified to in June is right"; but he did not testify to any such thing in June. His testimony in June, if I remember rightly, exactly coincides with his cross examination this morning.

The Court: The Court will have to consider the testimony as a whole.

Mr. Brogan: We both want the truth.

Mr. Faulks: Certainly. I would like to see if I can refresh the Doctor's recollection.

*By Mr. Faulks:*

Q. You spoke this morning in reference to this matter, didn't you, to the effect that you had written a letter, or caused a letter to be written, to a Mr. Heaton, not to shut off water at the point in question, until you further advised him as to whether to shut it off or not?

Mr. Brogan: I object to that question in that form.

Mr. Faulks: I have to lay some basis.

The Court: The objection will be sustained. Strike the question out.

Q. Do you recollect testifying this morning about having written a letter to Mr. Heaton? A. I think I said, didn't I, that Mr. Heaton was the man who would know, and I think I said that I had issued instructions to keep water flowing; it was my custom to issue instructions through Mr. Metz, the superintendent of the canal.

Q. Do you remember how those instructions were issued; whether they were in the form of

letters or orally? A. They were issued in the form of a letter.

Q. Do you not recollect that that letter was written on April 7th, 1924?

Mr. Brogan: I object to that; that is getting in by indirection the contents of that letter.

The Court: Objection sustained.

Q. Have you any recollection of the date on which that letter was written? A. There were several.

*By the Court:*

Q. Haven't you a letter-book, Doctor? A. No, sir, we have a file.

*By Mr. Faulks:*

Q. Have you that file with you? A. No, sir.

The Court: Now, in the absence of the files, will Mr. Brogan agree to let the Doctor testify about that letter?

Mr. Brogan: No, sir, I will not.

The Court: It is not the best evidence; the objection will be sustained.

Q. Do you remember, Doctor, whether two or three days after the issuing of the instructions to which you have just referred, you did or did not receive any advice with regard to the shutting off of the water at that point, from the Attorney General? A. I issued instructions in April, 1924, covering the general matter of draining the canal. I do not recall now, with any degree of definiteness, the dates on which I had conferences with the Attorney General. I am quite sure there were several

letters written regarding the particular section of the canal under discussion at the present time—the Montville water.

Q. In the absence of your file, you cannot testify any more definitely than you have heretofore done with regard to the dates under which those instructions were issued, or the dates upon which the water was shut off at that point? A. I cannot.

*Recross examination by Mr. Brogan:*

Q. Tell us how much water was diverted from Hopatcong to the Rockaway River?

Mr. Faulks: Objected to.

The Court: The objection will be overruled.

A. I do not know in terms of gallons or cubic feet per second; I can answer the question in other ways.

Q. Please answer the question the best way you know how. A. Evidently water was taken from Lake Hopatcong eastward, to supply the canal between Lake Hopatcong and Dover, where the canal joined the Rockaway River; the section of the canal between Lake Hopatcong and Dover could get its water from no other source.

Q. Is not that a distance of eleven or twelve miles? A. Approximately, somewhere in that neighborhod.

Q. And is there any water today being diverted from the Hopatcong Lake? A. No.

Q. How is it obviated? A. There is no water diverted eastward from Lake Hopatcong by the new dam at Lake Hopatcong, and also by the fact that the canal has been cut squarely in two about a mile from Lake Hopatcong by the new highway route;

the highway route cuts right across the bed; and the level of the road is fifteen feet below the level of the old canal.

Q. When was the end of the taking of water out of Hopatcong and into the canal?

Mr. Faulks: Objected to as immaterial.

The Court: The objection will be overruled.

A. In March or April, 1924.

Q. How much water came out of Greenwood Lake into the canal, if any, prior to 1924.

The Court: You want to use him as your witness?

Mr. Brogan: Yes, sir.

The Court: You are bound by the answers.

Mr. Faulks: We object; it is immaterial.

A. During the operation of the canal the water was drawn from Greenwood Lake by way of the Pompton feeder, to supply the entire section of the canal from a point about two miles west of Mountain View, to Newark, or to the Passaic River.

Q. And that is a distance of how much, Doctor, roughly? A. Well, approximately 25 miles all together.

Q. Is that water still going out of Greenwood Lake into the canal property? A. No, sir.

Q. How is that prevented? A. By the filling of the intake lake at the head of Pompton feeder and by three or four solid fillings across the Pompton feeder where bridges formerly existed.

Q. So that up to at least April of 1924, waters were being diverted from Lake Hopatcong and from Greenwood Lake into the Rockaway River?

*Dr. Henry B. Kummel, redirect—recross.*

Mr. Faulks: Objected to as immaterial.

The Court: The objection will be overruled.

A. There was no water ever came from Greenwood Lake.

Q. I will re-ask the question: Up to 1924, in the spring of 1924, waters were diverted from Lake Hopatcong and found their way into the Rockaway River? A. That is true.

*Redirect examination by Mr. Faulks:*

Q. Where did that diversion take place, above or below Dover? A. The diversion took place by Lake Hopatcong, down the Hopatcong feeder, and eastward into the canal.

Q. Where did those waters reach the canal? A. They entered the canal above Dover.

Q. In what watershed is Greenwood Lake?

Mr. Brogan: I object; that is immaterial.

A. It is in the Wanaque watershed.

Q. Does any water from Greenwood Lake flow into the Rockaway River watershed; does it? A. It does not.

*Recross examination by Mr. Brogan:*

Q. Did your board grant the North Jersey District Board in their development of the Wanaque a right to take water out of the Greenwood Lake supply?

Mr. Faulks: Objected to as immaterial; I don't think it has anything to do with this case.

The Court: I cannot see how it enters the case; what is the object? I am inclined to sustain the objection, Mr. Brogan.

CORNELIUS C. VERMEULE, being duly sworn, testified as follows:

*Direct examination by Mr. Faulks:*

Q. Where do you live? A. East Orange.

Q. What is your business or profession? A. Civil engineer.

Q. In the practice of that profession, have you devoted your time largely to water matters? A. Quite largely.

Q. And whereabouts—within or without the State of New Jersey? A. Both—very largely within the State of New Jersey, but generally through New England and the Middle States and the West Indies.

Q. Were you at one time connected with the State Geological Department of New Jersey? A. I was, for a long period.

Q. Have you any connection at the present time with the Department of State that has charge of the Morris Canal property? A. I am the consulting and directing engineer.

Q. How long have you held that position? A. My appointment was as of April 1st, 1924.

Q. And from whom did you receive that appointment? A. From the board, the Board of Directors, of the Morris Canal and Banking Company.

Q. What have been your duties as such officer? A. Generally to advise the board as to all engineering questions and as to physical conditions on the canal, and to direct the work of dismantling and reconstruction which has been going on since April of last year, on the canal.

Q. How long have you been familiar with the Morris Canal, Mr. Vermeule? A. I made surveys

on it in 1882; I have known it very well since that date; from 1890 to 1895 I made a very thorough examination of it for the State, including many measurements and surveys. Between 1895 and 1918 I came in contact with it in connection with my work for municipalities, water supply work; and made some special investigations in connection with it; and from 1918 to 1923, I made a very thorough examination of it and survey—measurement of its waters—for the Lehigh Valley Company; and in the year 1923, I became a member of the Governor's Committee, and we again examined the canal for the State, to advise the State what to do; that was after they took it in their hands; and that work lasted practically up to the time that I was appointed directing and consulting engineer in April, 1924.

Q. Is the familiarity that you have thus acquired with regard to the Morris Canal as great in regard to the portion of it that formerly existed between Dover and Montville, as it is to the rest of the canal? A. Yes, sir.

Q. After you became consulting and directing engineer, did you have anything to do with the work of dismantling and abandonment of a portion of the canal which I have just referred to, namely, that part between Dover on the west and Montville on the east? A. I did; I advised and directed that work throughout during the time it was going on.

Q. Will you tell us how much of that work was undertaken, and to what extent it had progressed prior to June 6, 1924? Just tell us in your own way how the work was undertaken and what was done, and of the result so far as the dismantling and abandonment of the canal is concerned, beginning,

if you will, at Dover, and working down towards Montville. A. The work was begun by draining off the water where the canal was still full; there were many parts of the canal that had not been refilled at any time—in 1924. But in this particular section the work of draining off was begun early in April, and by May 2nd the canal there was empty. On April 21st I was notified that Mr. Metz had had boats placed at his disposal for the sanitary drainage work which followed the emptying of the canal waters. The first step prior to that, had been to open up all available gates, take them off, and let the canal drain off, so far as we could drain it off. This immediately produced unsanitary conditions along the canal, and we then proceeded to cut the culverts, and in some cases cut through the banks and made all openings that we possibly could—cut through the floors of the aqueducts over the rivers; the aqueduct at Dover practically was cut through, and the aqueduct over the Rockaway at Denville; and the bottom of the canal was ditched. The section of the canal just at the head of the plane at Boonton—between the head of the plane and the West Main Street bridge, which is just above Boonton Falls, could not be drained, because it was used as a raceway by the water power at Boonton, which is known ordinarily as the Cooper-Lord property, now belonging to the New Jersey Light and Power Company. The section of the canal from the foot of the plane eastward to the Montville gates, was drained on my inspection on May 2nd, except for the water that was allowed to run through it down to the gates on Montville Brook, which water has been referred to in my hearing today as the water to which the Capstick mill was entitled. This part

of the canal at the time of my inspection was probably carrying from one and a half million to two and a half million gallons of water per day, and we could not drain it. East of Montville the canal was drained; the gates were taken out just a mile east of Montville village, where the Montville Brook crossed the canal, and opened wide open. A cut had been made about two miles east of there into a culvert going under the canal; and at various points from that down to Mountain View cuts had been made; and at the Mountain View aqueduct the floor had been opened up to give better drainage of the canal.

Q. You are now below or east of Montville? A. That is east of Montville—

Q. Now, coming down from Dover into Montville, at that time, which you place as May 2, 1924, what was the greatest depth of water in the old bed of the canal at any point between Dover and Powerville? I would like to have you describe the physical condition of the bed of the canal and the amount of water, the depth of the water that there was in it at any point and for any extent at that time. A. The canal was always built level and that made it difficult to drain the last water from the bottom of the canal, unless we could have very frequent openings; in fact, after that we still had to ditch it; and there was a case of that kind, a particularly difficult case, west of Peer's lock in Denville, where the water did not drain off readily; and there might possibly have been a foot of water in the bottom of the canal; but at most points it was only a matter of a few inches. While the bottom of the canal was generally level—it was intended to be constructed level—in dredging the canal, while it was being operated, there were

places where the dredging went too deep and it made pools which would not drain out. There was some water standing in such holes, but the water was in all cases, I should say, fully four feet below what we know as the operating level of the canal, and the normal depth of the canal being five feet.

Q. Coming up from Denville on down to Montville, to what extent did that same condition of shallow and undrained water continue? A. It was generally similar to that. There were not a great many openings that could be made in the section from the Denville aqueduct down to Powerville, in doing the temporary sanitary work. Those openings had to be left until we did the permanent work of dismantling and drainage, which required more funds than we had at our disposal until after the beginning of the year.

Q. Was there any navigation during that period on the portion of the canal between Dover and Montville; was that portion of the canal then capable of conducting navigation? A. No, sir.

Mr. Faulks: You may cross-examine.

Mr. Brogan: I have subpoenaed this witness, so I will examine him as my own witness.

*Direct examination by Mr. Brogan:*

Q. The examination and inspection that you made was in May, 1924? A. May 2nd.

Q. Do you know where Miller's lock is, or is that called 7-East? A. Where is that lock?

Q. It is the first lock below the plane in Boonton. A. Yes, sir, I know that lock.

Q. Is that 7-East? A. No, sir, that plane is 7-East; the lock has a higher number.

Q. Are you familiar with the brook or stream on the northerly side of the canal at or near Miller's lock? A. Yes, sir.

Q. Will you, Mr. Vermeule, describe the course of that stream for us? A. The course of the stream? Do you mean as the stream originally was or as it is now?

Q. I think that both would help us. A. The stream comes down out of Boonton from the north, from the side hill, and it strikes the canal just at that lock, east of Boonton, and comes in the canal just below the lock, as it is at present. As the stream was, from physical examination of the situation, it originally went on across the canal and down into the Rockaway River.

Q. Above the dam at Boonton? A. Yes, sir.

Q. And at the present time it empties, as I understand it, into the Rockaway River below the dam at Boonton; at the present time it follows the canal down east and goes into Montville Brook.

Q. And Montville Brook is below the dam at Boonton? A. Yes, sir.

Q. In your opinion, Mr. Vermeule, before the cutting through of the canal, was this brook a part of the Rockaway River watershed, above the dam? A. Yes, sir, I base that on the topography and an examination of the conditions there. The course of the stream is quite apparent from examination —the original course.

Q. Mr. Vermeule, will you roughly describe the course of the canal and the river, and where they cross? A. At which crossing?

Q. Well, between Hopatcong and Montville? A. The first crossing of the Rockaway River is at Dover, and there the canal has a lock, and boats

were originally locked down into a pond on the Rockaway River. They crossed the pond and were locked into the canal, through the guard lock. That was the original condition when the canal was in operation. Then the next crossing of the river was at Powerville. At that point the records and original surveys of the canal show that there was a forge dam across the river, and that the canal again locked its boats down into that forge pond; and on the opposite side they were locked through the guard lock into the canal. At both of these points there was a bridge for the mules to cross.

Q. There was a commingling of waters in both places? A. Yes, sir, the waters were commingled.

Q. Where is the third plane, Mr. Vermeule? A. There is no other crossing of the river; there is no commingling of the waters at the head of Boonton Falls; a dam was built across the river at the head of the falls, and the water was taken into the canal at that point from the river for the use of the water power at Boonton to which I have referred; the canal from that point on down—the head of the plane was used as a raceway; and the water was taken out at the head of the plane for power.

Q. Would you say that this raceway, or Cooper-Lord use of the water of the Rockaway River, took the whole flow of the river six months of the year?

Mr. Faulks: I object to that on the ground that the evidence shows that that Boonton use did not take in the water—

The Court: I will let it stand.

Q. I am asking you to describe the physical condition.

The Court: The objection is overruled.

A. During several months of the year the entire flow of the river at the dam, at the head of the falls, was taken into the canal to be used as I have described.

Q. That is what is going on today at this very hour, isn't it? A. It is; I made an inspection last Wednesday, and there was just that condition at that time; the water was below the crest of the dam at the head of the falls, and all the water of the river was going through in that manner, through the canal.

Q. And that condition which you have described, where the water is by—passed into the canal for the use of power purposes—is a condition that is going to obtain, so far as you know, isn't it?

Mr. Faulks: Objected to.

Mr. Brogan: The question is withdrawn.

*By the Court*:

Q. Has your board taken up this subject? A. Yes, sir.

Q. Is there any resolution or otherwise? A. No, sir.

*By Mr. Brogan*:

Q. Is it a fact that you have recommended to the board, and that they have concurred in that recommendation, that this Cooper-Lord raceway through the Morris Canal be left as it is?

Mr. Faulks: I object to that; the situation at that point is very clear on the record. There was a Scot agreement to which the owners of the Cooper-Lord State property succeeded. Now that agreement is in evidence.

The Court: The objection will be overruled.

A. I have recommended that that part of the canal cannot be changed in that respect; I have so advised.

Q. The canal diverted waters from Lake Hopatcong up to last year? A. Yes, sir, that is true.

Q. And the waters thus diverted came into the Rockaway River above the dam at Boonton?

Mr. Faulks: Objected to.

The Court: The objection will be overruled.

A. Some of that water in question came into the Rockaway River.

Q. Above the dam at Boonton? A. Yes, sir.

Q. Do you know of any right that now exists to divert water above the dam on the Rockaway River?

Mr. Faulks: Objected to.

The Court: What is the object of that question; what is the materiality of it?

Mr. Brogan: I think that is the corpus of the case.

Mr. Faulks: It is not the proper way to develop that subject at all, if it is to be gone into. There is nothing in my direct examination that would warrant it.

The Court: He has put him on as his own witness, and is examining him as such. Answer "Yes" or "No."

A. I remember some rights.

Q. Now, I direct your attention to the action of the State Board of Conservation and Development in referring to Mr. McCarter the question

as to whether or not they have the right to dispose of their right to divert water in the Rockaway watershed, and ask you if you are familiar with the Board's action in that respect?

Mr. Faulks: Objected to.

*By the Court*:

Q. Are you familiar with it? A. I know what has been done in that respect.

*By Mr. Brogan*:

Q. What has been done?

The Court: There must be documentary proof in this matter; I shall sustain the objection.

Q. Could not the State of New Jersey, Doctor, in your opinion, at very small expense, rehabilitate the canal, if so desired?

Mr. Faulks: Objected to as irrelevant and incompetent.

The Court: The objection will be overruled.

A. It is physically possible; there would be some expense.

Q. $200,000, roughly? A. At least as much as we have spent; we have spent six or seven hundred thousand.

Q. You are a sanitary engineer as well? A. Yes, sir; that is a part of my practice.

Q. Do you know anything about that situation that exists below the Cooper-Lord property, and where Dr. Kummel has testified the water was turned into the bed of the stream to flush it as

late as July and August of last year? A. I know the situation there.

Q. Do you know whether or not the water was turned out to flush out the bed of that canal?

Mr. Faulks: Objected to as immaterial.
The Court: Objection overruled.

A. I cannot say positively; I was not there at any time when it was being done.

Q. Mr. Vermeule, where the water is diverted for the purposes of the Cooper-Lord rights, what is the depth of the canal at that particular point where the waters of the Rockaway enter just above the falls at Boonton? A. There were some changes made there and I have not inspected it since then. The normal depth of the canal was five feet. There was a gate into the river and a waste gate from the canal below the dam to waste the waters.

Q. How long would you say it was before the water which came in on that gate there right at the head of the falls—how long a time elapsed between the time it enters at that point and leaves at the end of the tailrace?

Mr. Faulks: Objected to as immaterial.

A. I should say normally it would take something like 20 minutes.

Q. There are parts of this section of the canal and lock that are somewhat stagnant; is not that so? A. There are points where there is a little stagnant water; we have complaints from mosquito commissions and local authorities, and we ourselves are policing it all the time.

Q. Does not that, in your opinion, have a deleterious effect upon the water as to its potability?

Mr. Faulks: Objected to as incompetent, irrelevant and immaterial.

The Court: You may answer to save time.

A. The water which comes from such stagnant pools is not in as good condition as it was before.

*Cross examination by Mr. Faulks:*

Q. With reference to this brook which you have spoken of as now reaching the Rockaway River below the dam of the Jersey City reservoir, what is the character or quality of the water in that brook? A. I never have made a special examination of it. At the times that I have seen it, it appeared to be reasonably clear; but, of course, knowing where it comes from, I should not consider it to be entirely desirable for drinking purposes.

Q. Why is it permitted to flow into the canal below the dam of the reservoir? A. Because we have not dared to make the cut at the point where that brook should go out. The law directs us to make those cuts and restore the natural drainage, but this is a case in which, if we really made the cut, it would send the sewage of Boonton down into the reservoir of Jersey City.

Mr. Faulks: We rest.

---

CLYDE POTTS, being duly sworn, testified as follows:

*Direct examination by Mr. Stout:*

Q. Where do you live? A. Morristown, New Jersey.

Q. What is your calling or profession? A. I am a consulting sanitary engineer.

Q. Are you in the employ of any municipalities? A. Yes, sir, quite a number, among them, Jersey City.

Q. Are you familiar with the physical conditions of the Morris Canal? A. From Wharton easterly to Montville, yes.

Q. That comprises the stretch between Dover and Montville? A. Yes, sir.

Q. And how long have you been familiar with the physical condition of the Morris Canal? A. Seventeen years.

Q. Are you also familiar with the Rockaway River from its source to the Boonton dam of the Jersey City Water Supply? A. Yes, sir.

Q. How long have you been familiar with that stream? A. For about seventeen years.

Q. And by being familiar with the Rockaway River, are you also familiar with the tributaries of the Rockaway River? A. Yes, sir.

Q. And you know the stream that is below the lock in Boonton, and which is known as Miller's lock? A. Yes, sir, I am familiar with the lock and the stream.

Q. What is the name of that stream? A. I don't believe it has a name; it is a little stream that makes up through Boonton; it is covered in places by pipes in Boonton; and I have never heard a name given to it.

Q. And what is the present outlet of that stream? A. It flows into the Morris Canal just below the lock in Boonton.

Q. And after it reaches the bed of the Morris Canal what is its course then? A. It flows easterly along the bed of the Morris Canal to Vreeland

Avenue in Boonton, and escapes through a cut in the Morris Canal bank there, and flows northerly across the Boulevard into a small stream which flows down across what was formerly John Capstick's property, and thence through a stream adjoining a stream there which rose above his property, sometimes called Montville Creek, and flows into the Morris Canal again at Montville, and flows a short distance east of the Morris Canal and then through a cut which has recently been made in the banks of the Morris Canal, out into a stream which is known as Crooked Brook, and then flows through that and joins the Rockaway River about one mile below the Jersey City reservoir.

Q. And is the canal filled at any point east of Boonton? A. No, sir, not that I know of.

Q. Have the bridges been taken down and filled in? A. Yes, sir, bridges have been taken down and the canal filled in to carry the roads across the canal—a number of places.

Q. East of Boonton? A. Yes, sir.

Q. And are there not pipes through those filled-in places to take care of the water? A. At all of them that I know anything about, east of Boonton, there are pipes in the fills to carry the water along the bed of the canal.

Q. And what is the area drained by this brook which enters the canal east of Miller's lock? A. About 125 acres in that brook.

Q. And the water which falls on that 125 acres is diverted through the canal in the manner you have described and enters the Rockaway River about a mile below the Boonton dam; is that right?

Mr. Faulks: Objected to as being unduly leading.

Q. Where does the rain water which falls on this 125 acres that you have spoken of, reach the Rockaway River, if it does? A. Below the Boonton reservoir.

Q. So there is an area there of 125 acres where the rain water is diverted into the Rockaway River below the Boonton dam? A. In that one creek, yes, sir.

Q. What is the condition of the Morris Canal east of the so-called Scott millrace in Boonton? A. The plane, which is the first plot east of the raceway, is substantially in the same condition that it was when boats were carried; and when you leave the plane you encounter a stretch of the canal that has been drained, but which receives part of the rain water from Boonton; and with it quite a good deal of sewage from a sewer that is known as the Brook Street sewer; that water comes down the plane in a concrete channel that was built fifteen or twenty years ago and is still there.

Q. The canal immediately east of the Scott raceway is in a filthy condition, isn't it? A. And that sewage coming down the plane strikes this low level below the plane and stagnates there and is not flushed out except when there was rain which washed it out through the bed of the canal and through these pipes under the bridges and thence joins this other brook that I spoke of a while ago as originating in Boonton, and having a watershed of 26 acres.

Q. Do you know whether, since June, 1925, any of the waters which flow through the Scott millrace have been diverted into the canal bed just east of it, to flush out this fill? A. I know that waters have been diverted east from the Scott millrace

after that date, but I don't know the purpose for which they were diverted.

Q. What is the condition of the water as to flow between the upper end of the Scott millrace and the lower end of the Scott millrace? A. Why, the water enters the principal end of the millrace at the West Main Street bridge in Boonton in the same condition that it lies in the river, and flows along this raceway, which is a part of the old Morris Canal, and in that passage it is not possible to detect with the eye any change in the water; but it is possible that during rains that water gets the wash from the waste in the streets of Boonton, and from some of the sewers that come down there and discharge along the bank of the old Morris Canal.

Q. Isn't it a fact that the water in that millrace at certain points is practically stagnant?

Mr. Faulks: Objected to as leading, and as having nothing to do with any issue involved in this case.

The Court: I shall sustain the objection on the ground that it is leading.

Q. What is the speed of the flow in the Scott millrace? A. Mr. Vermeule said about 20 minutes, and I think that is about right.

Q. Is that always so; does it always flow at that rate of speed? A. It would not vary much one way or the other.

Q. Are there any stagnant pools in the millrace?

Mr. Faulks: Objected to as leading, and also on the other ground.

The Court: The objection will be sustained.

Q. Is there anything further about the physical

condition of the waters in the millrace, the Scott millrace? A. The only thing else I know about it is that there is a source of potential danger there always, because of the fact that sewers from Boonton discharge on the bank of the canal, and only because Jersey City maintains a ditch along there, are those waters kept from mingling with the waters in the millrace; and unless that ditch is carefully maintained, the rest of the canal is liable to get all that polluting matter from Boonton.

Q. And what are the points, if any, or places, on the canal, between Dover and Montville where there is opportunity to divert water from the Rockaway River?

Mr. Faulks: Objected to as immaterial and incompetent.

A. It is possible to divert water at the West Main Street bridge from the old Cooper-Lord into the canal; and it is possible to divert water from the Rockaway River into the canal at Powerville. I am answering the question on the assumption that you mean to divert waters out of the watershed—those two places.

Q. Do you know, Mr. Potts, whether the flow of the Rockaway River above the Boonton dam has been diminished since the State has undertaken to dismantle the Morris Canal?

Mr. Faulks: Objected to as immaterial.
The Court: Objection overruled.

A. Yes, sir.

Q. In what way has the flow of the Rockaway River been diminished? A. By the diversion of the waters of Lake Hopatcong westerly to the Dela-

ware River, the waters which formerly came into the Rockaway watershed.

No Cross Examination.

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CORNELIUS C. VERMEULE, recalled.

*Direct examination by Mr. Brogan:*

Q. Mr. Vermeule, is it not the fact that Dover receives its water supply from the Rockaway watershed on the southerly side of Dover? A. Yes, sir, they received a considerable part of their supply from a branch of the Rockaway.

No Cross Examination.

Mr. Brogan: I desire to call to the Court's attention, and have it noted on the record, a case which was passed on I think in the Supreme Court, and certainly by the Court of Errors and Appeals, namely, the application of the Town of Wharton for leave to divert water out of the Rockaway River, and the title of the case is Wharton *v.* Jersey City. I think we certioraried the decision of the State Board.

I offer the Cooper-Lord agreement of 1888 which was marked for identification. The agreement itself is very short. I think it is material. From it I hope to make an argument in my written memorandum.

Mr. Faulks: I object to its reception in evidence because it has not any bearing on any issue involved in this case. It was an agreement that was conditional on the passage of a certain act of the Legislature.

The Court: You object to it as incompetent, irrelevant and immaterial.

Mr. Stout: It showed the intent of the parties.

Mr. Brogan: I urge it for two reasons: I want to get it in evidence.

The Court: All right.

Mr. Brogan: Send a copy of it to Mr. Roberts, the court stenographer, Mr. Kummel.

Both Sides Rest.

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The Court: If Mr. Brogan will see me on Monday next at Jersey City, I will fix a day for oral argument.

Mr. Faulks: We shall be ready to argue it at any time, if your Honor will make a mental note that I cannot be present on the 21st or 22nd.

**Exhibit A-1.**

# New Jersey Court of Errors and Appeals

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
*Complainant-Respondent.*

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
*Defendants-Appellants.*

## CASE

HUMPHREYS & SUMNER,
Solicitors for and of Counsel with
Defendants-Appellants.

JOHN MILTON,
Solicitor for and of Counsel with
Complainant-Respondent.

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## Exhibits.


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| Exhibit A—Contract dated Nov. 21, 1898, between the Morris Canal & | | |

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| Banking Co. and the Lehigh Valley R. R. Co., party of the first part, and Patrick H. Flynn, party of the second part | 47 | 71 | |
| Exhibit B—Contract dated Feb. , 1901, between the Morris Canal & Banking Co. and the Lehigh Valley R. R. Co., party of the first part, and Patrick H. Flynn, party of the second part | 50 | 77 | 10 |
| Exhibit C—Letter from P. H. Flynn to the Mayor and Aldermen of Jersey City, Board of Street and Water Commissioners, Board of Finance, dated March 30, 1901, joined in by Jersey City Water Supply Co. | 50 | 87 | 20 |
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| Specifications for a new water supply for Jersey City approved July 9, 1898—Abridgment | 54 | 106 | |
| Unmarked Exhibit (Schedule B)—Contract dated July 8, 1901, betwen the Mayor and Aldermen of Jersey City, party of the first part, and Patrick H. Flynn and the Jersey City Water Supply Co., party of the second part | 53 | 127 | 40 |
| Exhibit X (Schedule C)—Contract dated March 31, 1902, between the Mayor and Aldermen of Jersey City, party of the first part, and | | | |

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| Patrick H. Flynn and the Jersey City Water Supply Co., party of the second part ..... | 53 | 134 |
| Exhibit Y (Schedule D)—Contract dated March 31, 1902, between the East Jersey Water Co., party of the first part, the N. J. General Security Co., party of the second part, Patrick H. Flynn and the Jersey City Water Supply Co., party of the third part, and the Mayor and Aldermen of Jersey City, party of the fourth part ..... | 53 | 138 |
| Unmarked Exhibit—Notice from Morris Canal & Banking Co., by Collins & Corbin, Attorneys, to the Mayor and Aldermen of Jersey City, the Board of Finance and the Board of Street and Water Commissioners, dated April 24, 1901 .. | 55 | 145 |
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| Exhibits marked together D-4½: | | |
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| 2—Check from Jersey City Water Supply Co. payable to the order of the Lehigh Valley R. R. Co., for $25,000, dated Nov. 15, 1910 | 59 | 156 |
| 3—Letter from J. F. Schapperkotter, General Solicitor Lehigh Valley R. R. Co., to E. LeB. Gardner, President Jersey City Water Supply Co., dated Nov. 16, 1910 | 59 | 157 |
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| Unmarked Exhibit—Original Decree of Affirmance dated July 11, 1911, entered by N. J. Court of Errors and Appeals, ordering, adjudging and decreeing that the decree of the Chancellor and the order of Dec. 3, 1910, should be in all things affirmed ..... | 63 | 199 |
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**Notice of Appeal.**

(Filed July 29, 1921.)

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY and others,
Defendants.

On Supplemental Bill.

The defendant, Jersey City Water Supply Company, hereby appeals from the decree of the Chancellor made in the above-entitled cause under date of July 26th, 1921, dismissing the supplemental bill of said defendant, and from the whole and every part of said decree, including the allowance therein of a counsel fee to the complainant, the Mayor and Aldermen of Jersey City, of Three Thousand Dollars ($3,000), to be paid by the defendant, Jersey City Water Supply Company, to the Court of Errors and Appeals in the last resort in all causes.

HUMPHREYS & SUMNER,
Solicitors for Defendant,
Jersey City Water Supply Co.

Dated, July 28, 1921.

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

WILLIAM A. SUMNER,
Of Counsel with the said Defendant.

2

**Petition of Appeal.**

(Filed July 29, 1921.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant-Respondent,

and

JERSEY CITY WATER SUPPLY COMPANY (*et al.*),
Defendant-Appellant.

On Appeal from Chancery.

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

The petition of Jersey City Water Supply Company, one of the above-named defendants, respectfully shows:

That your petitioner finds itself aggrieved by a certain decree made in the above-entitled cause under date of July 26th, 1921, wherein and whereby the Chancellor does adjudge that your petitioner is not entitled to the relief sought and prayed for by it in its supplemental bill filed by it in the above cause, and that said supplemental bill be dismissed, and that there be allowed to complainant, the Mayor and Aldermen of Jersey City, a counsel fee of Three Thousand Dollars ($3,000), to be paid by the defendant, Jersey City Water Supply Company, and by each and every part of said decree, and your petitioner humbly appeals from each and every part of said decree, upon the ground that the same

is erroneous and contrary to the evidence in the cause, inequitable and contrary to law.

Your petitioner therefore prays that the said decree of the Chancellor may be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this court shall seem meet.

HUMPHREYS & SUMNER,
Solicitors and of Counsel with
the Defendant-Appellant.

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**Answer.**

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant-Respondent,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendant-Appellant.

On Appeal from Chancery.

The answer of the above-named Complainant-Respondent to the petition of appeal of the above-named Defendant-Appellant:

1. The Complainant-Respondent in acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits that a decree was made in the above-entitled cause under date of July 26th, 1921, by the Chancellor of the State of New Jersey, in the cause for that purpose mentioned in the said petition, as is herein stated; but as to the substance and form thereof this Complainant-Respondent prays to refer thereto when the same shall be produced. And Complainant-Respondent is advised and believes that the said decree is agreeable to equity, and it prays that the same may be affirmed, with costs to be adjudged to this Complainant-Respondent.

JOHN MILTON,
Solicitor for and of Counsel with
Complainant-Respondent.

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**Opinion.**

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants.

On pleadings and proofs.

Messrs. Humphreys and Sumner, for the defendant, Jersey City Water Supply Company.

Mr. John Bentley and Mr. John Milton, for the complainant.

LEWIS, *V. C.:*

This matter is before the Court on a supplemental bill, filed by the defendant, Jersey City Water Supply Company, against the complainant, The Mayor and Aldermen of Jersey City; and also against the Fidelity and Deposit Company of Maryland as a party defendant. Its object is to accomplish the release and payment to the Water Supply Company of a fund of $500,000.00, with certain deductions therefrom, retained and withheld by the City of Jersey City from the sum due the Water Supply Company under a contract to furnish the municipality with a water supply system, pursuant to the decree of this Court, entered in the original cause June 4, 1908, and affirmed, with slight modifications, by the Court of Errors and Appeals, by its decree dated March 18, 1910.

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Opinion of Lewis, V. C.

The controversy arises out of a provision of the contract between the city and the Water Supply Company, dated July 8, 1901, which reads as follows:

"Fourth: Whenever the contractors shall deliver to Jersey City a valid release from the Morris Canal & Banking Company, and its lessee, releasing all their rights to divert the waters of the Rockaway River Water Shed out of said river above said proposed reservoir site, the same to take effect upon their abandonment of the navigation of said canal between Dover and Montville under legislative sanction, for a sum therein to be named and to be paid upon such abandonment, then there shall be paid over by Jersey City to said contractors all of said sum of $500,000.00; except the amount named in said release, which said last mentioned amount the contractors authorize Jersey City to pay to said Morris Canal & Banking company and its lessee, upon the actual abandonment aforesaid."

The Water Supply Company contends that the release called for by the fourth clause of the contract referred to, has been delivered in accordance with the provisions quoted; and that, therefore, it is entitled to be paid the money withheld by the City, as above indicated. The City of Jersey City, however, asserts that such a release has not been obtained and delivered to it; and that, therefore, the moneys retained should not be paid over by the City to the Water Supply Company.

The Fidelity and Deposit Company of Maryland, which was the surety on the Water Company's contract, was made a party to this supplemental bill,

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Opinion of Lewis, V. C.

so that its rights in the controversy might also be presented and adjudicated, but it has filed no answer, and a decree pro confesso has been taken and entered against it.

The proofs show that there has been delivered to the City of Jersey City a release from the Morris Canal and Banking Company and its lessee, which contains, among other things, the following terms:

> "We, the said Morris Canal & Banking Co., and Lehigh Valley Railroad Co., lessee of the Morris Canal & Banking Co., in consideration of the premises and of the sum of one dollar to us paid upon the execution of this writing, and to be paid to us upon such abandonment of navigation, have released, and by these presents do release unto The Mayor and Aldermen of Jersey City, their successors and assigns forever, all our rights to divert the waters of the Rockaway River Water Shed out of said river above the proposed reservoir site, mentioned in said supplemental agreement of July 8, 1901, upon which site there has since been erected a reservoir below Boonton by the Jersey City Water Supply Company, under its contract with Jersey City.
>
> "This release to take effect upon our abandonment of the navigation of the Morris Canal between Dover and Montville, under legislative sanction; and upon the payment by The Mayor and Aldermen of Jersey City to us of the sum of $1.00, as hereinbefore provided upon such abandonment."

This, the Water Supply Company contends, is a release in literal compliance with the express terms of the fourth clause of the contract referred to.

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Opinion of Lewis, V. C.

Upon application of the Water Supply Company to settle certain matters referred to in the final decree in the original cause, the release mentioned was received in evidence, and Vice Chancellor Stevens was asked to adjudge in the final decree that the release was a sufficient fulfillment of the terms of the fourth section of the contract of July 8, 1901, and that the sum of $500,000.00 should no longer be retained by Jersey City but should be paid over with the rest of the contract price to the Water Supply Company.

Vice Chancellor Stevens filed an opinion upon this application, which is reported in 78 Atl. Rep., 391, the material portions of which are as follows:

"I do not think that the decree, as it stands, should be so modified as to direct the payment of the $500,000.00 reserved. After giving the contract of July 8, 1901, considerable study. I am not able to come to the conclusion that the release of May 12, 1909, is a sufficient compliance with its terms to entitle the Water Supply Company to the immediate payment of the money. To so hold would be to nullify the general intent of the parties as expressed in the instrument itself; but I do not think that the question should be finally passed upon at this time. If the contention of the Water Supply Company be correct it would seem that the liability of the Fidelity and Deposit Company, the surety, would or might be considerably increased. If so, the company is interested in the question and should be heard.

"I cannot find among the papers any copy of the condition of this bond, but it would seem from the terms of the contract of July 8, 1901, that it is under some liability for the

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Opinion of Lewis, V. C.

flow of the Rockaway up to the limit of 70,000,000 gallons per diem.

"The question has been informally presented and without any issue framed.

"In a question of such importance the proper course would appear to be to present the matter by bill and leave to file it should be reserved."

Later, the matter again came before this Court upon petition and affidavits of the Water Supply Company, whereby it again sought to obtain a decree for the payment of the $500,000.00 withheld by the City. After hearing upon that petition, Vice Chancellor Stevens filed the following opinion:

"I have carefully considered the petition presented by the Water Company, asking leave to introduce evidence relative to the release of the Morris Canal Company to Jersey City, dated May 12, 1909. The question is of much importance, and the construction of the supplemental contract of July 8, 1901, as far as it bears upon that release, not without difficulty.

"It seems to me that this new controversy involving the large sum of $500,000.00 should be determined on bill or supplemental bill; and that the signing of the final order or decree in this suit should not be postponed until the final determination of that controversy. The bill was filed August 1, 1905. The final decree was made on June 4, 1908, and except as to an unimportant detail, affirmed on March 18, 1910; and so it appears that the question of the sufficiency of the release, which it is now sought to interject into the present suit, is one which did not arise until nearly a year after

the issues made by the pleadings in this suit had been passed upon in this court. To introduce at this stage of the cause an entirely new issue, whose final determination will necessarily consume much time, would be not only irregular, but unjust to complainant, whose rights have been established by the Court of Last Resort."

From this decree, which was entered on or about November 15, 1910, an appeal was taken by the Water Supply Company to the Court of Errors and Appeals, and was there affirmed, in an opinion which is reported in 81 Atl. Rep., at page 1134, which reads as follows:

"Per curiam: So much of the decree as is involved in the present appeal will be affirmed upon the opinion delivered by the Vice Chancellor in the Court below. We think that the petition of the Appellant, praying that the making of the final decree in this cause be withheld until the determination of the question whether the $500,000.00 authorized by the third item of the contract between the parties, to be retained by the City until the performance by the contractor, of one or other of the conditions therein recited, is now due and payable to the contractor, was properly refused, and we rest this conclusion upon the ground set forth in the memorandum opinion of the learned Vice Chancellor, delivered in the disposing of the application. The order denying the application will also be affirmed."

I cannot see that the situation, as presented by this supplemental bill, differs in any way from the situation as previously passed upon by this Court, and the Court of Errors and Appeals.

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Opinion of Lewis, V. C.

Vice Chancellor Stevens held that he was not able to come to a conclusion that the release of December 12, 1919, was a sufficient compliance with the terms of the contract of July 8, 1901, to entitle the Water Company to the immediate payment of the money. It is true that he said that the matter was informally presented to him, and that it should be brought on by bill or supplemental bill, owing to its importance; but he also speaks of the matter being premature, and to hold, he says, that the release is a sufficient compliance with the terms of the contract, would be to nullify the general intent of the parties as expressed in the instrument itself.

I am inclined to think that the views heretofore judicially expressed, as herein set forth, are binding upon me on this application.

The City's real purpose doubtless was to acquire the flow of the water shed complete and free from claims or rights that might conflict with its untrammeled enjoyment of that unrestricted supply, required for the uses of its thickly settled area and highly congested population.

It is most likely that the City in assenting to Paragraph 4 referred to, did not have any intention of relinquishing any of its rights under the contract. It allowed the provision to meet the situation involved, but not to give up its valuable rights. Surely it did not contemplate the production of a release that was ultra vires and meaningless, lacking legislative sanction (and with which counsel for the Water Company in their closing argument have intimated the City may have to be satisfied), but rather, it seems to me, one which would effectually foreclose in the City's favor whatever rights and claims might in any way and at any time be asserted against its paramount rights in the complete flow of the water shed.

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Opinion of Lewis, V. C.

Until such rights and claims have been thus effectually extinguished and released, and acquiesced in by legislative sanction, I think that the true intent and meaning of the fourth paragraph has not been met and complied with and the application to release the $500,000.00 fund retained by the City is premature. The supplemental bill will, therefore, be dismissed.

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**Final Decree.**

(Filed July 29, 1921.)

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants.

On Supplemental Bill.

This cause coming on to be heard on a supplemental bill filed by the defendant, Jersey City Water Supply Company, against the complainant, The Mayor and Aldermen of Jersey City, and against the Fidelity and Deposit Company of Maryland, as party defendant, before Vice Chancellor Lewis, at the Chancery Chambers, in the City of Jersey City, on the 26th day of July, A. D. 1921, in the presence of Messrs. Humphreys and Sumner, of

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Final Decree.

counsel with the defendant, Jersey City Water Supply Company, and Mr. John Bentley and Mr. John Milton, of counsel with the complainant, and the pleadings and proofs having been read, and the arguments of the respective counsel having been heard and considered, and it appearing to the Court that the defendant, Jersey City Water Supply Company, is not entitled to the relief sought and prayed for by it in its supplemental bill.

It is, on this 26th day of July, A. D. 1921, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED, that the supplemental bill of the defendant, Jersey City Water Supply Company, be and the same is hereby dismissed, with costs.

And it is further ordered that there be allowed to complainant, The Mayor and Aldermen of Jersey City, a counsel fee of Three Thousand Dollars, to be paid by the defendant, Jersey City Water Supply Company, and that the same be taxed in the costs.

Respectfully advised,

VIVIAN M. LEWIS,
*V. C.*

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**Order of Substitution.**

(Filed July 26, 1919.)

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants.

} On Bill, etc.

Upon reading the consent at foot hereof, it is, on this 25th day of July, 1919, ordered that Humphreys & Sumner, solicitors of the City of Paterson, New Jersey, be, and they are hereby, substituted as solicitors for the defendants Jersey City Water Supply Company in the place and stead of Messrs. Collins & Corbin, its former solicitors.

E. R. WALKER,
*C.*

We hereby consent to the entering of the above order.

COLLINS & CORBIN,
Solicitors of the defendant,
Jersey City Water Supply Co.

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**Supplemental Bill of Complaint.**

(Filed July 26, 1919.)

IN CHANCERY OF NEW JERSEY.

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

The defendant, Jersey City Water Supply Company, a corporation of this State, by this supplemental bill against the complainant, the Mayor and Aldermen of Jersey City, and the Fidelity & Deposit Company of Maryland, filed by leave of the court, respectfully shows that:

1. The Mayor and Aldermen of Jersey City, a municipal corporation of New Jersey (hereinafter called Jersey City), on or about August 1, 1905, exhibited its original bill of complaint in this Honorable Court against Patrick H. Flynn and this defendant (the last named hereinafter called the Water Company) as defendants, praying (among other things) that the said defendants might be decreed to convey to it the waterworks constructed by them under a certain contract dated February 28, 1899, or so much of said waterworks as they were able to convey upon payment by Jersey City of such part of the consideration as might be ascertained to be due.

2. The defendant Patrick H. Flynn's proposal for a new water supply for Jersey City, which formed part of the contract between him and Jersey City, dated February 28, 1899, a copy of which was annexed to and made part of said original bill, contained this representation or agreement:

"There will be tributary to this intake and storage reservoir the whole flow of the Rock-

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Supplemental Bill of Complaint.

away River having a watershed and gathering grounds of one hundred and twenty-two and one-half square miles, including the waters of the Longwood Valley, Green Pond, Denmark Lake, Beach Glen, Split Rock Lake, Dixon's Pond, Shongum Lake and other tributary streams."

Said contract of February 28, 1899, and the specifications therein referred to, are printed in Vol. 1 of the printed state of the case in said original cause on cross appeals from the decree hereinafter mentioned of June 4, 1908, at pages 17 to 71 of said volume (both pages inclusive), to which printed volume now on file in the State Library at the pages aforesaid reference is made for the full particulars thereof.

3. On March 22nd, 1901, a statute was passed by the legislature of New Jersey entitled "An Act to authorize Municipalities to modify the terms of any contract heretofore or hereafter made for a new water supply" (P. L., 1901, p. 416), and the Morris Canal & Banking Company claiming that it had the right by prescription or otherwise to divert from the Rockaway River and out of the watershed thereof at Boonton above the proposed reservoir so much of the waters of the Rockaway River as might be necessary for purposes of navigation east of Boonton over and above the waters brought into said watershed by its canal from Lake Hopatcong and elsewhere west of Dover, and further claiming that it did at times divert some of the waters of the Rockaway River for such purposes, and Jersey City taking the position that this claim on the part of the Canal Company, if enforced, would prevent Flynn from carrying out

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his agreement to pass through his reservoir the whole flow of the Rockaway River, an agreement was entered into on July 8, 1901, under and by virtue of the statute above referred to between Jersey City and the defendants Patrick H. Flynn and the Water Company (the latter two therein called "the contractors") reciting (among other things) the original contract between Jersey City and Flynn for the new water supply for Jersey City and the fact that Jersey City had since given notice of its acceptance of the option contained in said original contract to purchase said water supply on completion for the sum of $7,595,000, and also reciting the assignment of the original contract by Flynn to the Water Company and the claim above mentioned on the part of the Morris Canal & Banking Company and that in the judgment of the Boards of Street and Water Commissioners and of Finance of Jersey City the modifications therein provided for were needed to ensure the construction of the works for such new water supply and the delivery thereof to Jersey City. The agreement then provided (among other things), by way of modification of the original contract, as follows:

That the surety bond for $500,000 attached to the original contract, which by its terms was to remain in force so long as Jersey City should purchase water of the contractors by the million gallons, should continue in force for the benefit of Jersey City until the contractors should secure to Jersey City by contract the extinguishment of the claims, if any, of the Morris Canal & Banking Company and its lessee, or the entry of final judgment in the courts of the State of New Jersey adverse to such claim.

That Jersey City should, upon the completion and acceptance of said works and water supply so

contracted for, in case the claims aforesaid of the Morris Canal & Banking Company and its lessee should not have been released or extinguished, be entitled to retain, out of the purchase price of $7,595,000, the sum of $500,000 until the happening of any one of the following events:

(a) A final judgment or decree of the highest court of the State of New Jersey to which a test case might be carried that the Morris Canal & Banking Company had no legal or equitable right by prescription or otherwise to divert out of the watershed of the Rockaway River at Boonton any of the waters out of the Rockaway River over and above the amount of water brought into said watershed by said canal from Lake Hopatcong and elsewhere outside of the Rockaway River watershed.

(b) The delivery of a valid release from the Morris Canal & Banking Company and its lessee vesting in said contractors for the benefit of Jersey City the first right to the whole flow of the Rockaway River into said storage reservoir at old Boonton so far as the same might be required from time to time to furnish and deliver, with the storage provided for in the original contract and proposal, all the water said Jersey City might require up to 70 million gallons per day, it being the intent thereof that such release should vest in the City the first and paramount right to divert all the waters of the Rockaway River watershed up to 70 million gallons per day as the same might be required.

(c) The abandonment under legislative sanction by the Morris Canal & Banking Company and its lessee of the portion of the Morris Canal lying between Dover and Montville and the surrender of all its rights to divert the waters of the Rockaway River above said proposed reservoir site.

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Said agreement then provided that upon the happening of any one of said three events Jersey City should pay over to the contractor said retained sum of $500,000 without interest. The agreement further provided that the bond of $500,000 attached to the original contract should also be held as additional security by Jersey City against the claims, if any, of said Morris Canal & Banking Company and its lessee.

The fourth paragraph of said agreement provided that whenever the contractors should deliver to Jersey City a valid release from the Morris Canal & Banking Company and its lessee releasing all their rights to divert the waters of the Rockaway River watershed out of said river above said proposed reservoir site, the same to take effect upon their abandonment of the navigation of said canal between Dover and Montville under legislative sanction for a sum therein to be named, and to be paid upon such abandonment, then there should be paid over by Jersey City to said contractors all of said sum of $500,000 except the amount named in said release, which last mentioned amount the contractors authorized Jersey City to pay to said Morris Canal & Banking Company and its lessee upon the actual abandonment aforesaid.

By the fifth paragraph of said contract it was provided (among other things) that the modifications in said contract contained should not relieve said contractor or his sureties from furnishing and delivering to Jersey City the quantity and quality of water required by the original contract, nor from constructing the plant in accordance with the original contract as modified thereby, it being and remaining the duty of said contractors to furnish Jersey City with the water supply of 70 million gallons per day, and a plant capable of actually delivering 50 million gallons of water per day.

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The sixth paragraph of said agreement provided that said contractors should convey to Jersey City, upon the purchase of the plant and supply by Jersey City, and without additional compensation, all of their rights in the water of the Rockaway River watershed.

The seventh paragraph of said agreement provided that said contractors should not sell any waters out of said Rockaway River watershed at any time to any other person or corporation.

It was expressly provided by the eighth paragraph of the agreement that nothing therein contained should be construed as an admission on the part of any of the parties thereto of any rights in the Morris Canal & Banking Company or its lessees to divert any of the waters of the Rockaway River watershed east of Boonton.

Said contract of July 8, 1901, is printed in Vol. 13 of the printed state of the case in said original cause on an appeal by the Water Company from the decree hereinafter mentioned of November 15, 1910, and from the order hereinafter mentioned, dated December 3rd, 1910, as of November 15th, 1910, and filed December 8th, 1910, at pages 7038 to 7045 (both pages inclusive), to which printed volume now on file in the State Library at the pages above mentioned reference is made for the full particulars thereof.

4. There was annexed to said contract an assent executed under the corporate seal of the Fidelity & Deposit Company of Maryland and the hand of its president in the words and figures following, that is to say:

"In consideration of the sum of one dollar to it in hand paid, the Fidelity & Deposit Company of Maryland, a corporation organized un-

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der the laws of the State of Maryland, the surety of Patrick H. Flynn, to the Mayor and Aldermen of Jersey City in the sum of $500,000 upon his contract of February 28, 1899, for a new water supply for said City (a copy whereof is hereto annexed), hereby assents to the modification of said original contract by the contract hereto annexed of even date herewith made between the Mayor and Aldermen of Jersey City of the first part and Patrick H. Flynn and the Jersey City Water Supply Company (the assignees of said Patrick H. Flynn) of the second part, and agrees that its bond aforesaid shall stand as security for the performance of said original contract as modified this day.

Witness, its corporate seal and the hand of its president, this 8th day of July, Nineteen Hundred and One."

5. Decree was entered in said original cause on June 4, 1908, whereby it was, among other things, ordered, adjudged and decreed that the Water Company should convey and transfer to Jersey City the waterworks and the appurtenants thereof with the water supply, water rights, lands, reservoir sites, rights of way and all easements, as the same had been constructed and provided under the contract of February 28, 1899, and the supplements and additions thereto, and also the rights of the defendants in the water of the Rockaway River watershed, or the water flowing or that might flow therein to the extent of 70 million gallons per day, as therein provided, upon payment by Jersey City to the Water Company of the contract price of $7,595,000, and upon payment of the contract price for water delivered pursuant to the contract, less

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certain deductions from and abatements of the said purchase price therein more particularly set forth.

6. By said decree it was, among other things, provided that there should be retained by Jersey City from the contract price the sum of $500,000 as authorized by the contract between the City and the Company dated July 28, 1901, until the same should become due under the terms and conditions of the said contract (after the conveyance of the waterworks by the said defendants to the complainant).

Said final decree is printed in Book 7 of the printed state of the case in said original cause on cross appeals from the decree hereinafter referred to of June 4, 1908, at pages 4159 to 4165 (both pages inclusive), to which printed volume now on file in the State Library at the pages above mentioned reference is made for the full particulars thereof.

7. Both parties appealed from the said decree to the Court of Errors and Appeals, and that court, by its decree, bearing date March 18th, 1910, struck out the aforementioned words "after conveyance of the waterworks by the said defendants to the complainant," but otherwise affirmed the said decree so far as above quoted; and the Chancellor afterwards, upon said decree of the Court of Appeals being remitted to this court, did, on the 9th day of April, 1910, make the said change and other changes decreed by the said Court of Errors and Appeals, and in other respects did ratify and confirm said former decree of this court.

The decree of the Court of Errors and Appeals of March 18th, 1910, is printed in Vol. 13 above mentioned of the state of the case at pages 6994 to 6995 (both pages inclusive), and the decree of this

court of April 9, 1910, is printed in same book at pages 6996 to 6998 (both pages inclusive), to which printed volume now on file in the State Library at the pages above mentioned, reference is hereby made for the full particulars of said decrees.

8. On May 12, 1909, an instrument, or deed of release, was obtained from Morris Canal & Banking Company and its lessee, Lehigh Valley Railroad Company, reciting the incorporation of the Canal Company, the lease of its canal and navigation works and its property and effects to Lehigh Valley Railroad Company, the original contract between Jersey City and Patrick H. Flynn for said water supply, dated February 28, 1899, its assignment to the Water Company, the supplemental agreement, dated July 8, 1901, between Jersey City, Flynn and the Water Company, and particularly and at length the fourth paragraph thereof stated above, and that the Water Company had requested it (the Canal Company) to execute said release in conformity with said paragraph of said supplemental contract. After such recitations the instrument continued:

> "Now know ye, that we, the said Morris Canal & Banking Company and Lehigh Valley Railroad Company, lessee of the Morris Canal & Banking Company, in consideration of the premises and of the sum of One Dollar, to us paid upon the execution of this writing, and to to be paid to us on such abandonment of navigation, have released, and by these presents do release unto the Mayor and Aldermen of Jersey City, their successors and assigns forever, all our rights to divert the waters of the Rockaway River watershed out of said river above the proposed reservoir site mentioned in said

supplemental agreement of July 8, 1901, upon which site there has since been erected a reservoir below Boonton by the Jersey City Water Supply Company under its contracts with Jersey City.

This release to take effect upon our abandonment of the navigation of the Morris Canal between Dover and Montville under legislative sanction, and upon the payment by the Mayor and Aldermen of Jersey City to us of the sum of One Dollar as hereinbefore provided upon such abandonment."

A copy of said deed of release is hereto appended, marked Exhibit 1, and made part hereof.

9. Said release was delivered to Jersey City June 5, 1909.

10. On July 20th, 1910, the original cause came on upon exceptions of Jersey City to the report of Honorable William J. Magie, Special Master, made pursuant to said decree of June 4, 1908, and upon application of said Water Company to settle other matters reserved in said final decree as corrected by the decree on remittitur herein, dated April 9, 1910, and upon the hearing the defendants offered in evidence, and there was received in evidence, said deed of release bearing date May 12, 1909, from the Morris Canal & Banking Company and Lehigh Valley Railroad Company, its lessee, to the Mayor and Aldermen of Jersey City, and it was proved that said release was delivered to Jersey City on June 5, 1909.

11. On said hearing the counsel of the Water Company asked the court on such proof to adjudge

in the final decree that the said deed of release was sufficient fulfillment of the terms of the fourth section of said contract of July 8, 1901, and that the said sum of $500,000 should no longer be retained by Jersey City, but should be paid over with the rest of the purchase price to the defendant, the Water Company.

12. After said hearing his Honor, Vice Chancellor Stevens, filed an opinion, reported in 78 Atl. Rep., p. 391, of which the following is a copy of the portion material to this cause:

> "I do not think that the decree as it stands should be so modified as to direct the payment of the $500,000 reserved. After giving the contract of July 8, 1901, considerable study, I am not able to come to the conclusion that the release of May 12, 1909, is a sufficient compliance with its terms to entitle the Water Company to the immediate payment of the money. To so hold would be to nullify the general intent of the parties as expressed in the instrument itself. But I do not think the question should be finally passed upon at this time. If the contention of the Water Supply Company be correct it would seem that the liability of the Fidelity & Deposit Company, the surety, would or might be considerably increased. If so, the Company is interested in the question and should be heard. I cannot find among the papers any copy of the condition of its bond, but it would seem from the terms of the contract of July 8, 1901, that it is under some liability for the flow of the Rockaway up to the limit of 70 million gallons per diem. The question has been informally presented and

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without any issue framed. In a question of such importance the proper course would appear to be to present the matter by bill, and leave to file it should be reserved."

13. Decree confirming report was filed November 16, 1910, whereby it was, among other things, ordered, adjudged and decreed that the total deductions and reservations to be made by Jersey City from the sum of $7,595,000, the contract price for the waterworks mentioned in the said decree of June 4, 1908, were determined by said court to be certain sums therein mentioned, including the reservation of the sum of $500,000 mentioned in the decree theretofore made in said cause on June 4, 1908.

Said decree was expressly made without prejudice to the right of the Water Company to file a bill or supplemental bill to recover the sum of $500,000 mentioned in the decree of June 4, 1908, authorized to be retained as therein mentioned whenever in the estimation of said company the same was or should be payable by Jersey City.

A copy of said decree is printed in said Vol. 13 of the printed state of the case at pages 7098 to 7107 (both pages inclusive), to which reference is made for the full particulars thereof.

14. On October 20, 1910, the matter again came before this Honorable Court upon petition and affidavits of the Water Company, which petition and affidavits had been previously duly served upon Jersey City, and counsel having been again heard for the respective parties on all the above matters, and especially upon the question of granting the prayer of the said Water Company, which prayer asked leave to introduce evidence relative to the said release from Morris Canal & Banking Com-

pany to Jersey City, dated May 12, 1909, and that it might be adjudged that the said deed of release did fulfill the terms of said fourth paragraph of the contract of July 8, 1901, and the said sum of $500,000 ought therefore no longer to be retained by Jersey City, whereupon and after said hearing, and on or about November 15, 1910, his Honor, Vice Chancellor Stevens, filed the following opinion:

"I have carefully considered the petition presented by the Water Company asking leave to introduce evidence relative to the release of the Morris Canal Company to Jersey City dated May 12, 1909. The question is of much importance, and the construction of the supplemental contract of July 8, 1901, as far as it bears upon that release, not without difficulty. It seems to me that this new controversy, involving the large sum of $500,000, should be determined on bill or supplemental bill, and that the signing of the final order or decree in this suit should not be postponed until the final determination of that controversy. The bill was filed August 1st, 1905. The final decree was made on June 4, 1908, and except as to an unimportant detail, affirmed on March 18, 1910; and so it appears that the question of the sufficiency of the release which it is now sought to interject into the present suit, is one which did not arise until nearly a year after the issues made by the pleadings in this suit had been passed upon in this court. To introduce at this stage of the cause an entirely new issue, whose final determination will necessarily consume much time, would be not only irregular, but unjust to complainant, whose rights have been established by the Court of Last Resort."

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Supplemental Bill of Complaint.

Said opinion is printed in said Vol. 13 of the printed state of the case in the original cause at page 7079, to which reference is made for the full particulars thereof.

15. There was filed on December 8th, 1910, as of November 15th, 1910, an order in said cause advised by His Honor, Vice Chancellor Frederic W. Stevens, in pursuance of his said last mentioned opinion, ordering that the prayer of the petitioner should be denied, and that the sum of $500,000, mentioned in said decree of June 4th, 1908, should be retained as decreed in the decree of June 4, 1908, and in the decree of November 15, 1910, but without prejudice to the right of the Jersey City Water Supply Company to file a bill or supplemental bill to recover the said sum whenever in the estimation of said company the same was or should be payable by Jersey City.

A copy of said order is printed in said Vol. 13 of the State of Case at pages 7108 to 7110 (both pages inclusive), to which reference is made for the full particulars thereof.

16. An appeal was taken by the Water Company to the Court of Errors and Appeals from said decree of November 15th, 1910, and said order filed December 8, 1910, as of November 15, 1910, and said Court of Errors and Appeals rendered the following opinion:

> "So much of the decree as is involved in the present appeal will be affirmed upon the opinion delivered by the Vice Chancellor in the Court below. We think that the petition of the appellant praying that the making of the final decree in this cause be withheld until the determination of the question whether the

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Supplemental Bill of Complaint.

$500,000 authorized by the third item of the contract between the parties to be retained by the City until the performance by the contractor of one or the other of the conditions therein recited is now due and payable to the contractor was properly refused, and we rest this conclusion upon the grounds set forth in the memorandum opinion of the learned Vice Chancellor delivered in disposing of the application. The order denying the application will also be affirmed."

Said opinion is reported in 81 Atl. Rep., p. 1134, to which reference is had for the full particulars thereof.

17. On July 11, 1911, a decree of affirmance was entered by the New Jersey Court of Errors and Appeals pursuant to the foregoing opinion, ordering, adjudging and decreeing that the decree of the Chancellor and the said order of December 3rd, 1910 (filed December 8th, 1910), should be in all things affirmed.

18. The defendant, the Water Company, submits that the said deed of release is in form and substance a fulfillment in good faith of the requirements of the fourth paragraph of the contract of July 8, 1901, the terms of which are set forth in the third paragraph hereof.

19. The Fidelity & Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, as surety under said contracts hereinabove recited, has an interest in this cause, and is on that account made a party defendant thereto.

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Supplemental Bill of Complaint.

This defendant is without adequate remedy in the courts of law, and therefore prays by way of supplemental bill:

(1) That the Mayor and Aldermen of Jersey City and the Fidelity & Deposit Company of Maryland may answer this supplemental bill of complaint and each statement therein made.

(2) That it may be adjudged that the said deed of release does fulfill the terms of said fourth clause of said contract of July 8, 1901, and that said sum of $500,000 ought therefore no longer to be retained by Jersey City, and that the said decree may be directed to be forthwith carried specifically into execution by the payment by Jersey City to complainant of the said sum of $500,000 (less one dollar) with interest from June 5th, 1909, in accordance with the terms of the decree entered; and that Jersey City may be ordered to do and concur in all necessary acts for that purpose.

(3) That a writ of subpoena may issue commanding said Fidelity & Deposit Company of Maryland to answer this bill of complaint and to abide by such decree as this court may make in the premises.

HUMPHREYS & SUMNER,
Solicitors and of counsel with Jersey
City Water Supply Company.

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Supplemental Bill of Complaint.

EXHIBIT 1.

TO ALL TO WHOM THESE PRESENTS SHALL COME, OR MAY IN ANYWISE CONCERN, WE, MORRIS CANAL AND BANKING COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY, AND LEHIGH VALLEY RAILROAD COMPANY, A CORPORATION OF THE STATE OF PENNSYLVANIA, LESSEE OF MORRIS CANAL & BANKING COMPANY, SEND GREETING:

WHEREAS, Morris Canal & Banking Company was duly incorporated by an act of the Legislature of New Jersey, entitled: "An act to Incorporate a Company to form an artificial navigation between the Passaic and Delaware Rivers," Passed December 31, 1824 (P. L. 158) and has all the powers, privileges, rights and authority given by the said act, and the several acts amendatory thereof and supplementary thereto;

AND WHEREAS, said Canal Company, under legislative authority, by a lease dated the fourth day of May, Eighteen Hundred and Seventy-One, did let and demise the canal and navigation works, and its property and effects unto the said Lehigh Valley Railroad Company, as by reference to said lease will more fully appear;

AND WHEREAS, The Mayor and Aldermen of Jersey City entered into a contract with Patrick H. Flynn, dated February 28th, 1899, for the obtaining from the Rockaway River of a supply of water for said City, as by reference to said contract will more fully appear, which contract was afterwards assigned by the said Patrick H. Flynn to the Jersey City Water Supply Company;

AND WHEREAS, on the eighth day of July, Nineteen Hundred and One, the said Mayor and Aldermen of Jersey City entered into a supplemental

contract with the said Patrick H. Flynn and said Jersey City Water Supply Company, therein called the "Contractors," the fourth paragraph whereof is in the following words:

> "Fourth: Whenever the Contractors shall deliver to Jersey City a valid release from the Morris Canal and Banking Company and its lessee, releasing all their rights to divert the waters of the Rockaway River water-shed out of said river above proposed reservoir site, the same to take effect upon their abandonment of the navigation of said canal between Dover and Montville, under legislative sanction, for a sum therein to be named and to be paid upon such abandonment, then there shall be paid over by Jersey City to said Contractors all of said sum of five hundred thousand dollars, except the amount named in said release, which last mentioned amount the Contractors authorize Jersey City to pay to said Morris Canal & Banking Company and its lessee upon the actual abandonment aforesaid."

And whereas, the said Jersey City Water Supply Company has requested us to execute this release, in conformity with the said fourth paragraph of said supplemental contract,

Now know ye, that we, the said Morris Canal and Banking Company and Lehigh Valley Railroad Company, Lessee of the Morris Canal & Banking Company, in consideration of the premises, and of the sum of One Dollar ($1.00) to us paid upon the execution of this writing and to be paid to us on such abandonment of navigation, have released, and by these presents do release, unto The Mayor and Aldermen of Jersey City, their successors and assigns forever, all our rights to divert the waters

of the Rockaway River watershed out of said river above the proposed reservoir site mentioned in said supplemental agreement of July 8th, 1901, upon which site there has since been erected a reservoir below Boonton by the Jersey City Water Supply Company, under its contracts with Jersey City.

This release to take effect upon our abandonment of the navigation of the Morris Canal, between Dover and Montville, under legislative sanction, and upon the payment by the Mayor and Aldermen of Jersey City to us of the sum of One Dollar ($1.00) as hereinbefore provided upon such abandonment.

TO HAVE AND TO HOLD the same unto the said The Mayor and Aldermen of Jersey City, their successors and assigns forever.

IN WITNESS WHEREOF, we have caused our respective common seals to be hereunto affixed, and duly attested, and these presents to be signed and delivered by our respective Presidents, the 12th day of May, Nineteen Hundred and Nine (1909).

MORRIS CANAL AND BANKING COMPANY,
By E. B. Thomas,
President.

Attest:
J. Wm. Robbins,
Assistant Secretary.

LEHIGH VALLEY RAILROAD COMPANY,
By E. B. Thomas,
President.

(Seal of L. V. R. R. Co.)
(Seal of M. C. & B. Co.)

Attest:
J. Wm. Robbins,
Assistant Secretary.

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IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants.

On Supplemental Bill.

Order.

The above named defendant, Jersey City Water Supply Company, having, pursuant to leave reserved in that behalf in the decrees made in this cause on June 4, 1908, and on November 16, 1910, and in the order filed in this cause on December 8, 1910, as of November 15, 1910, filed its supplemental bill of complaint in this cause on July 26, 1919, praying (among other things) that the Mayor & Aldermen of Jersey City might answer said supplemental bill and each statement therein, and no writ of subpoena having been issued commanding the said The Mayor & Aldermen of Jersey City to answer said bill of complaint, the said The Mayor & Aldermen of Jersey City being already in court as complainant in the original cause,

It is, on this 7th day of August, in the year of our Lord, Nineteen Hundred and Nineteen, on motion of Humphreys & Sumner, solicitors of the defendant, Jersey City Water Supply Company, ordered that said The Mayor & Aldermen of Jersey City do file an answer to said supplemental bill in the office of the Clerk of this Court at Trenton on or before the expiration of twenty days from and after the service upon it of certified copies of this order and of said supplemental bill, and in default thereof such order or decree will be made against

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Order on Supplemental Bill.

said The Mayor & Aldermen of Jersey City as this court shall think equitable and just.

E. R. WALKER,
*C.*

Respectfully Advised,
JOHN H. BACKES,
*V. C.*

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IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants.

On Supplemental Bill.
Acknowledgment of Service.

Service of certified copies of the following papers upon the complainant is hereby asknowledged August 12, 1919:

1. Order filed July 26, 1919, substituting Messrs. Humphreys & Sumner as solicitors for the defendant Jersey City Water Supply Company.

2. Supplemental bill of complaint filed by Jersey City Water Supply Company July 26, 1919.

3. Order requiring complainant to answer said supplemental bill, dated August 7, 1919.

JOHN BENTLEY,
Solicitor of the Mayor & Aldermen
of Jersey City.

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**Answer.**

(Filed August 29, 1919.)

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants.

Answer.

The answer of the Complainant, The Mayor and Aldermen of Jersey City, to the supplemental bill of the Defendant Jersey City Water Supply Company says:

1. It admits the allegations of paragraph "1" of said supplemental bill.

2. It neither admits nor denies the allegations of paragraph "2" of said supplemental bill, but begs leave to refer to the proposal from which the alleged representation is taken.

3. It admits the allegations of paragraph "3" respecting the passage of the statute therein referred to and the claims made with respect to the right of the Morris Canal and Banking Company to divert waters from the Rockaway River, and as to the provisions and effect of the agreement between Flynn and this complainant therein referred to it begs leave to refer to the original of said agreement.

4. It neither admits nor denies the allegations of paragraph "4," but begs leave to refer to the written assent annexed to said contract.

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Answer.

5. It admits, as alleged in paragraph "5" of said supplemental bill, that final decree was entered in said original cause on June 4th, 1908, but for the terms and provisions of said decree as set out in paragraphs "5" and "6" of said supplemental bill complainant begs leave to refer to the said decree.

6. It admits that appeals were taken to the Court of Errors and Appeals, but as to the action of said Court it begs leave to refer to the opinion thereof and the remittitur entered therein.

7. It admits that an instrument was obtained from the Morris Canal and Banking Company on May 12th, 1909, but as to the form and effect of said instrument and as to its provisions and conditions this complainant begs leave to refer thereto.

8. It denies that said instrument or release was ever delivered to it.

9. It admits that on July 20th, 1910, said original cause came on for hearing upon exceptions, but as to the proceedings thereunder and therein, as referred to in paragraphs "10," "11" and "12" of said supplemental bill, it begs leave to refer to the record thereof.

10. It admits that the decree was filed November 16th, 1910, but as to the tenor and effect of said decree it begs leave to refer thereto.

11. It admits that on October 20th, 1910, said matter again came on before this Court, but as to the tenor and effect of the petition and affidavits and as to the proceedings thereunder and therein, as stated in paragraphs "14" and "15" of said supplemental bill, this complainant begs leave to refer to the record thereof.

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Answer.

12. It admits that an appeal was taken by the Defendant Water Company to the Court of Errors and Appeals on said decree of November 15th, 1910 and said order filed December 8th, 1910, but as to the tenor and effect of the opinion of the Court of Errors and Appeals, as stated in said paragraph "16" of said supplemental bill and as to the decree of the Court of Errors and Appeals thereon, as set out in paragraph "17" of said supplemental bill, complainant begs leave to refer thereto.

13. It denies the allegations of paragraph "18" of said supplemental bill and on the contrary says that said deed of release is not in form or substance a fulfillment of the requirements of the fourth paragraph of the contract of July 8th, 1901, being a conditional release only.

14. It admits the allegations of paragraph "19" of said supplemental bill.

15. And this defendant humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

JOHN BENTLEY,
Solicitor for Complainant.

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IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY and others,
Defendants.

On Supplemental Bill.
Replication.

The defendant, Jersey City Water Supply Company, joins issue on the answer of the complainant, The Mayor and Aldermen of Jersey City, to the supplemental bill of the defendant, Jersey City Water Supply Company.

HUMPHREYS & SUMNER,
Solicitors of Defendant,
Jersey City Water Supply Co.

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(Filed September 9, 1919.)

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY and others,
Defendants.

On Supplemental Bill. Decree Pro Con.

This cause, being opened to the court by Humphreys & Sumner, of counsel with the defendant, Jersey City Water Supply Company, and it appearing that process of subpoena for the Fidelity & Deposit Company of Maryland to appear and answer the supplemental bill of the defendant, Jersey City Water Supply Company, has been duly issued and returned served upon the defendant, the Fidelity & Deposit Company of Maryland; and that the said defendant has not appeared and answered the said supplemental bill within the time limited by law or at any other time, but that it has wholly failed and neglected so to do;

It is thereupon, on this 9th day of September, in the year of our Lord One Thousand Nine Hundred and Nineteen, on motion of Humphreys & Sumner, solicitors of the defendant, Jersey City Water Supply Company, ordered and decreed that the said defendant's supplemental bill be, and the same is hereby, taken as confessed as against the said Fidelity & Deposit Company of Maryland to the end that such decree may be made against it as the Chancellor shall think equitable and just.

E. R. WALKER,
*C.*

A True Copy,
JESSE R. SALMON,
Clerk.

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(Filed December 2, 1919.)

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF THE CITY OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants.

On Supplemental Bill. Order of Reference.

The Honorable Frederic W. Stevens, the Vice-Chancellor to whom the above stated cause was referred, having departed this life:

It is, on this twenty-eighth day of November, A. D. nineteen hundred and nineteen, on motion in behalf of Humphreys & Sumner, solicitors of defendant, Jersey City Water Supply Company, ORDERED that the said cause be and the same hereby is referred to Hon. Vivian M. Lewis, 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.

E. R. WALKER,
*C.*

I consent to the foregoing order:

JOHN BENTLEY,
Solicitor of complainant.

A true copy,
JESSE R. SALMON,
Clerk.

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**Testimony.**

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants.

On Bill, etc., Testimony.

Transcript of testimony taken in the above-entitled cause, at the Chancery Chambers, Jersey City, on the 30th day of December, 1919, before Hon. Vivian M. Lewis, Vice-Chancellor.

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APPEARANCES:

JOHN MILTON, Esq., for the complainant.

GILBERT COLLINS and J. B. HUMPHREYS, Esqs., for the defendants.

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Mr. Collins: This is really the taking of a little testimony de bene esse. This is the situation and you will have the case in your mind:

There was a contract made between one Flynn and Jersey City to furnish the water supply and build an aqueduct reservoir dam at Boonton, Rockaway River, and in his proposition he provided that the entire flow of the Rockaway should be furnished; and that contract was afterwards assigned by Flynn to the Jersey City Supply Company.

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Case.

The city (after the works were done, claiming that they were not sufficiently constructed, and defects, etc., but, nevertheless, they wanted them) filed a bill for specific performance, offering to pay what should be held by the Court to be the proper sum to pay. And in the case it developed that the Morris Canal & Banking Company claimed the right to divert from the Rockaway Watershed for its canal; and the Court provided in its decree that $500,000 should be retained until the canal was either abandoned or a release was procured from the Morris Canal Company of its right. The Court of Chancery decided in favor of the Water Supply Company, and it went to the Court of Errors and Appeals, and it was affirmed except upon an incidental matter. Then a release was procured from the Morris Canal & Banking Company to take effect on the abandonment of the canal, which it was then supposed might be near. They had all the water they needed. You understand the quantity outside of 70,000,000 was there for them, but they did not have the whole of the flow of the Rockaway; but $500,000 was put aside and they got the release. Then we came in before Vice-Chancellor Stevens and wanted to prove that release and get the money, and he did not pass on it, because he said it would have to be done by a supplemental bill, in his opinion, because the issue having been determined before without this matter being laid before the Court, he did not think it should be done by mere petition in an incidental way; and especially as there would have to be other parties brought in as defendants. So that went up to the Court of Errors and Appeals and was affirmed.

We served the release on the Mayor and, as we understand it, we are entitled to that money, but the Vice-Chancellor said we must do it by supple-

mental bill. The thing has dragged along ten years, because everybody thought the canal would be abandoned, and then it would not make any difference. We filed the supplemental bill. It is filed by the defendants, but the equity jurisdiction provides for that—after decree the defendant may file a supplemental bill, and we filed it.

Mr. Bain says that this release is given, not by the original contract with Flynn, but by supplemental contract made afterwards, and we claim that it is exactly within the terms of that supplemental contract.

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ROBERT J. BAIN, sworn for the defendants, testified as follows:

*Direct examination by Mr. Humphreys.*

Q. You are a solicitor and counsellor of this court? A. Yes, sir.

Q. And you are connected with the firm of Collins & Corbin? A. Yes, I am a member of that firm.

Q. Did you, on June 5, 1909, deliver a release to the Mayor of Jersey City? A. I did.

Q. Have you got a copy of that release there? A. Yes, sir.

Q. Produce it. A. (Witness does so.)

Q. Is that the release which you delivered to him? A. This is a copy of the release which I delivered.

Q. Where did you deliver it to him? A. at the City Hall, in Jersey City.

Q. In the Mayor's office? A. In an anteroom to the Mayor's office.

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Robert J. Bain—For Defendants—Direct.

Q. Had the original the seals of the Morris Canal & Banking Company and the Lehigh Valley Railroad Company on it? A. Yes, sir.

Q. Are you familiar with those seals? A. Yes, sir.

Q. And you have seen the original, haven't you? A. I delivered the original.

Q. And you knew the signature of the president? A. Well, the original had upon it the signature of Mr. E. B. Thomas, president of the Morris Canal & Banking Company, and also president of the Lehigh Valley Railroad Company; the original had the signatures upon it.

Q. And it was the original that you left with the Mayor on June 5, 1909? A. Yes, sir.

Q. Did you leave any letter with that original? A. Yes, sir.

Q. Have you a copy of that letter? A. Yes, sir.

Q. You left that letter at the same time? A. At the same time that I left that original release.

Mr. Humphreys: Now, I have asked Mr. Milton to produce the original, and he says he has not got it, and I offer in evidence a copy which Mr. Bain has, and a letter annexed to it—copy of the release I mean.

Mr. Collins: We might put in this record you made at the time.

The Witness: Annexed to the copy of the release and letter that I have is an affidavit by me of service, signed and sworn to on June 8, 1909.

Q. And that includes the copy of the release and the copy of this letter? A. Yes, sir.

Q. And also includes an affidavit by Mr. Carl M. Herbert, who at that time was associated with Col-

lins & Corbin, to the effect that he was present with you at the time the release and letter were delivered? A. Yes, sir.

(Marked "Exhibit D-1.")

Q. A copy of that release appears at page 7096 of the printed book in the earlier litigation? A. Page 7034.

Mr. Collins: In the printed book of the litigation, based on the bill which went to decree, and the present bill being supplemental to that suit, by leave of the Court.

Mr. Humphreys: That is Volume 13. It is on file in the State Library, too.

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Edmund L. B. Gardner, sworn in behalf of the defendants, testified as follows:

*Direct examination by Mr. Humphreys.*

Q. Mr. Gardner, you are the president of the Jersey City Water Supply Company? A. Yes, sir.

Q. And you have been its president since February, 1902? A. Yes, sir.

Q. Have you been at all times familiar with the history of the dealings between Patrick H. Flynn and the Jersey City Water Supply Company and the City of Jersey City? A. Yes, sir.

Q. After Mr. Flynn had offered his bid to Jersey City in August, 1898, and before its acceptance in February, 1899, what do you know about Mr. Flynn obtaining from the various mill owners contracts and releases to enable him to carry out his contract

to supply 70,000,000 gallons of water per day to Jersey City perpetually, if the contract should be awarded to him?

Mr. Milton: That question is objected to; I make a general objection to it.

The Court: I will admit it and deal with it later.

A. Yes, sir.

Q. You knew that Flynn obtained such contracts and releases? A. I know that they were obtained; the principal ones were obtained through me.

Q. And, Mr. Gardner, have you before you Volume 13 of the printed case in the suit of the Mayor and Board of Aldermen of Jersey City v. The Jersey City Water Supply Company on an appeal of the water company from a decree on November 15, 1910, and from the order dated December 3, 1910, said printed volume being now on file in the State Library; have you that paper book before you? A. Yes, sir.

Q. Now, turn to page 7070 of that volume, please. A. I have it.

Q. That is an agreement, isn't it, dated November 21, 1898, between the Morris Canal & Banking Company and the Lehigh Valley Railroad Company, its lessees, party of the first part, and Patrick H. Flynn, party of the second part? A. Yes, sir.

Q. Now, was that one of the contracts that Flynn obtained to which you have just referred? A. That was one of the contracts.

Mr. Humphreys: I offer that contract in evidence, that copy. (Identify it by saying page 7070 in Vol. 13, and it is marked "Exhibit A.")

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E. L. B. Gardner—For Defendants—Direct.

Q. Now, I notice, if you will look at that contract, that by the fourth paragraph the railroad and canal company agreed that in case the City of Jersey City and Flynn should within one year from the date thereof apply to the Legislature of the State of New Jersey for legislation authorizing the abandonment of the Morris Canal for purposes of navigation and to permit the water and water rights thereof all to be devoted by said companies, or their assigns, to other public uses, they would join and co-operate in such application; and would, upon its enactment, and in case said Jersey City contract should have been awarded to Flynn —(reading fourth paragraph.) To your knowledge, was any endeavor made to obtain legislation pursuant to that contract at Trenton? A. There was, yes, sir.

Q. What was the result of that endeavor? A. It failed.

Q. The Legislature was unwilling to pass the bill at that time? A. Yes, sir.

Q. What knowledge, if any, have you as to Flynn's financial status just previous to March 30th, 1901, with reference to carrying out that contract?

Mr. Milton: Objected to as incompetent, irrelevant and immaterial.

A. I know that he was financially embarrassed and had got to have help to carry the work through.

Q. Did you know anything about his having made application to any persons in New York for any purpose?

Mr. Milton: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Yes, sir.

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E. L. B. Gardner—For Defendants—Direct.

Q. What do you know on that subject?

Mr. Milton: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Some of the bankers had been to see me about it.

Q. What was your understanding as to what the application was?

Mr. Milton: I enter the same objection.

The Court: The objection is overruled.

A. He wanted to raise about four and a half million dollars.

Q. To your knowledge, did the bankers have the work inspected and the contracts examined and reports made thereon? A. Yes, sir.

Mr. Milton: This is taken subject to the same objection.

The Court: Yes.

Q. What, if any, objections did they make to the transaction going through?

Mr. Milton: Same objection.

The Court: Objection overruled.

A. They objected to the clause in the contract which said that the entire flow of the Rockaway River was tributary to the reservoir, on the ground that the canal company claimed that they had a right, prescriptive right, to take some of the water.

Q. Was it ever claimed that this prior right of the canal company would prevent Jersey City from obtaining its full 70,000,000 gallons per day from the Rockaway River? A. The full 70,000,000

could be obtained with adequate reservoir sites—no question about that.

Q. Then the objection they made was purely of a technical character? A. Yes, sir.

Q. What action then did the bankers take with reference to the transaction? A. They declined to advance the money.

Q. Unless those matters were adjusted? A. Yes, sir.

Q. What did Flynn and the water company then do in order to have the matter adjusted? A. They made a contract with Jersey City; they first went to the canal company and made another contract to try and get the canal abandoned, and failing in that they got the Legislature to pass a law giving, I believe, the right to change the terms of their contracts.

Q. Will you turn to page 7077 in Volume 13 of the printed book, which you will find is the agreement dated February , 1901, marked "Exhibit B," between Morris Canal & Banking Company, the Lehigh Valley Railroad Company— A. I don't see it; where do you get any such page number as that?

Q. Here it is. A. Oh, yes, "Exhibit B."

Q. (Question continued)—and Patrick H. Flynn; now, I ask you if that is the contract which was obtained in modification of the former contract? A. It was.

Mr. Humphreys: I offer that in evidence.

Q. After that contract was made, did Flynn and the water company send the communication to the city (a copy of which you will find dated March 30, 1901, page 7086 of Volume 13 of the printed book, marked "Exhibit C")? A. Yes, sir, he did.

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E. L. B. Gardner—For Defendants—Direct.

Mr. Milton: We object; he is testifying from hearsay only.

The Court: The objection is overruled.

A. I only had hearsay knowledge at the time.

Q. Mr. Gardner, have you knowledge of the facts stated in that communication—have you today knowledge that the facts stated in that communication are true?

Mr. Milton: Objected to.

A. I have, yes, sir.

Mr. Collins: This thing was in evidence in the original suit; our present suit is purely supplemental; it is before you, anyhow.

Q. Was any bill introduced into the New Jersey Senate pursuant to that contract?

Mr. Milton: Objected to.

A. Yes, sir.

Q. And what became of that bill? A. It failed of passage.

Mr. Milton: Objected to; this is not the best evidence.

Mr. Humphreys: We are going to try to get copies of the bills that were introduced.

*By the Court.*

Q. What year was that? A. 1901.

Mr. Humphreys: Senate Bill 162; it was introduced by Senator Hudspeth, and I have written to the Secretary of State, and he referred me to the librarian.

The Court: I will receive the evidence.

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E. L. B. Gardner—For Defendants—Direct.

*Further direct.*

Q. Mr. Gardner, do you know whether that bill was prepared by counsel for the water company, as well as by counsel for Flynn? A. Yes, sir.

Q. What was the result of the introduction of that bill?

Mr. Milton: Objected to.

A. It failed of passage.

Mr. Humphreys: I want to offer in evidence, although it is a public statute; I want to offer in evidence; that is chapter 207 of the Laws of 1901, authorizing municipalities to modify the terms of existing contracts for a new water supply.

The Court: All right.

Q. Do you remember that in 1901, the fact that Senator Reed, for President Pitney, introduced a bill for the appointment of a commission to examine into the Morris Canal question?

Mr. Milton: I object to that question.

A. I do remember it, yes, sir.

Q. Was that passed?

Mr. Milton: May I enter my objection?

The Court: Objection overruled.

A. That was passed, yes, sir.

Q. Now, look at page 7038 of Volume 13. A. I have it.

The Court: Do I understand, Judge Collins and Mr. Humphreys, that you are going to produce here, if you can get them, this

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E. L. B. Gardner—For Defendants—Direct.

evidence regarding the procedure in reference to these bills?

Mr. Collins: Yes; all Mr. Gardner can testify to is that he has followed all the course of procedure looking towards abandonment.

Q. If you look, Mr. Gardner, at page 7038 of Volume 13 of the printed book, you will find what purports to be a contract, dated July 8, 1901, between the Mayor and Aldermen of Jersey City, party of the first part, Patrick H. Flynn and the Jersey City Water Supply Company, party of the second part; I ask you if you remember that contract being entered into pursuant to the bill passed by the Legislature, the public bill to which I have referred, authorizing municipalities to modify the terms of existing contracts for a new water supply?

Mr. Milton: Objected to as incompetent, irrelevant and immaterial.

A. I remember that it was entered into.

Mr. Humphreys: I offer it in evidence.

Q. Here is Volume 1 (handing it to witness); I show you contract dated March 31, 1902, marked "Exhibit X," which appears on page 79 in Volume 1 of the Jersey City Water case; also contract dated the same date, marked "Exhibit Y," which appears in the same book at page 83, and I ask you whether those were not the contracts whereby the New Jersey General Security Company succeeded to the rights of Flynn and undertook to complete the works?

Mr. Milton: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

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E. L. B. Gardner—For Defendants—Direct.

A. Yes, sir.

Q. You know that to your own knowledge? A. Yes, sir.

Mr. Humphreys: I offer them in evidence also.

The Court: They will be received with the objection noted to them.

Q. Do you remember on March 31st, 1903, the two houses of the Legislature passed a concurrent resolution for the appointment of three commissioners to investigate the whole question of the Morris Canal, to report upon the expectancy of its abandonment?

Mr. Milton: Objected to.

The Court: I shall have to sustain the objection to it if it is made on the ground that it is not the best evidence, but I will receive the evidence now and take your objection to it. Has not there been some arrangement made regarding the taking of this testimony?

Q. Do you remember who the Governor appointed as such commissioners?

Mr. Milton: Objected to.

The Court: Objection overruled.

A. Ex-Governors Voorhees, Griggs and Werts, three ex-Governors.

Q. And they examined into the matter and made what report? A. Advising the abandonment of the canal.

Q. That was in 1905? A. Yes, sir.

Q. Do you remember whether a bill was introduced in accordance with that report? A. I do.

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E. L. B. Gardner—For Defendants—Direct.

Mr. Milton: I make the same objection.
The Court: I will make the same ruling.

Q. Now, will you turn to page 7047 of Volume 13? A. Yes, sir.

Q. Where appears a communication, dated April 24, 1901, signed by Morris Canal & Banking Company, by Collins & Corbin, attorneys, and addressed to the Mayor and Aldermen of Jersey City, the Board of Finance and the Board of Street and Water Commissioners. To your knowledge, had the City this letter before it when it was negotiating for the supplemental contract which was made on July 8, 1901? A. I was not present when they negotiated; I don't know that it was actually before them, but they must have received it, of course, before that.

Mr. Humphreys: I offer in evidence the formal communication from the Morris Canal & Banking Company to the Jersey City authorities, page 7047, Volume 13, which was offered in the original suit.

Q. As connected with the Jersey City Water Supply Company and one naturally interested in the subject, I ask you what was the general impression at the time the contract of July 8, 1901, was executed, with reference to the probable vacation of the Morris Canal?

Mr. Milton: Objected to as incompetent, irrelevant and immaterial.

A. It was a matter of common knowledge that the canal was going to be abandoned very soon; and that remained the case for several years—quite a number of years. That was the public impression.

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E. L. B. Gardner—For Defendants—Direct.

Q. How did you know that that was a matter of public impression? A. It was talked about by everybody; of course, I was very much interested, because I have interests on the river, and I was closely connected with it.

Q. Did you see anything about it in the public press? A. Yes, sir, the press was full of it.

The Court: This is July 8, 1901.

Q. Have years of experience demonstrated more clearly the adequacy of the flow of the Rockaway River for the needs of both the canal company and the City?

Mr. Milton: Objected to.

The Court: Objection overruled.

A. Yes, sir, it has demonstrated it.

Q. Do you know to-day more than you knew on that subject years ago? A. Of course, we operated the works until 1911, and we knew just what the flow of the water was.

Q. What have you ascertained as to the flow of the Rockaway as to its being sufficient for all the needs of both the canal company and the City? A. The flow was sufficient during that time with adequate reservoirs to provide at least 100,000,000 for the City and let the canal have such water as it was using.

Q. You are a hydraulic engineer? A. Yes, sir—I saw the records.

Q. At that time what had been ascertained with reference to the quantity of water that the Rockaway River was capable of supplying in million gallons? A. It was capable on sufficient storage to supply at least 100,000,000 to Jersey City.

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E. L. B. Gardner—For Defendants—Direct.

Q. And it is capable to-day to do the same thing? A. Yes, sir.

Q. How much are they using now to-day? A. They are using about 53,000,000, I think.

Q. Turn to page 7038 of Volume 13 of the printed book; that is the agreement of July 8, 1901, which has been offered in evidence? A. I have it.

Q. And looking at the fourth paragraph there, it provides for a release being given? A. Yes, sir.

Q. Would such a release have cost a large sum of money if obtained from the Morris Canal & Banking Company at that time?

Mr. Milton: Objected to as incompetent, irrelevant and immaterial, and calls for a conclusion.

The Court: Objection overruled.

A. Yes, sir.

Q. Were you, as a result of the investigation by the Governors' report of 1905, and of the better understanding of the whole subject as developed since 1901, able to obtain a release from the Morris Canal & Banking Company on more favorable terms than you could have obtained it in 1901?

Mr. Milton: Same objection.

The Court: The objection is overruled.

A. Yes, sir.

Q. When did you obtain it? A. In 1909.

Q. What is the reason? A. The reason was, that before 1909 they had a feeling that they had more valuable rights in the Rockaway River than they were convinced that they did have later on; it came to their knowledge, or they began to realize that they did not have the rights that they thought they had for water rights apart from navigation.

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E. L. B. Gardner—For Defendants—Direct.

Q. Now, turn to page 7096 of Volume 13, which is the release which has been offered in evidence; I ask you were you able on May 12, 1909, to obtain that release from the Morris Canal Company? A. Yes, sir.

Q. Look at 7034. A. Oh, yes.

Q. You were able to obtain that release on May 12, 1909? A. Yes, sir.

Q. What did you have to pay for it? A. $25,000.

Q. And you paid that sum? A. Yes, sir.

Q. How did you manage to get it?

Mr. Milton: Objected to.

The Court: Objection overruled.

A. I made application to the canal company; I was fairly close with the canal company, and I made application to them and finally induced them to give it to me.

Q. I show you a letter, copy of a letter, dated March 11, 1909, from you to Mr. J. F. Schaperkotter, general solicitor of the Lehigh Valley Railroad Company, 143 Liberty Street, New York, and ask you if you recognize that as a copy of a letter which you sent to him, having to do with this release? A. That is my signature; yes, sir, that is a copy of the letter.

Mr. Humphreys: I offer the copy of the letter in evidence.

Mr. Milton: I object; how can a communication from Mr. Gardner or from this company to some third party, bind this municipality?

The Court: I will receive it and note your objection.

Mr. Collins: The purpose of this letter is to show the payment of $25,000.

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E. L. B. Gardner—For Defendants—Direct.

Mr. Humphreys: I will put in a copy of this, as it is a valuable document.

(Marked "Exhibit D-2, December 30, 1919.")

Q. I show you what purports to be a bill rendered to the Jersey City Water Supply Company from the Lehigh Valley Railroad Company for $25,000, with a letter written by Mr. Schaperkotter to you as president of the New Jersey General Security Company; did you receive that bill and letter? A. Yes, sir, I did.

Mr. Humphreys: I offer them in evidence.

The Witness: The bill is against the Jersey City Water Supply Company.

(Marked "Exhibit D-3, December 30, 1919.")

Q. I show you a letter dated November 14, 1910, from you to Mr. Schaperkotter; I ask you if you sent that letter? A. Yes, sir, that is my handwriting.

Mr. Humphreys: I offer this letter in evidence.

(Marked "Exhibit D-4½, December 30, 1919.")

Q. I show you a check of the Jersey City Water Supply Company, drawn on the First National Bank of Paterson, New Jersey, payable at the First National Bank, New York, for $25,000, dated November 15, 1910, and endorsed by the Lehigh Valley Railroad Company, accompanied by a letter acknowledging the receipt of that check; I ask you if you received that letter? A. Yes, sir, I received the letter and the check came through the bank, and they were attached in my office and it was paid.

(No cross-examination.)

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IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants.

On Bill, etc., Testimony.

Transcript of testimony taken in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on the 20th day of May, 1920, before Hon. Vivian M. Lewis, Vice-Chancellor.

Same appearances as before noted.

Mr. Humphreys: These three volumes are the only ones we referred to, and these are for your Honor's use and are to be returned to Collins & Corbin.

I shall offer them in evidence later.

I observe that in the transcript of testimony taken here on the 30th of December, 1919, Mr. Gardiner testified to the giving of a check dated November 15, 1910, by the Jersey City Water Supply Company to the Lehigh Valley Railroad Company.

No formal offer of the check appears to have been made in evidence.

A copy of the check is annexed to Exhibit D-4½, and I would like the stenographer to note that I now offer that check, and it is annexed to and forms part of Exhibit D-4½.

1. I now offer in evidence the entire record in the original suit of The Mayor and Aldermen of Jersey City v. Jersey City Water Supply Com-

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pany and Patrick H. Flynn, namely, copies thereof as embraced in Volume 1 of the printed State of the Case in said original cause on cross-appeals from the decree of June 4th, 1908, in said original cause; Volume 7 of the same printed State of the Case, and Volume 13 of the printed State of the Case in said original cause, on an appeal by the water company from the decree of November 15, 1910, in said original cause, and from the order dated December 3, 1910, and filed December 8, 1910, as of November 15, 1910, in said original cause, so far as said records are relevant and evidential as to the subject matter of the present inquiry, the printed volumes referred to being on file in the State Library of New Jersey, and more particularly offer in evidence the following documents:

2. The original bill of complaint in said original cause, copy of which is set forth in Volume 1, which I have referred to, at pages 1 to 103, both inclusive.

3. Contract of February 28, 1899, and the specifications therein referred to, the contract being between Jersey City and Flynn, copies of which are printed in Volume 1, pages 17 to 71, both inclusive, and copies of which are annexed to such original bill of complaint and form part thereof.

4. Contract dated July 8, 1901, between The Mayor and Aldermen of Jersey City, Patrick H. Flynn and Jersey City Water Supply Company, copy of which is printed in Volume 13, to which I have above referred, at pages 7038 to 7045, both pages inclusive. It is also printed as part of the original bill of complaint in Volume 1, pages 72 to 78, both inclusive.

5. Assent under the corporate seal of The Fidelity & Deposit Company of Maryland, surety of

Patrick H. Flynn, to the modification of the original contract of February 28, 1899, by the later contract of July 8, 1901, and agreeing that its bond shall stand as security for the performance of said original contract as modified, which assent is printed in Volume 13, page 7044, line 33, to page 7045, line 16, and is also printed in Volume 1, page 78, line 5, to the end of the page.

6. Decree in said original cause of June 4, 1908, copy of which is printed in Book 7 of said original cause, at pages 4159 to 4165, both pages inclusive.

7. Decree of Court of Errors and Appeals of March 18, 1910, on appeal from decree of the Court of Chancery of June 4, 1908, striking out certain words from said decree, but otherwise affirming it, copy printed in Volume 13, pages 6994 to 6995, both pages inclusive.

8. Decree of Court of Chancery of April 9, 1910, upon the decree of the Court of Errors and Appeals, having been remitted to that Court, making certain changes decreed by the Court of Errors and Appeals, and in other respects modifying and confirming the original decree. The decree of the Court of Chancery of April 9, 1910, is printed in Volume 13, at pages 6996 to 6998, both pages inclusive.

9. Decree of Court of Chancery confirming report; decree filed November 16, 1910; copy printed in Volume 13, at pages 7098 to 7107, both pages inclusive. I wish to have it noted on the record that this decree contains these clauses:

"And leave is hereby reserved to either party to apply to the Court in manner and

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form as such leave was reserved in the said decree of June 4, 1908.

"This decree is made without prejudice to the right of the Jersey City Water Supply Company to file a bill or supplemental bill to recover the sum of $500,000, mentioned in the decree of June 4, 1908, authorized to be retained as therein mentioned whenever in the estimation of said company the same is or shall be payable by Jersey City."

10. I also offer in evidence the testimony given by Robert J. Bain on July 20, 1910, and the offer then of the release from the Morris Canal & Banking Company (Volume 13, page 7030 et seq.), and the offer of the contract of July 8, 1901, by Mr. Vredenburg (page 7038, line 10, to end of page 7052, both pages inclusive).

11. I next offer in evidence opinion of Stevens, *V. C.*, printed in Volume 13, page 7097, dated November 15, 1910.

12. Order filed December 8, 1910, as of November 15, 1910, and dated December 3, 1910, as of November 15, 1910, advised by Stevens, *V. C.*, copy printed in Volume 13, page 7018 to page 7108, both pages inclusive.

13. I also offer in evidence the original decree of affirmance, dated July 11, 1911, entered by New Jersey Court of Errors and Appeals ordering, adjudging and decreeing that the decree of the Chancellor and the order of December 3, 1910, filed December 8, 1910, should be in all things affirmed.

(Marked "Exhibit H. A. 1.")

Now the defendant rests.

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Mr. John Milton: Do I understand that Mr. Humphreys has offered the complete record?

Mr. Humphreys: Yes, I do not think you will find anything else has any bearing on it except the documents I have called attention to.

Counsel have agreed to submit this case on the brief. Mr. Milton has kindly consented to that, and I will serve a brief on Mr. Milton within the next ten days, as soon as I get it printed, and then Mr. Milton can serve his brief on me.

The Court: If I require an oral argument, I can get it when you come back, Mr. Humphreys.

Mr. Humphreys: Yes.

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Exhibit D-1.

*To all to whom these presents shall come, or may in anywise concern,*

We, MORRIS CANAL AND BANKING COMPANY, a corporation of the State of New Jersey, and LEHIGH VALLEY RAILROAD COMPANY, a corporation of the State of Pennsylvania, Lessee of Morris Canal & Banking Company.

SEND GREETINGS:

WHEREAS, Morris Canal and Banking Company was duly incorporated by an act of the Legislature of New Jersey, entitled: "An Act to Incorporate a Company to form an Artificial Navigation between the Passaic and Delaware Rivers," passed December 31st, 1824 (P. L. 158), and has all the powers, privileges, rights and authority given by the said act, and the several acts amendatory thereof and supplementary thereto:

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Exhibit D-1.

AND WHEREAS, said Canal Company, under legislative authority, by a lease dated the Fourth day of May, Eighteen Hundred and Seventy-one, did let and demise the canal and navigation works, and its property and effects, unto the said Lehigh Valley Railroad Company, as by reference to said lease will more fully appear:

AND WHEREAS, The Mayor and Aldermen of Jersey City entered into a contract with Patrick H. Flynn, dated February 28th, 1899, for the obtaining from the Rockaway River of a supply of water for said City, as by reference to said contract will more fully appear, which contract was afterwards assigned by the said Patrick H. Flynn to the Jersey City Water Supply Company:

AND WHEREAS, on the eighth day of July, Nineteen Hundred and One, the said Mayor and Aldermen of Jersey City entered into a supplemental contract with the said Patrick H. Flynn and said Jersey City Water Supply Company, therein called the "Contractors," the Fourth Paragraph whereof is in the following words:—

"Fourth: Whenever the Contractors shall "deliver to Jersey City a valid release from "the Morris Canal and Banking Company and "its lessee, releasing all their rights to divert "the waters of the Rockaway River watershed "out of said river above said proposed reser- "voir site, the same to take effect upon their "abandonment of the navigation of said canal "between Dover and Montville, under legisla- "tive sanction, for a sum therein to be named "and to be paid upon such abandonment, then "there shall be paid over by Jersey City to said "Contractors all of said sum of five hundred

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Exhibit D-1.

"thousand dollars, except the amount named
"in said release, which last mentioned amount
"the Contractors authorize Jersey City to pay
"to said Morris Canal & Banking Company and
"its lessee upon the actual abandonment afore-
"said."

AND WHEREAS, the said Jersey City Water Supply Company has requested us to execute this release, in conformity with the said Fourth Paragraph of said supplemental contract,

NOW, KNOW YE that WE, the said MORRIS CANAL AND BANKING COMPANY and LEHIGH VALLEY RAILROAD COMPANY, lessee of the Morris Canal and Banking Company, in consideration of the premises, and of the sum of One Dollar ($1.00) to us paid upon the execution of this writing and to be paid to us on such abandonment of navigation, have released, and by these presents do release, unto the Mayor & Aldermen of Jersey City, their successors and assigns forever, ALL our rights to divert the waters of the Rockaway River watershed out of said river above the proposed reservoir site mentioned in said supplemental agreement of July 8th, 1901, upon which site there has since been erected a reservoir below Boonton by the Jersey City Water Supply Company, under its contracts with Jersey City.

This release to take effect upon our abandonment of the navigation of the Morris Canal, between Dover and Montville, under legislative sanction and upon the payment by the Mayor and Aldermen of Jersey City to us of the sum of One Dollar ($1.00), as hereinbefore provided upon such abandonment. TO HAVE AND TO HOLD the same unto the said THE MAYOR AND ALDERMEN OF JERSEY CITY, their successors and assigns forever.

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Exhibit D-1.

IN WITNESS WHEREOF, we have caused our respective common seals to be hereunto affixed, and duly attested, and these presents to be signed and delivered by our respective Presidents, the Twelfth day of May, Nineteen hundred and nine (1909.)

MORRIS CANAL AND BANKING COMPANY,
By E. B. Thomas,
President.

(Seal of M. C. & B. Co.)

Attest:
J. Wm. Robbins,
Assistant Secretary.

LEHIGH VALLEY RAILROAD COMPANY,
By E. B. Thomas,
President.

(Seal of L. V. R. R. Co.)

Attest:
J. Wm. Robbins,
Assistant Secretary.

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Jersey City, N. J. June 3, 1909.

Hon. H. Otto Wittpenn,
Mayor of Jersey City,
and
The Mayor & Aldermen of Jersey City.

Dear Sirs:—

Herewith, we deliver to the Mayor, for the Mayor and Aldermen of Jersey City, a deed of release,

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Exhibit D-1.

dated May 12, 1909, duly executed by the Morris Canal and Banking Company and by Lehigh Valley Railroad Company, its lessee, releasing to The Mayor and Aldermen of Jersey City, their successors and assigns, all the rights of said Companies to divert the waters of the Rockaway River watershed out of said river above the proposed reservoir site mentioned in the supplemental agreement of July 8, 1901, between the Mayor and Aldermen of Jersey City, Patrick H. Flynn and Jersey City Water Supply Company, upon which site there has since been erected a reservoir below Boonton by the Jersey City Water Supply Company, under its contracts with Jersey City.

This release is executed and delivered in execution and fulfillment of the Fourth Paragraph of the said contract of July 8, 1901, which is supplemental to the original contract between Patrick H. Flynn and The Mayor and Aldermen of Jersey City, dated February 28, 1899. You will observe that by the terms of this contract, the sum of $1.00 only is to be paid by The Mayor and Aldermen of Jersey City upon the abandonment of navigation of the Morris Canal and for that $1.00 the City will have credit upon the amount due to the Jersey City Water Supply Company, in case the city shall purchase and take over the works.

We are delivering this paper to the city by authority of Morris Canal and Banking Company, Lehigh Valley Railroad Company and Jersey City Water Supply Company.

We call your attention to the fact that the delivery of this release is the fulfillment of the terms and conditions under which $500,000 was to be retained by The Mayor and Aldermen of Jersey City from the contract price of the Jersey City Water Works, under the First Clause of reservations con-

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Exhibit D-1.

tained in the decree of the Court of Chancery of New Jersey, dated June 4, 1908, in the suit wherein The Mayor and Aldermen of Jersey City, is complainant, and Patrick H. Flynn and Jersey City Water Supply Company, are defendants, and that the amount to be paid by Jersey City for the Works, in case the same be taken over under said decree, will be the full contract price of $7,595,000, less any other deductions that may be finally allowed by the Court.

Will you kindly acknowledge receipt of the enclosed release, and greatly oblige,

Yours very truly,

COLLINS & CORBIN

(enclosure)

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

ROBERT J. BAIN, of full age, being duly sworn, according to law, on his oath, says that on the Fifth day of June, A. D., Nineteen hundred and Nine, he delivered the original release, of which the annexed is a copy, and a letter, of which the annexed is a copy, to Honorable H. Otto Wittpenn, Mayor of Jersey City, personally, at the office of said Mayor, in the City Hall in said City.

ROBERT J. BAIN.

Sworn and subscribed at Jersey City, this Eighth day of June, Nineteen Hundred and Nine, before me

SAMUEL S. MOORE,
Notary Public
of New Jersey.

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Exhibit D-1.

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

CARL M. HERBERT, of full age, being duly sworn, according to law, on his oath, says that on June Fifth, A. D., Nineteen Hundred and Nine, the original release, of which the annexed is a copy, were delivered by Robert J. Bain to Honorable H. Otto Wittpenn, Mayor of Jersey City, personally, at the office of said Mayor, in the City Hall, in said City, in his presence.

CARL M. HERBERT.

Sworn and subscribed at Jersey City, this Eighth day of June, Nineteen Hundred and Nine, before me

SAMUEL S. MOORE,
Notary Public
of New Jersey.

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**Exhibit A.**

(Taken from page 7070, etc., Vol. 13, of State of Case in The Mayor and Aldermen of Jersey City, Appellant and Respondent, vs. Jersey City Water Supply Company, Respondent and Appellant.)

THIS AGREEMENT made this twenty-first day of November, A. D. One thousand eight hundred and ninety-eight (1898), BETWEEN the MORRIS CANAL AND BANKING COMPANY, its lessees, party of the first part, (hereinafter called the Railroad and Canal Companies), and PATRICK H. FLYNN, of the Borough of Brooklyn, City of New York, party of the second part, (hereinafter called the said Flynn): WITNESSETH:

WHEREAS the said Flynn has presented proposals to The Mayor and Aldermen of Jersey City for the construction of works and furnishing of a public water supply to said City, pursuant to specifications which said City has prepared, and under which proposals it is expected a contract will be awarded to said Flynn:

AND WHEREAS it is provided by an agreement of even date herewith entered into between the New Jersey General Security Company, Patrick H. Flynn and The New Jersey Title Guarantee and Trust Company, Trustee, that the said Railroad and Canal Companies and the said Flynn shall enter into the agreements herein contained:

Now, in consideration of the premises, it is agreed between the parties hereto as follows:

FIRST: The Railroad and Canal Companies agree that they will not object to but will permit the erection and perpetual maintenance by the

said Flynn and his assigns, across Beaver Brook at Beach Glen in Morris County, New Jersey, at or near Kitchell's house above the Morris Canal feeder dam, of a new dam for the storage of water in a reservoir there to be constructed; and said Flynn hereby covenants that there will be allowed to flow over or through said new dam into the natural water course of Beaver Brook at least 8,000,000 gallons of water daily forever if demanded by the Railroad and Canal Companies until navigation of the canal shall be abandoned at this point, and that all the water from said reservoir and from Beaver Brook and from the water shed tributary thereto shall be drawn over or through the said new dam into the natural water course of Beaver Brook above said canal feeder dam, and that the same shall not by any pipe or in any other manner be diverted by said Flynn from said natural water course so long as the canal is operated at this point, PROVIDED that nothing herein contained shall be construed as requiring said Flynn to construct such dam. The pay of the gate-tender operating the gates in said new dam to regulate the flow of 8,000,000 gallons of water daily into the feeder of the canal shall be borne equally by the Railroad Company and said Flynn; and the gate-tender employed for such purpose shall be under their joint control, appointment and pay. This obligation on the part of the Railroad Company shall cease upon the abandonment of navigation at this point. It shall be the duty of such gate-tender to insure said flow daily and in addition thereto only such additional flow as the said Flynn may require.

SECOND: The Railroad and Canal Companies agree that they will not object to but will permit the erection and perpetual maintenance by the

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Exhibit A.

said Flynn and his assigns across the Longwood Valley in Morris County, New Jersey, of a dam for the storage of water in a reservoir there to be constructed; and said Flynn hereby covenants that there will be allowed to flow over or through said dam into the natural water course of the Rockaway River at least 6,000,000 gallons of water daily forever, if demanded by the Railroad and Canal Companies until navigation of the portion of the Canal directly fed from this source shall be abandoned; and that all the water from said reservoir and from Longwood Valley and from the water shed tributary thereto, shall be drawn over or through the said dam into the natural water course of the Rockaway River without any diversion whatever, and that the same shall not by any pipe or in any other manner be diverted by said Flynn from said natural water course so long as the portion of the canal directly fed from this source is operated, PROVIDED that nothing herein contained shall be construed as requiring said Flynn to construct said dam. The pay of the gate-tender operating the gates in said dam to regulate the flow of 6,000,000 gallons of water daily into the feeder of the canal shall be borne equally by the Railroad Company and said Flynn; and the gate-tender employed for such purpose shall be under their joint control, appointment and pay. This obligation on the part of the Railroad Company shall cease upon the abandonment of navigation of the portion of the canal directly fed from this source. It shall be the duty of such gate-tender to insure said flow daily and in addition thereto only such additional flow as the said Flynn may require.

THIRD: The Railroad and Canal Companies covenant and agree that they will hereafter draw

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Exhibit A.

from the Rockaway River and its tributaries at or above Boonton only such quantity of water as, together with the waters of Lake Hopatcong as now used by said Companies, is reasonably sufficient and necessary to operate their canal as heretofore operated; and it is understood and agreed that the right so to draw is hereby reserved by said companies, anything herein contained to the contrary notwithstanding (the parties hereto being satisfied that with sufficient storage there is enough water in the Rockaway water shed above Old Boonton, including the waters of Lake Hopatcong as heretofore drawn, to supply Jersey City with 70,000,000 gallons of water daily, and to operate the canal as now operated). And said Companies agree that they will co-operate with said Flynn, who may, in the name of the said railroad and Canal Companies but at the expense of said Flynn, take legal measures to prevent and punish pollution of the waters herein referred to, and that the canal above Boonton shall be operated with care to avoid, so far as may be practicable, pollution of its waters. Said Flynn agrees that until the Morris Canal at Boonton is abandoned for navigation, he will establish no intake for the diversion of water and will divert no water above Old Boonton. After such abandonment said Flynn may establish intakes in the Rockaway watershed and divert the waters at such points above Old Boonton as he may desire.

FOURTH: The Railroad and Canal Companies further agree that in case the City of Jersey City and the said Flynn, or either of them, shall within one (1) year from the date hereof apply to the Legislature of the State of New Jersey for legislation authorizing the abandonment of the Morris Canal for purpose of navigation and to permit the waters and water rights thereof to be devoted by

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Exhibit A.

said Companies or their assigns, to other public uses, such legislation to be for the abandonment of said Canal in whole or in part at the option of said Railroad and Canal Companies, that they will co-operate and join in such application, and will upon its enactment, in form satisfactory to the Railroad and Canal Companies, and in case said Jersey City contract shall have been awarded to said Flynn and all payments from Flynn to the Security Company under his said contract with that Company shall have been made, completely abandon for purposes of navigation the use of the waters of Lake Hopatcong, and will by bargain and sale deed convey and release to said Flynn all the interest of the Railroad and Canal Companies therein, and in the lands flowed by such waters including all their right, title and interest in flowage rights in said Lake and in a certain parcel of land at and near the outlet thereof, and being about twenty acres in extent shown on the map attached hereto, and in so much of the right of way of the Canal as may be reasonably demanded by the said Flynn to use for the conducting of the waters of Lake Hopatcong or any part thereof to the Rockaway River at some convenient point near Port Oram, and deliver such deed and release therefor to the Trustee named in the above recited agreement of even date herewith between the Security Company and Flynn, subject to the provisions of said agreement.

FIFTH: Upon the abandonment of the Morris Canal at Boonton, under Legislative sanction, said Railroad and Canal Companies will consent that said Flynn may also perpetually detain and store in the Rockaway Water Shed and withdraw from the Rockaway River at any points at or above Old Boonton, the waters of the Rockaway Water Shed up to the maximum amount of seventy million gal-

lons per day forever, without any let, suit, hindrance, objection, delay or obstruction from them.

SIXTH: The Railroad and Canal Companies agree that they will not hereafter divert, sell or supply for potable uses any water from the Rockaway water shed above Flynn's intake at Old Boonton to any person or corporation, under the provisions of the Act of March 14th, 1871, supplementary to the act incorporating said Canal Company, or under any other authority, it being understood, however, that the said Railroad and Canal Companies shall have the use of said stream at and above Boonton for power according to their existing rights therein, but such rights shall be subject and subservient to all the rights acquired and to be acquired by Flynn under this contract. After the passage of the above mentioned legislation the Canal and Railroad Companies may at their pleasure abandon for navigation all or any part of the Canal at any time without affecting the obligations of this agreement.

SEVENTH: It is understood that the right of Flynn and his assigns to store and draw from the Rockaway River or Water Shed seventy million gallons of water per day as expressed in this agreement means from the natural yield of said water shed and that any rights obtained by said Flynn to take or draw the water of Lake Hopatcong shall be in addition to said seventy million gallons per day.

EIGHTH: The term "Flynn" as used in the foregoing contract shall include the heirs, executors, administrators and assigns of the said Patrick H. Flynn, and the term "Railroad and Canal Companies" shall include the successors and assigns of

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the Lehigh Valley Railroad Company and of the Morris Canal and Banking Company.

IN WITNESS WHEREOF, the said Railroad and Canal Companies have caused their corporate seals, duly attested, to be hereunto affixed, and the said Flynn has hereunto affixed his hand and seal the day and year above written.

(Here follows signatures and seals.)
(Map of Hopatcong lands annexed.)

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**Exhibit B.**

(Taken from pages 7077, etc., Vol. 13, of State of Case in The Mayor and Aldermen of Jersey City, Appellant and Respondent, v. Jersey City Water Supply Company, Respondent and Appellant.)

THIS AGREEMENT, made this day of February, A. D. One thousand nine hundred and one (1901) between the MORRIS CANAL AND BANKING COMPANY and the LEHIGH VALLEY RAILROAD COMPANY, its lessee, party of the first part (hereinafter called the Railroad and Canal Companies), and PATRICK H. FLYNN, of the second part (hereinafter called the said Flynn), WITNESSETH:

WHEREAS by agreement dated November 21st, 1898, between the said Railroad and Canal Companies and said Flynn it was provided *inter alia*, that upon the enacting of certain legislation therein stated, within the time therein stated, the said Railroad and Canal Companies would, on the conditions therein stated, abandon for purposes of navigation, certain waters of the Morris Canal,

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and would convey to the said Flynn, or his assigns all the interest of the Railroad and Canal Companies therein and in and to a certain right of way therein stated;

AND WHEREAS such legislation authorizing the abandonment of the Morris Canal was not enacted and the provisions above referred to in the said agreement, dated November 21st, 1898, for the abandonment of the canal became inoperative;

AND WHEREAS application is to be made by consent of all parties hereto to the present session of the Legislature of the State of New Jersey for similar legislation;

NOW THEREFORE in consideration of the premises and of One Dollar each to the other paid it is covenanted and agreed by and between the parties to these presents as follows:

FIRST: That application shall be made to the present session of the Legislature of the State of New Jersey for legislation authorizing the abandonment of the Morris Canal for purposes of navigation and the sale of its lands, reservoirs, waters, water rights and other property; such legislation to be for the abandonment of said Canal in whole or in part at the option of said Railroad and Canal Companies.

SECOND: That upon the enactment of such legislation at said present session in the form attached hereto, or with such modifications thereof as may be agreed to in writing before the final passage of such legislation by the parties hereto or their respective representatives, to be selected for that purpose and within one year after the enactment of

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said legislation the said Railroad and Canal Companies will grant and convey to said Flynn by a bargain and sale deed or deeds in the form attached hereto, marked schedule B;

(a) All their right, title and interest in the waters of Lake Hopatcong, New Jersey, and in the lands flowed thereby, or covered by the dams and embankments thereof, including all their flowage rights in said Lake and rights to maintain the dams and to divert the waters thereof, and in and to a strip of land thirty (30) feet wide above and adjacent to high water mark in said Lake, as fixed by the present dam, wherever they may own such strip.

(b) A certain parcel of land at the outlet of Lake Hopatcong being about acres in extent, including the waste weir and outlet, shown on the map attached hereto, and also their right to discharge the overflow from Lake Hopatcong into said outlet.

(c) All their right, title and interest in the waters of Green Pond, and in the lands flowed thereby, including all their rights to divert the same.

(d) A certain parcel of land at the outlet of Green Pond being about acres in extent, also shown on the map attached hereto.

(e) All their right, title and interest in and to a right of way for the purpose of conducting the waters of Lake Hopatcong or any part thereof to the Rockaway River at some convenient point near Port Oram over the right of way of the canal and feeder such right of way to be reasonably suf-

ficient for the purpose of permitting the said Flynn to conduct said waters either by pipes or in an open channel located within the prism of the Canal on the berme bank side, such location, however, to be reasonably and properly made so as to occupy no more space than would be properly sufficient for the purpose, not exceeding one-half of said prism, and so as to leave the Railroad and Canal Companies the balance of the canal prism and right of way on the tow-path side for their railroad and other uses, it being understood that the use by said Flynn and his assigns of such right of way for water conducting purposes, and the use by the Railroad and Canal Companies of the remainder of the property for railroad or other purposes shall be so managed in the future that each use shall interfere as little as possible with the other, and that if changes in the works of either party shall be needed to accommodate the other party they shall be made at the expense of the party desiring the same, and that no use thereof shall be made by said Railroad and Canal Companies which shall pollute the aforesaid waters running in said channel; the Railroad and Canal Companies to have the right to cross and recross the said open channel or pipes of the said Flynn with their railroads or other structures provided such crossings shall not interfere with the reasonable exercise of the paramount rights of said Flynn hereunder.

Until the Railroad and Canal Companies or their assigns shall make use of their reserved portion of the right of way between Lake Hoptacong and Port Oram, or any part thereof, they will make no objection to the use by said Flynn of the entire canal prism between those points for the conveyance of water.

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The deed for such rights of way to said Flynn shall contain a proviso and condition that if the said lands shall not in good faith be devoted as aforesaid to the purpose of conveying water, within seven years from the date of the deed, then said lands shall revert to said Railroad and Canal Companies who may thereupon re-enter and the said Flynn shall execute all deeds, if in the said Railroad and Canal Companies any be necessary, to effectually re-invest the same.

IT IS UNDERSTOOD AND AGREED, that in all cases where between the point of junction of the Lake Hopatcong feeder with the canal and the point to which the said Flynn shall under the provisions of this agreement, make use of the canal right of way he shall in any constructions placed on said right of way make such provision as the Engineers of the Railroad and Canal Companies shall reasonably deem necessary for carrying across the canal right of way, streams whose courses have heretofore been interrupted by the canal and which should be returned to their original water courses, and shall make such other provision as may be reasonably necessary and proper to maintain road crossings, culverts, and other necessary structures.

The deeds aforesaid shall also convey and assign all rights in and powers over the said property and rights above enumerated which the Railroad and Canal Companies, or either of them may acquire by virtue of such legislature.

THIRD: The Railroad and Canal Companies will deliver the aforementioned deed to the New Jersey Title Guarantee and Trust Company, for delivery to said Flynn and will within six months after the passage of such legislation file a certificate of aban-

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donment of Lake Hopatcong and of said canal from Lake Hopatcong to Montville eastward and the summit level westward, upon the payment by said Flynn into the hands of the New Jersey General Security Company of the sum of One Hundred Thousand Dollars ($100,000) and into the hands of the New Jersey Title Guarantee and Trust Company of the sum of Two Hundred and Fifty Thousand Dollars ($250,000), which payments said Flynn agrees to make upon notice that said deed is ready for delivery to the Trust Company and said certificate of abandonment is ready for filing. Said sum of Two Hundred and Fifty Thousand Dollars ($250,000) it is understood and agreed the Trust Company shall pay over to the Security Company upon the day fixed in said certificate for the abandonment of said Lake Hopatcong and portion of the canal, at which time the Trust Company shall deliver said deed to said Flynn and the said Railroad and Canal Companies shall deliver possession of the property and rights thereby conveyed. At the time of the delivery of the deed by the Trust Company to said Flynn the said property and rights to be conveyed as aforesaid shall be free from encumbrances created by any judgment liens against said Canal Company and from taxes.

Within six months after the payments aforesaid the Railroad and Canal Companies shall forever abandon the use of the waters of Lake Hopatcong for navigation and all other purposes, and shall also forever abandon the Morris Canal for navigation and all other purposes requiring the use of water from Lake Hopatcong or the Rockaway Water Shed, from Lake Hopatcong to Montville eastward, and the summit level westward, to the end that the said Flynn may thereafter use, store, divert, and enjoy the waters of Lake Hopatcong

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and the Rockaway River and its tributaries without any suit, molestation, eviction, or claim of the Railroad and Canal Companies or either of them or of anyone claiming or to claim under them or either of them.

FOURTH: After the passage of the above mentioned legislation the Railroad and Canal Companies may at their pleasure abandon for navigation all or any other part of the canal at any time without affecting the obligations of this agreement.

FIFTH: The said Flynn shall be under no obligation to the said Railroad and Canal Companies or any one holding under them to carry the waters of Lake Hopatcong when acquired by him into the Rockaway Water Shed and he may, so far as said Railroad and Canal Companies or any one holding under them is concerned, divert said waters or any part thereof in any direction by any method.

SIXTH: Nothing in this agreement contained shall be construed as an admission on the part of said Flynn of any asserted right in the Railroad and Canal Companies or either of them to divert the waters of the Rockaway River for use in the canal below Powerville.

SEVENTH: The said Flynn shall have the right to designate to what persons or corporations (municipal or otherwise) the said deeds or any of them shall be made, and also to direct that different parts of said lands, waters and rights so purchased shall be conveyed to different persons or corporations, but his delay or failure to

so designate shall not extend the time for payment on his part provided the said Railroad and Canal Companies tender themselves ready to convey.

The term "Flynn" as used in this agreement shall include the heirs, executors, administrators and assigns of the said Patrick H. Flynn, and the term "Railroad and Canal Companies" shall include the successors and assigns of the Lehigh Valley Railroad Company and of the Morris Canal and Banking Company.

IN WITNESS WHEREOF the parties hereto have duly executed these presents the day and year first above written.

MORRIS CANAL AND BANKING COMPANY,
by ALFRED WALTER,
President.

(Seal)

Attest JNO. R. FANSHAWE,
Secretary.

LEHIGH VALLEY RAILROAD COMPANY,
by ALFRED WALTER,
President.

(Seal)

Attest JNO. R. FANSHAWE,
Secretary.

P. H. FLYNN, (Seal)

As to P. H. Flynn,
J. F. McLEAN,

THE NEW JERSEY TITLE GUARANTEE AND TRUST COMPANY hereby accepts the trusts imposed upon it by the foregoing agreement, but assumes no responsibility of the performance thereof by either party.

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In Witness Whereof the said Trust Company has caused its corporate seal to be hereto affixed and duly attested by the signatures of its appropriate officers.

The New Jersey Title Guarantee and Trust Company

By

Attest:

President.

Secretary.

The Jersey City Water Supply Company, in consideration of One Dollar ($1.00) to it paid by the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, its lessee, receipt whereof is hereby acknowledged, hereby consents to the making of the within contract between Patrick H. Flynn and the said Companies.

In Witness Whereof, the Jersey City Water Supply Company has caused its corporate seal to be hereto affixed and these presents to be signed by its appropriate officers, the
day of February, 1901.

Jersey City Water Supply Company,
By John McCarty,
President.

(Seal)

Attest: Henry Belden,
Secretary.

Witness:
Jas. P. Northrop.

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Appended to the foregoing is a draft of two Bargain and Sale Deeds, in blank, both from THE MORRIS CANAL AND BANKING COMPANY, and LEHIGH VALLEY RAILROAD COMPANY, Lessee, to grantee in blank, consideration blank. The first deed to convey all the right, title and interest of the grantors in and to the waters of Lake Hopatcong and the lands flowed thereby or covered by dams and embankments thereof, with all flowage rights, with a strip of land 30 feet wide, above and adjacent to high water mark. ALSO a parcel of 14½ acres of land at the outlet of the Lake; ALSO the right, title and interest of the grantors to the waters of Green Pond and the lands flowed thereby; ALSO a parcel of land at the outlet of Green Pond containing 10.01 acres. ALSO all rights and powers over the afore-mentioned property and rights acquired by the grantors by act of Legislature of 1901 authorizing abandonment of canal or portions thereof, under which act the grantors are about to file certificate of abandonment of Lake Hopatcong and of canal from Lake Hopatcong to Montville eastward, and the summit level westward.

(N. B.—Supposed Act of 1901 not passed.)

The second deed provides for the conveyance of the right, title and interest of the grantors in and to right of way for the purpose of conducting waters of Lake Hopatcong to the Rockaway River near Port Oram, and to lay pipes, &c.

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**Exhibit C.**

(Taken from page 7086, etc., Vol. 13, of State of Case in The Mayor and Aldermen of Jersey City, Appellant and Respondent, vs. Jersey City Water Supply Company, Respondent and Appellant.)

Jersey City, March 30, 1901.

THE MAYOR AND ALDERMEN OF JERSEY CITY;
BOARD OF STREET AND WATER COMMISSIONERS;

BOARD OF FINANCE:

Dear Sirs—On February 28, 1899, I entered into a contract with your city for a New Water Supply, based upon specifications prepared by your engineers and adopted by your Board, and my bid thereunder.

Under such bid I offered the water shed of the Rockaway River above old Boonton, containing about 121½ square miles, from which I undertook to deliver to the city a daily supply of fifty million gallons of water forever, with the right to divert at any time twenty million gallons additional. In order to ensure proper storage for such supply of 50 million gallons daily, I provided and am building a storage reservoir on the accepted site at Old Boynton capable of storing seventy-one hundred and ninety (7190) million gallons of water, all in strict accordance with the specifications. In my bid I stated there would be tributary to this intake and storage reservoir The Whole Flow of the Rockaway River.

In pursuance of said contract I have thus far expended over two million dollars. In order to avoid all litigation and question, my first move was to acquire the rights to divert the water from the Society for Establishing Useful Manufactures at Paterson, the Dundee Water Power and Land Company at Passaic, the Acquackanonk Water

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Exhibit C.

Company, the Passaic Water Company, the Montclair Water Company and the East Jersey Water Company, who had vested rights in the flow of the Passaic River and its tributaries, including the Rockaway. All such known rights have been acquired, with the exception of two small private mill rights which will be acquired in due course. An agreement was also made with the Morris Canal and Banking Company, which restricted its use of the waters of Lake Hopatcong and of the Rockaway to the necessities of navigation, and whereby said company agreed not to supply any water for power or potable uses from the Rockaway as it claimed to be authorized by the supplement to its charter passed in 1871 and also to operate the canal with care, so as to avoid pollution.

I have also acquired the title to the greater part of the reservoir site and pipe line right of way. The great dam at Boonton is well under way; practically all the excavation made, and over one-third of the stone prepared and ready to place; all the false works, derricks and power plant are finished. Indeed, upon the dam and the work incidental thereto, over four hundred thousand dollars have been expended, this includes the quarry, crushers, railroad, cut stone, machinery, power plant and excavation. The tunnel through Hook Mountain has been cut through and is ready for lining. About one-third of the long tunnel through Watchung Mountain has been opened. The excavation for about all of the masonry conduit between Boonton and Hook Mountain has been completed. Twenty-five thousand feet of the steel pipe line have been laid and completed; while twelve thousand feet more are in process of manufacture and delivery. During the past winter the roadway for the pipe across the Hackensack

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Exhibit C.

meadows from Kingsland to the Hackensack River has been nearly completed.

In addition to these actual expenditures amounting to over two million dollars, I have become personally liable for sub-contracts entered into for the completion of the pipe line, the Watchung tunnel and the masonry conduit lines, and for other items amounting to at least two million dollars more.

The necessary funds to do all this work have been furnished by me and on my credit without recourse to any banking syndicate. In order to obtain the requisite funds to complete the work I made application, last fall, to a number of banking firms with a view to the formation of a syndicate for the loan of $4,500,000. The application was favorably considered; all the legal points connected with the contract and its award, including the power of the city to purchase and issue bonds therefor, were carefully passed upon by eminent counsel in New York and in New Jersey, and approved in detail.

Then the general plan and scope of the work, done and to be done, including the capacity and potability of the watershed and supply to fulfill the practical terms of the contract, were submitted to several of the leading hydraulic engineers of the country, selected by the syndicate, and were likewise approved.

Three criticisms, based upon technical grounds only, were submitted in the report of the engineers.

(1) That the basis of yield per square mile of the watershed in the dry season fixed by the specification at 666,000 gallons per day, was entirely too low for the Rockaway River watershed, and entailed a large expenditure for storage beyond a

reasonable factor of safety. The estimate being that with the amount of reservoir capacity that has been furnished, the watershed could be counted on in a dry season for at least 900,000 gallons per day per square mile.

(2) That the statement in my original proposal that "the whole flow of the Rockaway River" was tributary to the storage reservoir at Boonton was technically incorrect if the Morris Canal diverted east from the Rockaway River at Boonton a single gallon of water.

(3) That if the Morris Canal withdrew legally or otherwise from the Rockaway River at Boonton any more water than it cast into the river from Lake Hopatcong, this excess would be a draft upon every square mile of the Rockaway River water shed offered by me and manifestly make impossible of correct application the table for the proportion of storage capacity to area of watershed set out in the specification.

Exception 1 applies only to the economic features of the specifications and shows that they are ultra conservative and will cause results beyond the contemplation of the contract.

Exceptions 2 and 3, if well founded, prevent a technical fulfillment of the contract, notwithstanding the works may be built strictly in accordance with the physical features of the specifications, and supply to and vest in the city forever the full quantity and quality of water called for.

When these technical objections (2 and 3) were submitted to the counsel of the syndicate, a doubt as to the ability of the contractor to fulfill the terms of his contract and of the city to accept works not technically in accordance therewith, was

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Exhibit C.

raised. Under the circumstances the syndicate declined to make the loan unless the claim of the Morris Canal could be eliminated or some other remedy found, as it would certainly involve sooner or later, a litigation over either the true meaning of the contract or the rights of the Morris Canal.

These technical objections were a great surprise to me.

Before I put in my proposal based upon the Rockaway River, I had secured the advice of the engineers and of counsel as to the claims thereon by all parties. I learned that several proposals had already been made to Jersey City based upon the Rockaway Water Shed, some above and some below Boonton, that indeed this was the only source seriously considered. I was advised that no water could be legally diverted from the Rockaway River without settlement with the owners having power rights below Boonton. I immediately made arrangements to secure the same, with the result above stated. Among the powers on the property acquired was that of the Fitzgibbons mill at Old Boonton; this is one of the oldest powers on the river, having been operated for upwards of 125 years; this is the power first affected by any diversion; this will be vested in the city as part of the reservoir site. I was also advised that no reservoirs could be located or built in Beach Glen or the Upper Rockaway (as proposed in unaccepted plan No. 2) without litigation or arrangement, with the Morris Canal. I made such arrangement. I was also advised that the Morris Canal, since the beginning of navigation, had always answered in many law suits brought by the owners of power on the Rockaway and Passaic Rivers below Boonton, to prevent diversion, that it took no more water out of the Rockaway River east of Boonton than it cast

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into the river from Lake Hopatcong and other sheds above Dover. An examination of the records of the various state and county offices show that the Morris Canal never acquired by grant or condemnation any right to divert any of the waters of the Rockaway River.

At this late day I find that notwithstanding these facts, which are not denied by the Canal Company, it still claims to exercise the right by prescription, to draw a small quantity of water from the Rockaway River in addition to the waters of Lake Hopatcong, when forced in dry seasons to do so, in order to carry out its obligation to maintain navigation. Even this claim has never been made openly. Of course, I deny such prescriptive rights.

In order, however, to overcome the objections of the syndicate, and hasten the loan and the early completion of the work, I approached the officials of the Morris Canal and Banking Company with a view to enlarging the scope of our former agreement by the addition of a clause waiving to me and to the city its rights, if any, to the use of the waters of the Rockaway River east of Boonton, and offering to pay a reasonable sum for such extinguishment.

The Canal Company replied that although it would make such an agreement willingly if it had the power, it doubted such power without express legislation, as it might involve the practical abandonment of the canal for navigation.

I was advised by counsel that under the case of the State, Van Reipen, et als., vs. Jersey City (29 Vr., 262), the rights of the Morris Cannal could not be condemned under existing laws.

In this emergency, after conference between my counsel and your corporation counsel, I agreed to join the Morris Canal in an application to the Leg-

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islature for the passage of an act authorizing that company to abandon its canal for navigation and to sell and dispose of its property and water rights; the canal company in turn agreeing upon the passage of the bill to relinquish all rights in the Rockaway River and Lake Hopatcong upon the payment of a sum agreed upon. The legislation failed.

When its failure seemed imminent, a bill was introduced by Senator Hudspeth, at the suggestion of counsel for myself and the city, allowing the city to modify the contract of February 28, 1899, so as to do away with the technical objections of the bankers, without in anywise impairing the actual supply to the city. This bill, with some alterations made by Senator Hudspeth, passed and was approved by the Governor; a copy thereof is hereto annexed.

Under this authority I ask that the city modify the present contract in the following particulars:

(1) That for the purpose of construing said contract any waters which may be drawn and diverted from the water shed of the Rockaway River above the location (as now fixed) of the storage and intake reservoir at Old Boonton by the Morris Canal and Banking Company for the purposes of navigation (if any there be) over and above the quantity of water cast into said Rockaway River shed by said Canal Company from the water shed of Lake Hopatcong and otherwise outside of the Rockaway River water shed, shall not be deemed to affect the whole flow of the Rockaway River tributary to said storage reservoir as offered in the accepted proposal of Patrick H. Flynn, and shall not be deducted in any calculation of the capability of the drainage

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Exhibit C.

area tributary to the Rockaway River to furnish 666,000 gallons per day per square mile of such drainage area, nor from any calculation of storage capacity of reservoirs as proportioned to the drainage area, as set forth in the table of "storage required" in the specifications annexed to said contract.

It being the intent hereof to make such calculations as if no waters were drawn by the canal from the area of 121½ miles in the Rockaway River watershed above Old Boonton.

Provided (1) that nothing herein contained shall be construed as an admission on the part of the city or said contractor of any rights by grant, prescription, user or otherwise of the Morris Canal and Banking Company to divert any of the waters of the Rockaway River watershed out of said watershed for the purposes of navigation or otherwise at Boonton; and provided further (2) that said Patrick H. Flynn, the Jersey City Water Supply Company, his assign, and the sureties on said contract of February 28th, 1899, shall assent to the modifications aforesaid; and provided further (3) that such modifications shall not relieve said contractor or his sureties from furnishing and delivering to the said city the quantity and quality of water required by the original contract.

Although the contract of February 28, 1899, has been assigned by me for the purposes of construction to the Jersey City Water Supply Company, I have addressed this letter to you in my own name, since I control said company.

I have had the officers of the company assent hereto under the seal of the company.

If the above modifications are made, I shall be able to proceed to complete said works speedily

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to the satisfaction of the city and avoid the delay of extended litigation.

I urge upon the city immediate action, in order that there may be no delay in the completion of the works.

Respectfully submitted,

P. H. FLYNN.

The Jersey City Water Supply Company, the assignee of Patrick H. Flynn, joins in the above application.

Dated, March 30, 1901.

JERSEY CITY WATER SUPPLY CO.,
JOHN MCCARTHY, Pres.

Attest:—

HENRY BELDEN, Sec'y. (Seal)

ACT WITHIN REFERRED TO.

(Unmarked Exhibit, Chapter 207 of Laws of 1901, P. L. p. 416.)

An Act to authorize municipalities to modify the terms of any contract heretofore or hereafter made for a new water supply.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. It shall and may be lawful for the board having charge and control of the water-supply and the board having charge of the finances in any

municipality of this State, to modify, by resolution, the terms of any contract heretofore or hereafter made by such municipality for the construction and purchase of a new water-supply for said municipality, as to area of the watershed or the proportion of the flow of any river or stream tributary thereto, or the capacity of the storage reservoirs thereof, whenever in the judgment of said boards such modifications are needed to ensure the construction of the works for such new water supply and the delivery thereof to the municipality; provided, the contractor and his sureties shall assent to such modifications; and provided, further, such modifications shall not relieve said contractor or his sureties from furnishing and delivering to the municipality the quantity and quality of water required by the original contract.

2. The action of such boards shall be certified and forwarded to the Mayor, who shall have power to veto the same within ten days thereafter, and unless each of said boards shall by a two-thirds vote at its next meeting after receiving notice thereof, vote to sustain said action, notwithstanding said veto, said action shall be void.

3. This act shall take effect immediately.

Approved March 22, 1901.

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**Unmarked Exhibit.**

Schedule A.

(Taken from pages 17, etc., Vol. 1, of State of Case in The Mayor and Aldermen of Jersey City, Complainant, vs. Patrick H. Flynn and the Jersey City Water Supply Company.)

THIS AGREEMENT, made this twenty-eighth day of February, eighteen hundred and ninety-nine, BETWEEN THE MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation of the State of New Jersey, party of the first part, hereinafter called Jersey City, and PATRICK H. FLYNN, of the Borough of Brooklyn, in the City and State of New York, party of the second part, hereinafter called the Contractor, WITNESSETH:

WHEREAS, On the eighth day of July, eighteen hundred and ninety-eight, the Board of Street and Water Commissioners of Jersey City adopted specifications for a new water supply, which specifications are hereunto annexed, and made a part of this contract, and advertise for proposals for a supply of pure and wholesome water, based on such specifications to be received by said Board on the eighteenth day of August, eighteen hundred and ninety-eight; and

WHEREAS, After due advertisement said Board of Street and Water Commissioners did, on said eighteenth day of August, eighteen hundred and ninety-eight, receive such proposals; and

WHEREAS, The said Contractor in answer to such advertisement did present to said Board on said last mentioned day proposals for a new water supply under said specifications upon three plans, known as Plan No. 1, Plan No. 2 and Plan No. 3,

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Unmarked Exhibits—Schedule A.

a copy of which proposal under Plan No. 1 is hereunto annexed and made a part hereof; and

WHEREAS, on the eighth day of December, eighteen hundred and ninety-eight, the said Board of Street and Water Commissioners accepted the proposal of said Contractor under said Plan No. 1, and awarded a contract to him in accordance therewith and with said specifications, which award was on the twenty-first day of December, eighteen hundred and ninety-eight, concurred in by the Board of Finance of such City, and was on the first day of February, 1899, approved by the Mayor of such City:

NOW THEREFORE, In consideration of the premises and of One Dollar each to the other paid, it is hereby covenanted and agreed by and between the parties hereto as follows:

FIRST.—The said contractor agrees to construct a new system of water works for Jersey City and to supply said City therefrom with pure and wholesome water, in strict conformity with said specifications and his proposal under Plan No. 1, and to enlarge said works if required by Jersey City, in the manner provided in said specifications and proposal. Such works shall be so constructed and maintained by the Contractor that the water delivered therefrom shall be pure and wholesome and free from pollution deleterious for drinking and domestic purposes during the time that Jersey City shall take water by the million gallons. If such works and supply are purchased by Jersey City they shall be delivered to said City as a completed operating plant free from pollution as aforesaid.

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Unmarked Exhibits—Schedule A.

SECOND.—Jersey City agrees to take the water aforesaid, and use the same for its water supply, when said works are completed in accordance with said specifications, and Plan No. 1, as soon as the said Contractor is ready to deliver pure and wholesome water from such supply.

THIRD.—Jersey City agrees to pay for such water when delivered to it under said specifications and plan as follows:

For each million gallons of water furnished up to twenty-five (25) million gallons daily, thirty-six dollars ($36.00) per million gallons.

For each million gallons in excess of twenty-five million gallons daily up to thirty (30) million gallons daily, thirty-four dollars ($34.00) per million gallons.

For each million gallons in excess of thirty (30) million gallons daily up to thirty-five (35) million gallons daily, thirty-two dollars ($32.00) per million gallons.

For each million gallons in excess of thirty-five (35) million gallons daily up to forty-five (45) million gallons daily, twenty-four dollars ($24.00) per million gallons.

For each million gallons in excess of forty-five (45) million gallons daily up to the limit of capacity of the water works, twenty dollars ($20.00) per million gallons.

FOURTH.—Said specifications and accepted proposal under Plan No. 1 which are hereto annexed, are hereby made a part of this contract.

FIFTH.—The said contractor hereby covenants and agrees that he will, upon the receipt of notice as provided in the specifications and the payment

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of the purchase price, sell and convey said water supply with the appurtenances to Jersey City upon any of the following options:

For the water works and all appurtenances thereof necessary to fulfill the requirements of the specifications to the extent of fifty (50) million gallons of water daily, together with the water supply, water rights, lands, reservoir sites, rights of way and all easements necessary to fulfill the requirements of the specifications and to the extent of seventy (70) million gallons of water daily forever, which purchase can be made by the City when the water works are completed and accepted hereunder; provided that the City shall give notice of its intention to purchase within one year after the date of contract, the sum of seven million five hundred and ninety-five thousand dollars ($7,595,000.00).

For the water works and all appurtenances thereof necessary to fulfill the requirements of the specifications to the extent of fifty (50) million gallons of water daily, together with the water supply, water rights, lands, reservoir sites, rights of way and all easements necessary to fulfill the requirements of the specifications and to the extent of seventy (70) million gallons of water daily forever, which purchase can be made by the City at the expiration of five (5), ten (10), or fifteen (15) years from the date of contract; provided, that the City shall give notice of its intention to purchase at least one year in advance of such purchase, the sum of seven million nine hundred and ninety-five thousand dollars ($7,995,000.00).

For the water works, water supply, water rights, lands, reservoir sites, rights of way and all appurtenances and easements necessary to fulfill the requirements of the specifications and to the extent of seventy (70) million gallons of water daily for-

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ever, which purchase can be made by the City when the water works are completed and accepted hereunder; provided, that the City shall give notice of its intention to purchase within one year from the date of contract, the sum of eight million seven hundred and forty-five thousand dollars ($8,745,000.00).

For the water works, water supply, water rights, lands, reservoir sites, rights of way and all appurtenances and easements necessary to fulfill the requirements of the specifications and to the extent of seventy (70) million gallons of water daily forever, which purchase can be made by the City at the expiration of five (5), ten (10) or fifteen (15) years from the date of contract; provided, that the City shall give notice of its intention to purchase one year in advance of such purchase, the sum of nine million two hundred and forty-five thousand dollars ($9,245,000.00).

SIXTH.—It is understood and agreed that in case the City shall give notice within one year from the date of this contract of its intention to purchase said water supply and water works under said specifications, when the water works are completed and accepted, that then the City shall have such reasonable time to test said works and the water supply after completion, and before the acceptance thereof for purchase, as Jersey City may deem necessary and reasonable for that purpose; provided such test shall not extend beyond a period of four years and eleven months from the date of this contract.

SEVENTH.—Upon the purchase of the works and water supply by the City under any of the options aforesaid, the said Contractor shall turn over and deliver to the City, Searches, Abstracts and Guar-

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antees of Title, for all the lands, water rights and easements obtained for such works made by the New Jersey Title Guarantee and Trust Company of Jersey City, or by approved counsel, which Abstracts and Guarantees of Title shall be continued and guaranteed down to the date of the transfer of the water works to the City, without cost or expense to such City.

EIGHTH.—It is further understood and agreed that all sewers and sewage disposal works constructed or arranged for by the Contractor to prevent pollution or to carry off pollution existing in the watershed shall, under said specifications and plan, be so constructed and arranged for by him that in the event of the purchase of the water supply and plant by Jersey City under any of the options aforesaid the operation and maintenance of such sewers and sewage disposal works for the purposes aforesaid, shall not be a charge upon or expense to Jersey City.

NINTH.—It is further understood and agreed that so long as Jersey City shall continue to take water by the million gallons without purchasing the water supply and works under the options aforesaid no water shall be sold or furnished by said Contractor to any other person or municipality from any point on the main pipe line or lines between the intake at Old Boonton and the Bergen Reservoir in Jersey City, said pipe line or lines being intended for the exclusive use of Jersey City; nor shall any water be furnished from said water works by said Contractor to any consumer of Jersey City water.

TENTH.—Nothing in this contract contained shall be construed as an abandonment by Jersey City of

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its rights in the Passaic River at Belleville, New Jersey, or elsewhere, as vested in it by Legislative grant, Riparian ownership or otherwise.

ELEVENTH.—The provisions of this contract shall apply to and bind the successors and assigns of Jersey City, and the heirs, executors, administrators and assigns of the said contractor.

IN WITNESS WHEREOF, The said party of the first part hath caused its corporate seal to be hereto annexed and these presents (executed in triplicate) signed by its Mayor, The President of the Board of Street and Water Commissioners and the President of the Board of Finance, and attested by the City Clerk; and the said party of the second part hath hereunto affixed his hand and seal the day and year first above written.

In presence of

EDWARD HOOS,
*Mayor.*

.....
: Corporation of :
: Jersey City :
: Seal. :
:.....:

*Attest:*
M. J. O'DONNELL,
*City Clerk.*

ANTHONY HAUCK,
*President of the Board of S. and W. Commissioners.*

*Attest:*

GEO. T. BOUTON,
*Clerk.*

WM. C. HEPPENHEIMER,
*President Board of Finance.*

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*Attest:*

MARTIN FINCK,
*Clerk.*

PATRICK H. FLYNN. (Seal)

*In presence of*
HENRY BELDEN.

---

KNOW ALL MEN BY THESE PRESENTS, That we, PATRICK H. FLYNN, of the Borough of Brooklyn, in the City and State of New York, as principal, and the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation organized under the laws of the State of Maryland and authorized to transact business in the State of New Jersey, as surety, are held and firmly bound unto The Mayor and Aldermen of Jersey City, a municipal corporation of the State of New Jersey, in the sum of five hundred thousand dollars, lawful money of the United States of America, to be paid to the said The Mayor and Aldermen of Jersey City, its successors or assigns, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and successors, jointly and severally firmly by these presents.

Sealed with our seals and dated this twenty-eighth day of February, eighteen hundred and ninety-nine.

WHEREAS, The said The Mayor and Aldermen of Jersey City and the said Patrick H. Flynn, have this day entered into a contract for the construction of water works and the furnishing of a new water supply to said City by said Flynn, which contract is hereunto annexed;

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NOW THEREFORE, The condition of this obligation is such that if the said Patrick H. Flynn, his heirs, executors, administrators or assigns, shall well and faithfully keep and perform the covenants, agreements and conditions of said contract in accordance therewith and with the specifications and proposals thereunto annexed, then this bond or obligation shall be void, but otherwise to remain in full force and virtue.

THIS BOND shall remain in effect up to the date of the acceptance of a water supply under said contract by Jersey City, and the furnishing by the said Contractor of a new bond satisfactory to the City for the sum of five hundred thousand dollars for the faithful performance of the above mentioned contract throughout its period, which last mentioned bond shall remain in force so long as Jersey City shall purchase water of the Contractor by the million gallons under said contract above recited.

Upon the acceptance of such water supply and the approval of such new bond this bond shall be cancelled.

In presence of

HENRY BELDEN,

PATRICK H. FLYNN. (Seal)

FIDELITY AND DEPOSIT CO., OF MARYLAND,

By Henry V. Platt,
Vice-President.

Attest:
John W. Wooten,
Attorney.

| |
|---|
| Fidelity and Deposit Company of Maryland Incorporated 1860 |

U. S. Revenue Stamps, $12.50

Approved as to form,

ALLAN L. MCDERMOTT, C. C.

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## SPECIFICATIONS FOR A NEW WATER SUPPLY

FOR JERSEY CITY, N. J.
(Abridgment.)

Approved July 9th, 1898.

The Mayor and Aldermen of Jersey City, by the Board of Street and Water Commissioners, will receive proposals for a supply of pure and wholesome water based on this specification, at the meeting room of the Board, at the City Hall, Jersey City, New Jersey, on the 18th day of August, 1898, at 10 o'clock A. M.

Bidders must submit proposals under the following plan:

PLAN.

The water must be delivered by gravity at Bergen Reservoirs. The first works must be constructed with storage and intake reservoirs of sufficient capacity and so located as to be capable of collecting and delivering fifty (50) million gallons daily at all times, and a single conduit having a capacity to deliver seventy (70) million gallons daily if of masonry or in tunnel, or fifty (50) million gallons daily if of steel pipe; delivery of said conduit to be at Bergen Reservoirs, with a pressure equivalent to an elevation of 210 feet above mean high tide. All gatehouses at intakes and points of delivery, and all points of connection of steel with

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masonry conduits shall be provided with connections for a second steel pipe of thirty (30) million gallons daily capacity. The lands, reservoir sites, water rights and easements necessary to enable the city to divert and use seventy (70) million gallons daily must be acquired.

Whenever during the term of contract, but prior to the exercise of the City's option to purchase, the City shall notify the contractor to increase the capacity of his water works, then the contractor shall immediately proceed to construct such additional storage and intake reservoirs as may be necessary, so located and of such capacity as to be capable, together with those previously constructed, of collecting and delivering seventy (70) million gallons daily at all times, and he shall likewise proceed to construct a second steel pipe where such pipe may be necessary to enable him to deliver thirty (30) million gallons daily additional into Bergen Reservoirs at an elevation of 127 feet above mean high tide, and shall so perfect and complete his water works in all details as to make them capable of collecting and delivering to the City seventy (70) million gallons daily at all times. Such additional works shall be completed within two years after the service of the aforesaid notice, and when so completed, on demand of the City, the City will agree to take and pay for at least fifty (50) million gallons of water daily. But the contractor shall in no case be compelled to complete these additional works earlier than the first works are to be completed hereunder.

If the conduit or conduits shall pass within one thousand feet of Belleville Reservoir, connections must be provided therewith, and the City may require delivery of a part of the supply into said reservoir.

New Jersey State Library

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GENERAL CONDITIONS.

The City reserves the right to reject any or all bids made by virtue of this specification.

Proposals will not be received after the time fixed by the advertisement.

Proposals must be made on blank forms, to be obtained at the office of the Clerk of the Board of Street and Water Commissioners, and must be delivered in open meeting, and when called for, to that officer, in a sealed envelope, to be endorsed "Proposals for New Water Supply for Jersey City, N. J."

Prices must be stated in figures and writing.

Any proposal under this specification which does not comply with all of its requirements will be deemed informal and rejected.

Bidders must submit and annex as a requisite to their proposal such descriptions, plans and drawings as may be necessary to make clear the essential features of the works proposed to be built, and must show the location, area, depth and capacity of all reservoirs, the location of intakes, the route, profile and hydraulic gradient of conduits, with all necessary data for determining their carrying capacity, and the location, area, and extent of the gathering grounds.

In case future exploration and boring shall demonstrate that the sub-soil of any of the storage reservoirs offered is unfit for the construction of safe and practicable dams, the contractor will be allowed to furnish other reservoirs of equal value and efficiency and acceptable to the Engineer.

CERTIFIED CHEQUE TO ACCOMPANY BID.

As an evidence of good faith, each bidder will deposit one hundred thousand dollars in one of the

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national banks of Jersey City, or the New Jersey Title Guarantee and Trust Company, and attach to his proposal a certified cheque for the amount, payable to the order of the Treasurer of Jersey City. On award of the contract, such cheque will be returned to unsuccessful bidders and returned to the successful bidder on signing and delivery of the contract; but will be forfeited by the successful bidder, to the use of the City, in case the contract is not signed within ten days after it is ready for execution on part of said contractor. Said cheque shall be in lieu of freeholder security.

Any bidder may, on one certified cheque, make one or more bids upon the plan hereby presented by the City, and said cheque shall stand as security for each bid so made.

BONDS.

The contract must furnish a bond of five hundred thousand dollars, the security to be subject to approval according to law, for the performance of the contract up to the date of acceptance of water supply thereunder, at which time and upon the delivery to the City of the bond hereinafter provided for, this bond is to be cancelled. Upon the acceptance of water under this contract, the contractor must furnish a new bond for five hundred thousand dollars for the faithful performance of the contract throughout its period, which bond is to be in force so long as the City shall purchase water of the contractor by the million gallons, but will be cancelled on completion of a purchase of the plant by the City.

FORM OF BOND.

The form of all bonds mentioned in this specification shall be approved by the Corporation Counsel.

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DRAWING OF CONTRACT.

The contract to carry into effect this specification shall be prepared by the Corporation Attorney with the approval of the Corporation Counsel.

TERM OF CONTRACT.

If a contract is entered into it will run for twenty-five years from the date of contract, unless sooner terminated by a purchase of the water works by the City as herein provided for.

IN CASE CONTRACT IS CONTESTED.

In case an award of contract shall be made, and the legality of such award and the carrying out the provisions of the specifications or any portion thereof shall be legally contested, due diligence must be used in effecting a speedy settlement of such contest to a conclusion, and to the attainment of that end no postponement or delay in the hearing of such case or in its prosecution or process of settlement shall be consented to or requested by the successful bidder or by any one representing him, unless the same shall have been first agreed to by the Mayor or Corporation Counsel of Jersey City.

AMOUNT THE CITY AGREES TO TAKE.

The City will agree to take at least twenty-five (25) million gallons of water per day and to take its whole supply of water from the contractor during the term of contract.

* * * * * *

HOW TO BID.

Bidders must state a price per million gallons for a supply of twenty-five million gallons daily;

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a price per million gallons for all in excess of twenty-five million gallons daily up to thirty million gallons daily; a price per million gallons for all in excess of thirty million gallons daily up to thirty-five million gallons; a price per million gallons for all in excess of thirty-five million gallons daily up to forty-five million gallons daily, and a price per million gallons for all in excess of forty-five million gallons daily up to the limit of capacity of the works.

Bidders must also state a price for which the City can buy and own the water works of a capacity of fifty (50) million gallons daily, together with the water supply, water rights, lands, reservoir sites, rights of way and all easements necessary to fulfill the requirements of this specification and to the extent of seventy (70) million gallons of water daily; said purchase to take effect on completion and acceptance of the works, if the City shall give notice of its intention to purchase within one year after the date of contract.

Bidders must also state a price for which the City can buy and own the water works of a capacity of fifty (50) million gallons daily, together with the water supply, water rights, lands, reservoir sites, rights of way and all easements necessary to fulfill the requirements of this specification and to the extent of seventy (70) million gallons of water daily; said purchase to take effect at the expiration of five, ten or fifteen years from the date of contract, but the City shall give notice of its intention to purchase one year in advance of said purchase.

Bidders must also state a price for which the City can buy and own the water works, water supply, water rights, lands, reservoir sites, rights of way and all appurtenances and easements necessary to fulfill the requirements of this specification

and to the extent of seventy (70) million gallons of water daily forever; said purchase to take effect on completion and acceptance of the works if the City shall give notice of its intention to purchase within one year after the date of contract.

Bidders must also state a price for which the City can buy and own the water works, water supply, water rights, lands, reservoir sites, rights of way and all appurtenances and easements necessary to fulfill the requirements of this specification and to the extent of seventy (70) million gallons of water daily forever; said purchase to take effect at the expiration of five, ten or fifteen years from the date of contract, but the City shall give notice of its intention to purchase one year in advance of such purchase.

* * * * * *

WORK MUST BE INDEPENDENT.

The water works must be so constructed that they may be used and operated to supply Jersey City exclusively, and the contractor must agree to furnish no water therefrom to any consumer of Jersey City water.

TIME TO COMPLETE.

The contractor will be allowed two years and six months from the date of contract to complete the work and furnish the water specified.

For every day's delay beyond the term of contract the contractor shall pay the City of Jersey City the sum of five hundred (500) dollars per day as liquidated damages, and not by way of penalty.

All the time lost by reason of strikes, accidents or other delays unavoidable or beyond the control

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of the contractor shall not be computed as part of the time herein specified, if the unavoidability of such delays is certified to by the Engineer appointed by the City to superintend said work.

RIGHT OF EMINENT DOMAIN.

The City will agree to exert or exercise such powers or rights in the matter of condemnation or otherwise as it now has or may hereafter acquire, and which may be advantageously used or exercised for the purposes of the contract, in order to enable the use or acquisition of such water and water rights and lands or other property, for the right of way, storage reservoirs and other works or plant as may be necessary to the proper and convenient construction and maintenance of said system of water works to supply Jersey City as aforesaid, said rights of condemnation to be exercised in the name of the City, but at the cost and expense of the contractor; and the contractor shall pay and hold the City harmless of and from all cost, expenses, claims and demands of all persons by reason of the taking and acquiring for the purpose of the proposed contract of all lands, water, water rights and other property. The City will also agree to exercise, on demand of the contractor, all its legal powers to prevent pollution of waters tributary to the proposed works, but all expenses attendant upon the prevention of such pollution shall be borne by the contractor.

USE OF CITY LAND AND STREETS.

The City will, so far as it has legal power, permit the contractor to use such lands as it may now own or control as may be necessary for the purpose of laying and maintaining the proposed con-

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duit from Passaic River to the reservoirs at Jersey City Heights.

The contractor, in constructing the works required and necessary to be built under the contract, shall have the right to lay pipes through the streets, avenues and lands of the City, public parks excepted; provided, however, that such construction through such streets, avenues and lands shall be made under the direction of the Board of Street and Water Commissioners, and shall not interfere with or injure other constructions or works made therein; and that the contractor shall, at his own cost and expense, immediately fill up all excavations and relay any pavement or sidewalk removed and leave such streets, avenues and lands in as good condition after such pipes are laid therein as they were before such work was commenced.

* * * * * *

WHAT CONSTITUTES THE CONTRACT.

The advertisement, the specifications, the accepted proposals and all maps, plans and drawings accompanying, attached to or described therein, the specific contract and the contractor's bond are to be considered essential portions of the complete contract.

MEANING OF CITY.

Whenever the word City is used herein reference is made to the Mayor and Aldermen of Jersey City, in the State of New Jersey.

MEANING OF ENGINEER.

Whenever the word Engineer is used reference is made to an Engineer to be appointed by the

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Board of Street and Water Commissioners of the City of Jersey City, New Jersey, to superintend the construction of the water works, or to his authorized assistants.

MEANING OF CONTRACTOR.

Whenever the word contractor is used reference is made to the person or persons or corporation contracting to perform the work or furnish the materials provided for under these specifications.

SPECIFICATIONS.

* * * * * *

STORAGE CAPACITY.

The available storage capacity of the reservoirs will be taken to be the capacity between the level of the waste weir and the lowest level to which the reservoir can be drawn through its effluent pipes; but if this storage capacity shall exceed 175 million gallons for each square mile of drainage area tributary to said reservoir, then the available or effective capacity of said reservoir will be taken at 175 million gallons for each square mile of said drainage area. The amount of effective storage so determined must be equal to that given in the following table. In this table the area of catchment or drainage area being given in the first column, the corresponding storage capacity to be required for a draft of 50,000,000 gallons daily will be found on the same line in the second column, and for a draft of 70,000,000 gallons daily in the third column of the table. In case the area of catchment is not given in the table, then the required storage capacity must be determined by interpolation:

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TABLE.

| Number of Square Miles of Catchment | Storage Required in Million Gallons for the Given Daily Draught | |
|---|---|---|
| | Draught 50 Million Gallons Daily | Draught 70 Million Gallons Daily |
| 76 | 9,880 | |
| 80 | 9,448 | |
| 90 | 8,838 | |
| 100 | 8,300 | |
| 105 | 8,022 | 13,650 |
| 125 | 7,000 | 12,450 |
| 150 | 5,580 | 11,070 |
| 200 | 3,770 | 8,360 |
| 300 | 1,800 | 4,740 |
| 400 | 500 | 2,440 |

## PROPOSAL FOR A NEW WATER SUPPLY
FOR JERSEY CITY, N. J.

PLAN No. 1.

Made by Patrick H. Flynn.

Residence or Office: 189 Montague Street, Borough of Brooklyn, New York City, N. Y.

Date, August 18, 1898.

To the Board of Street and Water Commissioners of Jersey City, New Jersey:

Gentlemen—I hereby propose to provide a new supply of water to Jersey City, New Jersey, and produce the results required in the plan and specifications preceding, attached to and made a part of this proposal, for the following prices:

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For each million gallons of water furnished up to twenty-five (25) million gallons daily, thirty-six dollars ($36.00) per million gallons.

For each million gallons in excess of twenty-five (25) million gallons daily up to thirty (30) million gallons daily, thirty-four ($34.00) per million gallons.

For each million gallons in excess of thirty (30) million gallons daily up to thirty-five (35) million gallons daily thirty-two dollars ($32.00) per million gallons.

For each million gallons in excess of thirty-five (35) millions gallons daily up to forty-five (45) million gallons daily, twenty-four dollars ($24.00) per million gallons.

For each million gallons in excess of forty-five (45) million gallons daily up to the limit of capacity of the water works, twenty dollars ($20.00) per million gallons.

For the water works and all appurtenances thereof necessary to fulfill the requirements of these specifications to the extent of fifty (50) million gallons of water daily, together with the water supply, water rights, lands, reservoir sites, rights of way and all easements necessary to fulfill the requirements of these specifications and to the extent of seventy (70) million gallons of water daily forever, which purchase can be made by the City when the water works are completed and accepted hereunder; provided, that the City shall give notice of its intention to purchase within one year after the date of contract, the sum of seven million five hundred and ninety-five thousand dollars ($7,595,000.00).

For the water works and all appurtenances thereof necessary to fulfill the requirements of these specifications to the extent of fifty (50)

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million gallons of water daily, together with the water supply, water rights, lands, reservoir sites, rights of way and all easements necessary to fulfill the requirements of these specifications and to the extent of seventy (70) million gallons of water daily forever, which purchase can be made by the City at the expiration of five (5), ten (10) or fifteen (15) years from the date of contract; provided, that the City shall give notice of its intention to purchase at least one year in advance of such purchase, the sum of seven million nine hundred and ninety-five thousand dollars ($7,995,000.00).

For the water works, water supply, water rights, lands, reservoir sites, rights of way and all appurtenances and easements necessary to fulfill the requirements of these specifications and to the extent of seventy (70) million gallons of water daily forever, which purchase can be made by the City when the water works are completed and accepted hereunder, provided that the City shall give notice of its intention to purchase within one year from the date of contract, the sum of eight million seven hundred and forty-five thousand dollars ($8,745,000.00).

For the water works, water supply, water rights, lands, reservoir sites, rights of way and all appurtenances and easements necessary to fulfill the requirements of these specifications and to the extent of seventy (70) million gallons of water daily forever, which purchase can be made by the City at the expiration of five (5), ten (10) or fifteen (15) years from the date of contract, provided that the City shall give notice of its intention to purchase one year in advance of such purchase, the sum of nine million two hundred and forty-five thousand dollars ($9,245,000.00).

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I herewith offer a certified cheque for one hundred thousand dollars ($100,000.00) on The New Jersey Title Guarantee and Trust Company, payable to the order of the Treasurer of Jersey City, as an evidence of good faith, which cheque is in lieu of freeholder security.

I herewith submit and annex to this proposal the plans, general drawings, etc., enumerated below, and in addition thereto furnish the following description of the works proposed to be built and the sources of the supply proposed to be furnished.

Note—Following any written matter hereto annexed the bidder must sign name in full and post-office address. In case an individual sign for a corporation, proper authority must accompany the proposal.

PATRICK H. FLYNN,
189 Montague Street,
Borough of Brooklyn,
New York City, N. Y.

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PLAN NO. 1.

The following is the general description of the plan and essential features for a water supply proposed by me at the foregoing prices for Jersey City, on Plan No. 1, under the specifications of the City, hereto annexed and in strict conformity thereto.

This plan provides for the immediate supply of fifty million gallons of pure and wholesome water daily, with the lands, reservoir sites, water rights and easements necessary to enable the City to divert and use seventy million gallons of water daily.

It is to be taken from the Rockaway River water-

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shed, with the main intake located on the Rockaway River at Old Boonton, as shown on Maps Nos. 1 and 2, accompanying this bid. This intake reservoir, which will also serve the purpose of a storage reservoir, will have an area, as improved for the fifty million gallons delivery, of nine hundred and forty-nine (949) acres; a maximum depth of one hundred and two (102) feet at the dam, and more than seventy-five per cent. (75 per cent.) of the area thereof will exceed eight (8) feet in depth at the full water level. It will have a capacity above the effluent pipes of 7,362 million gallons; an elevation at the flow line of two hundred and ninety-two (292) feet above mean high tide, and the elevation of the effluent pipes will be 256.5 feet. The dam will be of masonry, one hundred and five (105) feet in height, exclusive of foundation, and will be constructed and equipped as required by the specifications. It is marked Dam No. 1 and shown on Maps Nos. 1 and 2.

There will be tributary to this intake and storage reservoir, the whole flow of the Rockaway River, having a watershed and gathering grounds of one hundred twenty-two and one-half (122½) square miles, including the waters of the Longwood Valley, Green Pond, Denmark Lake, Beach Glen, Split Rock Lake, Dixon's Pond, Shongum Lake and other tributary streams.

The location, area and extent of the gathering grounds are shown on Maps Nos. 1 and 2.

Under this plan for a supply of fifty million gallons of water per day at the outset no additional storage reservoirs will be required.

* * * * * *

The water proposed to be furnished is pure and wholesome; the plan has been prepared so as to prevent all contamination thereof from any source, in accordance with the specifications.

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This plan contemplates the acquirement of lands, reservoir sites, water rights and easements necessary to enable the City to divert and use seventy million gallons of water daily.

In order to provide for the increase of the old Boonton reservoir, as hereinafter provided, the plan includes the acquirement of the additional lands required for such reservoir sites, making a total of 1,242 acres therein.

Whenever during the term of the contract, as provided in the specifications, the City shall notify the contractor to increase the capacity of his water works, then it is proposed to increase the Old Boonton reservoir above described by raising the dam and increasing the capacity thereof as follows:

The dam will be raised so that the flow line thereof will be at an elevation of three hundred and seven and one-half (307½) feet; the area of said reservoir at a flow line, as increased, will be 1,177 acres; the maximum depth thereof will be one hundred and seventeen and one-half (117½) feet and seventy-five (75) per cent. of the area thereof will exceed eight (8) feet in depth at the full water level. It will then have a capacity above the effluent pipes of 12,683 million gallons; an elevation at the flow line of 307.5 feet above mean high tide; and the elevation of the effluent pipes will be 256.5 feet. The dam will be of masonry one hundred and twenty-two (122) feet high, exclusive of foundation. It will be constructed and equipped as required by the specifications and is marked Dam No. 1, and shown on Maps Nos. 1 and 2.

From the intake at Old Boonton reservoir, above described, there will be constructed an additional steel pipe conduit along the route, as shown generally on Map No. 1, upon the right of

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way theretofore required, capable of delivering thirty million gallons daily into the Bergen reservoir, at an elevation of one hundred and twenty-seven (127) feet above mean high tide. This pipe, and the pipe first above described, in connection with the tunnels will enable the contractor to deliver seventy million gallons of water daily into the Bergen reservoir. This steel pipe conduit will be sixty-three (63) inches inside diameter from Old Boonton to Hook Mountain, where it will connect with the tunnel hereinbefore mentioned; from the tunnel at Hook Mountain to the tunnel at Watchung Mountain it will be of sixty-three (63) inches inside diameter, connecting with the tunnel hereinbefore mentioned through Watchung Mountain; from the tunnel at Watchung Mountain this steel conduit will be of forty-seven (47) inches diameter to Bergen reservoir, where it will deliver the water with a pressure equal to a head of one hundred and twenty-seven (127) feet above mean high tide.

All of the above conduits and tunnels will be constructed and equipped as required by the specifications.

The route of the last above conduit is shown on Map No. 1 annexed.

The profile and hydraulic gradients of said conduits and tunnels are shown on Profile No. 1.

The right is reserved, subject to the approval of the Engineer of the City, to substitute at the crossing of the Hackensack, Passaic and Rockaway Rivers for each single steel pipe two or more cast iron pipes of approved strength and material, having a combined capacity equal to the steel conduits for which they may be substituted.

In the foregoing description the phrase "elevation" means height above mean high tide.

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I herewith submit and annex the following preliminary plans, maps and profiles necessary to make clear the essential features of the works proposed to be built.

Map No. 1.
Map No. 2.
Profile No. 1.

PATRICK H. FLYNN,
189 Montague Street,
Borough of Brooklyn,
New York City, N. Y.

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BOARD OF STREET AND WATER COMMISSIONERS.

CLERK'S OFFICE.

Jersey City, February 2, 1899.

To Mr. John Wahl Queen, Corporation Attorney:—

The following is a copy of a resolution adopted by the Board of Street and Water Commissioners, at its meeting held December 8, 1898; concurred in by the Board of Finance, December 21, 1898; and approved by His Honor, the Mayor, February 1, 1899.

GEORGE T. BOUTON,
Clerk.

RESOLVED, That by and with the concurrence of the Board of Finance, the proposal of Patrick H. Flynn to provide a new water supply for Jersey City and to produce the results required in the

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specifications heretofore adopted by this Board on July 8th, 1898, in accordance with his Plan No. 1 set forth in said proposal and submitted to this Board in answer to public advertisement on August 18th, 1898, be and the same is hereby accepted, this Board being of opinion that said proposal under said Plan No. 1 is the proposal of that responsible bidder which offers the terms most advantageous to the City.

The prices proposed and accepted under said plan and conformably with said specifications are as follows:—

For each million gallons of water furnished up to twenty-five (25) million gallons daily, thirty-six dollars ($36.00) per million gallons.

For each million gallons in excess of twenty-five (25) million gallons daily up to thirty (30) million gallons daily, thirty-four dollars ($34.00) per million gallons.

For each million gallons in excess of thirty (30) million gallons daily up to thirty-five (35) million gallons daily, thirty-two dollars ($32.00) per million gallons.

For each million gallons in excess of thirty-five (35) million gallons daily up to forty-five (45) million gallons daily, twenty-four dollars ($24.00) per million gallons.

For each million gallons in excess of forty-five million gallons daily up to the limit of the capacity of the water works, twenty dollars ($20.00) per million gallons.

Said proposal also contains the following options to the City for the purchase of the works and water supply by the City; any of which said options may be hereafter exercised by the City conformably with said specifications and proposals heretofore referred to.

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For the water works and all appurtenances thereof necessary to fulfill the requirements of said specifications to the extent of fifty (50) million gallons of water daily, together with the water supply, water rights, lands, reservoir sites, rights of way and all easements necessary to fulfill the requirements of said specifications and to the extent of seventy (70) million gallons of water daily forever, which purchase can be made by the City when the water works are completed and accepted hereunder; provided that the City shall give notice of its intention to purchase within one year after the date of contract, the sum of seven million five hundred and ninety-five thousand dollars ($7,595,000.00).

For the water works and all appurtenances thereof necessary to fulfill the requirements of said specifications to the extent of (50) million gallons of water daily, together with the water supply, water rights, lands, reservoir sites, rights of way and all easements necessary to fulfill the requirements of said specifications and to the extent of seventy (70) million gallons of water daily forever, which purchase can be made by the City at the expiration of five (5), ten (10) or fifteen (15) years from the date of contract; provided, that the City shall give notice of its intention to purchase at least one year in advance of such purchase, the sum of seven million nine hundred and ninety-five thousand dollars ($7,995,000.00).

For the water works, water supply, water rights, lands, reservoir sites, rights of way and all appurtenances and easements necessary to fulfill the requirements of said specifications and to the extent of seventy (70) million gallons of water daily forever, which purchase can be made by the City when the water works are completed and accepted hereunder; provided, that the City shall give

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notice of its intention to purchase within one year from the date of contract, the sum of eight million seven hundred and forty-five thousand dollars ($8,745,000.00).

For the water works, water supply, water rights, lands, reservoir sites, rights of way and all appurtenances and easements necessary to fulfill the requirements of said specifications and to the extent of seventy (70) million gallons of water daily forever, which purchase can be made by the City at the expiration of five (5), ten (10) or fifteen (15) years from the date of contract; provided, that the City shall give notice of its intention to purchase one year in advance of such purchase, the sum of nine million two hundred and forty-five thousand dollars ($9,245,000.00).

BE IT FURTHER RESOLVED, That the Corporation Attorney be instructed to prepare, subject to the approval of the Corporation Counsel, a contract to carry out the terms of this resolution, and that His Honor, the Mayor, and the President of this Board be requested to execute the same, under the seal of the City, to be attested by the City Clerk on behalf of the City.

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**Unmarked Exhibit.**

SCHEDULE B.

(Taken from pages 7038, etc., Vol. 13, in State of Case in The Mayor and Aldermen of Jersey City, Appellant and Respondent, v. Jersey City Water Supply Company, Respondent and Appellant.)

CONTRACT OF JULY 8, 1901, page 72.

THIS AGREEMENT, made this 8th day of July, nineteen hundred and one, between the Mayor and Aldermen of Jersey City, a municipal corporation of the State of New Jersey, hereinafter called "Jersey City," party of the first part, and Patrick H. Flynn, of the Borough of Brooklyn, in the City and State of New York, and the Jersey City Water Supply Company, a corporation of the State of New Jersey, hereinafter called the "contractors," parties of the second part, witnesseth:

WHEREAS, On the twenty-eighth day of February, eighteen hundred and ninety-nine, Jersey City entered into a contract with the said Patrick H. Flynn for a new supply of water from the Rockaway River, a copy whereof with the specifications and proposals are hereunto annexed and made a part hereof, and has since given notice of its acceptance of the option to purchase the same on completion for the sum of seven million five hundred and ninety-five thousand dollars; and

WHEREAS, Said contract was afterwards assigned by said Patrick H. Flynn to the Jersey City Water Supply Company, wherein said Flynn holds a controlling interest and which company has already executed a large portion of the construction of the plant and works provided for in said contract; and

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WHEREAS, In said accepted proposal of said Patrick H. Flynn he stated that there would be tributary to his proposed intake and storage reservoir, now in process of construction at Old Boonton, Morris County, New Jersey, the whole flow of the Rockaway River; and

WHEREAS, the Morris Canal and Banking Company now claims that it has the right by prescription or otherwise to divert from the Rockaway River, and out of the watershed thereof at Boonton, above said proposed reservoir, so much of the waters of the Rockaway River as may be necessary for purposes of navigation east of Boonton over and above the waters brought into said watershed by said canal from Lake Hopatcong and elsewhere west of Dover, and that by virtue of such alleged right said Morris Canal and Banking Company claims that it does at times divert some of the waters of the Rockaway River for such purposes, all of which claims and rights are disputed by all parties to this agreement; and

WHEREAS, Jersey City claims that under said contract of February 28, 1899, the said Flynn is required to pass through said reservoir the whole flow of the Rockaway River, and that the city is entitled to divert said flow to the extent of seventy million of gallons of water daily forever; and

WHEREAS, in the judgment of the Board of Street and Water Commissioners of Jersey City and of the Board of Finance thereof the modifications herein provided for are needed to ensure the construction of the works for such new water supply and the delivery thereof to Jersey City; Now, therefore, in consideration of the premises and of one

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dollar each to the other paid, it is agreed by and between the parties to these presents by way of modification of the original contract as follows:

FIRST—That the surety bond for five hundred thousand dollars ($500,000) attached to the original contract, which by its terms is to remain in force so long as Jersey City shall purchase water of the contractors by the million gallons, shall continue in force for the benefit of Jersey City until the contractors shall secure to Jersey City by contract the extinguishment of the claims, if any, of the Morris Canal and Banking Company and its lessee or the entry of final judgment in the Courts of the State of New Jersey adverse to such claim.

SECOND—That the limit of time for the testing of the works and water supply, after completion, shall be extended, if desired by Jersey City, to a period not beyond January twenty-eighth, in the year nineteen hundred and five (January 28th, 1905); in case of such extension Jersey City shall not be required to pay therefor the additional sum of four hundred thousand dollars provided for in the original contract.

THIRD—That Jersey City shall upon the completion and acceptance of said works and water supply, so contracted for, in case the claims aforesaid of Morris Canal and Banking Company, and its lessee, shall not have been released or extinguished, be entitled to retain out of the purchase price of seven million five hundred and ninety-five thousand dollars, the sum of five hundred thousand dollars, until the happening of any one of the following events:—

(A) A final judgment or decree of the highest court of the State of New Jersey to which a test

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case may be carried that the Morris Canal and Banking Company has no legal or equitable right, by prescription or otherwise, to divert out of the watershed of the Rockaway River at Boonton any of the waters out of the Rockaway River over and above the amount of water brought into said watershed by said canal from Lake Hapatcong and elsewhere outside of the Rockaway River watershed.

(B) The delivery of a valid release from the Morris Canal and Banking Company and its lessee, vesting in said contractors for the benefit of Jersey City, the first right to the whole flow of the Rackaway River into said storage reservoir at Old Boonton so far as the same may be required from time to time to furnish and deliver, with the storage provided for in the original contract and proposal all the water said Jersey City may require up to seventy million gallons per day, it being the intent hereof that such release shall vest in the city the first and paramount right to divert all the waters of the Rockaway River watershed up to seventy million gallons per day as the same may be required.

(C) The abandonment under legislative sanction by the Morris Canal and Banking Company and its lessee of the portion of the Morris Canal lying between Dover and Montville and the surrender of all its rights to divert the waters of the Rockaway River above said proposed reservoir site.

Upon the happening of any one of the said three events Jersey City shall pay over to the contractors said retained sum of five hundred thousand dollars without interest.

The bond of five hundred thousand dollars mentioned in paragraph one of this agreement shall

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also be held as additional security by Jersey City against the claims, if any, of said Morris Canal and Banking Company and its lessee.

FOURTH—Whenever the contractors shall deliver to Jersey City a valid release from the Morris Canal and Banking Company and its lessee, releasing all their rights to divert the waters of the Rockaway River watershed out of said river above said proposed reservoir site, the same to take effect upon their abandonment of the navigation of said canal between Dover and Montville, under legislative sanction, for a sum therein to be named and to be paid upon such abandonment, then there shall be paid over by Jersey City to said contractors all of said sum of five hundred thousand dollars, except the amount named in said release, which last mentioned amount the contractors authorize Jersey City to pay to said Morris Canal and Banking Company and its lessee upon the actual abandonment aforesaid.

FIFTH—That for the purpose of construing said contract of February 28th, 1899, any waters which may be drawn or diverted from the watershed of the Rockaway River above the location (as now fixed) of the storage and intake reservoir at Old Boonton, by the Morris Canal and Banking Company for the purposes of navigation (if any there be) over and above the quantity of water cast into said Rockaway River watershed by said Canal Company from the watershed of Lake Hopatcong and elsewhere outside of the Rockaway River Watershed, shall not be deemed to affect the whole flow of the Rockaway River tributary to said storage reservoir as offered in the accepted proposal of Patrick H. Flynn, and shall not be deducted in

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any calculation of the capability of the drainage area tributary to the Rockaway River to furnish 666,000 gallons per day per square mile of such drainage area, nor used to modify any calculation of storage capacity of reservoirs as proportioned to the drainage area as set forth in the specification annexed to said contract. It being the intent hereof to make such calculations as if no waters were drawn by the canal from the area of 121½ square miles in the Rockaway River watershed above Old Boonton.

That the modifications in this contract contained shall not relieve said contractor or his sureties from furnishing and delivering to Jersey City the quantity and quality of water required by the original contract, nor from constructing the plant in accordance with the original contract as modified hereby; it being and remaining the duty of said contractors to furnish Jersey City with a water supply of seventy million gallons per day and a plant capable of actually delivering fifty million gallons of water per day. This contract shall not take effect until the sureties of the said Patrick H. Flynn shall assent thereto in the form hereto annexed.

SIXTH—That said contractors shall convey to Jersey City upon the purchase of the plant and supply by Jersey City, and without additional compensation, all of their rights in the water of the Rockaway River watershed.

SEVENTH—That said contractors shall not sell any waters out of said Rockaway River watershed at any time to any other person or corporation.

EIGHTH.—Nothing herein contained shall be construed as an admission on the part of any of the

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parties hereto of any rights in the Morris Canal and Banking Company or its lessees to divert any of the waters of the Rockaway River watershed east of Boonton.

NINTH.—That the agreements and stipulations aforesaid shall apply to and bind the executors, administrators, successors and assigns of the respective parties.

IN WITNESS WHEREOF the said party of the first part hath caused its corporate seal to be hereto affixed, and these presents (executed in triplicate) signed by its Mayor, the President of its Board of Street and Water Commissioners, and the President of its Board of Finance, and attested by the City Clerk, and the said Patrick H. Flynn, of the second part, hath hereto affixed his hand and seal and the said Jersey City Water Supply Company of the second part, hath caused its corporate seal to be hereto affixed, and these presents signed by its President and attested by its Secretary the day and year first above written.

In consideration of the sum of one dollar to it in hand paid, the Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, the surety of Patrick H. Flynn, to the Mayor and Aldermen of Jersey City, in the sum of five hundred thousand dollars upon his contract of February 29, 1899, for a new water supply for said city (a copy whereof is hereto annexed) hereby assents to the modification of said original contract by the contract hereto annexed of even date herewith, made between the Mayor and Aldermen of Jersey City, of the first part, and Patrick H. Flynn and the Jersey City Water Supply Company (the assignees of

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said Patrick H. Flynn), of the second part, and agrees that its bond aforesaid shall stand as security for the performance of said original contract as modified this day.

WITNESS, its corporate seal and the hand of its President, this 8th day of July, nineteen hundred and one.

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**Exhibit X.**

SCHEDULE C.

(Taken from pages 79, etc., Vol. 1, State of the Case, in Mayor and Aldermen of Jersey City v. Patrick H. Flynn and The Jersey City Water Supply Company.)

THIS AGREEMENT

made the 31st day of March, A. D. Nineteen Hundred and Two, between THE MAYOR AND ALDERMEN of Jersey City, a municipal corporation of the State of New Jersey, party of the first part, and PATRICK H. FLYNN of Brooklyn, in the State of New York, and the JERSEY CITY WATER SUPPLY COMPANY, a corporation of the State of New Jersey, party of the second part,

WITNESSETH:

WHEREAS, a contract in writing was entered into between The Mayor and Aldermen of Jersey City and Patrick H. Flynn, dated February twenty-eighth, One Thousand Eight Hundred and Ninety-nine, whereby said Flynn was to provide a supply of water for said City and to construct water works

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Exhibit X—Schedule C.

for said City, which the City had the option to buy, as by reference to said contract, which is hereto annexed and made a part hereof, will more fully appear.

AND WHEREAS, afterwards the said contract was by the said Patrick H. Flynn assigned to and his obligations thereunder assumed by the Jersey City Water Supply Company.

AND WHEREAS, by another agreement dated July Eighth, Nineteen Hundred and One, between the parties hereto, the said contract was in divers respects modified and changed as by reference to said contract, which is hereto annexed and made a part hereof, will more fully appear.

AND WHEREAS, the water works provided for in said contracts have not yet been completed and it is apparent that the same cannot be completed for a long time to come, and the said party of the second part desire the party of the first part to extend the time for the completion of the said works and the fulfillment of said contracts, as hereinafter provided, and to waive any claim for liquidated or unliquidated damages for delays until the expiration of such extended time.

AND WHEREAS, the City is now receiving its supply of water from the East Jersey Water Company under a temporary contract which will expire on October twenty-third, Nineteen Hundred and Two.

AND WHEREAS, for the purpose of inducing the City to grant the extension of time hereinafter mentioned, and to waive all claims for liquidated or unliquidated damages for delay during such ex-

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Exhibit X—Schedule C.

tended time, and as a consideration therefor, the party of the second part have secured the consent of the EAST JERSEY WATER COMPANY and the NEW JERSEY GENERAL SECURITY COMPANY to execute an agreement bearing even date herewith, and a copy whereof is appended hereto, whereby The Mayor and Aldermen of Jersey City will secure a continuance of the temporary supply of water until the new supply from the Rockaway River shall be put in use and whereby the said City will secure the early completion of that portion of the new pipe line which will lie between Upper Montclair and the High Service Works in Jersey City, and will secure the delivery of said temporary supply of water through the same more copiously and at the high pressure called for in the said contract of February twenty-eighth, eighteen hundred and ninety-nine, and will also secure the conveyance of about five hundred and two acres of land in Longwood Valley and certain other advantages and benefits under said contract, as by reference thereto will more fully appear.

NOW, THEREFORE, in consideration of the premises and of One Dollar to them in hand paid by the party of the second part, The Mayor and Aldermen of Jersey City do hereby agree that the time to complete the work and furnish the water specified in said contract of February twenty-eighth, eighteen hundred and ninety-nine, shall be and hereby is extended until December twenty-fifth nineteen hundred and three, and that the payment of Five Hundred Dollars per day as liquidated damages for delay under said contracts and specifications shall be incurred or reckoned, only from and after December twenty-fifth, nineteen hundred and three.

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Exhibit X—Schedule C.

IT IS FURTHER AGREED that the limit of time for the testing of the works and water supply and the payment therefor by the City, after completion, and before the acceptance thereof for purchase, shall be extended, if desired by Jersey City, to a period not beyond October First, Nineteen Hundred and Five; in case of such extension, Jersey City shall not be required to pay therefor the additional sum of Four Hundred Thousand ($400,000) Dollars provided for in the original contract of February twenty-eighth, eighteen hundred and ninety-nine.

AND IT IS FURTHER AGREED that the modifications in this contract contained shall not relieve the said Patrick H. Flynn or his sureties, or the said Jersey City Water Supply Company, from their obligation to furnish and deliver to Jersey City the quantity and quality of water required by the said contract of February Twenty-eighth, Eighteen Hundred and Ninety-nine, as modified by the said contract of July Eighth, Nineteen Hundred and One, nor from constructing the plant in accordance with the said contract as hereby modified. This contract shall not take effect until the sureties of the said Patrick H. Flynn shall assent thereto in the form hereto annexed.

AND IT IS FURTHER AGREED that in all other respects the said contract of February Twenty-eighth, Eighteen Hundred and Ninety-nine, as modified by the contract of July Eighth, Nineteen Hundred and One, is hereby ratified and confirmed; and all the contract rights and relations between the parties hereto, as they existed before the making of this instrument, are ratified and continued unchanged, except as expressly changed by this instrument.

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Exhibit X—Schedule C.

IN WITNESS WHEREOF, the party of the first part hath caused its corporate seal to be hereto affixed and these presents (executed in triplicate) signed by its Mayor, the President of the Board of Street and Water Commissioners, and the President of the Board of Finance and attested by the City Clerk; and the said PATRICK H. FLYNN has hereunto set his hand and seal, and the JERSEY CITY WATER SUPPLY COMPANY has caused its corporate seal to be hereto affixed and duly attested and these presents to be signed by its President the day and year first above written.

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**Exhibit Y.**

SCHEDULE D.

(Taken from pages 83, etc., Vol. 1, of State of Case in The Mayor and Aldermen of Jersey City vs. Patrick H. Flynn and The Jersey City Water Supply Company.)

THIS AGREEMENT, made the thirty-first day of March, Nineteen Hundred and Two, between the EAST JERSEY WATER COMPANY, a corporation of the State of New Jersey, party of the first part; the NEW JERSEY GENERAL SECURITY COMPANY, a corporation of the State of New Jersey, party of the second part; PATRICK H. FLYNN, of Brooklyn, New York, and the JERSEY CITY WATER SUPPLY COMPANY, a corporation of the State of New Jersey, parties of the third part, and THE MAYOR AND ALDERMEN OF JERSEY CITY, party of the fourth part,

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Exhibit Y—Schedule D.

WITNESSETH:

WHEREAS, The Mayor and Aldermen of Jersey City, at the request of the parties of the first and second parts, have granted to the parties of the third part an extension of the time to complete the work and furnish the water specified in the contract dated February twenty-eighth, Eighteen Hundred and Ninety-nine, between said city and Patrick H. Flynn, as by reference to an agreement bearing even date herewith between The Mayor and Aldermen of Jersey City of the one part, and Patrick H. Flynn and the Jersey City Water Supply Company, of the other part, will more fully appear; and

WHEREAS, the party of the fourth part are at present obtaining their public water supply from the party of the first part under a temporary contract, which will expire on October twenty-third, Nineteen Hundred and Two; and it is now apparent that the new water-works cannot be completed and a supply obtained therefrom until long after that date, and the City is desirous of providing and continuing such temporary supply until the said new supply can be obtained, and also of obtaining the use as soon as possible of the easterly portion of the new main, in lieu of the old mains, now being used between Belleville and Jersey City, so that the temporary supply of water may be delivered in Jersey City more copiously and at a sufficiently high pressure to answer the High Service requirements of the said Flynn contract, and to relieve the City from the necessity of pumping; and the City is desirous to obtain the other advantages of this contract, hereinafter set forth.

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Exhibit Y—Schedule D.

NOW, THIS AGREEMENT WITNESSETH:

FIRST: That the party of the first part has agreed and hereby doth agree to continue its said temporary supply of water to Jersey City, which it is now furnishing under its contract with said City, dated April twenty-second, Eighteen Hundred and Ninety-seven, at the present price of Thirty-five Dollars ($35) per million gallons ($1,000,000) until the 25th day of December, Nineteen Hundred and Three, and thereafter, until the City shall have obtained and put in use the new supply from the Rockaway River by means of the water-works which are being constructed under said contract with said Patrick H. Flynn, the terms and conditions of said contract of April Twenty-second, Eighteen Hundred and Ninety-seven, being continued in force accordingly, but not beyond March First, Nineteen Hundred and Seven.

SECOND: And the party of the first part further agrees that as soon as the new main, now being constructed under said Flynn contract by the Jersey City Water Supply Company, shall be completed from the High Service Works at Jersey City to the point in Upper Montclair, where the same crosses the existing main of the party of the first part, it will permit and allow, under its direction, the Jersey City Water Supply Company to connect the two mains at that point with proper pipes, connections, valves, meters and other appliances, and will thereafter, as soon as the said new main is ready for use, deliver the said temporary supply of water into said new main at Upper Montclair so that the City may receive the same through said new main at High Service Works in Jersey City instead of through the old main from Belleville to Jersey City as heretofore, and will deliver the same into said new main at a pressure sufficient to an-

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Exhibit Y—Schedule D.

swer all the High Service conditions of the said Flynn contract of February twenty-eighth, Eighteen Hundred and Ninety-nine, the said water to be metered at the connection between said mains at Upper Montclair; the said new main while so used for the carriage of said temporary supply is to be maintained and kept in order by and at the expense of the Jersey City Water Supply Company. The said connections, valves, meters and other appliances at Upper Montclair, which are to be installed as aforesaid by the Jersey City Water Supply Company, shall, in case of the purchase of the water-works by the party of the fourth part, be transferred to them as a part of the works, without additional charge. The Mayor and Aldermen of Jersey City hereby consenting to receive such delivery in lieu of delivery at Belleville, as provided in the contract of April twenty-second, Eighteen Hundred and Ninety-seven; and agreeing also to the continuance of said temporary supply in the manner and at the price and under the conditions aforesaid.

THIRD: And the parties of the first and second parts for the considerations aforesaid hereby further covenant and agree to and with the party of the fourth part that they will forthwith acquire a controlling interest in the shares of stock of the Jersey City Water Supply Company, and through such controlling interest, will take control of the offices and management of that Company, and will provide the treasury of that Company, from time to time as fast as may be needed by it for the construction of the said new water-works and the carrying out of the said Flynn contracts with Jersey City, with money to the amount of Three Million Two Hundred and Eighty Thousand ($3,280,000) Dollars in cash, and will see to it that said

moneys are promptly and efficiently applied by the Jersey City Water Supply Company in the construction of the said water-works, and that the construction of the portion of the new main between Upper Montclair and Jersey City High Service Works shall be undertaken and pushed to completion with all practicable dispatch so that the delivery of said temporary supply of water through said new main may commence at the earliest practicable date, which it is estimated will be on or before December first, Nineteen Hundred and Two, the parties of the first and second part being of opinion that the work under said contracts and the furnishing of water therein specified can be fully completed for the said sum of Three Million Two Hundred and Eighty Thousand Dollars ($3,280,000).

FOURTH: The party of the first part guarantees that the Jersey City Water Supply Company shall construct and complete Jersey City's new water-works to such an extent that the water from the new source can be turned on, on or before March First, Nineteen Hundred and Four, and that the same shall be turned on by said Company on or before that date so that the City shall thereafter receive the same to the full extent of its then current requirements; and if said water-works are not so sufficiently constructed and completed and said water so turned on by that date, the East Jersey Water Company agrees that it will continue to deliver the temporary supply of water to Jersey City from March First, Nineteen Hundred and Four until said new supply is so turned on, at the rate of Three Hundred and Fifty-three Thousand Eight Hundred ($353,800) Dollars per annum, payable quarterly, but the agreement of the East Jer-

sey Water Company relative to said temporary supply shall not extend beyond March First, Nineteen Hundred and Seven.

Upon the turning on of the water from the new source as hereinbefore provided, then all the obligations of the East Jersey Water Company to furnish a temporary supply shall forthwith cease.

FIFTH: The parties of the first, second and third parts as a further consideration for this agreement agree that at the time of the execution and delivery of this agreement they will cause to be delivered to the Mayor and Aldermen of Jersey City a Bargain and Sale Deed conveying to them the title, free and clear of incumbrances, of about five hundred and two (502) acres of land situate in Longwood Valley, in the Township of Jefferson, in the County of Morris, and commonly known as the Longwood Valley Reservoir site, being property now or lately owned by the Society for the Establishment of Useful Manufactures at Paterson; and that on or before June 1st, 1902, they will turn over and deliver to said City searches, abstracts and guarantees of title for said lands made by the New Jersey Title Guarantee and Trust Company, of Jersey City, or by approved counsel; which abstracts and guarantees of title shall be continued and guaranteed down to the date hereof without expense to such City.

And the parties of the third part have joined in this agreement to signify their assent to and concurrence in the terms hereof; and they undertake on their part to do all things necessary to be done by them to enable the parties of the first and second part to carry out the provisions of this agreement.

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Exhibit Y—Schedule D.

In witness whereof the several parties to this agreement who are corporations have caused their respective corporate seals to be hereto affixed and duly attested by the signatures of their appropriate Executive Officers, and the said Patrick H. Flynn has hereunto set his hand and seal the day and year first above written.

Consent of Surety.

In consideration of the sum of One Dollar to it in hand paid, the Fidelity and Deposit Company of Maryland, a corporaton organized under the laws of the State of Maryland, the surety of Patrick H. Flynn to The Mayor and Aldermen of Jersey City, in the sum of Five Hundred Thousand Dollars, upon his contract of February Twenty-eighth, Eighteen Hundred and Ninety-nine, for a new water supply for said City, as modified by a contract between the Mayor and Aldermen of Jersey City and said Patrick H. Flynn and the Jersey City Water Supply Company, under date of July Eighth, Nineteen Hundred and One (copies of which contracts are hereto annexed), hereby assents to the modification of the said contract by the two contracts hereto annexed of even date herewith, one marked "X" and made between The Mayor and Aldermen of Jersey City, party of the first part, and Patrick H. Flynn and the Jersey City Water Supply Company, party of the second part; and the other marked "Y" and made between the East Jersey Water Company, party of the first part, the New Jersey General Security Company, party of the second part, Patrick H. Flynn and the Jersey City Water Supply Company, party of the third part, and The Mayor and Aldermen of Jersey City, party of the fourth part;

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and agrees that its bond aforesaid shall stand as security for the performance of the said contract of February Twenty-eighth, Eighteen Hundred and Ninety-nine, as modified by the said contract of July Eighth, Nineteen Hundred and One, and as further modified this day as aforesaid.

Witness its corporate seal and the hand of its this Thirty-first day of March, Nineteen Hundred and Two.

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**Unmarked Exhibit.**

(Taken from pages 7047, etc., Vol. 13, of State of the Case of The Mayor and Aldermen of Jersey City vs. Jersey City Water Supply Company.)

To the Mayor and Aldermen of Jersey City, The Board of Finance, and the Board of Street and Water Commissioners:

On behalf of the Morris Canal and Banking Company your attention is respectfully called to the rights of said Company in the Rockaway Water Shed, from which shed you have entered into a contract to obtain a public water supply for your City.

The Morris Canal is located in the Rockaway Valley for a distance of about 13 miles above your proposed intake, and takes water from the river and its tributaries at Dover, Beaver Brook, Powerville and Boonton, the boats actually passing into and out of the waters raised by slackwater dams at Dover and Powerville.

The Supreme Court, in setting aside a former water contract of the City, decided that the City has no power to take by condemnation water that is needed for navigation purposes; nor has the

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Canal Company the power to give up by contract or consent water so needed, it being bound to maintain the canal as a public highway until the expiration of its Charter in 1973.

Before Mr. Flynn made his present contract with your City dated February 28th, 1899, he applied to the Canal Company for a Grant of certain water rights, which grant was made and is still in force. He also applied for an agreement whereby the Canal Company should abandon navigation on the canal, if Mr. Flynn, among other conditions, should obtain a needful authority from the Legislature of 1899. To this the Company assented. Mr. Flynn caused a bill for the abandonment of navigation on the canal to be introduced into the Legislature, but did not secure its passage. His agreement for the abandonment of navigation therefore expired when the Legislature of 1899 adjourned. Mr. Flynn never renewed the subject with the Canal Company until during the past winter, when he was endeavoring to obtain a loan with which to complete the construction of your water works. It was then shown that the watershed was insufficient to allow of the operation of the Morris Canal and still supply Jersey City under its contract, and that either larger reservoirs must be built or the canal abandoned. Mr. Flynn then applied to the Canal Company for a renewal of the agreement to abandon navigation, to which the Company assented, consenting also to join in an application to the Legislature for the passage of such legislation.

Mr. Flynn accordingly caused a second bill to be introduced in the Legislature of 1901 permitting the abandonment of the canal, which, however, failed to pass, and Mr. Flynn's second agreement for abandonment thereby expired.

To operate the canal, the waters of the Rockaway River are necessary. Very careful tests ex-

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tending over a long period demonstrated years ago that the control of the Rockaway Water Shed above Old Boonton is essential to the operation of the Canal, and the Company has for more than fifty years had and enjoyed the first right to use these waters and its right to use them is unquestionable. Its duty to use them is no less clear, for the Canal is a public highway which the Company is bound to maintain.

The result is that Jersey City can obtain from the Rockaway Water Shed only such waters as remain after the needs of the Canal are supplied, such needs being necessarily variable from year to year.

We have stated these details at length, so that it may be understood that the Canal Company has taken no position of hostility to the City, but has sought to further the City's project of obtaining a permanent water supply by aiding the City's contractor to get the water; this statement is further made to the end that at this juncture when it is proposed to modify the City's contract with Mr. Flynn, the City may have renewed notice of the rights and claims of the Canal Company and of the duty and necessity under which it remains, to continue the use of the waters of the Rockaway for canal purposes as heretofore.

When the Canal Company contracted with Mr. Flynn it was never contemplated that he would construct his water plant without obtaining either the abandonment of the Canal or provision for sufficient storage, and special provision was made in the great water rights (above mentioned) and which he still holds (in case the Canal should not be abandoned), for additional storage in the shape of a reservoir at Beach Glen, and also a reservoir at Longwood Valley, from each of which the Canal

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Unmarked Exhibit.

Company reserved a prior right to a prescribed daily flow for the purposes of the Canal. For this purpose Mr. Flynn acquired 502 acres of land for the reservoir at Longwood. The Canal Company then stated in its contract that with sufficient storage capacity (but only on this condition) they believed there was sufficient water in the Rockaway Shed, both for the City and for the Canal.

The provision in the grant of water rights from the Morris Canal & Banking Company, and the Lehigh Valley Railroad Company, to Mr. Flynn, bearing on this point, is as follows:

The Railroad and Canal Companies covenant and agree that they will hereafter draw from the Rockaway River and its tributaries at or above Boonton only such quantity of water as, together with the waters of Lake Hopatcong as now used by said companies, is reasonably sufficient and necessary to operate their canal as heretofore operated; and it is understood and agreed that the right so to draw is hereby reserved by said Companies, anything herein contained to the contrary notwithstanding (the parties hereto being satisfied that with sufficient storage there is enough water in the Rockaway Water Shed above Old Boonton including the waters of Lake Hopatcong as heretofore drawn to supply Jersey City with 70,000,000 gallons of water daily and to operate the canal as now operated). And said Companies agree that they will co-operate with said Flynn, who may, in the name of the said Railroad and Canal Companies, but at the expense of said Flynn, take legal measures to prevent and punish pollution of the waters herein referred to, and that the canal above Boonton shall be operated with care to avoid, as far as may be practicable, pollution of its waters. Said Flynn agrees that until the Mor-

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ris Canal at Boonton is abandoned for navigation, he will establish no intake for the diversion of water, and will divert no water above Old Boonton. After such abandonment said Flynn may establish intakes in the Rockaway Water Shed and divert the waters at such points above Old Boonton as he may desire.

By this it will be seen that the Canal Company also agreed so far as might be practicable, to aid in lessening the pollution of the City's water supply resulting from the evils incident to canal boats being passed through it, until such time as this source of pollution could be eliminated by abandonment of navigation. The canal boats are towed about eight miles from Lake Hopatcong to Dover through water that is discharged into the Rockaway River at Dover, and from Dover, they pass for about eight miles through water that is again discharged into the Rockaway at Powerville, both these discharges being above the City's intake at Boonton.

Statements have been published that the Morris Canal and Banking Company made no claim to the waters of the Rockaway River until after your contract for water supply with Mr. Flynn had been entered into, and that, in fact, they have no rights to these waters. Both statements are erroneous.

On the twenty-fourth day of February, 1898, the Canal Company gave the City written notice of its rights. At the request of the Corporation Counsel for particulars he was given a written statement, which was published April 30th, 1898, and was reported by him to the Board of Finance. In the course of this statement we said:

"Possibly some bidders have proceeded on the theory that there is water enough in the Rockaway and its tributaries which supply the Morris Canal

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to supply not only the Canal but also to supply Jersey City; we know this is a mistake, for long experience has shown that in dry times the Company has barely been able to continue navigation, and in one extreme drought navigation was suspended."

Not only was full notice given to the City and to Mr. Flynn, but Mr. Flynn recognized the rights of the Canal Company by requesting from it the grant and agreements above referred to before he contracted with the City. The fact is that to supply both the City and the Canal from the Rockaway Water Shed, it is necessary to save and utilize substantially the entire flow of the Water Shed by the construction of reservoirs sufficient for that purpose.

If the City sees fit to release Mr. Flynn from his contract to make the "whole flow of the Rockaway River" tributary to his intake, and to relieve him from the necessity of building reservoirs which would cost from $800,000 to $1,000,000 the Canal Company desires that the City shall do so without any misunderstanding as to the Canal Company's rights and shall not base such action upon a denial of the Canal Company's prior right to draw water needed for the canal.

MORRIS CANAL AND BANKING COMPANY,
By CORBIN & CORBIN,
Attorneys.

Jersey City, April 24, 1901.

(The following exhibits covering the next seven pages are taken from pages 58, etc., Vol. 13, of State of Case in The Mayor and Aldermen of Jersey City v. Jersey City Water Supply Company.)

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**Exhibit D-2.**

March 11, 1909.

J. F. Schaperkotter, Esq.,
General Solicitor Lehigh Valley R. R. Co.,
143 Liberty St.,
New York, N. Y.

My dear Mr. Schaperkotter:

I have a letter from Mr. W. H. Corbin in which he says that on account of the action of the Jersey City authorities in deciding to sell bonds and make application to the Court to permit them to pay the purchase price of the works into Court, pending the settlement of the law suits, with the object of their getting control of the works, it was extremely important that we should secure the release of the Morris Canal & Banking Company to the flow of the Rockaway River, as quickly as possible. In his letter Mr. Corbin says:

> "In view of this action, I think your efforts to get Morris Canal release should proceed with the utmost possible speed, and we should have the same, if possible, before the question comes up before the court as to the deposit of the money. Vredenburgh seems to have no particular objection now to the release being obtained, but may have sufficient views later."

Mr. Corbin further states:

> "We must hustle to get Morris Canal release."

Therefore, please take up at once this matter of the release by the Morris Canal & Banking Company to the flow of the Rockaway River, same to

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Exhibit D-2.

become effective upon the abandonment of the canal; also, please push along the papers connected with the matter of laying the pipe down the inclined plane, all of which I left with you.

I am today writing Mr. Baker about this matter, so that he may be apprised of the necessity of hurry, as I suppose he is still connected with the management of the Lehigh Valley.

Yours very truly,

EDMUND LEB. GARDNER,
Vice President.

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**Exhibit D-3.**

COLLECTION VOUCHER.

October 29th, 1910.

Jersey City Water Supply Company,
158 Ellison Street,
Paterson, N. J.

To Lehigh Valley Railroad Company, Dr.

Remit to J. M. Baxter, Treasurer, Philadelphia, Pa.

If further information is required, address J. I. Morrison, Auditor, Philadelphia, Pa.

| | |
|---|---|
| Consideration for the release, dated May 12th, 1909, from the Morris Canal & Banking Company and the Lehigh Valley Railroad Company, lessee, of the right to divert the waters of the Rockaway River watershed out of said river above the proposed reservoir, mentioned in supplemental agreement between Patrick H. Flynn and said Jersey City Water Supply Company dated July 8th, 1901 ..... | $25,000.00 |

No. 2686
Correct for $25,000.00
Approved E. LeB. Gardner.
Original.

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**Exhibit D-4.**

LEHIGH VALLEY RAILROAD COMPANY
Legal Department,
143 Liberty St.,

New York, Nov. 1, 1910.

SJ File LD. 5731.

Mrs. E. LeB. Gardner, President,
New Jersey General Security Company,
158 Ellison Street,
Paterson, N. J.

Dear Sir:—

I send you herewith Collection Voucher of the Lehigh Valley Railroad Company against the Jersey City Water Supply Company for $25,000, consideration for the release, dated May 12th, 1909, from the Morris Canal & Banking Company and the Lehigh Valley Railroad Company, Lessee, of the right to divert the waters of the Rockaway River watershed out of the said river above the proposed reservoir, mentioned in the supplemental agreement between Patrick H. Flynn and said Jersey City Water Supply Company dated July 8th, 1901.

I would be glad if you will have check prepared and forwarded to me in payment of the enclosed voucher.

Yours very truly,

J. F. SCHAPERKOTTER,
General Solicitor

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**Exhibit D-4½.**

Nov. 14, 1910.

Mr. J. F. Schaperkotter,
General Solicitor, Lehigh Valley Railroad Co.,
143 Cedar St.,
New York, N. Y.

My dear Mr. Schaperkotter:—

I am sending you herewith our check for $25,000, payable in New York in settlement of the agreement which Mr. Baker made with the Lehigh Valley R. R. Co. to pay this sum upon your delivering to us a release as stated in the voucher.

It is my understanding with you, according to our conversation the other day, that you will make any alteration or change in said release that we may desire, conforming to the original intent of the release.

Yours very truly,

E. LeB. GARDNER,
President.

In payment of Collection Voucher, Oct. 29, 1910 "Consideration for the release of the right to divert waters of Rockaway River Watershed, etc."

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Exhibit D-4½.

No. 2686

Office of the
Jersey City Water Supply Co.,

Paterson, N. J., Nov. 15, 1910.

Pay to the order of The Lehigh Valley Railroad Company c/o Legal Department, 143 Liberty St., N. Y., $25,000.00 twenty five thousand dollars.

JERSEY CITY WATER SUPPLY Co.,
Whitney Conant,
Treasurer.

Certified Nov. 15, 1910.

Payable at the First Natl. Bank, New York.

To:

First National Bank,
Paterson, New Jersey.

Endorsed:
Pay First National Bank of New York or order
Lehigh Valley Railroad Company,
J. M. Baxter, Treasurer,
Per H. C. Kuntz.

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Exhibit D-4½.

LEHIGH VALLEY RAILROAD COMPANY
143 Liberty Street,

New York, Nov. 16th, 1910.

J. F. Schaperkotter,
General Solicitor.

J File LD 5731

Mr. E. LeB. Gardner, President,
Jersey City Water Supply Company,
Paterson, N. J.

Dear Mr. Gardner:—

I have your favor of the 14th inst. enclosing check of the Jersey City Water Supply Company to the order of the Lehigh Valley Railroad Company for $25,000, being consideration for the release dated May 12th, 1909, from the Morris Canal & Banking Company and the Lehigh Valley Railroad Company, lessee, of the right to divert the waters of the Rockaway River watershed, etc.

Your understanding is correct, that we will make any alteration or change in the release that you may desire, conforming to the original intent of the release.

Yours very truly,

J. F. SCHAPERKOTTER,
General Solicitor.

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**Unmarked Exhibit.**

(Taken from pages 1, etc., Vol. 1, of State of Case in The Mayor and Aldermen of Jersey City *v.* Patrick H. Flynn and The Jersey City Water Supply Company.)

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

PATRICK H. FLYNN and THE JERSEY CITY WATER SUPPLY COMPANY,
Defendants.

On Bill for Relief.

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

Humbly complaining, showeth unto your Honor, your orator, The Mayor and Aldermen of Jersey City, as follows:

I. That your orator is a municipal corporation of the State of New Jersey. That Patrick H. Flynn is a citizen of the State of New York; and that the Jersey City Water Supply Company is a corporation organized under the general corporation act of the State of New Jersey.

II. That for many years prior to the year eighteen hundred and ninety-five, the water used for

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Unmarked Exhibit.

domestic purposes by the inhabitants of Jersey City was obtained solely from the Passaic River at Belleville, through its plant located there. That your orator had spent, in the erection of said plant, prior to that date, many millions of dollars. At that date the increased diversion of the waters of the river, and its pollution by the cities and boroughs above that plant, compelled your orator to procure a new water supply for said city. The act entitled "An Act to authorize any of the municipal corporations of this state to provide for a supply or further supply of water therefor," approved April 2, 1888, was the only legislation authorizing your orator to procure such new water supply. In September, 1895, it entered into a contract with the Jersey City Water Company for the purchase of a new supply from the waters of the Passaic River, which contract was set aside by the Supreme Court of this state in the year 1896, on the application of the Morris Canal & Banking Company and others, on the ground that the act of 1895 did not authorize the rights of said canal company in the water of the Passaic River, to be condemned for the use of Jersey City. Your orator again advertised for bids for a new water supply and as the result thereof a contract was entered into between your orator and said Flynn; a true copy of which is hereto annexed and hereby referred to as "Schedule A." That said Flynn was then and still is a non-resident of this state, and, on the date of said contract, owned no land or water or water rights therein. That the said Jersey City Water Supply Company was organized by said Flynn for the sole object of carrying out said contract, which he assigned to it.

III. That on October 12, 1895, your orator entered into a contract with the East Jersey Water

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Unmarked Exhibit.

Company for a temporary supply of water, and on the 22d day of April, 1897, made a supplemental contract with that company by which that company was to supply your orator with all the water needed by the inhabitants of Jersey City from a plant located on the Passaic River near the City of Paterson, which supply was to continue until your orator should terminate such contract by giving one year's notice, or that company should terminate the contract by giving your orator one year's notice. This contract with the East Jersey Water Company remained in full force until it was modified by the contract of May 31, 1902, between the East Jersey Water Company, the New Jersey General Security Company, Patrick H. Flynn, the Jersey City Water Supply Company and your orator, annexed hereto and hereby referred to, marked "Schedule D."

IV. The contract "Schedule A" provides for the procuring and construction of a water supply for your orator for the sum of seven million five hundred and ninety-five thousand dollars, in the form required by the act of 1888. Thereafter the question of the purchase of its water supply in accordance with the terms of the contract and as required by the act entitled, "An Act to submit to popular vote the purchase of a supply of pure and wholesome water in cities of the first class in this state," approved April 1, 1895, was submitted to the voters of Jersey City. This election was had on the 13th day of February, in the year 1900, and the voters of Jersey City then voted to accept the purchase of the new water supply, and the notice of the result of such election was thereupon served within a year from the date of the contract upon said Flynn and the said water supply company, and they were also modified at the same time that

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your orator accepted the option in said contract to purchase said water plant and supply for the said sum of seven million five hundred and ninety-five thousand dollars in accordance with the said terms of said contract; that by said vote and said notice the acquiring by purchase of the said new water supply became binding upon your orator.

V. That by the contract of July 8, 1901, hereto annexed and hereby referred to, marked "Schedule B," said Flynn and the water supply company admit that your orator had exercised the option to purchase the water supply for the sum of seven million five hundred and ninety-five thousand dollars, and that your orator was entitled to divert from the flow of the Rockaway River water to the extent of seventy millions of gallons daily, forever, and that the modification of the contract of February 28, 1899, being "Schedule A," as herein provided, was needed to insure the construction of the works for such new water supply and the delivery thereof to your orator; and in consideration thereof your orator consented to such modification of said contract "Schedule A"; that thereafter a large part of the lands forming part of the said water works and water supply was acquired by condemnation under and by force of an act entitled "An Act to empower cities to acquire lands and other property for public use by condemnation," approved April 1, 1895, in the name of your orator.

VI. That by the terms of said contract, "Schedule A," said water works were to be completed by the 28th day of August, 1901. By said contract said Flynn agreed with your orator that if said works were not completed by that date, he would pay your orator for every day's delay to complete

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said works, the sum of five hundred dollars, as liquidating damages and not by way of penalty; and your orator says that the said works were not completed by the 28th day of August, 1901. That on the 31st day of March, 1902, the said works were not yet completed and it was then apparent that the same could not be completed for a long time still to come; that there was then due from the defendants to your orator as liquidated damages the sum of over one hundred thousand dollars; thereupon the defendants applied to your orator for an extension of time for the completion of the water works and a waiver of such liquidated damages until the expiration of such extended time, alleging that they had come to an agreement with the East Jersey Water Company, who were then supplying your orator with water under the contracts hereinbefore mentioned; thereupon the agreements bearing date that day, and being Schedules "C" and "D," hereto annexed and hereby referred to, were executed by which the time for the completion of the said works was extended until the 25th day of December, 1903, and the payment of five hundred dollars per day as liquidated damages for delay on the said contracts and specifications, was to be incurred and reckoned only from and after December 25th, 1903.

VII. That at the time of the making of said contract, Schedule "A," the damages to be sustained by your orator, by reason of the failure of the said Flynn to complete said water supply within the time mentioned in said contracts, were uncertain in amount and not readily susceptible to proof under the rules of evidence; that therefore the said Flynn and your orator agreed upon and stipulated as liquidated damages and the measure of compen-

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Unmarked Exhibit.

sation due from said Flynn to your orator, the sum of five hundred dollars per day for each and every day during which the water supply should remain uncompleted. That the delay in the completion of the water supply by the said Flynn and the said

ing customers for said water which it would otherwise have obtained, and prevented it from selling a portion of the water which it otherwise would have sold, and caused it to lose many customers for the water which, if said plant had been completed in accordance with said contract, it would have retained; and your orator says that the sum of five hundred dollars per day is not disproportionate to the loss suffered by your orator by reason of the failure of the defendants to complete the water works within the time mentioned in the said contract. That the water from the new source was not turned on on or before March 1, 1904, and the East Jersey Water Company continued to deliver the temporary supply of water after March 1, 1904, and charged and was paid therefor at the rate of three hundred and fifty-three thousand eight hundred dollars per annum, until the 24th day of May, 1904. That said sum of three hundred and fifty-three thousand eight hundred dollars per annum was so fixed by the defendants and the East Jersey Water Company and your orator, because it was the interest on the said consideration of seven million five hundred and ninety-five thousand dollars at four per cent., and fifty thousand dollars as representing the amount which it was assumed your orator might have to pay to its employees and others, if it were in possession of the said water plant and operating the same, including the expense of keeping the said plant in repair.

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Unmarked Exhibit.

VIII. On the 23d day of May, 1904, by some arrangement unknown to your orator between the East Jersey Water Company and the defendants, that company ceased to furnish water to Jersey City and turned over to the defendants the supply mains and gates through which water was furnished to your orator under said temporary contract, Schedule "D," and thereafter, notwithstanding the protest of your orator the defendants turned on water from this new supply, although said works were not completed, and claimed the right to charge, and rendered bills for the water so furnished to Jersey City, thereafter, at the rate fixed by the contract Schedule "A" for water supplied by the million gallons at which rate the amount to be paid by your orator exceeded the amount which would have been paid to the East Jersey Water Company if it had supplied the water, by about eighty thousand dollars per year. That your orator could obtain a sufficient supply of water at that time, for the use of the inhabitants of Jersey City, only through said water mains and gates, and from either the East Jersey Water Company or the defendants. That on the 15th day of November, 1904, in a letter bearing that date the said water supply company wrote to the Board of Street and Water Commissioners of Jersey City, to the effect that the water works designed for the city of Jersey City were completed and in use and ready for the city to purchase the same, if desired. That on November 24, 1904, the depth of the water in the reservoir was for the first time eight feet below the full water level throughout seventy-five per cent. of the entire area of the reservoir, that being the elevation required by the contract.

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Unmarked Exhibit.

IX. That on the 12th day of April, 1905, the defendants, the water supply company, commenced a suit against your orator, alleging that it had supplied water to your orator under said contract Schedule "A" to the extent of thirty-three hundred and twenty-seven and seven-tenths million gallons, for which they had not been paid; and that there was due them from Jersey City therefor the sum of one hundred and fifteen thousand seven hundred and forty-four dollars and eighty cents, and praying judgment against your orator for that sum; and that your orator has pleaded thereto several pleas, to one of which the said company has demurred and to the others has replied, concluding to the contrary. That on the 23d day of June last, the said company commenced a second suit against your orator to recover the sum of one hundred and five thousand seven hundred and thirty-two dollars for water supplied from February 25, 1905, to May 23, 1905; to which suit your orator has filed similar pleas to those filed in the first suit.

X. That the inhabitants of Jersey City at the present time require about thirty-three millions of gallons of water a day, and that the population of Jersey City is growing rapidly and that the amount of water required by your orator daily increases at the rate of about three per cent. per annum. That the only supply of water now available for the use of your orator in this state is from the watershed of the Passaic valley; that the city of Newark and the East Jersey Water Company control such supply. That your orator cannot obtain a supply of water from the city of Newark or from the East Jersey Water Company and it is therefore compelled to use the water from the works constructed by the defendants notwithstanding the said plant

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Unmarked Exhibit.

has not been completed in accordance with the said contracts. That the voters of Jersey City have voted to purchase said water works, and the water works having thereafter been constructed for your orator under said contract, your orator became and is the owner thereof in equity and entitled to the possession thereof. That your orator is compelled for the reasons aforesaid to accept said water works, notwithstanding they are not completed in accordance with the contract. That it desires to pay therefor but it should not be compelled to pay to the defendants the said sum of seven million five hundred and ninety-five thousand dollars for the following reasons:

That the defendants cannot convey the whole of said water works to your orator, because,

a. The defendants are not the owners of the lands overflowed by the reservoir. That one William J. Righter has lately recovered a judgment in the Supreme Court of the State of New Jersey against the defendants, for the damage to his land up to the commencement of his said suit from water resulting from the dam of the said reservoir at Boonton, and that said damage is a continuing damage.

b. Because the defendants have not acquired the rights of the Morris Canal & Banking Company to divert water from the water supply about the reservoir at Boonton—that company claiming to have a right to divert such water to such an extent as will prevent the defendants from furnishing to your orator the amount of water required by said contract.

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Unmarked Exhibit.

c. Because the defendants have not acquired the rights of riparian owners on the Rockaway River and its Branches above said reservoir at Boonton to so use their lands as to deposit in the waters of that stream matter which will pollute the water supply, and as a consequence prevent the delivery to your orator of the said plant as a completed operating plant, free from pollution.

d. Because the defendants have not obtained the consent of the riparian owners below said reservoir to the diversion from said reservoir by the defendants or by your orator, of the amount of water required by said contract to be delivered to your orator, except from the following riparian owners:

The Society for the Establishing of Useful Manufactures; the Dundee Water Power & Land Company; the East Jersey Water Company; the Acquackanonk Water Company; the Passaic Water Company; and the Montclair Water Company.

There are many riparian owners on the Rockaway River between the said Reservoir and the Passaic River, whose consent to the diversion of the waters of the Rockaway River by the defendants or by your orator, is necessary, among whom are the following owners, namely:

Abram Vreeland, owning thirteen hundred and eighty-six feet along said river; the estate of John P. Peer, owning twenty-eight hundred and seventy-five feet on said river; the Cullen estate, owning twenty-nine hundred feet on said river; the estate of Benjamin Starkey, owning thirty-one hundred feet along said river; Joseph H. Bastido, owning twenty-nine hundred and sixty-one feet on said river; and Phineas Farrand, owning six thousand and fifty feet on said river.

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Unmarked Exhibit.

That the defendants insist that they are not required by the terms of the contract to obtain the consents of any such owners to such diversion; whereas, your orator insists that the defendants are required by said contract to obtain such consents.

2. That the defendants cannot convey and deliver to your orator a completed operating plant, free from pollution, because polluted matter passes into this water supply from the following places, viz.:

a. From the lands known as tthe Cooper-Lord estate.

b. From the manufactories and mills at Boonton and Powerville.

c. From the Liondale print works.

d. From the Hibernia mines.

e. From the Hibernia village.

f. From the Wharton mines.

g. From the Mount Hope mines.

h. From the Rockaway village.

i. From Mt. Tabor, a camp in which, during the summer months, there are several hundred residents.

j. From the town of Dover, a growing town of several thousand inhabitants.

3. That the defendants cannot convey the works as provided for by the said contract Schedule "A," and the supplements thereto, because the same have not been constructed as required by said contract.

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Unmarked Exhibit.

a. The Parsippany dyke as now constructed shows a seepage under the core wall, and in that respect is not in accordance with the contract.

b. By the contract, the dam at Boonton was to be so built as to enable the city to divert and use seventy million of gallons of water daily therefrom, by increasing the old Boonton reservoir described in said contract, by raising the dam and thereby increasing the capacity thereof to the amount required. That in fact said dam has been so built that it cannot be raised in the manner specified in the contract; but, to enable your orator to divert seventy millions of gallons of water daily from this reservoir, a much larger sum must be expended by your orator than if said dam had been constructed as required by the contract.

c. Because in constructing a tunnel through the Watchung mountain the defendants adopted a method of construction which was cheaper than that required by the contract. That your orator is entitled to an abatement of the consideration of the contract to the extent of the amount saved by the defendants in constructing their tunnel in a manner different from that required by the contract.

d. Because the concrete conduits have not been demonstrated to be sufficient in size to deliver seventy millions of gallons of water daily under the head required by the contract.

e. Because the fence has not been built around the reservoir.

4. That your orator cannot pay to the defendants the said consideration of seven million five hundred and ninety-five thousand dollars, because

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Unmarked Exhibit.

it is entitled to recoup the damages suffered by it by reason of the failure of the defendants to complete their contract by the 25th day of December, 1903.

5. Because under the said contract your orator, on the completion of the said work, is entitled to an opportunity to test the same, and it is incumbent upon your orator before accepting the same to make such test. That your orator, in order to make such test, requires, either that the defendants shall deliver over the said works to the representatives of your orator, for a reasonable period of time, not less than three months, or that the defendants shall place their agents, representatives and servants in charge of said works, under the direction, orders and control of the proper officials of your orator. That your orator has made demands upon the defendants that the said works be delivered over to your orator for the purpose of making such tests, which demand has been refused. And further, that, in order to make such tests it is necessary that the full amount of water, to wit, fifty million gallons per day (which the plant under the contract must be sufficient to supply) should be delivered through the conduit and pipes for a reasonable period of time. That your orator has made demand that such amount of water be delivered in this manner and for this time, which defendants have refused. And defendants have also declined and refused to deliver any amount of water in excess of the present needs of the inhabitants of Jersey City, to wit, about thirty-three million gallons per day, unless your orator will agree to pay for such excess at the rate per million gallons provided for in the contract; whereas, your orator insists that, by the terms of said contract your orator is not required to pay for any water supply after the com-

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pletion of the works and during the test thereof preparatory to the acceptance of the same, and certainly it is not required to pay for any water in excess of the needs of your orator, which is used simply for the purpose of testing the capacity and quality of the works.

XI. That your orator is amply responsible for the payment to the defendants of the consideration for said water supply. That it cannot pay for the plant as completed in accordance with the contract, for the reasons heretofore stated. That it ought not be compelled to raise the sum of seven million five hundred and ninety-five thousand dollars in order to make a tender to the defendants. That if the defendants can compel your orator to pay for the water by the million gallons, before said works are completed, they will obtain greater compensation for the plant than the seven million five hundred and ninety-five thousand dollars agreed by your orator to be paid said Flynn for said plant.

XII. That your orator tenders itself ready and willing to pay to the said defendants, on account of said plant and water supply, such part of said consideration as this court shall determine, under the circumstances hereinbefore set forth it ought to pay therefor.

XIII. That the defendants insist that they are entitled to be paid, not only the sum of seven million five hundred and ninety-five thousand dollars, but also for the price of the water supplied to your orator since the 21st day of May, 1904, at the rate provided for by the contract if Jersey City had not voted to purchase the same; and they claim and insist that unless your orator pays said sum of seven million five hundred and ninety-five thousand

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dollars on or before the first day of October, 1905, that, under the terms of said contract the defendants will continue to have and enjoy the exclusive right and privilege of maintaining said water works for the term of twenty-five years, as aforesaid, or that your orator pay them an additional sum of four hundred thousand dollars, notwithstanding the vote of said city to purchase the said water works and in violation of the conditions of said contract.

XIV. That the manufactory known as the Rag Mill, or factory, at Powerville, has not been eliminated; that no intercepting sewer has been built at Boonton, and that no sewage disposal plant has been built at Dover.

To the end therefore, that the Jersey City Water Supply Company and Patrick H. Flynn, who are the defendants in this suit, may answer all and singular the premises and that particularly and in detail as if the same were here again rehearsed and they interrogated thereto, but without oath. And that it may be ascertained by reference to a master or in such other manner as the Court may deem proper how much and what part of said water works system the said defendants can convey to your orator, what part of the said consideration of seven million five hundred and ninety-five thousand dollars should be paid by your orator to the said Jersey City Water Supply Company therefor, and that the said Patrick H. Flynn and the Jersey City Water Supply Company may be ordered by decree of this Court to convey to your orator said water works or so much thereof as they are able to convey, upon payment by your orator of such part of said consideration as may be so ascertained, which part or price your orator is ready and willing and offers to pay and that the said Jersey City

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Unmarked Exhibit.

Water Supply Company may be enjoined from further prosecuting said suit at law against your orator, and that the said defendants deliver to your orator the possession of said water supply system, or that your orator may have possession of said works for making such tests and that the defendants may furnish to your orator water free of charge for making such tests, and that your orator may have such other or further relief in the premises as the nature of the case may require and to this Honorable Court shall seem meet.

May it please your Honor, the premises considered, to grant to your orator not only the state's writ of injunction issuing out of and under the seal of this Court to be directed to the said defendant, the Jersey City Water Supply Company, enjoining and restraining it in manner or form aforesaid, but also the state's writ of subpoena to be addressed to the said defendants, commanding them on a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court to answer all and singular the premises and to stand to, abide by and perform such order and decree as your Honor shall make therein, and that your orator may have such other and further relief as shall be agreeable to equity.

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

ROBERT CAREY,
Solicitor for and of Counsel with
Complainant.

GEORGE L. RECORD,
Of Counsel.

JAMES B. VREDENBURGH,
Of Counsel.

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**Final Decree.**

(Filed June 4, 1908.)

**Unmarked Exhibit.**

(Taken from pages 4159, etc., Vol. 7, in State of the Case in The Mayor and Aldermen of Jersey City vs. Jersey City Water Supply Company.)

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

PATRICK H. FLYNN and THE JERSEY CITY WATER SUPPLY COMPANY,
Defendants.

On Bill, etc.
Final Decree.
June 4, 1908.

This cause having come on for final hearing on pleadings and proofs, which having been read and counsel having been heard—Messrs. George L. Record and James B. Vredenburgh appearing as counsel for the complainant, and Messrs. Charles L. Corbin, William H. Corbin and William D. Edwards for the defendant, Jersey City Water Supply Company; and no one appearing for the defendant, Patrick H. Flynn, a decree *pro confesso* in this cause having been duly entered against him; and the court being of the opinion and adjudging that the contract dated the twenty-eighth day of February, eighteen hundred and ninety-nine, between the Mayor and Aldermen of Jersey City and Patrick H. Flynn for a new water supply, which

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Unmarked Exhibit.

was assigned by said Flynn to the Jersey City Water Supply Company, and the supplements thereto, ought to be specifically performed and carried into execution, and that the defendants should convey to the Mayor and Aldermen of Jersey City the water works and water supply therein provided for, upon the payment by the complainant of the contract price of seven million five hundred and ninety-five thousand dollars, less the deductions hereinafter set forth, because of delays and imperfect performance, or for other reasons:

* * * * * *

And the court being also of the opinion and adjudging that the complainant must pay for the water received by it from the defendants, at the rate per million gallons specified in the said contract between the Mayor and Aldermen of Jersey City and Patrick H. Flynn, dated the twenty-eighth day of February, eighteen hundred and ninety-nine, and at the time, place and in the manner required by said contract; and it also being of opinion that the defendant has complied with the terms of said contract in the construction of the dam at the said reservoir mentioned in the pleadings as Dam No. 1; and also, in the size of the steel pipes, tunnels and masonry conduits furnished; and also that complainant is not entitled to relief on its contention that the contract of the eighth day of July, nineteen hundred and one, was not warranted by the act of March twenty-second, nineteen hundred and one; nor on the other contentions in the bill specifically set forth, except as in this decree allowed;

It is, on this fourth day of June, nineteen hundred and eight, on motion of Warren Dixon, of counsel with the complainant, by the Honorable Mahlon Pitney, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the

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Unmarked Exhibit.

chancellor doth, by virtue of the power and authority of the Court of Chancery of New Jersey order, adjudge and decree, that the defendants do convey and transfer to the complainant, on or before the date hereinafter fixed, the water works and the appurtenances thereof, with the water supply, water rights, lands, reservoir sites, rights of way and all easements as the same have been constructed and provided under the said contract of February twenty-eighth, eighteen hundred and ninety-nine, and under the supplements and additions thereto, and also the rights of the defendants in the water of the Rockaway River water shed or the water flowing, or that may flow therein, to the extent of seventy millions of gallons per day as therein provided, upon the payment of complainant to the Jersey City Water Supply Company of the contract price of seven million five hundred and ninety-five thousand dollars and upon payment of the contract price for water delivered pursuant to the contract, less the following reductions from and abatements of the said purchase price, which it is hereby ordered, adjudged and decreed shall be made as follows:

*First.* There shall be retained by the complainant, from the contract price, the sum of five hundred thousand dollars ($500,000) as authorized by the contract between the city and the company, dated July twenty-eighth, nineteen hundred and one, until the same shall become due under the terms and conditions of the said contract, after the conveyance of the water works by the said defendants to the complainant.

* * * * * *

And it is further ordered, adjudged and decreed, that the Jersey City Water Supply Company is entitled to be paid by The Mayor and Aldermen of

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Unmarked Exhibit.

Jersey City, at the time fixed for the conveyance aforesaid, the sum of seven million five hundred and ninety-five thousand ($7,595,000.00) dollars, less the deductions aforesaid; and, it appearing that after the filing of the opinion in this suit, and before the signing of this decree, to wit, on June 1st, 1908, the city paid to the company the sum of three hundred and sixty-two thousand six hundred dollars and sixty-eight cents ($362,600.68), balance of principal and interest due at the contract rates for the water supplied by the company to the city up to February 23d, 1908, the court having announced, and it having been adjudged, that the city was obliged to pay the same. It is ordered, that the company is entitled to be paid by the said city for the water already delivered since February 23d, 1908, and, if pure and wholesome, for the water that may hereafter be delivered to the city, at the aforesaid contract prices per million gallons up to the day hereinafter fixed for the conveyance and transfer aforesaid, or up to the day of such conveyance and transfer, if made prior thereto; and, in default of such payment within the time herein limited for performance as aforesaid, the said defendant may apply to the court for a dismissal of the complainant's bill, or for such other relief as may be equitable.

And it is further ordered, adjudged and decreed, that if the complainant shall fail to make payments to the Jersey City Water Supply Company for said works, as by this decree required, within four months after the amount of all said deductions and reservations out of the contract price shall have been determined by the decree of this court, in case there be no appeal within forty days from said decree, and, if there be an appeal, within four months after the determination of such appeal, then the

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privilege given to the complainant under said contract dated February twenty-eighth, eighteen hundred and ninety-nine, to purchase said water works and appurtenances, under the option exercised by it, shall thereby be terminated, and the said defendant may apply to this court for a dismissal of the bill, or for such further and other relief as may be equitable.

And it is further ordered, adjudged and decreed, that it be referred to the Honorable William J. Magie, one of the Special Masters of this court, to ascertain and report upon the cost of sewers and of sewage disposal works, and of intercepting sewers or drains necessary to substantially prevent the contamination of the waters of the Rockaway River from the sewage of Dover, Hibernia and Boonton, and also to investigate and report upon other plans and devices as alternative remedies presented by the defendant company for delivering water to the city in a pure and wholesome condition throughout the year, under present conditions; and upon the cost of the works now necessary therefor; and also the cost of obtaining from the riparian owners below the Boonton Dam, rights of diversion of water to the extent of seventy million gallons per day, so far as said rights have not been heretofore acquired by said company.

And the master may use in his inquiry, the evidence already offered in the cause, and may receive further evidence on the matters herein referred to him, and shall report thereon to this court with all convenient speed.

And leave is hereby reserved to either party to apply to the court, at the foot of this decree, for such further order or decree as may be necessary to carry this decree into effect, or to prevent forfeiture arising out of the inability of the city to

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Unmarked Exhibit.

raise and pay the purchase price within the time fixed by the decree by reason of litigation not instituted at the instance or request of said city based upon any of the resolutions or proceedings taken by said city or any of its boards or officers to raise and pay the purchase money.

And it is further ordered that the defendants pay to the complainant the costs of this suit, including three-quarters of the expense of procuring a copy of the stenographers' notes and three-quarters of the cost of printing.

MAHLON PITNEY,
*C.*

Respectfully advised,

FREDERIC W. STEVENS,
*V. C.*

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**Decree of Affirmance of New Jersey Court of Errors and Appeals.**

(Filed March 22, 1910.)

**Unmarked Exhibit.**

(Taken from pages 6994 and 6995, Vol. 13, in State of Case in The Mayor and Aldermen of Jersey City vs. Jersey City Water Supply Company.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

MARCH TERM, 1909.

Between

MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

JERSEY CITY WATER SUPPLY COMPANY,
Defendant.

On Cross-appeal from Chancery.

Decree of Affirmance with Modification.

This cause coming on to be heard, on cross-appeals by each of said parties against the other, at the March Term, One thousand nine hundred and nine, and being argued by WILLIAM H. CORBIN, Counsel for the appellant, and JAMES B. VREDENBURGH, Counsel for the respondent, and having been reargued by direction of the Court at the November Term, Nineteen hundred and nine, and the Court having taken time to consider the same, and being of the opinion that the decree of the Chancellor should be affirmed in all things,

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Unmarked Exhibit.

in respect of which The Mayor and Aldermen of Jersey City appealed, and in all other things except as hereinafter stated:

It is Now, on this Eighteenth day of March, in the year of our Lord, One thousand nine hundred and ten, after hearing counsel upon the settlement hereof, Ordered, Adjudged and Decreed that the decree of the Chancellor bearing date the Fourth day of June, A. D., Nineteen hundred and eight, be in all things affirmed, except that the fifth item of abatements and reductions therein set forth, whereby it was adjudged that there should be deducted from the contract price of the Water Works fourteen hundred and forty dollars ($1440), being one-half the agreed cost of a lawful fence around the Boonton Reservoir, shall be stricken out; and that from the first item of said abatements and reductions there shall be stricken out the final words, to wit: the words "after the conveyance of the water works by the said defendants to the complainant," and for that purpose and to that extent only the decree is reversed, with costs to Jersey City Water Supply Company on both the appeal and cross-appeal; such costs not to include the expense of procuring a copy of the stenographer's notes, and of printing which was otherwise provided for by the said final decree; the only printing to be taxed in the costs in this Court to be the printing of the said final decree and proceedings thereafter; and that the record and proceedings be remitted to the Court of Chancery, to be therein proceeded on according to law and the practice of said Court.

On Motion of

Collins & Corbin,
Solicitors and of Counsel for
Jersey City Water Supply Company.

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Unmarked Exhibit.

Consent to the entry of the above decree as the final decree in the above appeal and cross appeal.

JAMES B. VREDENBURGH,
Of Counsel with Mayor &
Aldermen of Jersey City.

Endorsed:

"Filed, Mar. 22, 1910.

S. D. DICKINSON,
Clerk."

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**Final Decree in Chancery on Remittitur from Court of Errors and Appeals.**

(Filed April 12, 1910.)

**Unmarked Exhibit.**

(Taken from pages 6996, etc., Vol. 13, in State of Case in The Mayor and Aldermen of Jersey City vs. Jersey City Water Supply Company.)

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

PATRICK H. FLYNN and JERSEY CITY WATER SUPPLY COMPANY,
Defendants.

This matter coming on in the presence of MESSRS. COLLINS & CORBIN, Counsel for Jersey City Water Supply Company, and of MR. JAMES B. VREDENBURGH, Counsel for The Mayor and Aldermen of Jersey City, upon the remittitur from the Court of Errors and Appeals, upon the appeal filed by the Jersey City Water Supply Company, and the cross appeal filed by The Mayor and Aldermen of Jersey City; and, it appearing that said Court of Errors and Appeals, by its decree remitted to this Court bearing date the Eighteenth day of March, Nineteen Hundred and Ten,

"ORDERED, ADJUDGED AND DECREED that the decree of the Chancellor bearing date the

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Fourth day of June, A. D. Nineteen Hundred and Eight, be in all things affirmed, except that the fifth item of abatements and reductions therein set forth, whereby it was adjudged that there should be deducted from the contract price of the Water Works fourteen hundred and forty ($1440) dollars, being one-half the agreed cost of a lawful fence around the Boonton Reservoir, shall be stricken out; and that from the first item of said abatements and reductions there shall be stricken out the final words, to wit: the words 'after the conveyance of the water works by the said defendants to the complainant, and for that purpose and to that extent only the decree is reversed, with costs to Jersey City Water Supply Company on both the appeal and cross-appeal; such costs not to include the expense of procuring a copy of the stenographer's notes, and of printing which was otherwise provided for by the said final decree; the only printing to be taxed in the costs in this Court to be the printing of the said final decree and proceedings thereafter; and that the record and proceedings be remitted to the Court of Chancery, to be therein proceeded on according to law and the practice of said Court."

IT IS THEREFORE, on this ninth day of April, Nineteen Hundred and Ten, by His Honor, MAHLON PITNEY, Chancellor of the State of New Jersey,

ORDERED, ADJUDGED and DECREED, and the said Chancellor doth, by virtue of the power and authority in him vested, ORDER, ADJUDGE and DECREE

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Unmarked Exhibit.

that the decree entered in this cause by the Chancellor bearing date the Fourth day of June, Nineteen Hundred and Eight, for the purpose and to the extent of the corrections hereinafter set forth, be reversed, and that the same be and it hereby is corrected by striking out therefrom the fifth item of abatements and reductions therein set forth, whereby it was adjudged that there should be deducted from the contract price of the Water Works Fourteen Hundred and Forty Dollars, being one-half the agreed cost of a lawful fence around the Boonton Reservoir, which item is stricken out accordingly; and, in the sixth item of such abatements and reductions, the word "sixth" is changed to "fifth"; and in the seventh item of such abatements and reductions, the word "seventh" is changed to "sixth"; and that from the first item of such abatements and reductions there is hereby stricken out the final words thereof, to wit, the words: "after the conveyance of the water works by the said defendants to the complainant"; and that in all other things the said decree of this court dated June Fourth, Nineteen Hundred and Eight, be and the same hereby is re-affirmed and established.

MAHLON PITNEY,
C.

Respectfully Advised,

FREDERICK W. STEVENS,
Clerk.

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**Decree Confirming Report of William J. Magie, Master, and Settling Other Reserved Questions.**

(Filed, November 16, 1910.)

**Unmarked Exhibit.**

(Taken from pages 7098, etc., Vol. 13, in State of Case in The Mayor and Aldermen of Jersey City vs. Jersey City Water Supply Company.)

COURT OF CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

PATRICK H. FLYNN and JERSEY CITY WATER SUPPLY COMPANY,
Defendants.

On Bill, etc., Decree Confirming Report, &c.

This matter coming on to be heard in the presence of Mr. WARREN DIXON and of Mr. JAMES B. VREDENBURGH, of counsel with complainant, and Mr. WILLIAM H. CORBIN, of counsel with defendant, Jersey City Water Supply Company, on exceptions of complainant to the report of Hon. William J. Magie, Special Master, upon the matters referred to him in the decree entered herein on the fourth day of June, A. D., Nineteen hundred and eight, and upon application of said defendant to settle the other matters reserved in said final decree as corrected by the decree on remittitur herein, dated on the ninth day of April, 1910.

* * * * * * *

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Unmarked Exhibit.

AND, counsel having been heard: IT IS, on this fifteenth day of November, A. D., Nineteen hundred and ten,

ORDERED, ADJUDGED and DECREED, and the Chancellor doth, by virtue of the power and authority in him vested, ORDER, ADJUDGE AND DECREE, that the said exceptions to the Master's Report, be overruled with the cost of such exceptions; that the said Master's report, except so much thereof as relates to the cost of sewers and sewage disposal works, be in all things approved, ratified and confirmed; and, that the said alternative plan and device hereinbefore referred to and put in use by the defendant is approved as a substitute for the sewers and sewage disposal works, intercepting sewers and drains in the said decree suggested, except as hereinafter mentioned, and no deduction or abatement of the purchase price, except as hereinafter mentioned, shall be made because of the lack of any such sewers, works or drains, or because of any defect in the works as a mechanism for the purification of the supply.

* * * * * *

AND, IT IS ACCORDINGLY ASCERTAINED, ORDERED, ADJUDGED AND DECREED, that the total deductions and reservations to be made by The Mayor and Aldermen of Jersey City from the sum of Seven Million Five Hundred and Ninety-Five Thousand ($7,595,000) dollars, the contract price for the water works mentioned in the said decree, are determined by the Court by this decree to be the following sums, and no others, to wit:

(1) On account of alleged defects in the 72-inch pipe under the Hackensack River, the sum of Five Thousand ($5,000) Dollars.

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Unmarked Exhibit.

(2) For the liquidated damages by reason of the delay of the Company in the completion of the works, Seventy-two Thousand Five Hundred ($72,500) Dollars.

(3) Because of defects in the invert of the Watchung Tunnel, Eighteen Thousand Five Hundred ($18,500) Dollars.

(4) For the cost of obtaining rights of diversion from the riparian owners on the Rockaway River below the Boonton Dam, Seven Thousand ($7,000) Dollars.

(5) For Boonton sewers Fifty-eight Thousand Three Hundred ($58,300) dollars, unless bond be given, or other provision be made, as aforesaid.

(6) The sum of Five Hundred Thousand ($500,000) Dollars, mentioned in the decree heretofore made herein on June 4, 1908.

And, It is Adjudged, Decreed and Determined that the balance of the contract price to be paid for said works is the sum of Six Million Nine Hundred and Thirty-Three Thousand Seven Hundred ($6,933,700) Dollars, and in case said sum of $58,300 be not deducted, but other provision be made in lieu thereof as aforesaid, then and in that case the balance to be paid shall be the sum of Six Million Nine Hundred and Ninety-two thousand ($6,992,000) Dollars, besides the contract price for water delivered and to be delivered in manner and form as provided in said decree of June 4, 1908; and that the time limited within which such payments are to be made by the complainant to the Jersey City Water Supply Company, is the period

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Unmarked Exhibit.

of four (4) months from the date of this decree, in case there shall be no appeal from this decree taken within forty days from the date thereof, and if there be such an appeal taken within forty days from the date hereof, then the period of four months after the determination of such appeal as provided in said Final Decree dated June 4th, 1908.

And leave is hereby reserved to either party to apply to the Court, in manner and form as such leave was reserved in the said decree of June 4th, 1908.

This decree is made without prejudice to the right of the Jersey City Water Supply Company to file a bill or supplemental bill to recover the sum of Five Hundred Thousand ($500,000) dollars mentioned in the decree of June 4, 1908, authorized to be retained as therein mentioned, whenever in the estimation of said Company the same is or shall be payable by Jersey City.

And It is Further Ordered that the answering defendants pay the complainant the costs of the reference before the Special Master including the expense of procuring one copy of the stenographer's notes, the cost of printing as far as necessary, for use in this court, and a counsel fee of twenty-five hundred ($2500) dollars.

Mahlon Pitney,
C.

Respectfully advised

Frederic W. Stevens,
V. C.

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**Hearing of Exceptions to Master's Report and Settlement of Final Decree on Matters Reserved.**

**Unmarked Exhibit.**

(Pages 7030 and 7031, Vol. 13, State of Case in The Mayor and Aldermen of Jersey City vs. Jersey City Water Supply Company.)

The hearing was appointed by Vice-Chancellor Stevens, for July 20, 1910, at the Chancery Chambers in Newark and was brought on, the minutes being as follows:

Before His Honor Vice-Chancellor STEVENS.

Mr. James B. Vredenburgh appearing for the complainant.

Mr. William H. Corbin appearing for the Defendant.

Transcript of shorthand report of the evidence given in the above cause, on Wednesday, July 20, 1910, at Chancery Chambers, Newark, New Jersey.

ROBERT J. BAIN sworn.

DIRECT EXAMINATION BY MR. CORBIN.

Q. You are a solicitor of this Court? A. Yes.

Q. And associated in the office of Collins & Corbin? A. Yes.

Q. On the 5th of June, 1909, did you deliver a release to the Mayor of Jersey City? A. I did.

Q. Have you a copy of the release there, which you delivered to him? A. I have.

Q. Where did you deliver it to him? A. At the City Hall in Jersey City, at the Mayor's office.

Q. Did the original which you produced have the seals of the Morris Canal and Lehigh Valley Railroad Company on it? A. Yes, sir.

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Unmarked Exhibit.

Q. Are you familiar with their seals? A. Yes.

Q. And the signature of Mr. Thomas, as president of these companies, was that upon it? A. The signatures were upon it.

Q. You left the document with the Mayor? A. I left the original with the Mayor.

Q. What day was that? A. June 5, 1909.

MR. CORBIN: I offer in evidence the copy which the witness produces.

Marked Exhibit Morris Canal No. 1.

MR. CORBIN: I also offer in evidence the demand upon the complainant to produce the original of this document, this day, and the acknowledgment of Mr. Vredenburgh, counsel of complainant, endorsed thereon.

Marked Exhibit Morris Canal No. 2.

CROSS EXAMINATION BY MR. VREDENBURGH.

Q. What day did you say you took that release to the City Hall? A. June 5, 1909.

Q. What occurred there? A. I went to the Mayor's office and waited for quite a while, as I recall it, and in the room just outside of the Mayor's private office the Mayor came out to, and I delivered the paper to him.

Q. What then happened? A. He took it, and I don't know that anything much was said at that time.

Q. You handed him the paper? A. I handed him the paper.

Q. And he took it away? A. I presume so; I left it with him; I don't know what he did with it.

Q. You were in the outer office when you delivered it to him? A. Yes.

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Unmarked Exhibit.

Q. You gave him this paper? A. Yes.

Q. Then you went away? A. Yes.

Q. Is that all you know of it? A. That is all that I know of it, sir.

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**Memorandum of Vice-Chancellor Stevens.**

(Presented after the hearing of July 20, 1910.)

**Unmarked Exhibit.**

(Taken from pages 7053 and 7054, Vol. 13, State of Case in The Mayor and Aldermen of Jersey City vs. Jersey City Water Supply Company.)

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR & ALDERMEN OF JERSEY CITY,
Complt.

and

PATRICK FLINN & al.,
Defts.

STEVENS, V. C.

I do not think that the decree as it stands should be so modified as to direct the payment of the $500,000 reserved. After giving the contract of July 8, 1901, considerable study, I am not able to

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Unmarked Exhibit.

come to the conclusion that the release of May 12, 1909, is a sufficient compliance with its terms to entitle the Water Company to the immediate payment of the money. To so hold would be to nullify the general intent of the parties as expressed in the instrument itself. But I do not think the question should be finally passed upon at this time. If the contention of the Water Supply Company be correct, it would seem that the liability of the Fidelity & Deposit Co., the surety, would or might be considerably increased. If so, the Company is interested in the question and should be heard. I cannot find among the papers any copy of the condition of its bond, but it would seem from the terms of the contract of July 8, 1901, that it is under some liability for the flow of the Rockaway up to the limit of 70,000,000 gallons per diem. The question has been informally presented, and without any issue framed. In a question of such importance, the proper course would appear to be to present the matter by bill and leave to file it should be reserved.

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**Memorandum by Vice-Chancellor Stevens, dated November 15, 1910.**

**Unmarked Exhibit.**

(Page 7097, Vol. 13, in State of Case of The Mayor and Aldermen of Jersey City vs. Jersey City Water Supply Company.)

COURT OF CHANCERY OF NEW JERSEY.

VICE CHANCELLOR'S CHAMBERS.

Morristown, N. J., Nov. 15, 1910.

MAYOR, ETC., OF JERSEY CITY
*v.*
FLYNN *et al.*

STEVENS, V. C.

I have carefully considered the petition presented by the water company, asking leave to introduce evidence relative to the release of the Morris Canal Company to Jersey City, dated May 12, 1909. The question is of much importance and the construction of the supplemental contract of July 8, 1901, as far as it bears upon that release, not without difficulty. It seems to me that this new controversy, involving the large sum of five hundred thousand dollars, should be determined on bill or supplemental bill and that the signing of the final order or decree in this suit should not be postponed until the final determination of that controversy. The

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Unmarked Exhibit.

bill was filed August 1, 1905. The final decree was made on June 4, 1908, and except as to an unimportant detail affirmed on March 18, 1910; and so it appears that the question of the sufficiency of the release which is now sought to interject into the present suit is one which did not arise until nearly a year after the issues made by the pleadings in this suit had been passed upon in this court. To introduce at this stage of the cause an entirely new issue, whose final determination will necessarily consume much time, would be not only irregular, but unjust to complainants whose rights have been established by the Court of last resort.

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**Order Respecting $500,000 Reserved for Morris Canal Question.**

(Filed Dec. 8, 1910, as of Nov. 15, 1910.)

**Unmarked Exhibit.**

(Taken from pages 7108, etc., Vol. 13, in State of Case of The Mayor and Aldermen of Jersey City against Jersey City Water Supply Company.)

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

PATRICK H. FLYNN and JERSEY CITY WATER SUPPLY COMPANY,
Defendants.

On Bill, etc.
Order.

This matter having come on to be heard before the Court in Newark on the 20th day of July, 1910, upon the rule nisi for confirmation of report of Honorable William J. Magie, Special Master, to whom was referred special matters, and also upon application to settle various matters which were reserved unsettled in the decree of June 4, 1908, and on notice by the answering defendant to modify that decree so as to direct the payment of the five hundred thousand dollars ($500,000) retained by the complainant in accordance with said decree; and on said hearing the said answering defendant having offered in evidence a release given by the Morris Canal & Banking Company and its lessee, Lehigh Valley Railroad Company, to Jersey City,

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Unmarked Exhibit.

dated May 12, 1909, purporting to release the water rights mentioned in the contract between the complainants and defendants, dated July 8, 1901, and it having been received in evidence; and the evidence of a witness on the part of the defendant having been heard; and the complainant having offered part of the testimony heretofore taken in this cause and contained in a printed pamphlet, and said printed pamphlet having been offered and received in evidence and marked "Exhibit C-1," and argument being had thereon; and the Court having taken time to consider the same and having announced its conclusion that the decree as it stands should not be so modified as to direct the payment of the Five Hundred Thousand Dollars ($500,000) reserved, because it was at least a question of doubt and difficulty whether the release of May 12th, 1909, is a sufficient compliance with its terms to entitle the Water Company to the immediate payment of the money, and that the question should not be finally passed upon at this time; that in a question of such importance, the proper course was to present the matter by bill and leave to file it should be reserved; and afterwards, on October 20th, 1910, the matter coming again before the Court on the said matters and upon the petition and affidavits filed by the answering defendant—which petition and affidavits had been previously duly served upon the complainant—and upon the answering affidavit of the complainant then read before the Court; and counsel having again been heard for the respective parties on all the above matters, and especially upon the question of granting the prayer of the said petitioning defendant, which prayer asked leave to introduce relative to the said release from Morris Canal and Banking Company and another to Jersey City, Dated May 12th, 1909, the Court further considered this mat-

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ter and again announced that it was of the opinion that the question involved was one of difficulty and was a new controversy involving the large sum of Five Hundred Thousand Dollars ($500,000) and should be determined on bill or supplemental bill; and that the signing of the final order or decree in this suit should not be postponed until the final determination of that controversy; and that the question of the sufficiency of said release which is now sought to interject into the present suit, was one which did not arise until nearly one year after the issues made by the pleadings in this suit had been passed upon in this Court, and that to introduce at this stage of the cause an entirely new issue, whose final determination would necessarily consume much time, would be not only irregular but unjust to complainant whose rights have been established by the Court of Last Resort:

And it is, on this third day of December, nineteen hundred and ten, as of the fifteenth day of November, 1910.

Ordered, that the prayer of the petitioner be denied, and that the sum of Five Hundred Thousand Dollars ($500,000) mentioned in said decree of June 4th, 1908, be retained as decreed in the decree of June 4th, 1908, and in the decree of November 15th, 1910, but without prejudice to the right of the Jersey City Water Supply Company to file a bill or supplemental bill to recover the said sum whenever, in the estimation of said company, the same is or shall be payable by Jersey City.

Mahlon Pitney,
C.

Respectfully advised,
Frederic W. Stevens,
V. C.

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**Unmarked Exhibit.**

(Page 65 in Case of The Mayor and Aldermen of Jersey City vs. Jersey City Water Supply Company et al.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

JUNE TERM, 1911.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,

and

JERSEY CITY WATER SUPPLY COMPANY.

On Appeal from Chancery.

Decree of Affirmance.

This cause came on to be heard at the June Term, one thousand nine hundred and eleven, upon the cross appeals of both parties from the final decree of the Court of Chancery and the appeal of Jersey City Water Supply Company from the order of the Chancellor made December third, nineteen hundred and ten, and being argued by James B. Vredenburgh, Counsel, on behalf of the City, and Wm. H. Corbin, counsel for the Company, and the Court having taken time to consider the same, and being of the opinion that the decree of the Chancellor should be affirmed in all things.

It is now, on this eleventh day of July in the year of our Lord one thousand nine hundred and eleven, ordered, adjudged and decreed that the decree of the Chancellor and the said order of December third, 1910, be in all things affirmed; and that the record and proceedings be remitted to the

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Court of Chancery, to be therein proceeded on according to law and the practice of said Court.

On motion of

COLLINS & CORBIN,
Solicitors and of counsel for Jersey City Water Supply Company.

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**Affidavit of William D. Edwards.**

**Unmarked Exhibit.**

(Taken from pages 7064, etc., Vol. 13, State of Case of The Mayor and Aldermen of Jersey City vs. Jersey City Water Supply Company.)

IN CHANCERY OF NEW JERSEY.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant,

and

PATRICK H. FLYNN and JERSEY CITY WATER SUPPLY COMPANY,
Defendants.

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

WILLIAM D. EDWARDS, being duly sworn, according to law, on his oath says:

I am one of the Solicitors of this Court; I was counsel of Patrick H. Flynn and his associates

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Unmarked Exhibit.

from the beginning of his neogtiations with Jersey City in 1896, and afterwards for the Jersey City Water Supply Company from its formation in 1899 down to the time when the contract with Jersey City was undertaken by The New Jersey General Security Company, March 31st, 1902, and, since then, have been counsel of the Jersey City Water Supply Company continuously, and have been at all times familiar with the history of the dealings between Flynn and the Water Company and the City, and I am the only person living who has been connected with the enterprise from the beginning.

(1) After Flynn had offered his bid to Jersey City, in August, 1898, and before its acceptance in February, 1899, Flynn obtained from the various mill owners and the water companies interested in the waters which he expected to divert, contracts and releases to enable him to carry out his contract to supply seventy million gallons of water per day to Jersey City perpetually, if the contract should be awarded to him; among these, was a contract executed by The Morris Canal and Banking Company, and its lessee Lehigh Valley Railroad Company, copy of which is hereto annexed, marked Exhibit "A," dated November 21st, 1898. I personally negotiated that contract on behalf of Flynn, and Mr. William H. Corbin and Henry S. Drinker negotiated it on the part of the Canal Company and the Railroad Company. Pursuant to that contract, an endeavor was made to obtain legislation at Trenton, at the sessions of 1899 and 1900, to allow of the abandonment of the Morris Canal, but it was ineffective, the legislature being unwilling to pass bills at that time.

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Unmarked Exhibit.

(2) Previous to March 30th, 1901, Flynn and his associates had spent about two million dollars upon the water works and were short of money, and had made application to bankers in New York City to raise $4,500,000 to complete the work; the bankers had caused the entire work to be inspected and the contracts and rights to be examined, and reports to be made thereon, and had objected that while Flynn's bid offered in August, 1898, had represented that the entire flow of the Rockaway River would be tributary to his reservoir at Boonton, yet the water rights he had obtained would be subject to the paramount right of the Morris Canal and Banking Company to divert the waters of the Rockaway River above his intake, to the extent necessary to operate the canal. It was not claimed that this prior right of the Canal Company would prevent Jersey City from obtaining its full seventy mill. gall. per day, but that it would require the construction of a large storage reservoir to obtain such delivery, under the specifications, and that the acceptance of such prior right was a technical violation of his offer to make the whole flow of the Rockaway River tributary to his reservoir, of which point the City might take advantage. The bankers, therefore, declined to advance the money unless these matters were adjusted. Thereupon, Flynn and the Water Company applied to the Morris Canal and Banking Company, and its lessee, for a modification of their former contract, which resulted in the making of a new contract between them, in February, 1901, copy of which is hereto appended marked Exhibit "B." After that was made, Flynn and the Water Company sent a communication to the complainants, dated March 30th, 1901, setting out the aforementioned facts at much length; a copy of that letter

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Unmarked Exhibit.

is hereto appended, marked Exhibit "C." I, personally, drew that communication, and the facts therein stated are true.

(3) Pursuant to the contract of February, 1901, a bill was introduced into the New Jersey Senate, by Senator Hudspeth, on February 26th, 1901, known as Senate Bill No. 162, being an act authorizing Canal Companies to surrender their franchise of navigation, &c., the same being carefully prepared by counsel of Flynn and the Water Company and submitted to the Canal Company and counsel of the City and approved by them; the legislature would not pass this bill; much discussion was aroused. The legislature did pass a bill on March 22d, 1901, being Chap. 207, Laws of 1901, authorizing municipalities to modify terms of existing contracts for new water supply. That same year, Senator Reed, for President Pitney, introduced a bill for the appointment of a Commission to examine into the Morris Canal question, but it was not passed. On July 8th, 1901, pursuant to the act which the legislature had passed, the modified contract was made between complainant and defendants which is appended to the bill in this cause, and will be found in the record, page 72.

(4) On March 31st, 1902, the contracts "X" and "Y" were made (See Record, p. 79 & 83), whereby The New Jersey General Security Company succeeded to the rights of Flynn and undertook to complete the works.

(5) On March 31st, 1903, the two Houses of the legislature passed a concurrent resolution for the appointment of three Commissioners to investigate the whole question of the Morris Canal, and to re-

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port upon the expediency of its abandonment. The Governor appointed ExGov. Werts, Ex-Gov. Griggs and Ex-Gov. Voorhees, who examined into the matter and reported to the legislature in favor of abandonment, in 1905. A bill was introduced in accordance with the report, known as Assembly No. 239, which passed the House, but failed in the Senate.

(6) While the matter of the Morris Canal rights was under discussion in 1901 (p. 145), The Morris Canal and Banking Company on April 30th, 1901, sent to the Jersey City Authorities a formal communication (See Record, p. 145), setting up the Canal Company's rights, and insisting on the priority of their claim, and the City had this letter before it when it was negotiating for the supplemental contract which was finally made July 8th, 1901. At this time, it was supposed by all parties that the vacation of the Morris Canal would be a matter of a short time. The matter was agitated in the public prints, and the claim set up by the Canal Company, which was greatly emphasized in the public prints, and the decision of the Supreme Court in the Van Riper case, to the effect that there was no statute under which its rights could be condemned (29 Vr. 262), rendered the City Boards very cautions and exacting as against Flynn. Moreover, it was not then proved, as it since has been by years of experience, that the flow of the Rockaway is very much greater than had been reckoned, and was ample for all needs of both the Canal Company and the city; the extent also of the Morris Canal Company's rights to the waters for purposes other than navigation had not been inquired into by the Commission of the State, and were greatly exaggerated in

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the mind of everybody considering the subject, it being supposed that the Canal Company, under the supplement to its charter passed in 1871 (P. L. 1871, p. 444, §3), had some valuable rights in the water for purposes of water supply, &c. These being the conditions, the supplemental contract of July 8th, 1901, was made. It had, at that time, been ascertained, however, that the Rockaway River, with the full development of storage that was possible, would ultimately afford a supply of far more than seventy mill. gall. per day; indeed, the amount would be more than one hundred mill. gall. per day. The city authorities understood the value of obtaining the right ultimately to get all that flow, so that when the contract of July 8th, 1901, was framed, the alternatives which are set out in Paragraph Three, looking to a supply of seventy mill. gall. per day, were first stated; the city also afterwards stated the alternative which is set forth in paragraph Four, which looked to the ultimate obtaining by the City of the entire flow of the Rockaway River, as against the Morris Canal & Banking Company, and not limiting it to seventy mill. gall. per day; and, in view of the fact that the abandonment was considered to be only a matter of a few years at most, the City agreed that if a release could be obtained, to take effect upon abandonment, whenever that should be, which release would give the whole flow of the river, they would accept such a release. Undoubtedly, such a release, if obtained from the Morris Canal & Banking Company at that time, would have cost a large sum of money, and in view of that the City provided for withholding five hundred thousand dollars. In view of the investigation by the Governor's report of 1905, and of the better understanding of the whole subject, as since developed,

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Unmarked Exhibit.

release from the Morris Canal & Banking Company and Lehigh Valley Railroad Company was obtained May 12, 1909, for a very much less sum than anybody had previously supposed was possible.

In the negotiations with Jersey City resulting in the modification agreement of July 8, 1901, I made the first draft of the contract, and took up negotiations with the City. In the earlier drafts, which I still retain, subdivisions A, B and C, of Section Three are found as ultimately agreed on, but Paragraph Four is entirely new and was added during negotiations at the request of Jersey City as a further alternative.

In the original draft of the contract it was proposed that the Company should get the five hundred thousand dollars whenever it should increase the storage capacity of the Boonton reservoir from seventy-one hundred and ninety million gallons (which is its present capacity), to a storage capacity of eighty-seven hundred million gallons. During negotiations that was struck out and the other provision, Clause Four, was added.

WILLIAM D. EDWARDS.

Subscribed and sworn to, at Jersey City, N. J., this twenty-second day of October, A. D., 1910, before me,

SAMUEL S. MOORE,
Notary Public
of New Jersey.

EXHIBIT F-2.

Division of Geology
Henry B. Kümmel, State Geologist.

STATE OF NEW J ERSEY
DEPARTMENT OF CONSERVATION AND DEVELOPMENT
DOVER-STANHOPE SHEET.

C.C. Vermeule, Topographer. Henry B. Kümmel, State Geologist.

GEOLOGICAL SURVEY OF NEW JERSEY.
BOONTON SHEET.

C.C. Vermeule, Topographer.




Key to adjoining sheets

| | | |
|---|---|---|
| MORRISTOWN | BOONTON | |
| CHESTER | MORRISTOWN | |

Single track Railroads
Railroads with two or more tracks
Quarries
Pits.
Mines

Contour lines and figures show elevation in feet above mean sea level.
Contour Interval in level country 10 feet, in hilly country 20 feet.

Surveyed in 1881.
Resurveyed in 1915
Edition of 1916

Key to adjoining sheets.

| | | |
|---|---|---|
| MORRISTOWN | BOONTON | PATERSON |
| CHESTER | MORRISTOWN | NEWARK |

Single track Railroads
Railroads with two or more tracks.
Quarries.
Pits.

Contour lines and figures show elevation in feet above mean sea level.
Contour Interval in level country 10 feet, in hilly country 20 feet.

Surveyed in 1887.
Resurveyed in 1904.
(Reprint) Edition of 1904.

Exhibit F-1

DIVISION OF GEOLOGY AND WATERS
HENRY B. KÜMMEL, State Geologist

STATE OF NEW JERSEY

# DEPARTMENT OF CONSERVATION AND DEVELOPMENT

## ATLAS SHEET No. 42

SURVEYED, 1877-1887
BASE COMPILED AND ENGRAVED 1910-1912
EDITION OF 1925

# ROAD MAP
OF
# NEW JERSEY

From Original Surveys of the N. J. Geological Survey
based on the Triangulation of the U. S. Coast and Geodetic Survey

Improved Roads, as of January 1, 1925
with the cooperation of the State Highway Commission

EDITION OF 1925

SCALE 1:250,000 (approximately 4 miles to an inch)

LEGEND

*Hard surface roads of durable character.*
*Improved roads.*
*State Highway System, hard surface of durable character.*
*State Highway System improved roads.*
*Unimproved roads.*

**Unmarked Exhibit.**

AGREEMENT

BETWEEN

Frank H. Sommer, Louis Focht and Edward L. Young, Commissioners acting on behalf of the State of New Jersey, under and by virtue of the authority of an Act of the Legislature of the State of New Jersey, known as Chapter 212 of the Laws of 1922 (p. 367),

and

Morris Canal and Banking Company, a corporation of the State of New Jersey, and Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania.

Dated November 29, 1922

AGREEMENT made this twenty-ninth day of November, 1922, between Frank H. Sommer, Louis Focht and Edward L. Young, Commissioners acting on behalf of the State of New Jersey, under and by virtue of the authority of an Act of the Legislature of the State of New Jersey known as Chapter 212 of the Laws of 1922 of said State (p. 367), party of the first part, and Morris Canal & Banking Company, a corporation of the State of New Jersey, and Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, parties of the second part.

The parties hereto, in pursuance of and in accordance with the authority conferred by said Act, agree as follows:

FIRST: On behalf of the State of New Jersey the said Commissioners agree as follows:

(1) To cause to be executed and delivered a proper instrument in writing conveying to the Lehigh Valley Railroad Company all the right, title and interest, present and reversionary, of the State of New Jersey of, in and to all of the lands, lands under water and premises located in Jersey City, Hudson County, New Jersey, referred to in said Chapter 12 of the Laws of 1922 as the "Big Basin" and more particularly described in Chapter CXXXIII of the Laws of 1867 of the State of New Jersey (p. 251) excepting therefrom, however, a strip of land under water for a public waterway as hereinafter provided for in Paragraph 4 of the undertakings of the parties of the second part.

(2) To cause to be conveyed by proper instruments in writing all the right, title and interest, present and reversionary, of the State of New Jersey of, in and to all lands, lands under water and

rights of way of the Canal Company in Jersey City and Bayonne between the center line of Washington Street in Jersey City and the Hackensack River at the point where said canal enters said river, but the said cities of Jersey City and Bayonne shall have the right to maintain and replace sewers, water pipes and other sub-surface structures now on said premises, subject, however, to the terms of any existing agreement or agreements relating to the same, and said cities shall have the further right to construct additional sewers, water pipes and other sub-surface structures across and under said premises at their own expense respectively, but free from any liability to pay compensation or damages; provided, however, that said cities respectively in such case shall enter into a proper instrument in writing with the Lehigh Valley Railroad Company agreeing to indemnify said company against the results of any defective or improper construction or negligent use of any such sewer, water pipe or other sub-surface structure.

(3) To cause to be conveyed, by proper instruments in writing, all the right, title and interest, present and reversionary, of the State of New Jersey of, in and to all lands, lands under water and rights of way of the Canal Company in the Town of Phillipsburg from the southerly line or side of Main Street adjacent to Green's Bridge over the Morris Canal to the point where the Morris Canal enters the Delaware River, but the Town of Phillipsburg shall have the right to maintain and replace sewers, water pipes and other sub-surface structures now on said premises, subject, however, to the terms of any existing agreement or agreements relating to the same, and said Town shall have the further right to construct additional sew-

ers, water pipes and other sub-surface structures under said premises at its own expense, but free from any liability to pay compensation or damages; provided, however, that said Town in such case shall enter into a proper instrument in writing with the Lehigh Valley Railroad Company agreeing to indemnify the said Company against the results of any defective or improper construction or negligent use of any such sewer, water pipe or other sub-surface structure.

(4) To consent, and they do hereby consent, that the Provident Life & Trust Company of Philadelphia, Trustee, release the properties hereinbefore referred to from the lien of the mortgage of the Morris Canal & Banking Company securing the issue of bonds in the amount of $500,000 hereinafter referred to.

(5) To institute and prosecute to completion, when requested in writing by the Lehigh Valley Railroad Company, proceedings for the condemnation of any stock, consolidated or preferred, of the Morris Canal & Banking Company, the cost and expense of such proceedings, including the payment of the award for such stock, to be borne by said Railroad Company. Notice of the institution of any such condemnation proceeding shall be given to said Railroad Company and said Company shall be permitted to participate through its attorneys in the conduct thereof.

SECOND: Said Companies agree as follows:

(1) The Lehigh Valley Railroad Company will pay to the State of New Jersey in cash the sum of eight hundred and seventy-five thousand dollars ($875,000.00) in five equal annual instalments, the first instalment to be paid on the fifteenth day of

December, 1922; subsequent instalments to be paid on the fifteenth day of December in each year thereafter until said principal sum is fully paid. Interest shall be paid annually on the fifteenth day of December in each year subsequent to December 15, 1922, at the rate of five per cent (5%) per annum upon such part of the principal sum as remains unpaid.

(2) The Companies will convey or cause to be conveyed in fee, except as hereinafter noted, to the State of New Jersey by deed of bargain and sale, with covenant by the Lehigh Valley Railroad Company against its own acts and the acts of the Morris Canal & Banking Company, all the lands, lands under water and premises comprised within the Canal Terminal Basin in Jersey City, commonly called the "Little Basin," with the docks, wharves, slips and improvements appurtenant thereto, owned by said Companies or either of them, described as follows:

Beginning at a point in the center line of Essex Street extended distant 185 feet easterly at right angles from the center line of Hudson Street, running thence (1) easterly along the center line of Essex Street extended 790.03 feet more or less to the exterior line for piers in the Hudson River as now established; thence (2) southerly along said exterior line for piers 591.63 feet more or less to a point in the northerly line of the tract of land hereinbefore referred to as the "Big Basin"; thence (3) westerly along said line a distance of 1866.3 feet more or less to the center line of Washington Street; thence (4) northerly along the center line of Washington Street 360 feet; thence (5) easterly on a line parallel with Essex Street and distant 230 feet southerly from the center line thereof a

distance of 650 feet to a point; thence (6) northerly at right angles to Essex Street 100 feet; thence (7) easterly parallel with Essex Street and Essex Street extended 471 feet more or less to a point 185 feet easterly at right angles from the center line of Hudson Street; thence (8) northerly at right angles to Essex Street extended 130 feet to the center line of Essex Street extended, the point of beginning; containing approximately 20.7 acres; together with the right, title and interest of the said parties of the second part in and to any lands, lands under water and easements lying in the Hudson River in front of the said premises; subject, however, to any public streets or highways; provided, however, that as to such part of said tract included within the lines of Essex Street extended the Companies convey their right, title and interest. Nothing herein, however, shall operate as a dedication or the recognition of the dedication of any street, highway or public place.

(3) The Lehigh Valley Railroad Company will extend the present branch of its railroad now running to Warren Street, Jersey City, from said Warren Street to said "Little Basin" along the present right of way of the canal, when requested to do so by the Board of authority having control or management of said "Little Basin," and subject to necessary State and Municipal consent.

The Lehigh Valley Railroad Company agrees that in traffic service to be accorded by the said Company with respect to the "Little Basin," the Jersey City and New York rates shall apply, with switching charges to be absorbed in the through rates to and from all connecting lines in Hudson County under tariffs to be approved by the Interstate Commerce Commission.

(4) The Companies will convey to the State of New Jersey by like deed with like covenant, for the purposes of a public waterway, all their right, title and interest in and to a strip of land and land under water located in Jersey City and partly within the limits of the "Big Basin" and bounded and described as follows:

Beginning at a point in the center of Washington Street, said point being 260 feet south of the southerly boundary of the "Little Basin"; thence northerly along the center line of Washington Street, 50 feet to a point 210 feet south of the southerly boundary of the "Little Basin"; thence eastwardly, parallel with and distant southerly 210 feet from the southerly boundary of said "Little Basin", 1845.5 feet more or less to the pierhead line on the Hudson River as now established; thence southerly along said pierhead line, 251 feet, more or less, to a point; thence westerly along the northerly line of the existing piers of the Lehigh Valley Railroad Company 2261 feet, more or less, to a point in the easterly line of Warren Street, extended; thence northerly, along the said easterly line of Warren Street, extended, 200 feet to a point; thence eastwardly along a line parallel with and 260 feet south of the southerly boundary of the said "Little Basin", extended, 440 feet to the place of beginning, containing 12.541 acres more or less.

Until the present 200 foot public waterway running west from Washington Street to Warren Street shall be widened to a width of 250 feet by public authority, the Lehigh Valley Railroad Company shall have the right without cost to use the waters of the northerly 50 feet of the 250 foot public waterway hereinbefore described for the purpose of mooring boats.

Nothing herein contained shall be construed to create any obligation on the part of the State of New Jersey to incur any expense in dredging or otherwise maintaining the said waterway.

(5) The Companies will convey, or cause to be conveyed, to the State of New Jersey by like deed with like covenant all lands and right of way of the Canal Company between the westerly shore or bank of the Hackensack River in the Town of Kearny and the southerly line or side of Main Street adjacent to Green's Bridge in the Town of Phillipsburg aforesaid, and further, all the right, title and interest of said Companies or either of them or of any subsidiary company of, in and to all that part of the canal property and its feeders between the said westerly shore or bank of the Hackensack River in the Town of Kearny and the southerly line or side of Main Street adjacent to Green's Bridge in the Town of Phillipsburg, together with all the lands which said Companies last mentioned own which are appurtenant to or used in connection with the aforesaid part of the canal and its feeders, and also all lands, land under water, water and water rights, rights of flowage, pondage and diversion of water appurtenant to the canal, together with all rights of the Canal Company and of its lessee, the Lehigh Valley Railroad Company, or of any one claiming under them or either of them, appurtenant to, or used in connection with the canal, to take, use, impound, divert, sell and dispose of water. The deed to be given to the State to embrace the surrender to the State by the Morris Canal and Banking Company and the Lehigh Valley Railroad Company of all the right and title acquired by or vested in said Companies or either of them to impound, divert

or take water at any point within the State for any use or purpose in any way incident or pertaining to the canal or to the operation of the canal, its feeders, works or appurtenances.

The aforesaid conveyance shall be subject to the terms of the release given by the Morris Canal & Banking Company and its said lessee to the Mayor and Aldermen of Jersey City, dated May 12, 1909, and subject to the right of said Mayor and Aldermen of Jersey City continuously to maintain its drains, pipes and conduits down and along the inclined plane at Boonton and to conduct the same along the canal at a point below the first lock east of said plane so as to protect the water supply of said City from pollution; and also subject to the provisions of two certain contracts, namely, one made between the Lehigh Valley Railroad Company, the East Jersey Water Company, the Newark Aqueduct Board and the Mayor and Common Council of the City of Newark, dated September 24, 1889, relating to a supply of water for the City of Newark, and the second between the Morris Canal & Banking Company, the Lehigh Valley Railroad Company, and Patrick H. Flynn, dated November 21, 1898, relating to a supply of water for the City of Jersey City.

(6) The said companies will assign, transfer and set over to the State of New Jersey all personal and mixed property of the said Companies used in connection with said canal.

(7) The Lehigh Valley Railroad Company will, at its own expense, maintain the said Morris Canal as a canal in the usual manner until the first day of March, 1923.

(8) The Lehigh Valley Railroad Company will assign, transfer and set over to the State of New

Jersey, or its nominees, on or before December 30, 1922:—

(*a*) All of the shares of the capital stock of the Morris Canal & Banking Company owned by said Lehigh Valley Railroad Company, being 9,921 shares of consolidated stock and 11,399 shares of preferred stock.

(*b*) All of the outstanding bonds of the Morris Canal & Banking Company, which said bonds are owned by said Lehigh Valley Railroad Company and have an aggregate par value of $500,000.

(*c*) All of the outstanding preferred scrip of the Morris Canal & Banking Company, which said scrip is owned by the said Lehigh Valley Railroad Company and has an aggregate par value of $42,-080.50.

(9) The Lehigh Valley Railroad Company will acquire and assign, transfer and set over to the State of New Jersey all of the remaining outstanding stock, consolidated and preferred, of the Morris Canal & Banking Company not now owned by said Lehigh Valley Railroad Company. If the said Lehigh Valley Railroad Company cannot, on or before March 1, 1923, purchase such remaining outstanding stock at a price satisfactory to it and it therefore becomes necessary to condemn said shares of capital stock in order to acquire the same, said company shall request the Board of Conservation and Development of the State of New Jersey to bring proceedings in the name of the State to condemn said stock, and said proceedings shall be taken in accordance with subdivision 5 of the first section of this agreement and in conformity with the provision of Chapter 212 of the laws of 1922 aforesaid.

Pending the acquisition, by purchase or condemnation, and the transfer of said remaining outstanding shares of consolidated and preferred stock of the Morris Canal & Banking Company, the said Lehigh Valley Railroad Company will continue to pay the dividends thereon in accordance with its existing guaranty.

The Lehigh Valley Railroad Company will further, upon request of the Board of Conservation and Development of the State of New Jersey, deliver the resignations of all officers and directors of the said Morris Canal & Banking Company.

(10) The said companies will assign, transfer and set over, or cause to be assigned, transferred and set over to the State of New Jersey by a proper instrument in writing all existing leases, licenses and undertakings covering any part of any of the property to be conveyed or transferred to the State of New Jersey, and will deliver, or cause to be delivered, to the State of New Jersey all documents, maps, records, deeds and muniments of title relating to any of the property to be conveyed or transferred to the State of New Jersey.

(11) The Lehigh Valley Railroad Company will execute and deliver to the State of New Jersey on or before March 1st, 1923 a proper instrument in writing releasing any and all claims of every nature and description which the said company has, or may have, against the Morris Canal & Banking Company.

(12) The said companies hereby withdraw any and all protests heretofore made respecting taxes heretofore paid by the said companies to the State of New Jersey or to any municipality of the State on the canal property. This withdrawal, however,

shall not extend to or affect pending appeals involving the assessments for taxes for the years 1921 and 1922 on the "Little Basin" property, and the Lehigh Valley Railroad Company hereby agrees with respect to such assessments for taxes for the years 1921 and 1922 on the "Little Basin" property to pay such taxes as may finally be determined on said appeals to be due. Said companies shall not, nor shall either of them, be responsible for any taxes assessed for the calendar year 1923 or for any period after January 1, 1923 on the property conveyed and transferred or to be conveyed and transferred to the State of New Jersey under the terms of this agreement.

(13) The said Companies agree that any rents collected by them, or either of them, under existing leases, undertakings or licenses, covering or relating to any of the property to be conveyed or transferred to the State of New Jersey under the terms of this agreement for any period extending beyond January 1, 1923 shall be apportioned as of that date; rents for any leasehold period prior to January 1, 1923 shall be collected by and be the property of the Lehigh Valley Railroad Company.

(14) The Lehigh Valley Railroad Company will, in each of the several deeds of conveyance and instruments of transfer to be delivered hereunder by said company to the State of New Jersey, covenant that the property and rights to be conveyed or transferred are free from encumbrances, except as the same may be encumbered by rights created by and existing under the leases, agreements and other writings enumerated in the schedule attached hereto and marked "Schedule A," and except the mortgage securing the payment of bonds in the amount of five hundred thousand dollars

($500,000) hereinbefore referred to, and except encumbrances otherwise specifically set forth in this agreement.

There shall be excepted from the said several covenants against encumbrances and from the several covenants against grantor's acts which said Lehigh Valley Railroad Company has herein undertaken to enter into, the rights created by and existing under the leases, agreements and writings enumerated in the said Schedule A and said mortgage securing an issue of bonds in the amount of five hundred thousand dollars ($500,000) and any other encumbrances specifically set forth in this agreement.

(15) It is the intent of this agreement to vest in the Lehigh Valley Railroad Company all present and reversionary rights of the State of New Jersey in the properties referred to in Section 1 hereof, and to vest in the State of New Jersey all other property and rights of every description acquired by the Morris Canal & Banking Company and by the Lehigh Valley Railroad Company as its lessee, with the exceptions herein specifically provided.

(16) The Lehigh Valley Railroad Company covenants at its own expense to continue in possession and operate the canal and to maintain the same as hereinbefore provided under the existing lease until March 1, 1923, and the Morris Canal & Banking Company and the State of New Jersey covenant that the existing lease shall on that day be cancelled; the obligations of the Lehigh Valley Railroad Company for the payment of dividends on the outstanding stock to continue as hereinbefore provided.

(17) The Lehigh Valley Railroad Company hereby covenants that all debts of the Morris Canal

New Jersey State Library

& Banking Company have at the time of the execution hereof been paid and satisfied, except the liability for the payment of an issue of five hundred thousand dollars ($500,000) par value of bonds and an issue of scrip as hereinbefore referred to, and that no indebtedness shall be incurred by said Morris Canal & Banking Company subsequent to the execution hereof and prior to the delivery to the State of New Jersey of the outstanding capital stock of said Morris Canal & Banking Company now owned by the Lehigh Valley Railroad Company, and the said Lehigh Valley Railroad Company further covenants to indemnify and save the Morris Canal & Banking Company and the State of New Jersey harmless from any claim or liability arising out of the operation of the canal property prior to March 1, 1923.

(18) The deeds of conveyance, instruments of assignment and transfer and other writings, to be executed and delivered by the parties hereto in performance hereof, shall be approved as to form by the Attorney General of the State of New Jersey and shall be mutually delivered together with all documents, maps, records, deeds and other muniments of title at the office of the Board of Conservation and Development of the State of New Jersey in the City of Trenton on the first day of March, 1923, between the hours of 10 o'clock in the forenoon and 3 o'clock in the afternoon, except as any other time or times may hereinbefore have been specifically designated with respect to the delivery of any such conveyance, instruments of transfer and other writings.

(19) The Morris Canal & Banking Company covenants to execute and deliver to the Lehigh Valley Railroad Company a proper instrument of con-

veyance of all of its right, title and interest, free from any lien or encumbrance created subsequent to delivery to the State of New Jersey of stock of the Morris Canal & Banking Company, now owned by the Lehigh Valley Railroad Company, in the lands, lands under water and other canal property in respect of which the right, title and interest, present and reversionary of the State of New Jersey is, under the terms of this agreement, to be conveyed to the Lehigh Valley Railroad Company.

IN WITNESS WHEREOF the parties hereto have duly executed this instrument in quintuplicate the day and year first above aforesaid.

FRANK H. SOMMER
LOUIS FOCHT
E. L. YOUNG
Commissioners acting on behalf of the State of New Jersey.

MORRIS CANAL & BANKING COMPANY,
[SEAL] By E. E. LOOMIS
President.

Attest:
D. G. BAIRD
Secretary.

LEHIGH VALLEY RAILROAD COMPANY
[SEAL] By E. H. BOLES
Vice President.

Attest:
D. G. BAIRD
Secretary.

## SCHEDULE A

This schedule, attached to the original contract, contains an itemized list of agreements relating to wires, pipes, leases, easements and other miscel-

laneous privileges (1) affecting the canal property between Hackensack River and Green's Bridge, Phillipsburg, as of November 1, 1922; (2) affecting the Little Basin at Jersey City, N. J.; and (3) affecting waterway between Hackensack River and the south side of Main Street, adjacent to Green's Bridge, in the town of Phillipsburg, in respect of covenants in deeds as to existing bridges, etc.

[NOTE.—Original contract filed December 1, 1922 in the office of the Secretary of State of the State of New Jersey, Trenton, N. J., and duplicate original filed December 1, 1922 in the office of the State Board of Conservation and Development, Trenton, N. J.]

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**Exhibit F-3.**

Morris Canal and Banking Co & al

To

The State of New Jersey

THIS INDENTURE, made the 28th day of February in the year of Our Lord One thousand nine hundred and twenty-three (1923), Between Morris Canal And Banking Company, a corporation of the State of New Jersey and Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, hereinafter jointly referred to as the party of the first part, and State of New Jersey, party of the second part, Witnesseth: That the said party of the first part, for and in consideration of the sum of One Dollar ($1.00) and other valuable consideration, lawful money of the United States of America, to it in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said

party of the first part, therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part and to its successors and assigns forever, All lands and right of way of the party of the first part between the westerly shore or bank of the Hackensack River in the Town of Kearny, County of Hudson, and the southerly line or side of Main Street adjacent to Green's Bridge in the Town of Phillipsburg, County of Warren, and further, all the right, title and interest of said party of the first part, of, in and to all that part of the canal property and its feeders between the said westerly shore or bank of the Hackensack River in the Town of Kearny and the southerly line or side of Main Street adjacent to Green's Bridge in the Town of Phillipsburg, together with all the lands which said party of the first part owns which are appurtenant to or used in connection with the aforesaid part of the canal and its feeders, and also all lands, land under water, water and water rights, rights of flowage, pondage and diversion of water appurtenant to the canal, together with all rights of the party of the first part, or of anyone claiming under them or either of them appurtenant to, or used in connection with the canal, to take, use, impound, divert, sell and dispose of water. This conveyance is intended to embrace the surrender to the party of the second part by the party of the first part of, and the party of the first part does hereby give, grant, sell and convey to the party of the second part, all the right and title acquired by or vested in said party of the first part, to impound, divert or take water at any point within the State of New

Description
O. K.
L. F.

Jersey for any use or purpose in any way incident or pertaining to the canal or to the operation of the canal, its feeders, works or appurtenances. UNDER AND SUBJECT to the terms, covenants and conditions of the following:— A — Release dated May 12, 1909 from the Morris Canal and Banking Company and its Lessee, the Lehigh Valley Railroad Company, to the Mayor and Aldermen of Jersey City releasing right to divert water from the Rockaway River water shed; and also subject to the right of the Mayor and Aldermen of Jersey City continuously to maintain its drains, pipes and conduits down and along the incline plane at Boonton, and to conduct the same along the Canal at a point below the first lock east of said plane so as to protect the water supply of the City of Jersey City from Pollution, as granted by two Agreements, one dated June 22, 1904, the second dated October 14, 1909 and referred to in "Schedule A" attached to the Morris Canal Settlement Contract of November 29, 1922, hereinafter more definitely described, original counterpart of which said contract was filed in the office of the Secretary of State of the State of New Jersey at Trenton, New Jersey, on December 1, 1922, and original counterpart of which was also filed in the office of the State Board of Conservation and Development on December 1, 1922. B — Contract dated September 24, 1889, between the Lehigh Valley Railroad Company, East Jersey Water Company, Newark Aqueduct Board and Mayor and Common Council of the City of Newark, relating to a supply of water for the City of Newark, as modified by Supplemental Contract dated May 1, 1896. C — Contract dated November 21, 1898 between the Morris Canal and Banking Company, the Lehigh Valley Railroad Company and Patrick H. Flynn, relating to a sup-

ply of water for the City of Jersey City. UNDER AND SUBJECT further to the terms, covenants and conditions of certain contracts, agreements, licenses and leases set forth in detail in "Schedule A" attached and made part of the aforesaid agreement dated November 29, 1922 between Frank H. Sommer, Louis Focht and Edward L. Young, Commissioners acting on behalf of the State of New Jersey, under and by virtue of the authority of an Act of the Legislature of the State of New Jersey, known as Chapter 212 of the Laws of 1922 (p. 367), and Morris Canal and Banking Company, a corporation of the State of New Jersey, and Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, with the same force and effect as if herein set forth in full. UNDER AND SUBJECT, however, to the terms, covenants and conditions of an Indenture of Mortgage dated September 15, 1890 from the Morris Canal and Banking Company to The Provident Life and Trust Company of Philadelphia (now Provident Trust Company of Philadelphia). Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And Also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above described premises and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, its successors and assigns forever, to the only proper use, benefit and behoof of the said

party of the second part, its successors and assigns forever, under and subject as aforesaid. And the Lehigh Valley Railroad Company does for itself, its successors and assigns, under and subject as aforesaid, covenant and grant to and with the said party of the second part, its successors and assigns, that neither the Lehigh Valley Railroad Company nor the Morris Canal and Banking Company has done, caused, suffered or procured to be done, any act, matter or thing whereby the title of the said party of the second part, of, in and to the above granted, bargained and described lands, lands under water and premises or any part thereof can or may be changed, charged, altered or defeated in anyway whatsoever, and that said lands, premises and rights are free from incumbrances except as aforesaid, and that it will execute and deliver, or cause to be executed and delivered, such other conveyances or instruments in writing as may be necessary to carry into full effect the true intent and meaning of the aforesaid contract of November 29, 1922 in respect of the lands, premises and rights aforesaid. This Conveyance is made pursuant to the provisions of the aforesaid agreement dated November 29, 1922 between Frank H. Sommer, Louis Focht and Edward L. Young, Commissioners acting on behalf of the State of New Jersey, under and by virtue of an Act of the Legislature of the State of New Jersey known as Chapter 212 of the Laws of 1922 (p. 367), approved March 11, 1922 and the Morris Canal and Banking Company, a corporation of the State of New Jersey, and Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, said Act being entitled: "An Act to authorize the acquisition by the State of the Morris Canal (as defined in this act), in whole or in part, and all the stock of the Morris Canal and Banking Company and the rights of all

stockholders in said company and in said canal property and water rights, and all or any part of the right, title, interest of the Lehigh Valley Railroad Company in said canal property and water rights by virtue of its lease of said canal from the Morris Canal and Banking Company, or otherwise; to provide for a commission authorized to negotiate and agree upon terms of settlement with the Morris Canal and Banking Company and the Lehigh Calley Railroad Company, in relation to the said canal property and water rights, and to vest in said commission certain powers necessary for carrying out the terms of settlement and to make such other provisions as may be necessary to effectuate the objects aforesaid."

IN WITNESS WHEREOF, the said party of the first part has caused these presents to be signed by their Vice-Presidents and attested by their Secretaries and their common seals to be hereto affixed the day and year first above written.

MORRIS CANAL AND BANKING COMPANY

M. C. & B. C. Seal

By (Signed) J. A. MIDDLETON
Vice-President

Attest:

(Signed) DAVID G. BAIRD,
Secretary.

LEHIGH VALLEY RAILROAD COMPANY

L. V. R. R. C. Seal

By (Signed) EDGAR H. BOLES,
Vice-President

Attest:

(Signed) DAVID G. BAIRD,
Secretary.

Approved as to form
(Signed) THOMAS F. MCCRAN,
Attorney General

(10) No Revenue Stamps Required
Execpt under Art. 73, Reg. 55.

State of New Jersey, }
County of Mercer, } ss.:

BE IT REMEMBERED, That on the First day of March, A. D. 1923, before me, the subscriber, a Master in Chancery of New Jersey personally appeared David G. Baird, who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the Secretary of Morris Canal and Banking Company, party to the foregoing deed; that he well knows the corporate seal of said Company; that the seal thereto affixed is the proper corporate seal of the said Company; that the same was so affixed thereto, and the said deed signed and delivered by John A. Middleton who was, at the date and execution thereof, the Vice-President of the said Company, in the presence of deponent, as the voluntary act and deed of the said Company, and that deponent thereupon signed the same as subscribing and attesting witness.

(Signed) DAVID G. BAIRD

Subscribed and sworn to before me }
the day and year above written. }

(Signed) JOHN MILTON
Master in Chancery
of New Jersey.

State of New Jersey, }
County of Mercer, } ss.:

BE IT REMEMBERED, That on this first day of March, A. D. 1923, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared David G. Baird, who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the Secretary of Lehigh Valley Railroad Company, party to the foregoing deed;

that he well knows the corporate seal of said Company; that the seal thereto affixed is the proper corporate seal of the said Company; that the same was so affixed thereto, and the said deed signed and delivered by Edgar H. Boles who was, at the date and execution thereof, the Vice-President of the said Company, in the presence of deponent, as the voluntary act and deed of the said Company, and that deponent thereupon signed the same as subscribing and attesting witness.

(Signed) DAVID G. BAIRD

Subscribed and sworn to before me the day and year above written.

(Signed) JOHN MILTON
Master in Chancery
of New Jersey.

Received and Recorded March 22, 1923, at 3:44 o'clock, P. M.

E. BERTRAM MOTT
Clerk

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State of New Jersey, } ss.
County of Morris, }

I, E. BERTRAM MOTT, Clerk of the County of Morris, do hereby Certify that the foregoing is a true copy of the record of a Deed given by Morris Canal And Banking Co. & al To The State of New Jersey as fully and entirely as the same remains

of record in my office in Book N-28 of Deeds for said County, on pages 356, etc.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the (Seal) seal of said County, at Morristown, this Ninth day of June, A. D. nineteen hundred and twenty-five.

E. BERTRAM MOTT,
Clerk.

By EDWIN W. ORR,
Deputy Clerk.

(Endorsed):

MORRIS COUNTY CLERK'S OFFICE

MORRISTOWN, NEW JERSEY

DEED

Morris Canal and Banking Co & al
To
The State of New Jersey

CERTIFIED COPY

Dated February 28th, 1923
Recorded March 22, 1923,
Book N-28 of Deeds on
Pages 356 &c.
ELIAS BERTRAM MOTT, Clerk

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**Exhibit F-4.**

KNOW ALL MEN BY THESE PRESENTS,

That the LEHIGH VALLEY RAILROAD COMPANY, a corporation of the State of Pennsylvania, and the MORRIS CANAL AND BANKING COMPANY, a corporation of the State of New Jersey, (both hereinafter referred to as the Railroad Company,) of the first

part, for and in consideration of the sum of One dollar ($1.00) lawful money of the United States and other good and valuable considerations to each of them in hand paid, at or before the ensealing and delivery of these presents, by the State of New Jersey, party of the second part, the receipt whereof is hereby severally acknowledged, have sold, assigned, transferred and set over and do hereby sell, assign, transfer and set over unto the State of New Jersey, its successors and assigns, all personal and mixed property of said Companies or either of them used in connection with the ownership, maintenance use and operation of the Morris Canal, and, secondly, all of the right, title and interest of them or either of them in all existing leases, licenses and undertakings covering any part of any of the Morris Canal property conveyed and transferred to the State of New Jersey in accordance with the terms and provisions of a certain agreement dated November 29, 1922, between Frank H. Sommer, Louis Focht and Edward L. Young, Commissioners acting on behalf of the State of New Jersey under and by virtue of the authority of an Act of the Legislature of the State of New Jersey, known as Chapter 212, of the Laws of 1922 (page 367) parties of the first part, and the Morris Canal and Banking Company and Lehigh Valley Railroad Company, parties of the second part, which said agreement was duly filed on December 1, 1922, in the office of the Secretary of State of the State of New Jersey, at Trenton, New Jersey, and original counterpart duly filed in the office of the Board of Conservation and Development at Trenton, New Jersey, on the same day.

To Have and to Hold the same unto the said party of the second part, its successors and assigns, forever, and the parties of the first part do for

themselves, covenant and agree to and with said party of the second part, to warrant and defend the sale of the said personal and mixed property and the transfer and assignment of the aforesaid leases, licenses and undertakings hereby sold, as signed, transferred and set over unto the party of the second part against all and every person or persons whomsoever.

IN WITNESS WHEREOF, the said Lehigh Valley Railroad Company and the said Morris Canal and Banking Company have duly executed this instrument, this first day of March, nineteen hundred and twenty-three (1923).

LEHIGH VALLEY RAILROAD COMPANY

L. V. R. R. Seal

by

(Signed) EDGAR H. BOLES,
Vice President

Attest
D. G. BAIRD
Secretary

E.H.B.

MORRIS CANAL AND BANKING COMPANY

M. C. & B. Co. Seal

J. A. MIDDLETON
Vice President

D. G. BAIRD
Secretary

Approved as to form
THOMAS F. McCRAN
Attorney General

(Endorsed):

Deed to State of all personal property

(Bill of sale and assignment
March 1, 1923)

**Exhibit F-5.**

AGREEMENT, made and delivered this 28th day of February, 1923, by and between the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, party of the first part (hereinafter referred to as the Railroad Company) and the Morris Canal and Banking Company, a corporation of the State of New Jersey, party of the second part (hereinafter referred to as the Canal Company).

WHEREAS, pursuant to the authority of an act of the Legislature of the State of New Jersey, approved March 14, 1871 (P. L. 444) the Railroad Company by Indenture dated the 4th day of May, 1871 leased from the Canal Company the entire Canal and Navigation works of the said Canal Company from the Delaware River at Phillipsburg, New Jersey to the Hudson River at Jersey City, N. J. together with all branches, extensions, lands, water rights and privileges of said Canal Company as in said indenture of lease more specifically described, and

WHEREAS, pursuant to the authority contained in an act of the Legislature of the State of New Jersey known as Chapter 212 of the laws of 1922 (page 367) Frank H. Sommers, Louis Focht and Edward L. Young, Commissioners acting on behalf of the State of New Jersey, entered into an agreement with the said Canal Company and the said Railroad Company under date of November 29, 1922 which said agreement provides in part as follows:

"(16) The Lehigh Valley Railroad Company covenants at their own expense to continue in possession and operate the Canal and to maintain

the same as hereinbefore provided under the existing lease until March 1, 1923 and the Morris Canal and Banking Company and the State of New Jersey covenant that the existing lease shall on that day be cancelled; the obligation of the Lehigh Valley Railroad Company for the payment of dividends on the outstanding stock to continue as hereinbefore provided."

AND WHEREAS the stockholders of the said Canal Company at a meeting duly called and held on December 27, 1922 approved and confirmed the execution and delivery of said agreement and authorized the Board of Directors and officers of the Company to take such action as may be appropriate to carry out the terms thereof, and

WHEREAS, a resolution of like tenor and effect was passed by the stockholders of the Lehigh Valley Railroad Company at a meeting duly called and held on January 16, 1923. Now therefore, in consideration of the premises and of the mutual covenants of the aforesaid parties hereto, they do hereby agree as follows:

1. That this instrument is formally executed for the purpose of carrying into effect the aforesaid provision of the contract of November 29, 1922 made by the parties hereto and the said Commissioners acting on behalf of the State of New Jersey and in conformity thereto, the aforesaid Morris Canal lease of May 4, 1871 is hereby cancelled and terminated forever as and after the 1st day of March 1923.

2nd. That this agreement shall not affect the obligation of the Railroad Company for the payment of dividends in accordance with the terms and provisions of the aforesaid Canal lease of May

4, 1871 on the outstanding shares of capital stock of the Canal Company until said shares are acquired by the Railroad Company either by purchase or condemnation and delivered to the State of New Jersey in accordance with the aforesaid agreement of November 29, 1922.

IN WITNESS WHEREOF, the parties have duly executed this agreement in duplicate the day and year first above written.

(Corporate Seal) LEHIGH VALLEY RAILROAD COMPANY

by E. E. LOOMIS, President

Attest

D. G. BAIRD, Secretary.

(Corporate Seal) MORRIS CANAL & BANKING COMPANY

By E. E. LOOMIS, President

Attest

D. G. BAIRD, Secretary.

Proved by both Corporations by D. G. Baird, Secretary on February 28, 1923, before J. Wm. Robbins a Foreign Commissioner of Deeds for New Jersey in Pennsylvania (Seal)

Recorded March 5, 1923

Deed Book F-28, page 503

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**Exhibit F-6.**

(RELEASE)

KNOW ALL MEN BY THE PRESENTS, That the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, for and in consideration of the sum of One dollar ($1.00) lawful money of the United States of America, to it paid by the MORRIS CANAL AND BANKING COMPANY, a corporation of the State of New Jersey, receipt whereof is

hereby acknowledged, has remised, released, and forever discharged, and by these presents does for itself, its successors and assigns, remise, release and forever discharge the said Morris Canal and Banking Company of and from all and all manner of action and actions, cause and causes of action, suits, debts, and any and all claims of every nature and description which the said Lehigh Valley Railroad Company has or may have against the said Morris Canal and Banking Company from the beginning of the world to the date of the day of these presents.

In Witness Whereof the said Lehigh Valley Railroad Company has duly executed this release this first day of March, One thousand, nine hundred and twenty-three (1923).

L. V. R. R. seal

Lehigh Valley Railroad Company
(Signed) Edgar H. Boles,
Vice President

Attest

David G. Baird
Secretary

Approval as to form
(Signed) Thomas F. McCran
Attorney General

State of New Jersey, }
County of Mercer, } ss.:

Be it Remembered, That on this first day of March, A. D. 1923, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared David G. Baird, who being by me duly sworn, does depose and make proof to my satisfaction, that he is the Secretary of the Lehigh Valley Railroad Company, party of the foregoing re-

lease; that he well knows the corporate seal of said company; that the seal thereto affixed is the proper corporate seal of the said company, that the same was so affixed thereto, and the said release was signed and delivered by Edgar H. Boles, who was, at the date and execution thereof, the Vice president of the said company, in the presence of deponent, as the voluntary act and deed of the said company, and that deponent thereupon signed the same as subscribing and attesting witness.

Signed—
DAVID G. BAIRD

Subscribed and sworn to before me, the day and year last above written.

(Signed)

JOHN MILTON
Master in Chancery
of New Jersey

Received in the office of the Register of the County of Hudson, N. J. at 10:52 o'clock a. m. March 5, 1923 at Hudson County, N. J. and recorded in Book 1470 of Deeds for said County on page 549, etc.

JOHN J. McMAHON,
Register.

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**Unmarked Exhibit.**

(3 DOCUMENTS.)

THIS INDENTURE, made the 28th day of February, in the year of Our Lord, One thousand nine hundred and twenty-three (1923), between the MORRIS CANAL AND BANKING COMPANY, a corporation of the State of New Jersey, the LEHIGH VALLEY

RAILROAD COMPANY OF NEW JERSEY, a corporation of the State of New Jersey, and the LEHIGH VALLEY RAILROAD COMPANY, a corporation of the State of Pennsylvania, hereinafter jointly referred to as the party of the first part, and STATE OF NEW JERSEY, of the second part:

WITNESSETH

THAT the said party of the first part, for an in consideration of the sum of One dollar ($1.00) and other valuable consideration, lawful money of the United States of America, to it in hand paid, by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and to its successors and assigns forever, for the purposes of a public waterway,

ALL the right, title and interest, present and reversionary, of the party of the first part, of, in and to all lands and lands under water of the party of the first part, situate, lying and being in the City of Jersey City County of Hudson and State of New Jersey, bounded and described as follows:

Description O. K. L. F.

BEGINNING at a point in the center of Washington Street, said point being two hundred and sixty (260) feet south of the southerly boundary of the Little Basin; thence (1) northerly along the center line of Washington Street, fifty (50) feet to a point two hundred and ten (210) feet south of the southerly boundary of the Little Basin; thence (2) eastwardly, parallel with

and distant southerly two hundred and ten (210) feet from the southerly boundary of said Little Basin, eighteen hundred forty-five and five tenths (1845.5) feet more or less to the pierhead line on the Hudson River as now established; thence (3) southerly along said pierhead line, two hundred and fifty-one (251) feet more or less to a point; thence (4) westerly along the northerly line of the existing piers of the Lehigh Valley Railroad Company, twenty-two hundred and sixty-one (2261) feet more or less to a point in the easterly line of Warren Street, extended; thence (5) northerly along the said easterly line of Warren Street extended, two hundred (200) feet to a point; thence (6) eastwardly along a line parallel with and two hundred and sixty (260) feet south of the southerly boundary of the said Little Basin extended, four hundred and forty (440) feet to the place of beginning.

UNDER AND SUBJECT, however, to the right of the Lehigh Valley Railroad Company, without cost, to use the waters of the northerly fifty (50) feet of the two hundred and fifty (250) foot public waterway above described, for the purpose of mooring boats, such right continue until the present two hundred (200) foot public waterway running west from Washington Street to Warren St. shall be widened to a width of two hundred and fifty (250) feet by public authority.

Nothing herein contained shall be construed to create any obligation on the part of the State of New Jersey to incur any expense in dredging or otherwise maintaining the said waterway,

Nothing herein contained shall operate as a dedication or the recognition of the dedication of any street, highway or public place.

TOGETHER with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, its successors and assigns forever.

AND the said party of the first part does for itself, its successors and assigns, under and subject as aforesaid, covenant and grant to and with the said party of the second part, its successors and assigns, that it the said party of the first part has not done, caused, suffered or procured to be done. any act, matter or thing, whereby the title of the said party of the second part, of, in and to the above granted, bargained and described land and premises, or any part thereof, can or may be changed, charged, altered or defeated in any way whatsoever and that the property and rights conveyed and transferred hereby are free from encumbrances.

IN WITNESS WHEREOF, the said MORRIS CANAL AND BANKING COMPANY, LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY AND LEHIGH VALLEY RAILROAD COMPANY, have respectively caused this deed to be signed by their Vice Presidents and their corporate seals to be hereunto affixed and the same to be attested by the signatures of their Secretaries, the day and year first above written.

MORRIS CANAL AND BANKING COMPANY
By (Signed) J. A. MIDDLETON
Vice President

E.H.B. M. C. & B. Co
Seal

L. V. R. R. Co
Seal

Attest

(Signed) DAVID G. BAIRD,
Secretary

LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY
By (Signed) EDGAR H. BOLES,
Vice President

Attest

(Signed) DAVID G. BAIRD,
Secretary

LEHIGH VALLEY RAILROAD COMPANY
By (Signed) EDGAR H. BOLES,
Vice President

Attest

(Signed) DAVID G. BAIRD,
Secretary

No Revenue Stamps Required.
Exempt under Art. 73, Reg. 55.

State of New Jersey, }
County of Mercer, } ss.:

BE IT REMEMBERED, That on the first day of March, A. D. 1923, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared David G. Baird who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the Secretary of the Morris Canal and Banking Company, party of the foregoing deed; that he well knows the corporate seal of said Company, that the seal thereto affixed is the proper corporate seal of the said Company; that the same was so affixed thereto, and the said deed signed and delivered by John A. Middleton who was, at the date and execution thereof, the Vice President of the said Company, in the presence of deponent, as the voluntary act and deed of the said Company, and that deponent thereupon signed the same as subscribing and attesting witness.

(Signed) DAVID G. BAIRD

Subscribed and sworn to before me the day and year last above written. }

Signed JOHN MILTON
Master in Chancery
of New Jersey

State of New Jersey, }
County of Mercer, } ss.:

BE IT REMEMBERED, That on this first day of March, A. D. 1923 before me, the subscriber, a Master in Chancery of New Jersey, personally appeared David G. Baird, who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the Secretary of the Lehigh Valley Railroad Company of New Jersey, party to

the foregoing deed; that he well knows the corporate seal of the said Company, that the seal thereto affixed is the proper corporate seal of the said Company; that the same was so affixed thereto, and the said deed signed and delivered by Edgar H. Boles who was, at the date and execution thereof, the Vice President of the said Company in the presence of deponent as the voluntary act and deed of the said Company, and that deponent thereupon signed the same as subscribing and attesting witness.

(Signed) DAVID G. BAIRD

Subscribed and sworn to before me the day and year last above written.

(Signed) JOHN MILTON
Master in Chancery
of New Jersey

State of New Jersey, }
County of Mercer, } SS.:

BE IT REMEMBERED, That on this first day of March A. D. 1923, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared David G. Baird who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the Secretary of the Lehigh Valley Railroad Company party to the foregoing deed; that he well knows the corporate seal of the said Company, that the seal thereto affixed is the proper corporate seal of the said Company; that the same was so affixed thereto, and the said deed signed and delivered by Edgar H. Boles who was, at the date and execution thereof, the Vice President of the said Company, in the presence of deponent, as the voluntary act and deed of said Company,

and that deponent thereupon signed the same as subscribing and attesting witness.

Signed DAVID G. BAIRD

Subscribed and sworn to before me the day and year last above written.

JOHN MILTON
Master in Chancery
of New Jersey

Received in the Office of the Register of the County of Hudson, N. J. at 10:52 o'clock a. m. March 5, 1923 at Hudson County, N. J. and Recorded in Book 1470 of Deeds for said County on Page 544 etc.

JOHN J. McMAHON,
Register.

(Endorsed):

Deed to State
Feb 28-1923
Big Basin

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THIS INDENTURE made the 28th day of February in the year of our Lord, One thousand nine hundred and twenty-three (1923) between MORRIS CANAL AND BANKING COMPANY, a corporation of the State of New Jersey and LEHIGH VALLEY RAILROAD COMPANY, a corporation of the State of Pennsylvania, hereinafter jointly referred to as the party of the first part and STATE OF NEW JERSEY party of the second part.

WITNESSETH

That the said party of the first part, for and in consideration of the sum of One dollar ($1.00) and other valuable consideration, lawful money of the United States of America, to it in hand well and

truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part and to its successors and assigns forever.

ALL the lands, lands under water and premises comprised within the Canal Terminal Basin in the City of Jersey City, County of Hudson, commonly called the "Little Basin," with the docks, wharves, slips and improvements appurtenant thereto, owned by the parties of the first part or either of them, and described as follows:

Description O. K. L. F.

BEGINNING at a point in the center line of Essex Street extended, distant one hundred and eighty-five (185) feet easterly at right angles from the center line of Hudson Street, running thence (1) easterly along the center line of Essex Street extended, seven hundred ninety and three hundredths (790.3) feet more or less to the exterior line for piers in the Hudson River as now established; thence (2) southerly along said exterior line for piers five hundred ninety-one and sixty three hundredths (591.63) feet more or less to a point in the northerly line of the tract of land commonly referred to as the "Big Basin"; thence (3) westerly along said line a distance of one thousand eight hundred sixty-three and three tenths (1866.3) feet more or less to the center line

of Washington Street; thence (4) northerly along the center line of Washington Street three hundred sixty (360) feet; thence (5) easterly on a line parallel with Essex Street and distant two hundred and thirty (230) feet southerly from the center line thereof a distance of six hundred fifty (650) feet to a point; thence (6) northerly at right angles to Essex Street one hundred (100) feet; thence (7) easterly parallel with Essex Street and Essex Street extended, four hundred seventy-one (471) feet more or less to a point one hundred eighty-five (185) feet easterly at right angles from the center line of Hudson Street; thence (8) northerly at right angles to Essex Street extended, one hundred thirty (130) feet to the center line of Essex Street extended, the point of beginning. Containing approximately twenty and seven tenths (20.7) acres.

TOGETHER with the right, title and interest of the parties of the first part in and to any lands, lands under water and easement lying in the Hudson River in front of the above described premises.

EXCEPTING and RESERVING therefrom that certain piece or parcel of land conveyed by the Lehigh Valley Railroad Company to United Real Estate Company by deed dated February 7, 1901, recorded in the office of the Register of Hudson County, April 18, 1901, in Book 780 of deeds, page 51 etc., which property was described in said deed as "all that certain tract or parcel of land and premises hereinafter particularly described situate, lying and being in the city

of Jersey City, County of Hudson and State of New Jersey.

Description O.K. L.F.

BEGINNING at a point formed by the intersection of the Easterly line of Washington Street with the northerly line of Mason (formerly South) Street and from thence running northerly and along the easterly side of Washington Street one hundred (100) feet; thence easterly and parallel with Mason Street seventy-five (75) feet; thence southerly and parallel with Washington Street one hundred (100) feet to the northerly line of Mason Street and from thence running westerly and along the northerly side of Mason Street seventy-five (75) feet to the point or place of beginning.

SUBJECT to the rights of the public, if any, in and to the public streets crossing or abutting the tract of land above described.

NOTHING herein contained shall operate as a dedication or the recognition of the dedication of any street, highway or public place, provided however, as to such parts of the premises hereby conveyed included within the limits of Essex Street extended, the party of the first part conveys only their right, title and interest.

UNDER AND SUBJECT, however, to the terms covenants and conditions of an Indenture of Mortgage dated September 15, 1890 from Morris Canal and Banking Company to the Provident Life and Trust Company of Philadelphia (now Provident Trust Company of Philadelphia).

UNDER AND SUBJECT also, to the rights of certain tenants in possession of portions of

the premises hereby conveyed, said rights being in accordance with the provisions of the following leases and agreements:—

A—Lease dated May 29, 1918, between Morris Canal and Banking Company and American Sugar Refining Company, known as 115 Jersey City.

B—Lease dated March 25, 1918, between Morris Canal and Banking Company and Uvalde Asphalt Paving Company, known as 117 Jersey City.

C—Lease dated December 14, 1857, between Morris Canal and Banking Company and Josiah G. Gautier and extensions thereof, known as 110 Jersey City.

D—Lease dated February 7, 1919, between Lehigh Valley Railroad Company for itself and on behalf of the Morris Canal and Banking Company and Grymes Engineering Company; the interest of the Grymes Engineering Company having been assigned to the Vulcan Iron works, Inc., by agreement dated July 3, 1920, and as qualified by agreement between Lehigh Valley Railroad Company for itself and on behalf of the Morris Canal and Banking Company, dated August 12, 1920, all of which are known as 192 Jersey City.

E—Lease dated November 18, 1918, between the Lehigh Valley Railroad Company and Western Union Telegraph Company, known as 293 Jersey City.

F—Lease dated June 30, 1919, between the Lehigh Valley Railroad Company for it-

self and on behalf of the Morris Canal and Banking Company, and Grymes Engineering Company; the interest of Grymes Engineering Company having been assigned to the Vulcan Iron Works, Inc., by an agreement dated July 3, 1920, and as qualified by supplemental agreement of December 29, 1922, between Lehigh Valley Railroad Company, for itself and on behalf of the Morris Canal and Banking Company and Vulcan Iron Works, Inc., known as 319 Jersey City.

G—Lease dated September 4, 1919, between the Lehigh Valley Railroad Company, for itself and on behalf of the Morris Canal and Banking Company and Grymes Engineering Company, the interests of the Grymes Engineering Company having been assigned to the Vulcan Iron Works, Inc., by agreement dated July 3, 1920, all of which are known as 319-A Jersey City.

H—Agreement dated November 22, 1917 between Lehigh Valley Railroad Company, for itself and on behalf of the Morris Canal and Banking Company and Public Service Electric Company, covering the maintenance of nine poles and stringing three wires thereon, also three wire attachments.

I—Agreement dated November 17, 1919 between Director General of Railroads, Lehigh Valley Railroad Company, for itself and on behalf of the Morris Canal and Banking Company, the Pennsylvania Railroad Company and the American Sugar Refining Company, covering the construction and maintenance of an additional track over the bridge at Washington Street.

J—Agreement dated April 1, 1921 between Lehigh Valley Railroad Company for itself and on behalf of its Lessor, Morris Canal and Banking Company and Rogers-Pyatt Shellac Company, covering the construction maintenance and use of two eight inch water pipes across, under and along the lands of the Morris Canal.

TOGETHER with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, its successors and assigns forever, to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever, under and subject as aforesaid.

AND the Lehigh Valley Railroad Company does, for itself, its successors, and assigns, under and subject as aforesaid, covenant and grant to and with the said party of the second part, its successors and assigns, that neither the Lehigh Valley Railroad Company nor the Morris Canal and Banking Company has done, caused, suffered or pro-

cured to be done any act, matter or thing whereby the title of the said party of the second part of, in and to the above granted, bargained and described lands, lands under water and premises or any part thereof can or may be changed, charged, altered or defeated in any way whatsoever, and that the property and rights conveyed and transferred hereby are free from incumbrances except as aforesaid.

THIS CONVEYANCE is made pursuant to the provisions of the agreement dated November 29, 1922, between Frank H. Sommer, Louis Focht and Edward L. Young, Commissioners acting on behalf of the State of New Jersey, under and by virtue of an Act of the Legislature of the State of New Jersey known as Chapter 212 of the Laws of 1922 (p. 367), approved March 11, 1922, and the Morris Canal and Banking Company, a corporation of the State of New Jersey, and Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, said Act being entitled: "An Act to authorize the acquisition by the State of the Morris Canal (as defined in this act), in whole or in part, and all the stock of the Morris Canal and Banking Company and the rights of all stockholders in said company and in said canal property and water rights and all or any part of the right, title and interest of the Lehigh Valley Railroad Company in said canal property and water rights by virtue of its lease of said canal from the Morris Canal and Banking Company, or otherwise; to provide for a commission authorized to negotiate and agree upon terms of settlement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, in relation to the said canal property and water rights, and to vest in said com-

mission certain powers necessary for carrying out the terms of settlement and to make such other provisions as may be necessary to effectuate the objects aforesaid."

IN WITNESS WHEREOF, the said party of the first part has caused these presents to be signed by their Vice Presidents and attested by their Secretaries and their common seals to be hereto affixed, the day and year first above written.

MORRIS CANAL AND BANKING COMPANY

Signed EHB

By J. A. MIDDLETON,
(Signed) Vice president

M. C. and B. Co. Seal

Attest DAVID G. BAIRD
(Signed) Secretary

LEHIGH VALLEY RAILROAD COMPANY

By EDGAR H. BOLES,
(Signed) Vice President

The L. V. R. R. seal

Attest DAVID G. BAIRD,
(Signed) Secretary

Approved as to form

(Signed) THOMAS F. MCCRAN

No Revenue Stamps Required.
Exempt Under Art. 73, Reg. 55.

State of New Jersey }
County of Mercer } ss.:

BE IT REMEMBERED, That on this first day of March A. D. 1923, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared DAVID G. BAIRD, who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the secretary of Morris Canal and Banking Company, party to the foregoing

Deed: That he well knows the corporate seal of the said Company, that the seal thereto affixed is the proper corporate seal of the said Company; that the same was so affixed thereto, and the said Deed signed and delivered by John A. Middleton who was, at the date and execution thereof, the Vice President of the said Company, in the presence of deponent, as the voluntary act and deed of the said Company, and that deponent thereupon signed the same as subscribing and attesting witness.

(Signed) DAVID G. BAIRD

Subscribed and sworn to before me, the day and year last above written.

(Signed) JOHN MILTON
Master in Chancery
of New Jersey

State of New Jersey
County of Mercer } ss.:

BE IT REMEMBERED, That on this first day of March A. D. 1923, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared DAVID G. BAIRD, who being by me duly sworn, does depose and make proof to my satisfaction, that he is the secretary of Lehigh Valley Railroad Company, party to the foregoing Deed; that he well knows the corporate seal of the said Company, that the seal thereto affixed is the proper corporate seal of said Company; that the same was so affixed thereto, and the said Deed signed and delivered by Edgar H. Boles who was, at the date and execution thereof, the Vice President of the said Company, in the presence of deponent, as the voluntary act and deed of the said Com-

pany, and that deponent thereupon signed the same as subscribing and attesting witness.

(Signed) DAVID G. BAIRD

Subscribed and sworn to before me, the day and year last above written.

(Signed) JOHN MILTON
Master in Chancery
of New Jersey

Received in the Office of the Register of the County of Hudson, N. J. at 10:51 o'clock, a. m. March 5, 1923 and Recorded in Book 1468 of Deeds for said County on page 528.

JOHN J. MCMAHON,
Register.

(Endorsed):

Deed of Little Basin
Morris Canal and Banking Co.
to State of N. J.

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THIS INDENTURE, made the 28th day of February in the year of Our Lord One thousand nine hundred and twenty-three, Between the UNITED REAL ESTATE COMPANY, a corporation of the State of New Jersey, party of the first part, and the STATE OF NEW JERSEY, party of the second part,

WITNESSETH

THAT the said party of the first part, for and in consideration of the sum of the sum of One Dollar ($1.00) and other valuable consideration, lawful money of the United States of America, to it in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part,

therewith fully satisfied, contented and paid, has given, granted, bargained, sold aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell alien, release, enfeoff, convey and confirm to the said party of the second part, and to its successors and assigns forever.

Description O. K. L. F.

ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of New Jersey, in the County of Hudson and State of New Jersey, bounded and described as follows:

BEGINNING at a point formed by the intersection of the easterly line of Washington Street with the northerly line of Mason (formerly South) Street and from thence running northerly and along the easterly side of Washington Street one hundred feet; thence easterly and parallel with Mason Street seventy-five feet; thence southerly and parallel with Washington Street one hundred feet to the northerly line of Mason Street and from thence running westerly and along the northerly side of Mason Street seventy-five feet to the point or place of beginning.

BEING the same premises conveyed by the Lehigh Valley Railroad Company to the party of the first part by deed dated February 7, 1901 and recorded in the Register's office of Hudson County on the 18th day of April 1901, in Book 780 of Deeds, page 51 etc.

UNDER AND SUBJECT, however, to the ex-

ception and reservation of the right of ferry as the same is excepted and reserved in the deed from Associates of the Jersey Company to F. O. Matthiessen and Wiechers Sugar Refining Company, dated April 15, 1882, and recorded in the Register's office of Hudson County in Liber 367 of Deeds, pages 90 etc.

TOGETHER with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

AND ALSO, all the estate, title, right, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD, all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, its successors and assigns forever, to the only use, benefit and behoof of the said party of the second part, its successors and assigns forever, under and subject as aforesaid.

AND the United Real Estate Company, does for itself, its successors and assigns, under and subject as aforesaid, covenant and grant to and with the said party of the second part, its successors and assigns, that the United Real Estate Company has not done, caused, suffered or procured to be done any act, matter or thing whereby the title

of the said party of the second part, of, in and to the above granted, bargained and described lands and premises, or any part thereof, can or may be changed, charged, altered or defeated in any way whatsoever and that the aforesaid premises are free from encumbrances, except as aforesaid.

---

THIS CONVEYANCE is made pursuant to the provisions of the agreement dated November 29, 1922 between Frank H. Sommer, Louis Focht and Edward L. Young, Commissioners acting on behalf of the State of New Jersey, under and by virtue of an Act of the Legislature of the State of New Jersey known as Chapter 212 of the Laws of 1922 (p. 367), approved March 11, 1922, and the Morris Canal and Banking Company, a corporation of the State of New Jersey, and Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, said Act being entitled: "An Act to authorize the acquisition by the State of the Morris Canal (as defined in this act), in whole or in part, and all the stock of the Morris Canal and Banking Company and the rights of all stockholders in said company and in said canal property and water rights, and all or any part of the right, title and interest of the Lehigh Valley Railroad Company in said Canal property and water rights by virtue of its lease of said canal from the Morris Canal and Banking Company, or otherwise; to provide for a commission authorized to negotiate and agree upon terms of settlement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, in relation to the said canal property and water rights, and to vest in said commission certain powers necessary for carrying out the terms of settlement and to

make such other provisions as may be necessary to effectuate the objects aforesaid."

In Witness Whereof, the said party of the first part has caused these presents to be signed by its Vice President and attested by its Secretary and its common seal to be hereto affixed the day and year first above written.

United Real Estate Company
By (Signed) J. A. Middleton
Vice President

E. H. B. United Real Estate Co. Seal

Attest
(Signed) David G. Bird
Secretary.

Approved as to form

(Signed) Thomas F. McCran
Attorney General

No Revenue Stamps Required.
Exempt under Art. 73, Reg. 55.

State of New Jersey }
County of Mercer } ss.:

Be It Remembered, That on this first day of March A. D. 1923, before me, the subscribed, a Master in Chancery of New Jersey, personally appeared David G. Baird who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the Secretary of the United Real Estate Company party to the foregoing deed; that he well knows the corporate seal of the said Company, that the seal thereto affixed is the proper corporate seal of the said company; that the same was so affixed thereto, and the said Deed signed and delivered by John A. Middleton who was, at

the date and execution thereof, the Vice President of the said Company, in the presence of deponent, as the voluntary act and deed of the said Company, and that deponent thereupon signed the same as subscribing and attesting witness.

(Signed) DAVID G. BAIRD

Subscribed and sworn to before me, the day and year last above written.

Signed

JOHN MILTON,
Master in Chancery
of New Jersey

Received in the office of the Register of the County of Hudson, N. J. at 10:51 o'clock a. m. March 5, 1923 at Hudson County, N. J. and Recorded in Book 1470 of Deeds for said County on page 542, etc.

JOHN J. McMAHON,
Register.

(Endorsed):

Deed
United Real Estate Co.
to
The State of New Jersey
Feb. 28, 1923

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**Exhibit F-7½.**

THIS AGREEMENT, made in duplicate this 23rd day of July, One Thousand nine hundred and twenty-four (1924), between the MORRIS CANAL AND BANKING COMPANY, hereinafter called the Canal Company, of the first part, and the Mayor and Aldermen of Jersey City, a municipal corporation of the State of New Jersey, hereinafter called the Licensee of the second part.

WHEREAS: The Licensee has made application to the Canal Company for permission to construct, lay, maintain and operate a sanitary sewer not exceeding 36 inches in diameter, across, under and along the lands and right of way and canal of the Canal Company from a point one hundred feet westerly from the west line of Main Street at Boonton to a point fifty feet west of the head of the lock at West Main Street, Boonton, and also from a point in the roadway near Lock 9 East at Powerville to a point in the towpath of the canal 200 feet westerly from the west abutment of the bridge crossing of Beaver Brook, near the easterly boundary of the Borough of Rockaway.

NOW, THIS AGREEMENT WITNESSETH

FIRST.—The Canal Company in consideration of the sum of one dollar ($1.00) to it paid by the Licensee, the receipt whereof is hereby acknowledged and of the covenants and agreements hereinafter contained, does permit and license the said Licensee to construct, lay, maintain and operate said sewer pipe, across, along and under the lands, rights of way and canal of the Canal Company, within the limits above set forth, and also permits the Licensee to enter upon said lands, right of way and canal and from time to time as may be necessary for the purpose of laying, maintaining and repairing said sewer and pipe. The location of said sewer and pipe is shown on the map hereto attached and made a part hereof entitled.

"Jersey City—New Jersey
Dept. of Streets and Public Improvements
Plan and Profile of
Trunk Sewer
for
Rockaway Valley Water Shed
Serving
Wharton—Dover—Rockaway—Hibernia—
Boonton
Sept 15, 1920—Michael I. Fagen, Director"

and consisting of sheets Nos. 2, 3, 5, 6, 7, 8, 9, 10: being eight (8) sheets in all.

Second.—The said sewer shall be laid at such depths as are shown upon the plan above specified, and shall be constructed, laid, maintained, repaired, and operated by the Licensee at its sole cost and expense and at such times and in such manner and place as the Canal Company may direct and approve and so as not in any way to endanger the Canal Company's property or interfere with any business of the Canal Company. The Canal Company shall at all times be at liberty to inspect said pipes where they cross said lands, right of way and canal, and if any part thereof is found to be defective, to repair the same at the expense of the Licensee, if after reasonable notice the Licensee shall refuse or neglect to make such repairs. After said pipes are laid, the canal, lands, and property of the Canal Company shall be left in as good condition as before any such work was done, and shall be left in like good condition after any work shall be done thereon, in or about the maintenance of said pipes.

Third.—The Canal Company shall be at liberty to make any use of its canal embankments, land, right of way and appurtenances to the same ex-

tent, and as fully as if this agreement had not been made, without any liability to the Licensee for any damage, expense or inconvenience caused thereby.

FOURTH.—The Licensee in consideration of the premises, agrees to bear all and every expense now or hereafter incurred by reason of or incident to the construction, laying use, maintenance and repair of the said pipe and appurtenances and to indemnify the Canal Company from and against all and every expense and damage that may now or hereafter be caused directly or indirectly by the laying, construction, location, use or repair of said pipe and appurtenances, or by reason of the leaking or breaking thereof, or resulting from defective construction, or from maintenance or operation and from and against any and all damage that may result to the right of way, property, canal or employees of the Canal Company or to the public by reason of the location, construction, laying use, maintenance or repair of said pipe or by reason of any accident thereto however caused; and the Licensee hereby releases the Canal Company from any and all claims or demands for damage to its said pipe or property connected therewith unless said damage be caused solely by the neglect of the Canal Company.

FIFTH.—The Licensee, in further consideration of the premises, agrees to bear all cost and expense of removing structures, and providing for drainage of the Canal from the Canal Basin at Powerville, to and including the aqueduct over Beaver Brook east of Rockaway, and to remove all highway and private road bridges, grade down the approaches to the same, resurface the highways, remove all timber structures at the aqueducts as Denville and at Beaver Brook, fill up the lock at Powerville and

Pier's Lock, open through the canal bank at each natural water course in such manner as to permit free drainage of the canal into such water course, protect and maintain such opening, and to do all this work in a manner acceptable to the Consulting and Directing Engineer of the Canal Company. The Licensee shall have the option of repairing and using the stone piers of the aqueduct bridges, or of removing the same to a depth of at least two feet below ordinary summer stages of the water in the streams, provided, however, that if he shall use the same, said Licensee shall assume all liability for future maintenance thereof.

SIXTH.—If at any time hereafter the Canal Company shall find that location, maintenance, or operation of said pipes in said location interferes or is about to interfere with any of the present or future operations of the Canal Company (as to all of which the Canal Company shall be the sole judge) then the Canal Company may give thirty (30) days notice to the Licensee to change the elevation or location of said pipes as the Canal Company shall specify, and the Licensee shall and will at or before the expiration of the time named in said notice comply with the requirements thereof, and if it shall fail so to do the Canal Company may make said change in the location or elevation of said pipes at the cost and expense of the licensee.

SEVENTH.—The permit and license herewith granted as regards said sewer pipe is given by the Canal Company and is accepted by the Licensee subject to the limitations on the Canal Company contained in Chapter 111, Laws of 1923, as amended by Chapter 71, Laws of 1924, and in the event that the right of the Canal Company to so

permit and license the Licensee shall hereafter be denied by competent authority, the said Licensee hereby agrees that it will not hold the said Canal Company responsible for any damages which said Licensee may undergo by reason thereof.

Any waiver at any time of the Canal Company's rights as to anything herein contained shall not be deemed a waiver as to any breach of covenant or other matter subsequently occurring.

This agreement shall be binding upon and enure to the benefit of the parties hereto, their successors and assigns.

IN WITNESS WHEREOF, the parties hereto have duly executed these presents the day and year first above written.

MORRIS CANAL AND BANKING COMPANY

M. C. & B. Co. SEAL by (Signed) OWEN WINSTON, President

Attest

SARA COOLEY
Secretary

THE MAYOR AND ALDERMEN OF JERSEY CITY
(Signed) By FRANK HAGUE
Mayor

Attest

EDWARD J. HOLLAND (?)
City Clerk

DEPT OF STREETS & PUBLIC IMPTS.
By (Signed) MICHAEL I. FAGEN
Director

Approved as to form

H. R. COULOMB
Asst. Attorney General

Approved as to form
JOHN MILTON
Special Counsel

(Endorsed):

Agreement

Morris Canal and Banking Co.
and City of Jersey City
for Trunk Sewer for Rockaway Valley
Water shed—serving
Wharton, Dover, Rockaway, Hibernia
and Boonton,

Date July 23, 1924

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**Exhibit F-8.**

THIS AGREEMENT, made in duplicate this fourth day of December, one thousand nine hundred and seventeen, (1917), between the LEHIGH VALLEY RAILROAD COMPANY, a corporation of the State of Pennsylvania, for itself and on behalf of the Morris Canal and Banking Company, Lessor, (hereinafter called the Railroad Company, of the first part and the WHARTON STEEL COMPANY, a corporation of the State of New Jersey, (hereinafter called the Licensee) of the second part,

WITNESSETH

FIRST.—The Railroad Company, in consideration of the payments to be made and of the covenants hereinafter contained, hereby permits and licenses the Licensee to locate a pumping station on the lands of the Railroad Company and to lay and maintain a water pipe not exceeding five inches (5″) in diameter across and under the lands of the Railroad Company at Lock #2 East, near Wharton, New Jersey. The Licensee is also hereby ac-

corded the privilege of taking not over 300,000 gallons of water per day from the Morris Canal by means of the pumping station aforementioned for the purpose of obtaining a water supply for its compressor and fire protection at its Scrub Oaks Mine. The location of the pumping station and the pipe line is shown on the blueprint hereto attached and made a part hereof entitled:—

> "Plan showing Location of Proposed Pumping Station of Wharton Steel Co. at Lock No. 2 East, near Wharton, N. J. L. V. R. R.—M. C. Div. Supt's Office October 27, 1917, Phillipsburg, N. J."

SECOND.—The said pumping station shall be erected and the pipe shall be laid and maintained by the Licensee at its sole expense at such times and in such manner and place as the Railroad Company may approve and so as not to endanger the Railroad Company's property or interfere in any way with the business or operations of the said canal or the Railroad Company. The Railroad Company shall be at liberty at all times to inspect said pipe where it enters the said canal and if any part thereof is found to be defective to repair same at the expense of the Licensee, if after reasonable notice the Licensee shall refuse or neglect to make repairs.

After the pumping station is erected and the pipe laid the canal lands and property of the Railroad Company shall be left in as good condition as before such work was done and shall be left in like good condition after any work shall be done thereon in connection with the maintenance and repair of same.

The Licensee hereby agrees that it will not in any way waste the water that it will draw from

the canal nor permit any other corporation or person to tap said pipe or to use the water to be drawn through same.

THIRD.—The Railroad Company shall be at liberty to make any use of its canal, embankments, lands and appurtenances to the same extent and as fully as if this agreement had not been made, without any liability to the Licensee for any damages, expense or inconvenience caused thereby and shall have the right to maintain a cock or valve in the aforesaid pipe for the purpose of closing same and thereby excluding the water therefrom when the use of the canal shall so require, of which necessity or propriety the Railroad Company shall be the sole judge.

The Railroad Company shall have the right to draw part or all of the water from said canal whenever it shall be deemed necessary or proper so to do, for the purpose of repairing breaks in or injuries to said canal or any of the dams or works connected therewith or for cleaning the bed of the said canal or any of its feeders or for any other legitimate purpose connected with the use, management and and repair thereof, of which necessity or propriety the Railroad Company shall be the sole judge, and the Licensee hereby releases the Railroad Company from all liability for damages for total or partial deprivation of water by reason of any of the matters aforesaid. It is understood, however, that no rental shall be charged the said Licensee during periods when it may, as aforesaid, be totally deprived of the use of said water.

FOURTH.—It is understood that at some future time said canal may be abandoned as such and the canal property at this point may be deeded to

the State and sold or granted by the State for other public uses in which event the rights hereby retained in this agreement shall enure to the benefit of such purchaser or grantee.

FIFTH.—The Licensee hereby agrees to indemnify and save harmless the Railroad Company from and against any and all loss or damage which the Railroad Company may sustain including injuries to the employes of the Railroad Company as well as any other person or persons whomsoever by reason of the location, construction, maintenance and use of the said pumping station and said pipe, and the Licensee hereby releases the Railroad Company from any and all claims or demands for damages to its said pumping station and pipe or appurtenances connected therewith however caused.

SIXTH.—If at any time the Railroad Company shall find that the location, maintenance or use of said pumping station and pipe or either of them interfere with the free use of its canal or with any of the present or future operations of the canal or of the Railroad Company, (as to all of which the Railroad Company shall be the sole judge) the Railroad Company may give thirty (30) days' written notice to the Licensee to change the location of said pumping station or water pipe or either of them or to wholly remove the same from the property of the Railroad Company.

It is also agreed that either party may terminate this agreement at any time by giving to the other thirty (30) days' written notice of intention so to do and upon such termination the Licensee will, at its sole cost and expense, wholly remove the said pumping station and pipe from the property of the Railroad Company and if it shall fail so to

do the Railroad Company may itself at the expense of the Licensee do whatever it may consider necessary in the premises.

SEVENTH.—In consideration of the privileges herein granted the Licensee hereby agrees to pay to the Railroad Company annually, in advance the sum of $600.00 payment thereof to be made on the 2nd day of January of each year during the continuance of this agreement.

Any waiver at any time of the rights of the Railroad Company as to anything herein contained shall not be deemed a waiver of any breach of covenant or other matter subsequently occurring.

This agreement shall be binding upon and enure to the benefit of the parties hereto, their successors and assigns.

IN WITNESS WHEREOF, the parties hereto have duly executed these presents the day and year first above written.

LEHIGH VALLEY RAILROAD COMPANY

L.V.R.R.Co. Seal (Signed) By E. E. LOOMIS President

Attest J. W. M.
Asst. Secretary

WHARTON STEEL COMPANY,
By J. E. PERRY—President

Attest

S. H. BELL,
Secretary

Seal of Wharton Steel Company

Lehigh Valley
Form Approved E.H.B.
Description Approved W.D.C.
Terms and Conditions Approved G.L.M.

(Endorsed):

Agreement—
with Wharton Steel Company taking
water at Lock 2 East
Dec. 4, 1917

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**Exhibit F-9.**

March 19, 1924

Replogle Steel Company
(Wharton Steel Company)

Dover, N. J.

Gentlemen:

By an agreement dated December 4, 1917, the Lehigh Valley Railroad Company, Lessee of the Morris Canal and Banking Company, did permit and license the Replogle Steel Company (Wharton Steel Company) to take water from the Morris Canal at Lock 2 East, said agreement being terminable by either party upon 30 days written notice.

The Morris Canal and Banking Company as Trustee for the State of New Jersey has succeeded to all right, title and interest of the Lehigh Valley Railroad Company in the property of said Canal Company. The Legislature by act approved March 12, 1924, has directed that the Morris Canal be

abandoned as a navigable water way and that the water be drawn from the canal and its feeders.

The Board of Directors of the Morris Canal and Banking Company does hereby notify the Replogle Steel Company (Wharton Steel Company) of its intention to terminate said agreement in accordance with the terms thereof, and it does hereby terminate said agreement, this termination to take effect thirty days after the service of this notice.

On the termination of said agreement the Replogle Steel Company (Wharton Steel Company) will wholly remove the pumping station and pipe from the property of the Canal Company, as required by said agreement.

By order of the Board of Directors of
the Morris Canal and Banking Co.
HENRY B. KUMMEL,
General Manager

Service of the above notice is hereby acknowledged on this 20th day of March, 1924.

REPLOGLE STEEL CO.
by S. H. BELL, Secy.

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**Exhibit F-9.**

WILLIAM SCOTT and wife

TO

THE MORRIS CANAL & BANKING COMPANY

This indenture made this Eleventh day of August in the year of our Lord one thousand eight hundred and twenty nine between William Scott of the County of Morris and State of New Jersey and Susannah his wife of the first part and the Morris Canal and Banking Company of the second part:

Whereas the parties of the second part have with the consent and permission of the said parties of the first part entered upon and taken possession of certain lands of the said William Scott situate in the Townships of Hanover and Pequanack and have excavated a canal and constructed tow paths planes water wheels and other works and devises necessary for the navigation of the same through and along the said land under an agreement that the privilege of taking and using the waters of the Rockaway river for the purposes of the said canal should be the subject of future arrangement between the said parties which arrangement has been lately made and concluded as is hereinafter expressed. Now therefore this Indenture Witnesseth that the said parties of the first part in consideration of the said premises and of the sum of one dollar to them in hand paid by the said parties of the second part the receipt whereof is hereby acknowledged have granted bargained sold and assigned and by these presents do grant bargain sell and assign unto the said parties of the second part their successors and assigns subject excepting and reserving as hereinafter contained all and singular the land of the said William Scott situate in the said Townships of Hanover and Pequanock now occupied or covered or that may hereafter necessarily be occupied or covered by the said canal and by tow paths waste ways sluices wheels walls planes dams and other structures appertaining to or connected therewith including all the land between the waste way leading from the head of the plane and the wall of said plane to the foot thereof and also the right and privilege from time to time and at all times hereafter of erecting and maintaining on the said land any houses or edifices which may be necessary for the

residence use and accommodation of the workmen and servants of the said parties of the second part in and about the navigation of the said canal and the use and employment of the said plane and water wheels such buildings to be located on the northeast side of the canal and the land to be occupied by the same not to exceed in the whole more than one quarter of an acre and also the right and privilege of diverting and turning into the bed of the said canal so much of the waters of the Rockaway river as may be required to feed and supply the said canal with water for the purposes of navigation and to propel work and fill such water wheels, locks and other devises as may be used or employed in the passing and repassing of boats and other things upon and over any inclined plane constructed or to be constructed on the said land and to use and apply the said waters for these or any of these purposes and all the estate and interest at law or in equity of them the said parties of the first part of in and to the said hereby granted premises and every part and parcel thereof to be had and holden unto them the said parties of the second part their successors and assigns to their proper use and benefit forever provided always and these presents are subject nevertheless to the several reservations, limitations, conditions and agreements hereinafter expressed that is to say reserving to the said William Scott his heirs and assigns the right and privilege to use the said canal as a race way or channel by which to conduct the waters of the said river towards any hydraulic works to be by him or them erected on the adjacent land of the said William Scott and to take out of and divert from the said canal through or by means of one or more flume or flumes to be constructed on the margin thereof (as

hereinafter mentioned) such of the waters flowing through the said canal as he or they may require for any such works sufficient water for the purposes of the said canal being always left in the bed thereof and so much of the water so taken and drawn from the said canal as may be necessary to fill the same below the nearest adjacent plane being again returned to the said canal at the foot of said plane and in order to assure to the said parties of the second part the preferable use and control of so much of the waters passing through and along the said canal as may be necessary for the full enjoyment of the right and privilege above granted to them it is hereby expressly declared and agreed that no aperture floodgate or sluice by which to draw from the said canal any water for hydraulic purposes shall be lower than two feet above the bottom of the said canal and that the water of the said canal excepting when it may be unnavigable by reason of frost shall in no case nor under any pretence be drained so as to reduce the level there of lower than four inches below the top water line of the canal and in case the said water shall at any time be drained from the said canal so as to reduce the level thereof more than four inches below the top water line of the canal it shall be lawful for the parties of the second part or any agents or servants of the said parties of the second part to shut the gate or gates sluice or sluices by or through which the said water shall be so drained until the said level shall be so restored to the height above specified it being nevertheless understood and agreed that during any portion of the year in which from frost the said canal may be unnavigable the water may be drained to the bottom thereof and that the said flume or flumes may be constructed accordingly stops being inserted at the

approach of the season of navigation so as effectually to preserve in the canal during that season such height of water as is above described and to the end that the privilege hereby reserved to the said William Scott may not be used to the prejudice of the said parties of the second part contrary to the true intent and meaning of these presents it is further declared and agreed that no flume floodgate sluice or other contrivance by which to draw water from the said canal in pursuance of the right and privilege above reserved shall be commenced erected or made kept up or maintained otherwise than as shall be approved by the engineer for the time being of the Morris Canal and Banking Company and that the same shall be so constructed and maintained as to prevent the escape of any water through the bank of the canal by leaking and to the breadth of the tow path shall at the expense of the said William Scott his heirs and assigns be always kept securely covered by good and sufficient plank or be otherwise so constructed as to permit all persons horses and cattle travelling the said tow path to pass and repass without interruption and it is further and in like manner agreed and declared that no such flume floodgate sluice or other contrivance shall be inserted or placed upon the margin of the said canal at any point except between the waste weir next below the dam erected by the parties of the second part at the Boonton falls and the waste weir constructed next above the said plane and that in case of any injury to the said canal or its locks or tow paths or to any water wheel or other works or machinery thereto appertaining by means or in consequence of any flume floodgate sluice excavation or other work or contrivance for drawing water from the sd. canal, then and in every such

case all the loss and damage which may thence accrue to the said parties of the second part their successors or assigns (excepting such reasonable wear of the bank of the canal as may be caused by the increased rapidity of the current therein by reason of the drawing off the said water through the said flume or flumes) shall be borne sustained and paid by the party or parties by whom or for whose benefit such flume excavation work or contrivance shall be made or attempted to be made and it is further declared and agreed by and between the said parties that the said parties of the second part shall be at liberty and they are hereby authorized to construct erect and maintain all such dams dikes and obstructions in and across the pond produced by the dam of the said William Scott at Powerville or else wherein and across the bed of the said river above the said dam as may be necessary to the use and enjoyment of the rights and privileges hereby granted and to secure and fasten the same in and against the banks and shores of the said river and it is in like manner declared that it shall be lawful for the said William Scott his heirs and assigns to raise the said dam heretofore erected by the parties of the second part over and across the Rockaway river at the Boonton falls to such additional height not exceeding twelve inches as he or they shall deem necessary or useful and from time to time to maintain and keep up the same provided always that the water flowing into the said canal by means of the said dam or otherwise shall not be so increased in quantity as materially to obstruct (sic) the navigation of the said canal or to injure or to interfere with the operations of the water wheels planes or other works appertaining thereto or otherwise to disturb or incommode the said parties of the second part in the use and

enjoyment of the privileges hereby granted according to the true intent and meaning of these presents and it is further and in like manner declared and agreed that it shall be lawful for the said parties of the second part and their successors to drain the said canal or to divert and turn the water from the bed thereof when and as often as it shall be necessary in order to repair the said canal or any of the works appertaining thereto without any accountability to the said William Scott his heirs and assigns in respect to any damage or inconvenience which may accrue or be sustained by him or them by reason of the failure of the supply of water to propel and carry on such hydraulic works during the time of such repairs. And the said parties of the second part for themselves and their successors do by these presents covenant and agree to and with the said William Scott his heirs and assigns that they the said parties of the second part shall not at any time hereafter do or commit nor cause or procure to be done or committed any act matter or thing whereby the said William Scott his heirs or assigns may be injured interrupted or molested in the use and enjoyment of the privileges hereby reserved according to the true intent and meaning of these presents and for the true performance of all and every the covenants agreements and conditions herein contained according to the true intent and meaning of these presents the said parties do severally bind themselves that is to say the said William Scott for himself his heirs executors administrators and assigns to the said parties of the second part and their successors and assigns and the said parties of the second part for themselves their successors and assigns to the said William Scott his heirs and assigns firmly by these presents.

In Testimony Whereof the parties to these presents have here unto interchangeably set their hands and seals the day and year first above written.

William Scott L. S.
Susannah Scott L. S.
Cadwallader D. Colden
President
L. S.

R. Gilchrist
Secretary

Signed Sealed and Delivered
in the presence of Walter
Kirkpatrick Wit.
for Wm. Scott and wife

State of New Jersey to wit:—

Be it remembered that on the eleventh day of August in the year of our Lord one thousand eight hundred and twenty nine before me Walter Kirkpatrick one of the Masters in Chancery of the said State personally appeared William Scott and Susannah Scott his wife who I am satisfied are the same William Scott and Susannah Scott grantors named in the foregoing instrument of writing to whom I made known the contents thereof and who then did severally acknowledge that they signed sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed. And the said Susannah wife of the said William on a private examination before me separate and apart from her husband the said William did acknowledge that she signed sealed and delivered the same as her voluntary act and deed freely without any fear threats or compulsion of her said husband.

Walter Kirkpatrick.

State City and County of New York, s.s.

Be it remembered on the 13th day of August one thousand eight hundred and twenty nine personally appeared before me William H. Maxwell Commissioner to take the acknowledgments of deeds etc by virtue of an act of the Legislature of the State of New Jersey passed the 27th. December 1826 Cadwallader D. Colden and Robert Gilchrist well known to me and whom I am satisfied are the President and Secretary of the Morris Canal and Banking Company the grantors in the within deed named and who in my presence executed the within deed and to whom I first made known the contents of the said deed the said Cadwallader D. Colden signed his name as president of said banking Company and affixed their corporate seal and acknowledged that he as president of (and by order of the board of directors of) the said Morris Canal and Banking Company had signed sealed and delivered the said deed as and for his voluntary act and deed for the uses and purposes therein mentioned.

WILLIAM H. MAXWELL
Commissioner etc.

Received and recorded January 30th, 1830.

DAVID DAY Clk.

State of New Jersey, }
County of Morris, } ss.:

I, DANIEL S. VOORHEES, Clerk of the County of Morris, do hereby certify that the foregoing is a true copy of the record of a Deed given by William Scott and wife to The Morris Canal and Banking Company as fully and entirely as the same re-

mains in my office in Book Y Y of Deeds for said County on pages 229, etc.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said (Seal) County, at Morristown, this Twenty Third day of May A. D. nineteen hundred and one

(Signed) DAN. S. VOORHEES.
Clerk.

Endorsed:

MORRIS COUNTY CLERK'S OFFICE

CERTIFIED COPY
of a
Deed
William Scott and wife
to
The Morris Canal and Banking Company
Dated August 11th, 1829.
Recorded January 30th, 1830.
Book Y.Y. Page 229 etc.

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**Exhibit F-10.**

AGREEMENT
THE MORRIS CANAL &
BANKING COMPANY

To

SILAS COOK.

THIS INDENTURE made the 8th. day of June in the year of our Lord One Thousand Eight hundred and forty nine

BETWEEN the Morris Canal and Banking Com-

pany of the one part and Silas Cook of the County of Morris of the other part.;

Whereas the said Silas Cook is the owner of certain mill property at Montville in the said County of Morris and has since the construction of said canal used the water from said Canal as it passes around the plane into the level below during the season of Navigation.

And whereas, the said Silas Cook is desirous of having a more uniform supply of water to enable a more extended operation of his mill works at Said Plane. And whereas an agreement has been made between the said Morris Canal and Banking Company and the Said Silas Cook by which the Said Morris Canal and Banking Company for divers good causes and considerations have agreed to grant to the Said Silas Cook his heirs and assigns the privilege of using said Canal for the conducting of water to his mill as aforesaid at all seasons of the year.

Now this Indenture Witnesseth that the said Morris Canal and Banking Company in pursuance of said agreement and in consideration of the Sum of One Dollar to them paid by the said Silas Cook at or before the sealing and delivery hereof, have given, granted and conveyed and by these presents do give, grant and convey unto the said Silas Cook his heirs and assigns the right and privilege to use the said Canal for conducting the waters of the Rockaway River from the foot of Plain No. 7 East to the waste wier at the road bridge above the head of Plain No. 8 East at all Seasons of the year (Excepting always when the water is taken out of the Canal for necessary repairs) so as to pass a stream of water the size of twelve inches square without head: to the Mill Pond of said Cook.; the Said Morris Canal and Banking Company reserving to

themselves the right at all times to make such changes in the Reconstruction of the Plain or Plains on their Canal or improvements of the water power as shall by them be deemed necessary or advisable without prejudice or hindrance from or by reason of anything hereby conveyed or intended so to be agreeing however that if in consequence of such alteration or improvement it should be impractible or inexpedient to pass the said supply of water out of said Canal as aforesaid they will allow the same to be conveyed to the Mill Pond of said Silas Cook at his expense from such other point in the Canal and through or by means of such other course or channel as they the Said Company, may direct. Said Silas Cook to have and to hold the privilege hereby granted or mentioned or intended so to be unto him his heirs and assigns during the continuance of the charter of the Said Morris Canal and Banking Company.

In witness whereof the Said Company has caused their corporate seal to be hereunto affixed with the signature of the proper officer of the Company on the day and date first above written.

Witness

E. MARSH. Prest.
M. CANAL &. B. Co.

State of New Jersey, }
County of Hudson, }

On the 8th. day of June in the year one thousand eight hundred and forty nine before me I Dickinson Miller one of the masters in Chancery of New Jersey Personally appeared Ephriam Marsh Esquire of full age and to me well known he being by me duly sworn according to law on his oath deposeth and saith; That he is the President of

the Morris Canal and Banking Company a body corporate of the State of New Jersey that the seal affixed to the within instrument is the proper corporate seal of the said Morris Canal and Banking Company; and that the said seal was affixed to said instrument and the same signed by him, under the authority and directions of said Company and the said Instrument is delivered as the act and deed of the Morris Canal and Banking Company for the uses and purposes therein expressed.

Witness my hand the day and year aforesaid at Jersey City.

J. D. MILLER.

Received and Recorded Nov. 29, 1850.

State of New Jersey, } ss.:
Morris County, }

I, MELOIN S. CONDIT Clerk of the County of Morris do hereby certify that the foregoing is a true copy of the record of an instrument given by the Morris Canal and Banking Company to Silas Cook as fully as the same remains in my office on Book "U" 4. of Deeds on pages 270 &c.

In testimony whereof I have hereunto set my hand and affixed the seal of the Said County of Morris at Morristown this 17th. day of March, A. D. 1879.

JELOIN S. CONDIT
Clerk.

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**Exhibit F-11.**

THIS AGREEMENT made the thirtieth day of December A. D. One Thousand Nine Hundred and Five between the MORRIS CANAL AND BANKING COMPANY and the LEHIGH VALLEY RAILROAD COMPANY,

lessee of the works and franchises of the Morris Canal and Banking Company, parties of the first part, and JOHN H. CAPSTICK and THOMAS CAPSTICK of Morris County, New Jersey, parties of the second part, and the CONSOLIDATED REALTY COMPANY, a corporation of the State of New Jersey, party of the third part;

WHEREAS the parties of the second part claim certain rights in waters flowing from the Morris Canal through their lands at Montville in Morris County, New Jersey, said flowage being under an agreement between the Morris Canal and Banking Company and Silas Cook, dated June eighth, eighteen hundred and forty-nine, and recorded in the Morris County Clerk's Office in Book U of Deeds, page 270 etc., and they also claim such rights in said waters by prescription and otherwise, which rights, however, are not acknowledged or assented to by the parties of the first part:

AND WHEREAS the Canal Company have in contemplation certain changes in the Canal, involving the cessation of navigation on a part or all thereof, which will cut off the supply of water obtained from the Rockaway River at Boonton, from which supply the parties of the second part have heretofore drawn water at Montville; and the parties desire in case such action should be taken by the Canal Company to arrive at an amicable adjustment of the claims of said Capsticks.

NOW THIS AGREEMENT WITNESSETH

That the parties hereto, in consideration of the premises and in consideration of mutual covenants herein contained, and in consideration of One Dollar paid by each of the parties hereto to

the other, the receipt whereof is hereby acknowledged, agree as follows:

FIRST.—The parties of the first part will cause to be conveyed to John H. Capstick and Thomas Capstick by the United Real Estate Company, all those several tracts and parcels of land and premises, situate, lying and being in the Township of Montville, in the County of Morris and State of New Jersey, lying under the waters of and around Towasow Lake or Mud Pond, and having an aggregate area of three hundred and four and eight tenths (304.8) acres, more or less, being the same premises described and conveyed (in a large number of parcels) by three deeds from Thomas F. Hoxsey and wife to Montclair Water Company, two of which deeds are dated the tenth day of May, eighteen hundred and eighty-seven (1887) and were recorded in the office of the Clerk of Morris County on the 27th day of May, eighteen hundred and eighty-seven (1887) in Book B 12 of Deeds for said County, one at page 162 &c. and the other at page 166 &c. The third of said deeds was dated the third of April eighteen hundred and eighty-eight (1888) and recorded in said Morris County Clerk's Office in Book I 12 at page 148 &c.

AND being the same premises conveyed by Montclair Water Company to United Real Estate Company by deed dated the 13th day of January, nineteen hundred and two, and recorded on the 13th day of February, nineteen hundred and two, in Book U 16 of Deeds for Morris County on page 561 &c.; said land to be conveyed by deed in the form hereto attached, the lands to be conveyed being particularly described therein. And upon the execution and delivery of said deed, the said parties of the second part shall pay to the parties

of the first part the sum of nine thousand one hundred and forty-four ($9,144) dollars as consideration for said conveyance. The consideration named therein shall be one dollar and other valuable considerations; the deed from Montclair Water Company to United Real Estate Company to be at once re-executed by Montclair Water Company and recorded at the cost of the parties of the first part. The said deed shall be delivered to the said John H. Capstick and Thomas Capstick or to Riker and Riker, their attorneys, at the office of Riker and Riker, Lawyers Building, No. 164 Market Street, Newark, New Jersey, on the execution and delivery of this agreement.

SECOND.—That if at any time navigation upon the Morris Canal between the Rockaway River at Boonton and the Village of Montville or any part thereof shall, under legislative authority, be abandoned, then the parties of the second part agree to accept from the parties of the first part, and the parties of the first part agree to pay to the parties of the second part, the sum of twenty-nine thousand one hundred and forty-four ($29,144) dollars as a full consideration for their said rights and claims and all the rights and claims of the Consolidated Realty Company in and to water flowing from the Morris Canal through their said lands, now or hereafter owned or acquired by the said parties of the second part or in their interest or by said Consolidated Realty Company, and in consideration thereof, the parties of the second part agree to execute and deliver, and the said party of the third part agrees to execute and deliver to the parties of the first part a deed substantially in form hereto annexed, acknowledged so that it can be recorded, releasing and discharging the parties of the first part of and from any

and all claims of any nature whatsoever on their part now or then existing relating to or growing out of the said agreement, dated June eighth, eighteen hundred and forty-nine, or based on their rights, if any, in and to a flow of water from or along the Canal however acquired; and the parties of the first part, upon receiving delivery of said deed, will pay to the parties of the second part said sum of twenty-nine thousand one hundred and forty-four dollars. Said deed shall be delivered at the office of THE NEW JERSEY TITLE GUARANTEE AND TRUST COMPANY in Jersey City on a day and hour to be fixed by the parties of the first part, by notice to be given to the parties of the second part, said day and hour to be within thirty days after the day fixed for the abandonment of navigation on said portion of said canal.

THIRD.—Should the said parties of the first part hereafter determine to abandon navigation on the Morris Canal as aforesaid, they hereby covenant and agree that they will not, after such abandonment, make any claim of ownership or to the use of the waters of the Brook which now empties into the Morris Canal about half a mile to the southwest of the Black Mill Pond, or do anything to interfere with or prevent the water returning to its ancient natural channel.

FOURTH.—It is COVENANTED and AGREED that this contract shall bind the respective heirs, executors, administrators, successors and assigns of the respective parties hereto, and shall run with the land and be binding upon the successors in title of the lands of the respective parties affected thereby.

IN WITNESS WHEREOF the said parties hereto of the first and third parts have hereunto affixed

their corporate seals, duly attested, and the said parties of the second part have hereunto set their hands and seals the day and year first above written.

LEHIGH VALLEY RAILROAD COMPANY
by E. B. THOMAS
President

(Seal)

Attest:

D. G. BAIRD
Secretary

MORRIS CANAL AND BANKING COMPANY
by E. B. THOMAS
President

(Seal)

Attest:

D. G. BAIRD
Secretary

CONSOLIDATED REALTY COMPANY
by JOHN H. CAPSTICK
President.

Attest:

THOMAS CAPSTICK
Secretary.

(Seal)

JOHN H. CAPSTICK (Seal)
THOMAS CAPSTICK (Seal)

Approved as to form,
J. F. SCHAPERKOTTER,
Gen. Solicitor.

Witness
H. S. WORMAN
December 16th, 1905.

**Exhibit F-12.**

THIS AGREEMENT made and entered into this Nineteenth day of February in the year of our Lord One Thousand eight hundred and sixty nine by and between THE MORRIS CANAL AND BANKING COMPANY a body corporate of the State of New Jersey of the first part and THE PORT ORAM IRON COMPANY a body corporate of the said State of the second part

WITNESSETH That said party of the first part for and in consideration of the mutual agreements hereinafter expressed has letten and by these presents doth grant demise and to ( ? ) unto said party of the second part their successors and assigns the right liberty and privilege of taking from the Morris Canal at a point opposite or nearly opposite the works of said party of the second part at Port Oram, in Randolph Township, Morris County, New Jersey water for use for the boilers, twyers or other purposes connected with the works of the said party of the second part, to the full capacity of a pipe eight (8) inches in diameter for and during the term of the continuance of said Canal at its present location on that level and during the continuance of the flow of the Stevens brook into the said Canal at the foot of the Lock known as Lock No. 3 East of the Morris Canal Locks, or for such time as said waters may be required for said works, and in case of the discontinuance of the flow of said brook into said Canal the said term to continue for six months after written notice of said discontinuance is served upon said party of the second part, at a yearly rent or sum of One hundred Dollars ($100) to be paid yearly from and after the first day of July next ensuing.

And for this purpose to make such connection with the said Canal as shall be necessary, said connection to be of stone masonry laid in hydraulic cement, the work to be done under the direction and to the satisfaction of WILLIAM GROFF, SUPERVISOR OF THE MIDDLE DIVISION OF THE SAID MORRIS CANAL and to be accepted by him.

And the said party of the first part further agrees that during the close of navigation or in case of repairs to said Canal they will pass water enough to the said connection with the said canal to supply said party of the second part to the full capacity of said eight (8) inch pipe, and also in case of a break in said Canal to commence passing said water as soon as possible, and without any unnecessary delay.

IN CONSIDERATION WHEREOF said party of the second part doth covenant and agree to pay to said party of the first their successors or assigns said sum of One hundred dollars per annum from and after said first day of July next ensuing for and during such time as said party of the second part continue their said works or elect to use said waters from said Canal, And said party of the second part doth covenant and agree that all waste water shall be returned into the said Canal at the foot of the Inclined Plane known as Plane No. 5 East of the Morris Canal Planes by surface carriage

IN WITNESS WHEREOF said party of the first part has caused these presents to be signed by JACOB F. RANDOLPH their VICE PRESIDENT who has hereunto affixed the corporate seal of said Company, and said party of the second part has also caused the same to be signed by JOHN C. LORD their PRESIDENT who has also thereunto affixed their corporate seal

and to be countersigned by their Secretary the day and year first above written.

Signed, Sealed and Delivered in presence of

For the Morris Canal & Banking Company,
Jacob F. Randolph
(Seal) Vice President

Attest
Jno Rodgers Secy

Ed. N. Kirk Talcott
For the Port Oram Iron Company

John C. Lord
(Seal) Prest.
Jas. N. Neighbour Secy
P. O. Iron Co.

**Exhibit F-12.**

March 19, 1924

Port Oram Iron Company
(Wharton Steel Company)

Wharton, N. J.

Gentlemen:

By an agreement dated February 19, 1869, the Morris Canal and Banking Company did permit and license the Port Oram Iron Company (Wharton Steel Company) to take water from the Morris Canal near Plane No. 5 East, said agreement being terminable upon written notice as set forth therein.

The Morris Canal and Banking Company as Trustee for the State of New Jersey has succeeded to all right, title and interest of the Lehigh Valley Railroad Company in the property of said Canal Company. The Legislature by act approved

March 12, 1924 has directed that the Morris Canal be abandoned as a navigable water way and that the water be drawn from the canal and its feeders.

The Board of Directors of the Morris Canal and Banking Company does hereby notify the Port Oram Iron Company (Wharton Steel Company) of its intention to terminate said agreement in accordance with the terms thereof, and it does hereby terminate said agreement, this termination to take effect in accordance with the terms set forth therein.

By order of the Board of Directors of the
MORRIS CANAL AND BANKING COMPANY
HENRY B. KUMMEL
General Manager

Service of the above notice is hereby acknowledged on this 20th day of March, 1924.

REPLOGLE STEEL Co. Successors
By S. H. BELL, Secy.

---

**Exhibit F-13.**

LEHIGH VALLEY RAILROAD

MESSAGE BLANK

FROM Pburg 4/13/1896 (Written
(
To Time (filed
AT (Rec'd 219 p.m.

Central R. R. have been taken water from canal at Port Oram since 1879 compensation one hundred dollars per year Col. Wilbur arranged with Mr. Olhausen to change to Plane 4 East at same rent they have not had water from Plane 4 heretofore.

W. I. P.

LEHIGH VALLEY RAILROAD

OFFICE OF THE GENERAL SUPERINTENDENT

South Bethlehem, Pa. April 10, 1896

Mr. Henry S. Drinker,
General Solicitor,
Philadelphia, Pa.

Dear Sir:

I enclose herewith agreement in triplicate between our Company and the Central Railroad Company of New Jersey providing for a supply of water for their locomotives at Hopatcong Junction from the Morris Canal.

These agreements have been initialed by Mr. Sayre and I will be glad if you will have the same executed and returned to me and I will have them executed on the part of the Central Company.

Very truly yours,

ROLLIN H. WILBUR
General Supt.

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LEHIGH VALLEY RAILROAD COMPANY

General Office, 228 So. Third Street

Philadelphia, Pa. April 14, 1896

Col. Rollin H. Wilbur,
General Superintendent

Dear Sir:

I return herewith duly executed the three copies of proposed agreement between our Company and the Central Railroad Company of New Jersey for a supply of water from the Morris Canal for their locomotives at Lake Hopatcong. I understand from Mr. Power's telegram of 13th inst. to Mr.

Baird that these agreements involve no sale of surplus water of the Morris Canal, but is simply a readjustment of an existing agreement at the same rate to accommodate the Jersey Central.

Yours very truly

HENRY S. DRINKER,
General Solicitor

Enclos.

---

THIS AGREEMENT, made this 15th day of April, A. D. 1896, between the Lehigh Valley Railroad Company of the first part and the Central Railroad Company of New Jersey, of the second part.

WITNESSETH: that the party of the first part, for and in consideration of the covenants and agreements to be kept and performed by the party of the second part, does covenant and agree to and with the party of the second part as follows:

That the party of the first part doth grant to the said party of the second part, the license and privilege to lay and maintain a water pipe, running as shown by red line on blue print attached to and forming part of this agreement, from the Morris Canal, to a stand pipe to be located near Hopatcong Junction on High Bridge Branch, said pipe to be used for the purpose of supplying water for use of locomotives belonging to the party of the second part, and running on the High Bridge Branch.

The pipes to be laid beneath the surface of the ground. The right to lay and maintain said pipe to be exercised by the party of the second part in such manner that no inconvenience or trouble shall be suffered by the party of the first part.

And the party of the second part doth covenant and agree with the party of the first part, its successors, and assigns as follows:

FIRST.—That they will indemnify and save harmless the party of the first part, its successors and assigns, from all claims, actions, judgments and recoveries which may arise because of injury to any person or persons who may be employed in and about the laying and maintaining of said water pipe, caused by the operation of the said High Bridge Branch of the party of the second part. They will also keep the valve in stand pipe in proper working condition, to prevent waste of water, assume the risk of all damage, in case of breaks or leaks in the pipe, that may occur at any time, and keep the surface of the ground over the pipe smooth and in proper condition, in order to prevent accident to persons or vehicles while travelling over it.

SECOND.—That no other substance matter or thing shall be conveyed through said water pipe except water.

THIRD.—That this license and privilege is accepted upon the terms that it is to be operated only during the pleasure of the party or in the first part, and that when such license and privilege to lay and maintain said water pipe shall be revoked or withdrawn that it will within sixty days after notice to that effect is given remove from the property of the party of the first part the said water pipe and leave the surface of the ground in as good condition as it was before the pipe was laid.

FOURTH.—That they will not assign the whole or

any part of the license and privilege above granted to any person or persons.

In consideration of the granting of privileges as above, the party of the second part agrees to pay or cause to be paid to the party of the first part at the rate of one hundred dollars per year so long as the party of the second part draws water through said pipe and until said party of the second part notified the party of the first part that it no longer desires to continue to use said pipe.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed, the day and year first above written.

THE LEHIGH VALLEY RAILROAD COMPANY
by CHAS. HARTSHORNE
Vice President

(Seal)

Attest
JOHN R. FANSHAWE
Secretary

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

by J. R. MAXWELL
President

(Seal)

Attest
SAM'L KNOX
Secretary

**Exhibit F-13.**

(Sent by Registered Mail )
(No. 45751—March 19, 1924.)
( H. B. K. )

March 19, 1924

Mr. W. G. Bessler, President
Central Railroad Company of New Jersey
Liberty Street
New York City.

Dear Sir:

I enclose copy in duplicate of notice of termination of agreement on the part of the Morris Canal and Banking Company to furnish water from the Morris Canal at Hopatcong Junction. Will you kindly acknowledge receipt of service of this notice at the bottom of one copy, dating it, and return to me.

I am,

Very truly yours

HENRY B. KUMMEL,
General Manager—M. C. & B. Co.

HBK/E

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March 19, 1924

Central Railroad Company of New Jersey
Liberty Street
New York,
N. Y.

Dear Sirs:

By an agreement dated April 15, 1896, the Lehigh Valley Railroad Company, Lessee of the Morris Canal and Banking Company, did permit and license the Central Railroad Company of New Jer-

sey to take water from the Morris Canal at or near Hopatcong Junction, New Jersey, said agreement being terminable by either party upon 60 days' written notice.

The Morris Canal and Banking Company as Trustee for the State of New Jersey has succeeded to all right, title and interest of the Lehigh Valley Railroad Company in the property of said Canal Company. The Legislature by act approved March 12, 1924, has directed that the Morris Canal be abandoned as a navigable waterway and that the water be drawn from the canal and its feeders.

The Board of Directors of the Morris Canal and Banking Company does hereby notify the Central Railroad Company of New Jersey of its intention to terminate said agreement in accordance with the terms thereof and it does hereby terminate said agreement, this termination to take effect sixty days after the service of this notice.

Upon the termination of the said agreement the water pipe of the Central Railroad Company of New Jersey, shall be removed from the property of the Canal Company and the orioerty restored to its former condition.

By order of the Board of Directors of the Morris Canal and Banking Co.

HENRY B. KUMMEL,
General Manager

Service of the above notice is hereby acknowledged on this day of March, 1924.

.....

**Exhibit F-14.**

UNITED REAL ESTATE CO.

To

JOHN H. CAPSTICK & AL.

THIS INDENTURE made the thirtieth day of December in the year of our Lord one thousand nine hundred and five (1905)

BETWEEN the United Real Estate Company, a corporation of the State of New Jersey, of the first part, and John H. Capstick and Thomas Capstick of the township of Montville, in the County of Morris and State of New Jersey, of the second part;

WITNESSETH that the said party of the first part, for and in consideration of the sum of one dollar and other valuable considerations lawful money of the United States of America, to it in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged, hath granted bargained sold aliened remised released conveyed and confirmed, and by these presents doth grant bargain sell alien remise release convey and confirm unto the said party of the second part, and to their heirs and assigns forever. All those several tracts or parcels of land and premises hereinafter particularly described situate lying and being in the township of Montville, in the County of Morris and State of New Jersey, lying under the waters of and around Towasow Lake or Mud Pond and having an aggregate area of three hundred and four and eight tenths (304.8) acres, more or less being the same premises described and conveyed (in a large number of parcels) in three

deeds from Thomas F. Hoxsey and wife to the Montclair Water Company, two of which deeds are dated the tenth day of May A. D. 1887, and were recorded in the office of the Clerk of the County of Morris on the 27th day of May A. D. 1887, in Book B. 12 of Deeds for said County one at page 162 &c and the other at page 166 &c and the third of said deeds was dated the third day of April A. D. 1888 and recorded in said Clerk's office in Book I. 12 of Deeds at page 148 &c, it being the intention hereby to convey all the land and premises which were in and by said three deeds conveyed to the Montclair Water Company, and reference is hereby made to said deeds and the record thereof for a more particular description of said lands.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversions and reversions remainder and remainders rents issues and profits thereof. And also all the estate right title interest property possession claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part their heirs and assigns forever.

And the said party of the first part does for itself, its successors and assigns, covenant and grant to and with the said party of the second part, their heirs and assigns that it the said party of the first part has not done caused suffered or procured to be done any act, matter or thing whereby the title of the said party of the second

part, of, in and to the above granted, bargained and described land and premises or any part thereof can or may be changed charged altered or defeated in any way whatsoever.

In Witness Whereof the said party of the first part has hereunto set its corporate seal, duly attested, the day and year first above written.

Signed, sealed and delivered in the presence of

J. Wm. Robbins

Approved as to form, J. T. Schaperkolter, Gen'l Solicitor

United Real Estate Company
Incorporated
1897
New Jersey.

United Real Estate Company
by J. T. Schaperkolter
President

Attest:
D. G. Baird
Secretary

State of Pennsylvania, }
County of Philadelphia, } ss.:

Be it Remembered that on this 12th day of January, A. D. 1906, before me the subscriber, a *A* Foreign Commissioner of Deeds for New Jersey in Pennsylvania personally appeared D. G. Baird who being by me duly sworn does depose and make proof to my satisfaction that he is the Secretary of the United Real Estate Company party of the foregoing indenture; that he well knows the corporate seal of the said company; that the seal thereto affixed is the proper corporate seal of the said company, that the same was so affixed there-

to and the said indenture signed and delivered, by J. F. Schaperkolter who was at the date and execution thereof the President of the said Company, in the presence of deponent as the voluntary act and deed of the said Company, and that deponent thereupon signed the same as subscribing and attesting witness.

D. G. BAIRD

Subscribed and sworn to before me the day and year last above written

J. WM. ROBBINS
A Foreign Commissioner
of Deeds for New Jersey.
in Pennsylvania.

J. William
Robbins
A Foreign
Commissioner
of Deeds for
New Jersey
in
Pennsylvania

Received & Recorded Jan. 27, 1906 at 9:07 o'clock A. M.

DANIEL S. VOORHEES,
Clerk.

State of New Jersey,
County of Morris, } SS.:

I, E. BERTRAM MOTT, Clerk of the County of Morris, do hereby Certify that the foregoing is a true copy of the record of a Deed given by United Real Estate Co. To John H. Capstick & al as fully and entirely as the same remains in my office in Book E-18 of Deeds for said County, on pages 381, etc.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County, at Morristown, this Twelfth day of June A. D. nineteen hundred and twenty-five.

(Seal)

E. BERTARM MOTT
by EDWIN W. ORR
Deputy Clerk.

(Endorsed):

MORRIS COUNTY CLERK'S OFFICE
Morristown, New Jersey

DEED

United Real Estate Co.

TO

John H. Capstick & al.
Certified Copy

Dated December 30, 1905.
Recorded January 27, 1906.
Book E-18 of Deeds,
Page 381 etc.

ELIAS BERTRAM MOTT, Clerk

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**Exhibit B-A-1.**

THIS AGREEMENT Made this 17th. day of March A. D. 1888, between the LEHIGH VALLEY RAILROAD COMPANY, Lease of the Morris Canal, of the one part, and JOHN CROSBY BROWN, EDWARD C. LORD and GEORGE DE FORREST LORD, Executors of and Trustees under the Will of James Couper Lord Nicoll, Benjamin Nicoll, her husband, Eliza Brown Lord and William Brown Lord, his children, parties of the second part.

WHEREAS, the Legislature of the State of New

Jersey, is considering the passage of an Act, entitled "An act to authorize canal companies in certain cases to surrender their franchises of navigation and to be released from public obligation in respect thereto—"

AND WHEREAS The Lehigh Valley Railroad Company as lessee of the Morris Canal and Banking Company will probably take advantage of the said Act and abandon navigation on the Morris Canal—

AND WHEREAS the parties of the second part, who claim to have succeeded to the right reserved by one William Scott in a certain agreement between said William Scott and the Morris Canal and Banking Company, dated August 11th, 1829, are apprehensive that if the said bill becomes a law, the Lehigh Valley Railroad Company as lessee of the Morris Canal and Banking Company will construe the said act as in some way impairing the rights of the said William Scott or his assigns under the said agreement—

NOW THEREFORE THIS AGREEMENT WITNESSETH, that in consideration of the premises and of the sum of One Dollar, the said Lehigh Valley Railroad Company covenants and agrees that in case the said Bill shall become a law, said Company will not insist or claim that such law shall operate to injure, interrupt or molest the parties of the second part in the use or enjoyment of any privileges or rights to which they may be entitled or shall have acquired under the said Agreement, according to the true intent and meaning thereof, it being the intent and meaning of these presents in case the said Bill shall become a law, that the said Agreement of August 11th, 1829 and all rights acquired thereunder, shall as to both the parties

hereto remain as if the said bill had not become a law of the State of New Jersey.

In Witness Whereof, The said parties hereto have sealed and delivered these presents, the day and year first above written.

Lehigh Valley Railroad Company
by Chas. Hartshorne
Vice President (seal)

Sealed and Delivered in presence of
Jno. R. Fanshawe
S. H. Gray

Attest
Jno. R. Fanshawe
Secretary

Jno. Crossby Brown (seal)
Extr. & Trustee
E. C. Lord (seal)
Extr. & Trustee
George De Forrest Lord (seal)
Extr. & Trustee
Jas. Brown Lord (seal)
Mary T. Lord (seal)
Grace Nicoll (seal)
Benjamin Nicoll (seal)
Eliza Brown Lord (seal)
William Brown Lord. (seal)

Witness Henry S. Vansinger as to Jas. B. and Mary T. Lord

Witness as to all parties from Jas. Brown Lord & Mary T. Lord
S. H. Little

The signatures of all the parties were duly acknowledged before several Commissioners with Certificates of the Commissioners appointments attached to the paper.

# New Jersey Court of Errors and Appeals

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY,
Complainant-Appellant,

and

THE JERSEY CITY WATER SUPPLY COMPANY, *et als.*,
Defendants-Respondents.

On Supplemental Bill of Jersey City Water Supply Co.

On Appeal from the Court of Chancery.

## BRIEF OF THE MAYOR AND ALDERMEN OF JERSEY CITY.

This case is an appeal to this Court from the Court of Chancery by The Mayor and Aldermen of Jersey City from the decree advised in the Court below by Vice-Chancellor Lewis, whose opinion will be found at 132 Atlantic Rep. page 852.

The case involves another supplemental bill filed by the Jersey City Water Supply Company seeking the release and payment to it of the sum of five hundred thousand ($500,000) dollars, which by decree of this Court and by contractual agreement made between the parties has been and still is retained by Jersey City until the Jersey City Water Supply Company complies with its contract with Jersey City.

### Outline of the Facts.

Over thirty years ago it became apparent to the municipal authorities of Jersey City that the City

would soon require its own water supply to be owned and operated by it. Prior to October 12th, 1895, Jersey City had obtained its water supply from the Passaic River near Belleville. As the river water below Paterson had by that time become unfit for domestic purposes, Jersey City on that day contracted for a temporary supply to be furnished by the East Jersey Water Company. By this contract and by supplemental ones, this supply was continued until May 23rd, 1904, when the new supply obtained from the defendant's works was turned on (V. C. Stevens' Opinion, 74 N. J. Eq., p. 108). The original contract looking to such a supply was made between the City and one Patrick Flynn, on February 28th, 1899. Flynn thereby agreed "to construct a new system of water works for Jersey City and to supply said City therefrom with pure and wholesome water." His contract and the contract of the Jersey City Water Supply Company, which later became his assignee, read in part as follows:

> "There will be tributary to this intake and storage reservoir the whole flow of the Rockaway River, having a watershed and gathering grounds of one hundred twenty-two and one-half (122½) square miles, including the waters of Longwood Valley Green Pond, Denmark Lake, Beach Glen, Split Rock Lake, Dixon's Pond, Shongum Lake and other tributary streams."

This we conceive to be a most essential and important part of the contract which is now under discussion.

This contract of February 28th, 1899, was followed by a supplement thereto. This supplement was made pursuant to the authority conferred by Chapter 207 of P. L., 1901, page 416. Under it, it will be noted:

(a) That the specifications and proposal of the original contract were made part and parcel of the supplemental contract.

(b) That the purchase price of Seven Million, Five Hundred Ninety-Five Thousand ($7,595,000.) Dollars remains as in the original contract, *i. e.*, that there was no rebate made on the price for the execution of the supplemental contract.

(c) That the whole flow of the Rockaway River would be tributary to the storage reservoir at Boonton.

(d) That the supplement to the contract shall not relieve the contractor or his sureties from furnishing and delivering to Jersey City the *quantity* and quality of water required by the original contract.

Prior to this contract being executed, the Morris Canal & Banking Company asserted its right to divert water paramount and superior to the rights of the contractor, and it was for this reason that the supplemental contract became necessary. Under it, the parties agreed that because of the assertion of these rights of diversion by the Morris Canal & Banking Company, Jersey City, should retain out of the purchase price of seven million, five hundred and ninety-five thousand ($7,595,000.00) dollars, the sum of five hundred thousand ($500,000.00) dollars until these superior rights of diversion should have become extinguished, and *the provisions of the contract of February 28th, 1899,* should have been completely carried out.

The supplemental contract set up four conditions, three of which are contained in Paragraph 3 of the contract and the fourth in Paragraph 4, whereby the rights of the Morris Canal and Banking Company might be effaced. At the same time, it and any other change in the original contract reiterates the express condition that the contractor

is in no wise to be *relieved* of any part of the burden of the ORIGINAL contract. The defendant, the Jersey City Water Supply Company, now contends that it has complied with the conditions above referred to and set forth in full. The City contends that the conditions have not been complied with, and relies upon four main points, which are as follows:

1. *That the contract of Flynn provided that the City was to obtain from him or his assigns the whole flow of the Rockaway River and its tributaries; that Jersey City's rights should be superior to all other rights and exclusive of them and that until the rights of the contractor and any outstanding right incident to any claimant were not only extinguished but vested indisputably in Jersey City; that the contract of February 28th, 1899, and the contract supplemental thereto had not been fulfilled, and that the Water Company is not, therefore, entitled to the sum retained.*

2. *That the release of 1909 is ultra vires and void and that it vests no additional right in Jersey City whatsoever, and that it extinguishes no material right in favor of the City.*

3. *That the material questions raised now are and have been for some time adjudicated in favor of the City and against the Water Supply Company.*

4. *Unless and until the State acts through its proper agency, the Water Company is not entitled to the sum retained—hence the present action is premature and the bill should be dismissed.*

If the Court decides any of these four points just mentioned in favor of the City, such decision on any of them is fatal to the case of the Water Company on this supplemental bill.

**Grounds of Appeal.**

1. The decree of the Court of Chancery is erroneous in that it adjudged that the Jersey City Water Supply Company was entitled to the relief prayed for in its supplemental bill of complaint.

2. The decree is erroneous further in that it decreed the payment by The Mayor and Aldermen of Jersey City to the Jersey City Water Supply Company of the sum of five hundred thousand ($500,000) dollars with interest from April 7th, 1924.

3. The decree is further erroneous in that it adjudged and decreed, as above set forth, without finding and adjudging that the contract in chief, and the supplemental contract as well, had been fulfilled.

## POINT I.

**The contract of Flynn provided that the City was to obtain from him or his assigns the whole flow of the Rockaway River and its Tributaries; that Jersey City's rights should be superior to all other rights and exclusive of them and that until the rights of the contractor and any outstanding right incident to any claimant were not only extinguished but vested indisputably in Jersey City, that the contract of February 28th, 1899 and the contract supplementary thereto had not been fulfilled, and that the Water Company is not, therefore, entitled to the sum retained.**

Both the City and the Water Company concede, we believe, that under the contract of February 28th, 1899, between the City and Flynn (which con-

tract must be carried out in full by the Water Company) the City is entitled to the first and paramount flow of the Rockaway River. It is manifest that this is so, because the original contract and the supplemental contract contain the following provision:

> "There will be tributary to this intake and storage reservoir, *the whole flow of the Rockaway River,* having a watershed and gathering grounds of One hundred and twenty-two and one-half (122½) square miles, including the waters of Longwood Valley Green Pond, Denmark Lake, Beach Glen, Split Rock Lake, Dixon's Pond, Shongum Lake and other tributary streams."

One of the first questions to be decided after this point, therefore, is as follows: Is there any water of the Rockaway River above the dam now being diverted? That waters are being diverted and have been continuously diverted even since the so-called abandonment of the Morris Canal is clear. At pages 212-217, State of the Case, Mr. Cornelius Vermeule, on cross examination, testifies as follows:

> "Q. I am asking you to describe the physical condition.
>
> "The Court: The objection is overruled.
>
> "A. During several months of the year the entire flow of the river at the dam, at the head of the falls was taken into the canal to be used as I have described.
>
> "Q. That is what is going on today at this very hour, isn't it? A. It is. I made an inspection last Wednesday, and there was just that condition at that time; the water was below the crest of the dam at the head of the falls, and all the water of the river was going through in that manner, through the canal.
>
> "Q. And that condition which you have described, where the water is by-passed into the

canal for the use for power purposes, is a condition that is going to obtain, so far as you know, isn't it?

"Mr. Faulks: Objected to.

"Mr. Brogan: The question is withdrawn.

*"By the Court*:

"Q. Has your Board taken up this subject? A. Yes, sir.

"Q. Is there any resolution or otherwise? A. No, sir.

*"By Mr. Brogan*:

"Q. *Is it a fact that you have recommended to the Board and that they have concurred in that recommendation, that this Cooper-Lord raceway through the Morris Canal be left as it is?*

"Mr. Faulks: I object to that; the situation at that point is very clear on the record. There was a Scott agreement to which the owners of the Cooper-Lord State property succeeded. Now, that agreement is in evidence.

"The Court: The objection will be overruled.

"A. *I have recommended that that part of the canal cannot be changed in that respect; I have so advised.*

"Q. The canal diverted waters from Lake Hopatcong up to last year? A. Yes, sir, that is true.

"Q. And that waters thus diverted came into the Rockaway River above the dam at Boonton?

"Mr. Faulks: Objected to.

"The Court: The objection will be overruled.

"A. Some of that water in question came into the Rockaway River.

"Q. Above the dam at Boonton? A. Yes, sir.

"Q. Do you know of any right that now exists to divert water above the dam on the Rockaway River?

"Mr. Faulks: Objected to.

"The Court: What is the object of that question; what is the materiality of it?

"Mr. Brogan: I think that is the corpus of the case.

"Mr. Faulks: It is not the proper way to develop that subject at all, if it is to be gone into. There is nothing in my direct examination that would warrant it.

"The Court: He has put him on as his own witness, and is examining him as such. Answer 'Yes' or 'No.'

"A. I remember some rights.

"Q. Now, I direct your attention to the action of the State Board of Conservation and Development in referring to Mr. McCarter the question as to whether or not they have the right to dispose of their right to divert water in the Rockaway watershed, and ask you if you are familiar with the Board's action in that respect?

"Mr. Faulks: Objected to.

*"By the Court*:

"Q. Are you familiar with it? A. I know what has been done in that respect.

*"By Mr. Brogan*:

"Q. What has been done?

"The Court: There must be documentary proof in this matter; I shall sustain the objection.

"Q. Could not the State of New Jersey, doctor, in your opinion, at very small expense, rehabilitate the canal, if so desired?

"Mr. Faulks: Objected to as irrelevant and incompetent.

"The Court: The objection will be overruled.

"A. It is physically possible; there would be some expense.

"Q. $200,000 roughly? A. At least as much as we have spent; we have spent six or seven hundred thousand.

"Q. You are a sanitary engineer as well? A. Yes, sir; that is a part of my practice.

"Q. Do you know anything about that situation that exists below the Cooper-Lord property, and where Dr. Kummel has testified that water was turned into the bed of the stream to flush it as late as July and August of last year? A. I know the situation there.

"Q. Do you know whether or not the water was turned out to flush out the bed of that canal?

"Mr. Faulks: Objected to as immaterial.

"The Court: Objection overruled.

"A. I cannot say positively; I was not there at any time when it was being done.

"Q. Mr. Vermeule, where the water is diverted for the purposes of the Cooper-Lord rights, what is the depth of the canal at that particular point where the water of the Rockaway enters just above the falls at Boonton? A. There were some changes made there and I have not inspected it since then. The normal depth of the canal was five feet. There was a gate into the river and a waste gate from the canal below the dam to waste the waters.

"Q. How long would you say it was before the water which came in on that gate there right at the head of the falls—how long a time elapsed between the time it enters at that point and leaves at the end of the tailrace?

"Mr. Faulks: Objected to as immaterial.

"A. I should say normally it would take something like twenty minutes.

"Q. There are parts of this section of the canal and lock that are somewhat stagnant; is not that so? A. There are points where there is a little stagnant water; we have complaints from mosquito commissions and local authorities, and we ourselves are policing it all the time.

"Q. Does not that, in your opinion, have a deleterious effect upon the water as to its potability?

"Mr. Faulks: Objected to as incompetent, irrelevant and immaterial.

"The Court: You may answer to save time.

"A. The water which comes from such stagnant pools is not in as good condition as it was before.

*"Cross examination by Mr. Faulks*:

"Q. With reference to this brook which you have spoken of as now reaching the Rockaway River below the dam of the Jersey City Reservoir, what is the character or quality of the water in that brook? A. I never have made a special examination of it. At the times that I have seen it, it appeared to be reasonably clear, but, of course, knowing where it comes from, I should not consider it to be entirely desirable for drinking purposes.

"Q. Why is it permitted to flow into the canal below the dam of the reservoir? A. *Because we have not dared to make the cut at the point where that brook should go out. The law directs us to make those cuts and restore the natural drainage, but this is a case in which if we really made the cut, it would send the sewage of Boonton down into the reservoir of Jersey City.*

"Mr. Faulks: We rest."

The witness testifies to the actual conditions that existed during the Summer of 1925, which is a year *after* the filing of the Water Company's supplemental bill and several years after the *supposed* surrender by attempted release of the diversion rights of the Morris Canal and Banking Company. As a matter of unquestionable fact, these diversion rights were not extinguished at the time of the trial, nor are they yet extinguished and for all we know, may never be extinguished. This witness, Mr. Vermeule, the Consulting Engineer for the State of New Jersey on water questions, testified that the entire flow of the river was, during the Summer of 1925, a year after the bill in this case was filed, being turned into the bed of the Morris Canal.

Further down the Court will note that the wit-

ness says (State of the Case, p. 214) that "he has recommended *to the State* that this part of the Canal CANNOT be changed in that respect." Further down and at the end of his testimony (Case, p. 217) under cross examination, he testifies that a certain brook, which everyone agrees is a tributary to the Rockaway River, does not find its way to the Rockaway River because, as the witness says, *"We have not dared to make the cut at the point where that brook should go out."* This water belongs to Jersey City. It has contracted to buy this very water and, whether it is polluted or not is no concern of the Water Works Company, because under the decision of V. C. STEVENS in 74 Eq., above quoted, the answer is that the water should be delivered in accordance with the standard of quality called for in the contract of Jersey City. *We believe we could rest our argument here and that the supplemental bill must be dismissed on these undisputed facts.*

On this same point, let us turn to the testimony of Mr. Potts, a Water Engineer, and we find in the State of the Case, page 218, line 26, he points out a stream which is a tributary to the Rockaway River and is diverted. His testimony is quoted:

> "Q. And you know the stream that is below the lock at Boonton, and which is known as Miller's Lock? A. Yes, sir, I am familiar with the lock and the stream.
>
> "Q. What is the name of that stream? A. I don't believe it has a name; it is a little stream that makes up through Boonton; it is covered in places by pipes in Boonton; I have never heard a name given to it.
>
> "Q. And what is the present outlet of that stream? A. It flows into the Morris Canal just below the lock in Boonton.
>
> "Q. And after it reaches the bed of the Morris Canal, what is its course then? A. It flows

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easterly along the bed of the Morris Canal to Vreeland Avenue in Boonton, and escapes through a cut in the Morris Canal bank there, and flows northerly across the Boulevard into a small stream which flows down across what was formerly John Capstick's property, and thence through a stream adjoining a stream there which rose above his property, sometimes called Montville Creek, and flows into the Morris Canal again at Montville, and flows a short distance east of the Morris Canal and then through a cut which has recently been made in the banks of the Morris Canal, out into a stream which is known as Crooked Brook, and then flows through that and joins the Rockaway River about one mile below the Jersey City Reservoir."

From this testimony it appears that this stream has a drainage area of 125 acres and all of the waters that fall upon that area necessarily are diverted and prevented from reaching the Rockaway River above the dam at Boonton (see Case, pp. 219, 229).

This is just another example of the proposition that Jersey City is not getting the flow of the streams that are tributary to the Rockaway River.

This witness shows further on in his testimony that the condition of the Morris Canal, west of the Boonton Dam, and east of the Scott Millrace, is in the same condition as it has been for years. The testimony is as follows (Case, p. 220):

"Q. What is the condition of the Morris Canal east of the so-called Scott Millrace in Boonton? A. The plane, which is the first plot east of the raceway, is substantially in the same condition that it was when boats were carried; and when you leave the plane you encounter a stretch of the canal that has been drained, but which receives part of the rain water from Boonton; and with it quite a good deal of sewage from a sewer that is known as

> the Brook Street sewer; that water comes down the plane in a concrete channel that was built fifteen or twenty years ago and is still there."

It is manifest from this testimony that the waters which belong to the Rockaway River watershed, and which should find their way into the Rockaway River above the dam, are unquestionably diverted to take care of the filthy sewage condition which obtains east of the Scott Millrace and just west of the Boonton Dam and that this water never finds it way into the river above the dam.

This condition, it will be remembered, existed during the summer of 1925, one year after the filing of the bill and several years after the supposed extinction of the rights of diversion of the Morris Canal or any other party in interest.

To say that this water is not up to the quality that is desired is immaterial. Jersey City contracted for all *this water*. At pages 220-221 of the Case, this witness shows that since June, 1925, waters have been diverted east of the Scott Millrace. Why it has been diverted is beside the question. That there has been and is such diversion is indisputable. At page 222, line 29 of the Case, the testimony of this witness stands unimpeached, and it seems to us again to dispose of the Water Company's case, when he testifies as follows:

> "Q. Do you know, Mr. Potts, whether the flow of the Rockaway River above the Boonton Dam has been diminished since the State has undertaken to dismantle the Morris Canal?
>
> "Mr. Faulkes: Objected to as immaterial.
>
> "The Court: Objection overruled.
>
> "A. Yes, sir.
>
> "Q. In what way has the flow of the Rockaway River been diminished? A. By the diversion of the waters of Lake Hopatcong, west-

> erly to the Delaware River, the waters which formerly come into the Rockaway Watershed."

If this is true, and it is unquestioned, we find that the abandonment of the Canal, instead of extinguishing the rights of diversion, has materially diminished the flow of the river. This testimony of both Vermeule and Potts, the one corroborating the other, with Vermeule being offered as the witness for the Water Company, as well as the City's witness, stands corroborated, unshaken and unimpeached as the conclusion of fact, it seems to us, this Court should adopt.

**(A) Not only have diversion rights not been extinguished, but paramount rights to divert still exist by law.**

By Chap. 117 of the Laws of 1871, page 444, there was a supplement passed to the original act incorporating the Morris Canal Company. This supplement says that "it shall be lawful for the said company or its lessee, or lessees, to use the surplus water of the canal of said company or any of its feeders not needed for the purpose of navigation, in furnishing and supplying * * * with a sufficient quantity of pure and wholesome water * * * and to make contracts with the corporate authorities * * * for such supply of water * * * and to erect such water works and make such alterations in the said canal as may be necessary or proper to enable said company, or its lessee, or lessees, to furnish such supply of water from the said canal, provided that nothing herein contained shall be held to authorize the diversion of the said canal from the purpose of navigation, etc."

Respondents argued below that this act only permitted for such purposes of water supply, the use of

the surplus waters of the canal and its feeders not needed for the purpose of navigation, and it is stated that *this right* to sell such surplus waters was never exercised. In addition to the foregoing, there is set up the agreement between the Canal Company and its lessee and Flynn bearing date of November 21, 1898; an agreement by which the Railroad and Canal Companies expressly agreed that they *would not divert, sell or supply,* for any use, any waters from the Rockaway River watershed above the intake at Old Boonton (Case, p. 306, Vol. 2 [76], Sec. 6).

That this is not, and cannot be a proper interpretation of the Law of 1871, is apparent when we notice that this company and its lessee, has the right to sell surplus waters, not only of the canal, but any of its feeders which are not needed for the purpose of navigation. If that meant anything, it means that they could sell any and all surplus water diverted from the Rockaway River watershed so long as the canal continued to operate as a canal. In the instant case, the waters of the Rockaway River did supply the canal with its necessary water for navigation and a vast surplus remained, unnecessary for the purpose of navigation. It is this water that the Canal Company, and its lessee, could sell and necessarily divert, this right having been given by an act of the Legislature, and, not having been revoked by the power that bestowed it, it must still remain some place. Conceding for argument's sake, that navigation is abandoned on the canal, the right of diversion formerly owned and enjoyed by it has gone back to the power that bestowed it, the sovereignty.

The Morris Canal Company, and its lessee, did not release it to Flynn in 1898, but said merely, "that they would not exercise any such right," or if it claimed that the canal having been aban-

doned under legislative sanction, this right has been surrendered, it will be noticed that this right has not been vested in Jersey City, but rather in the Canal Company as trustee for the State of New Jersey. Therefore, we still find, in addition to all of the foregoing rights of diversion these paramount rights in some agency other than the City of Jersey City.

Counsel for the Water Company argued below that the State of New Jersey has been made a party to this action and that a decree "*pro confesso*" has been entered against the sovereignty. It is not even a debatable question but that the rights of the State cannot be foreclosed in this fashion and that the failure of the State to answer bars the State from asserting its rights whenever it desires so to do.

In the main, what has happened upon the effectuation of the so-called abandonment, based upon the enabling statutes of 1922, 1923 and 1924? As before stated, it is this. The Morris Canal and Banking Company conveyed to the State of New Jersey all of its properties and all of its rights to divert waters from the Rockaway River watershed subject to the alleged release of May 12, 1909, between The Morris Canal & Banking Company and its lessee, and Jersey City, wherein and whereby it attempted to release all its rights to divert water from the Rockaway River watershed, and, also, subject to the agreement of November 21, 1898, made between The Morris Canal & Banking Company and The Lehigh Valley Railroad Company and Patrick H. Flynn, whereby it was agreed that The Morris Canal & Banking Company and its lessee would not sell any of the surplus waters of the Morris Canal diverted out of the Rockaway River. Let us analyze the effect of this agreement of 1898. The right to sell waters which the Morris Canal acquired under the statute of 1871, counsel

says, has been quieted and has effectually been laid to rest by this agreement. The right still exists for the only way that it could be nullified would be

1. By dissolution of the Morris Canal corporation.

2. By the forfeiture of Charter.

3. By the express wiping out of this right by statute.

The corporation has not been dissolved; the charter has not been forfeited; the right has not been revoked by the Legislature. It follows that it still exists, but counsel says, it is dormant. It is a covenant of forbearance, not of foreclosure of the right.

Is the agreement of *forbearance* one of perpetuity? If it is, we submit that Jersey City was not a party to it nor did any consideration pass to the company from Jersey City, to enable Jersey City to enforce it, and, as is pointed out hereafter, the Morris Canal and Banking Company and its lessee, had no legislative authority to make such an agreement. Is it such an agreement as to prevail against the will of the sovereignty, especially since the sovereign state has become possessed of all the right, title and interest of the corporation which is still functioning as an agency of the State and in trust for the State?

The Lehigh Valley Railroad, which was party to the agreement, is no longer able to enforce this contract of forbearance. The covenant of the Water Company is that such rights as these should be extinguished and no one, we believe, can successfully maintain that this right does not exist. If its existence is not denied, certainly its extinguishment is impossible unless brought about by one or more of the three methods above cited.

In conclusion, it is beyond dispute that the City contracted for and is entitled to receive the first, full, unimpaired flow of the Rockaway River and an extinguishment of all rights and claims adverse to this right of the City and *further*, the *vesting in the City* of all such rights. The Court of Chancery has well said that "until such rights and claims have been thus effectually released and extinguished, and acquiesced in by legislative sanction, I think that the true intent and meaning of the fourth paragraph has not been met and complied with. The application to release the $500,000.00 fund retained by the City, is premature" (93 Eq., p. 36).

## POINT II.

**The release of 1909 is still ultra vires and void and vests no additional right in Jersey City whatsoever and extinguishes no material right in favor of the City.**

The release purports to release to Jersey City "all the rights of the Morris Canal and Banking Company and the Lehigh Valley Railroad Company to divert the waters of the Rockaway River watershed out of said river above the proposed reservoir site mentioned in said supplemental agreement of July 8, 1910, on which site there has since been erected the reservoir above Boonton by the Jersey City Water Supply Company under its contract with Jersey City."

By the Charter of the Morris Canal & Banking Company and subsequent legislative enactments in favor thereof, the Morris Canal & Banking Company was not empowered or authorized to release or extinguish any of its diversion rights in the waters of the Rockaway River. The Morris Canal & Banking Company, being a creature of the State

of New Jersey, could not effectually undertake to divest itself of any of its rights and privileges without being so empowered by the sovereignty. Since no such power or authority resided in the Morris Canal & Banking Company and the Lehigh Valley Railroad, its lessee, at the time of the execution of the release in question, it was then absolutely void and of no effect. As was said by the Court below, in *Jersey City* v. *Jersey City Water Supply Company, supra,* that this release was "*ultra vires* and meaningless, lacking legislative sanction."

The gist of the argument of the Water Company on this point is that the canal having been abandoned under legislative sanction, the release undertaken to be executed by the Morris Canal & Banking Company and the Lehigh Valley Railroad in 1909 became effective upon the mere happening of the canal abandonment. They do not argue that the intending releasors had the power and authority to make this release but they assume that the Morris Canal & Banking Company had the right to divest itself of these paramount rights of diversion of the waters of the Rockaway River without being empowered by the State so to do.

The cases cited in the brief of the Water Company below, that a release, like any other contract, may be granted to become effective upon the happening of a condition subsequent, are not in point. We concede each and every rule of law laid down in these cases, but manifestly they beg this question. It is elementary that a release may become effective upon the happening of a condition subsequent, but contained in the Water Company's argument is a complete assumption that the Canal Company had the right to release its charter and statutory privileges and prerogatives.

In what instance, let us ask counsel for the Water Company, in the case of a public or quasi-

public corporation, has that corporation the right of itself and on its own motion to modify, alien or surrender its rights and privileges to anyone outside of the sovereignty whose creature it is?

In addition, the City says that this release, if it has any legal effect whatsoever, must have resulted in the giving up of a right which in 1909 was most valuable to it and which constituted a distinctive asset to the stockholders, and nowhere do we find that the stockholders have consented to the action of the directors.

It is submitted that the question here presented is whether the Morris Canal and Banking Company had the power and authority to make the release, not when it should go into effect. The City insists that the release being "*ultra vires* and meaningless," in the language of the Court below at the time of the making thereof, it is still "*ultra vires* and meaningless." Therefore, in order to comply with the condition in the supplemental contract, in respect to giving a valid release, it was necessary for the Morris Canal and Banking Company or its present successors in title to be empowered and authorized by the State of New Jersey to make the release.

In *Union P. Ry. Co.* v. *Ry. Co.*, 163 U. S., 564; 41 L. Ed., 265, it was held that the general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public obligations without consent of the State, or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or enforcible by the application of the doctrine of estoppel.

In *Whitney Arms Co.* v. *Barlow*, 63 N. Y., 68, it was held that when acts of corporations are spoken of as *ultra vires*, it is not intended that they are

unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation.

Probably the leading case in this country on the question of *ultra vires* contracts of quasi-public corporations is *George W. Thomas, et al.* v. *West Jersey R. R. Co.*, 101 U. S., 71; 25 L. Ed., 950. In that case it was held that:

> "1. The powers of corporation organized under the legislative charters are only such as the statutes confer. Conceding that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.
>
> "2. A lease by a railroad company, of all its road, rolling stock and franchises, for which there is no authority given in its charter, is *ultra vires* and void.
>
> "3. The ordinary clause in the charter, authorizing such corporations to contract with other transportation companies for the mutual transfer of goods and passengers over each other's roads, is no authority to lease its road and franchises.
>
> "4. The franchises and powers granted to such corporations are, in a large measure, designed to be exercised for the public good, and this exercise of them is the consideration of the public grant. Any contract by which the corporation disables itself from its obligation without the consent of the State, is a violation of its contract with the State and is forbidden by public policy and is, therefore, void.
>
> "5. The fact that the Legislature, after such a lease is made, passes a statute forbidding the directors of the company, its lessees or agents, from collecting more than a fixed amount of

compensation for carrying passengers and freight, is not a ratification of such lease or an acknowledgment of its validity."

And the Court, in enunciating these principles, said:

"There is another principle of equal importance and equally conclusive against the validity of this contract which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

"That principle is, that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice CAMPBELL, in the case of Railroad Co. *v.* Winans, 17 How., 30, 15 L. Ed., 27."

And in the case of *Black* v. *Canal Company*, 7 C. E. Green, 130, 22 N. J. Eq., 130, Chancellor ZABRISKIE says:

*"It may be considered as settled that a corporation cannot lease or alienate any franchise, or any property necessary to perform its obligations and duties to the State, without legislative authority."*

For this he cites some ten or twelve decided cases in England and this country.

The Water Company further contends that the

conveyance and transfer by it of the canal property to the State of New Jersey, by special act of the Legislature vests in the State the title to the property and water rights of the Morris Canal & Banking Company and by this conveyance it surrendered to the State all its rights to divert the waters of the Rockaway River above Jersey City reservoir site and is a complete compliance with condition "C" of the supplemental agreement. The City says that if this is so, it would do violence to the original contract.

As is contended here under Point I, Jersey City is entitled to the whole flow of the Rockaway River, free from all claims or rights that might conflict with its unrestricted use of the full flow of the Rockaway River and the supplemental agreement nor any condition or provision thereof could in any way abridge or limit the obligation of the Jersey City Water Supply Company to vest in Jersey City the right to the whole flow of the Rockaway River. As was said by this Court, in 93 Eq., p. 620, "Jersey City entered into a contract with Patrick H. Flynn for the construction of the new water supply by the terms of which Flynn was to supply to the City *the whole flow* of the Rockaway River to the extent of seventy million gallons daily."

## POINT III.

**The material questions raised now are and have been for some time adjudicated in favor of the City and against the Water Supply Company.**

Many of the material points that have been raised in this case are and have been for years removed from the realm of discussion. They have been judicially determined, some in part and some in their entirety. That the City is entitled to the

whole flow of the river, in our judgment, is a matter that has been judicially determined. See opinion of Vice Chancellor STEVENS, 74 N. J. Eq., p. 104. At pages 135 and 136, the Court said:

> "These are the principal provisions of the subject. There are others of minor importance which do not in any way lessen the obligation of the contractor. If anything, they tend rather to emphasize it."

That the contract in chief of 1899 must be fulfilled, and that this Court and any other court before the Water Company could succeed, must say that that contract and all other contracts on the subject have been completely carried out is also a question, we believe, that has been judicially determined. In the opinion quoted above, the Court said:

> "I will assume that it was understood by both sides that the Water Company, if it undertook the work, would be bound by the written contract and by that only. What, then, was the written contract? It is elementary that a contract may be contained in more than one writing; if several papers are executed at the same time as part of one transaction, they together constitute the contract. The former contract expressly declares that its provisions shall bind the assigns of Flynn and that the specifications and proposals are made part of it. The specifications contain this clause, 'The advertisements, the specifications, the accepted proposals and all maps, etc., are to be considered the essential portion of the complete contract.'"

That which the City is entitled to, therefore, under the contract is *res adjudicata*. We submit, as argued above, that with the rights outstanding that have there been pointed out, there has not been a compliance with the contract between the parties.

In holding that the release of 1909 was not in compliance with the contract of 1901, the Court in 79 N. J. Eq., pp. 212 and 215, said that there was not such a compliance, and concluded:

> "To so hold would be to nullify the general intent of the parties as expressed in the instrument itself."

In other words, the instrument, as the Courts have subsequently held, was *ultra vires,* and the Court in 79 N. J. Eq. in commenting upon it held in effect that the instrument did not and could not convey away the rights at that time that were in the contemplation of the parties. Subsequent decisions in subsequent litigation between the parties held that this same instrument, which again appears, was not only *ultra vires* but meaningless and void. The Court below said in 93 N. J. Eq., p. 36, that certainly under Paragraph 4 of the supplemental agreement the parties did not contemplate, nor did the City have any intention of relinquishing any of its rights under the contract of 1899. This, then, is *res adjudicata.* The Court went on further to say that it allowed the provision to meet the situation involved, but did not give up its valid rights. We submit that it was also outside the power of the City to surrender its rights under the contract.

The Court of Appeals has put its stamp of approval on the reasoning of the Court below in the former case and has said, for the enlightenment of all concerned:

> "The cardinal rule in the construction of contracts is that the Court must if possible ascertain and give effect to the mutual intention of the parties so far as that may be done without the violation of legal principles."

The opinion went on further to say that the Court, where construction is doubtful, should look

into the surrounding circumstances and avail itself of such light as it may in ascertaining the true meaning of the language and terms employed.

To say that this contract could be fulfilled with the outstanding rights of diversion and sale of water which has been pointed out above would be absurd.

It has been adjudicated that there are outstanding rights of diversion out of the Rockaway River, and that Jersey City has not yet obtained the right to the full flow of the river above the dam. This Court has passed upon the rights of lower riparian owners. See *Weiderman Silk Dyeing Co.* v. *E. Jersey Water Co., et als.*, 88 Equity, 397; also *Weiderman, etc.* v. *Water Company*, 89 Eq., 541; also *Weiderman Silk Dyeing Co.* v. *Jersey City*, 89 Equity, 578.

The Court of Chancery in *Jersey City* v. *Flynn*, 74 Equity, 196, said:

> "As to the riparian owners below on reservoir their rights are inconsiderable and most of them have been obtained. It is *admitted that what remain must be acquired.*"

These points, therefore, we respectfully submit, are removed from discussion and predicating, as we do, the argument of the various points upon this solid legal foundation, we submit there has not been a compliance with the contract, the instrument in question is of no value, and the outstanding rights, while still in existence, are a barrier to the Water Company's obtaining the sum retained.

## POINT IV.

**Unless and until the State acts through its proper agency, the Water Company is not entitled to the sum retained—hence the present action is premature and the bill should be dismissed.**

The second supplemental bill in this case was filed June 6, 1924. The Legislature had passed Chapter 212, of the Laws of 1922, which was approved in March of that year. This law had to do with the appointing of a commission to negotiate with the Canal Company and fix the terms upon which the abandonment of the canal should be made. Under this law a transfer of the title to the possession of the property to the State had been consummated.

Chapter 229, of the Laws of 1924, approved May 12, 1924, authorized and directed the discontinuance of the use of the canal as a means of transportation by water. It is argued by the Water Company that by this law there was a dedication of the property formerly used for canal purposes, for highways, and it is said that, if nothing more had been done, this act of the Legislature would be construed as an irrevocable and indisputable abandonment of the canal for canal purposes.

It is argued as a result of all this, and by the express provision of the fourth paragraph of the agreement of July 8, 1901, and the release of May 12, 1909, that the condition upon which the release was to take effect, was not the abandonment of the canal as a conveyor of water, but merely an abandonment of the navigation of said canal between Dover and Montville under legislative sanction. This, it is claimed, had occurred prior to June 6, 1924, and it is alleged, by May 2, 1924, no

portion of the canal between Dover and Montville was capable of navigation.

The second argument made by the Water Company, is that a decree in equity acts no less upon the parties and subject-matter as they stood at the commencement of the suit, but it operates upon them only to subserve the ends of justice and in a case like the present, the issue, it is claimed, is only one as to whether the title to be delivered conforms with the pre-existing contract and if it does, then the decree is to be added to the rights existing not at the commencement, but at the time of the determination of the suit.

In behalf of this point, the Water Company urges several cases which concern themselves only with question of specific performance of a contract to convey land where, at the time of the making of the contract, the title was not perfect and subsequently the title was perfected and performance was ordered.

The answer to the first proposition is that it was not the abandonment of the canal, as such, that was to be authorized by Legislative sanction, but rather that Jersey City should obtain "a valid release" which would guarantee to it all of its rights under *all* of the pre-existing contracts. If this defendant or the Lehigh Valley Railroad, as lessee of the Morris Canal & Banking Company could make a valid release in 1909, then their powers so to do must be measured by those powers granted to it under its Charter and by and through any subsequent law.

It has already been argued that the power to alien or to give up in any way any of its rights, was not conferred by Charter, nor by the law of 1871 and, hence, a specific act of the Legislature was needed to confer this power upon the Morris Canal & Banking Company. No such power hav-

ing been found, the release of 1909, since it lacks an enabling act passed by the sovereignty, is of no effect.

Therefore, it is urged by the City of Jersey City that since this action was brought June 6, 1924, before and without the power of an enabling act by the State, the action is premature.

As to the second point, the cases cited are not in point. We are not, in this action, considering the perfection of any title nor is there to be sought any decree for a specific performance of a contract. It is admitted that a title not perfect could be, by operation of law or by action of the parties, later perfected and still leave the question of the validity of this release undetermined. Any act, as noted in the argument under Point 2, done *"ultra vires"* the corporation is without effect as between the parties and can be the foundation of no right. In this particular case, the Legislature has not passed any act which would increase the powers of the corporation so as to allow it to make such a release and without this action in behalf of the creating power of the State, this bill is prematurely brought. To hold that a *corporation* could *convey* away its *charter* rights would be to hold that it partakes of the sovereignty, *i. e.*, that the creature was proportionately as great as the creator.

In addition to the past inability of the Morris Canal and Banking Company to make a valid release of its rights of diversion, let us consider how this ability or lack of ability has been affected by the series of laws which cover the acquisition by the State of all of the property of the Canal Company and its final abandonment as a means of transportation.

In 1922 there was passed Chapter 212 at page 367, and by it we find the first authorization towards the acquisition by the State of:

> "The Morris Canal (as defined in this Act) in whole or in part."

It was by this Act that the first Commissioners were appointed to make and agree upon terms of settlement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company. The attention of the Court is respectfully directed to Section 1 of this Act which contains the following language:

> "The term 'Morris Canal' as herein used means and includes all of the property, lands, rights, easements, privileges and franchises, of whatsoever character now vested in the Morris Canal and Banking Company, as well as that which has passed to or has been directly or indirectly acquired by the Lehigh Valley Railroad Company."

Therefore we respectfully urge upon the Court in this place that these Commissioners could do nothing more than make and agree upon terms for the acquisition of

> "*all* the property, lands, rights, easements, privileges and franchises"

at that time vested in the Morris Canal and Banking Company. By Section 6 of this same Act, it was said:

> "The control and management of *all* the property real and personal, conveyed and transferred to the State by the Lehigh Valley Railroad Company, or the Morris Canal and Banking Company, shall be vested in the said Board of Conservation and Development, *subject to further action by the Legislature.*"

This Act then permitted the acquisition of *all* of the property, real and personal, of the Morris Canal and Banking Company and then placed its control and management in the State Board of Conservation and Development, subject to future legislature.

In 1923, there was passed Chapter 11, at page 34. By this Act the title to "*all the property* and property rights acquired, or to be acquired by the State of New Jersey, under and by virtue of the agreement entered into" under the authority of the present act "other than the shares of capital stock, bonds and script of the Morris Canal and Banking Company shall be and the same is hereby vested in said Morris Canal and Banking Company in trust for the State of New Jersey." The effect of this Act then, was to place the capital stock, bonds and script of the old Morris Canal Company in the Morris Canal and Banking Company in trust for the State of New Jersey, and still left everything else in the hands of the State Board of Conservation and Development.

In 1923, there was passed Chapter 210, at page 208, and the effect of it was to place the title "to the shares of capital stock of the Morris Canal and Banking Company now held, and that hereafter may be acquired by the State of New Jersey, shall be and is hereby vested in the State Board of Conservation and Development, in trust for the State of New Jersey." This then, made the State Board of Conservation and Development, the holders of the shares of capital stock, and it also made them and their successors in office eligible to serve as directors of the said Morris Canal and Banking Company.

Pausing here in the recital of Morris Canal Legislation, we respectfully urge upon the attention of the Court, that so far in the entire scheme there is nothing either to authorize or to validate any release of any diversionary rights of the Morris Canal and Banking Company by anyone.

Then followed Chapter 11 of the Laws of 1923, which determined that the stockholders of the Morris Canal and Banking Company at their next

meeting were to elect a board of directors consisting of eight members and upon the election of such board of directors, this said board was to manage the affairs of the said Company, and become fully vested with all of the rights and powers, except as modified by the act which made them. That is to say, Section 3 provided:

> "Said board of directors * * * shall not possess or be vested with the right, power or authority to convey, transfer or assign, mortgage or otherwise encumber the property or property rights, the title to which is vested in said Company for the State of New Jersey, or any part thereof, or any interest therein."

Then was passed Chapter 112 of the Laws of 1923 at page 10, and this Act gave to the Board of Conservation and Development the power to acquire by condemnation any and all of the capital stock of the Morris Canal and Banking Company, not hitherto owned by the State of New Jersey, and by Section 8 it was determined that

> "Upon making payment title to such stock shall become vested in the State of New Jersey."

During the same year of 1923, by Chapter 151 at page 321, there was appropriated to the Board of Commerce and Navigation all of the money in the amount of $875,000, which the Lehigh Valley Railroad Company was to pay to the State of New Jersey, except whatever part was specifically appropriated to the operation of Canal by any other statute.

Again we cease for a moment the recital of this legislation and direct the Court's attention to the fact that not yet has anything been authorized by the Legislature that concerns even remotely any release of any diversionary rights of the Canal Company to the City of Jersey City.

In 1924, Chapter 79, an Act was passed which simply had to do with any surplusses of money that had been received by reason of the previous legislation concerning the Canal, and said that it shall constitute a special fund, known as the "Canal Fund." This was followed by the passage of Chapter 218 of the Laws of 1924, at page 482, and this Act is very pertinent to our inquiry. By it, any railroad company in the State that had its right-of-way adjoining the lands of the Morris Canal and Banking Company could acquire "such portions of the lands of the Morris Canal and Banking Company adjoining the present right-of-way of such railroad company" as was necessary to admit the railroad to construct and operate one or more additional tracks. There was a provision that where such additional track or tracks, or roadbed supporting the same were to be constructed or laid on lands occupied by the canal bed, the berme bank or the tow-path of the Morris Canal "such lands shall not be conveyed nor the construction of such tracks and roadbed permitted thereon unless or until the said railroad company shall, by good and sufficient deed convey to the Morris Canal and Banking Company sufficient lands to permit of any change in the location of said canal bed, berme bank or tow-path made necessary by reason of the construction, maintenance and operation of said additional track or tracks, and further, that such railroad company shall at its own cost and expense make any and all other necessary changes in the location of said canal bed, berme bank and tow-path, to the end that the use of said canal for navigation purposes shall not be impaired," etc.

Then came Chapter 229 of the Laws of 1924, at page 506. This was an Act by which the abandonment of navigation upon the Morris Canal was

provided for. In Section 1 authorizing the abandonment there occur at page 507, these words:

> "Without the creation of unsanitary conditions or the impairment of contract obligations."

In Section 2 all of the rights that hitherto had been vested in the Morris Canal and Banking Company to impound and divert water

> "together with all such lands, easements, rights and other property, the title to which is vested in the said Company in trust for the State of New Jersey * * * shall be retained by the said Company, in trust for the State of New York * * *"

Surely in this section no right of diversion heretofore existing in the Morris Canal and Banking Company was released to the City of Jersey City, nor yet do we find any sanction of any release heretofore given by the Morris Canal and Banking Company.

By Section 4 of this Act, the Morris Canal and Banking Company was authorized and directed to sell any and all of the property the title to which is vested in the Company in trust for the State of New Jersey, other than some certain rights which were retained for the public use, and this particular section directed the exact manner and procedure for the sale of any of this property, as did other sections which followed it.

We then come to Section 10. By this section the Board of Directors of the Morris Canal and Banking Company received its power to carry out this Act. In this section we find these words:

> "All such contracts, instruments, or conveyances, consents, rights or other documents, shall be approved as to form by the Attorney General before being executed by the said Company."

Throughout this rather lengthy recital of the modern Morris Canal Legislation, we find exact and careful legislation to effect the end intended. The State was to acquire *"all of the property"* of the Morris Canal and Banking Company as was provided in Chapter 212, Laws of 1922, and all of the legislation which followed carefully and comprehensively considered and dealt with that which had been acquired. Such painstaking effort indicates clearly that the various Legislatures considered every phase of the situation having to do with the Morris Canal and Banking Company and its property and nowhere therein do we find either a release of the diversionary rights of the Canal Company to the City of Jersey City or a sanctioning of any release that heretofore had been given it.

Therefore the conclusion seems to be irresistible, *i. e.*, a release of these very valuable rights of diversion was never contemplated in anyone of all the acts passed concerning the Canal Company, nor was anything done to validate or sanction in any way any release that the Morris Canal and Banking Company might have executed before 1922. We therefore respectfully urge upon the Court that the release of 1909 is still *ultra vires,* and without action by the Legislature and the approval of the Attorney General of the State of New Jersey, or without the action of the Board of Directors of the Morris Canal and Banking Company and the approval of the Attorney General, still is null and void.

As was decided in the *Weiderman* case, *supra,* all of these rights have not been acquired and the records of this Court will show that this Court affirmed judgments for large sums of money, which would hardly be called inconsiderable, even in these days. Manifestly, the Water Company

has not acquired all the rights of diversion in the Rockaway River above the dam and vested same in Jersey City.

It was argued by counsel for the Water Company in the Court below, that the Morris Canal Commission which was created by the Act of 1922, mentioned above, entered into the agreement on behalf of the State of New Jersey concerning the properties of the Morris Canal and Banking Company, that the property should be turned over to the State of New Jersey for the consideration mentioned in the contract subject to the release of 1909. We respectfully submit that the Commission was without power to do any such thing. The Act which created the Commission expressly sets forth, as is quoted above, the extent of its duties and specifically states that the Commission was to acquire *"all* the property, lands, rights, easements, privileges and franchises, of whatsoever character now vested in the Morris Canal and Banking Company, as well as that which has passed to or has been directly or indirectly acquired by the Lehigh Valley Railroad Company."

Now *all* the property in the language of the statute certainly includes these property rights of diversion. Up to that moment we must all concede the release of 1909 was ineffectual, meaningless and *ultra vires.* Therefore the Morris Canal Commission was directed to acquire these rights of diversion, along with the other property of the Morris Canal and Banking Company.

## CONCLUSION.

**The Water Supply Company is not entitled to payment of the $500,000.00.**

Jersey City is entitled to the whole flow of the Rockaway River in the Boonton Reservoir as it existed at the time of the making of the original contract, and until the whole flow is obtained the contract has not been fulfilled. Outstanding rights of diversion however, still exist:

(a) The Cooper-Lord Raceway.

(b) The brook draining from an area surrounding Boonton.

(c) The rights of the Morris Canal Company under the statute of 1871.

(d) The rights adjudicated upon in all of the Weiderman Silk Dyeing cases.

Therefore Jersey City has not yet the whole flow of the Rockaway River, and hence the contract is unfulfilled.

The release of 1909 is still *ultra vires* because

(a) The Morris Canal and Banking Company before 1922 was without power to execute it.

(b) The Morris Canal and Banking Company, as trustee, is still without power to execute this release since the Legislature has neither sanctioned nor authorized it.

To require the payment of five hundred thousand ($500,000) dollars on behalf of this contract with all of its conditions, precedent and subsequent, still unfulfilled is to determine that the City shall pay for nothing. Such a conclusion is against reason and law.

For the reasons herein advanced we respectfully submit that the decree of the Court below herein complained of shall be set aside.

Respectfully submitted,

THOMAS J. BROGAN,
Solicitor of Complainant-Appellant.

THOMAS J. BROGAN,
EDWARD P. STOUT,
STEPHEN M. EGAN, JR.,
Of Counsel.

## New Jersey Court of Errors and Appeals.

Between

THE MAYOR AND ALDERMEN OF JERSEY CITY, a municipal corporation,
Complainant-Appellant,

*and*

JERSEY CITY WATER SUPPLY COMPANY, *et al.*,
Defendants-Respondents.

**On Appeal from the Court of Chancery.**

# BRIEF ON BEHALF OF RESPONDENT.

This is an appeal by The Mayor and Aldermen of Jersey City from a decree of the Court of Chancery advised by Vice-Chancellor Lewis, whose opinion will be found in Vol. I of the State of Case, at page 61.

By this decree Jersey City is required to pay to the Jersey City Water Supply Company, the respondent, $500,000. with interest from April 7, 1924 (Case, Vol. I, p. 64). The only issue presented is whether respondent is entitled to this payment under the provisions of an agreement made between the said parties on July 8, 1901. This agreement will be found at pages 357 to 364 of the State of Case.

## Statement of the Case.

The "Outline of the Facts" in appellant's brief, and some of the statements contained in the argument set forth in such brief, require, both for the benefit of the Court and in fairness to the ~~appellant~~ respondent, that an independent statement of the facts should here be made.

The sole question before the Court below was, and before this Court is, whether the portion of the Morris Canal lying between Dover and Montville has been abandoned under legislative sanction. It is true that in the more than twenty years that this case has been pending there have been many other issues raised. These, however, have all been heretofore finally disposed of by decrees of the Court of Chancery and of this Court, and there is no warrant for the endeavor constantly made throughout appellant's brief to again present these adjudicated issues.

The history of the transactions between the parties and of this suit is as follows:

On February 28, 1899, one Patrick H. Flynn made a contract with Jersey City to provide for it a water works and appurtenances of a stipulated capacity. That contract provided that there would be tributary to the storage reservoir of the water works the whole flow of the Rockaway River. Under its terms Jersey City had the right to purchase this water works and supply for $7,595,000. Shortly thereafter Flynn assigned all of his rights under this contract to respondent, which took over the completion of the work called for thereby (Case, pp. 327-356; p. 365, ll. 10-14).

Prior to the completion of the stipulated water works the Morris Canal and Banking Company asserted a claim that it had the right to take out

of the Rockaway River, above the proposed reservoir located at or near Boonton, so much of the waters of the Rockaway River Watershed as might be necessary for the purpose of navigation on its canal east of Boonton. This right was disputed by Jersey City, Flynn and the respondent (Case, p. 358, ll. 12-27). At the same time Jersey City claimed that under his contract with it Flynn was required to pass through said reservoir the whole flow of the Rockaway River and that the City was entitled to the flow of said waters to the extent of 70,000,000 gallons of water daily forever (Case, p. 358, ll. 28-34). Because of said claim of the Canal Company application was made to the Legislature which on March 22, 1901 passed an Act permitting Jersey City to modify the original contract (P. L. 1901, p. 416). Pursuant to the authority of this statute respondent and Jersey City entered into the supplemental contract of July 8, 1901, which as stated presents the sole question involved in the present appeal (Case, pp. 357-364).

By this supplemental contract it was provided that Jersey City should retain out of the agreed purchase price $500,000. until any one of four certain conditions therein prescribed had been fulfilled, when said sum was to be paid over by Jersey City to the respondent. One of these conditions was the delivery to Jersey City of a valid release from the Canal Company and its lessee, the Lehigh Valley Railroad Company, of all of the Canal Company's rights to divert the waters of the Rockaway River Watershed out of said River above the proposed reservoir site, the same to take effect upon their abandonment of the navigation of the Morris Canal between Dover and Montville under legislative sanction (Case, p. 361,

l. 9). Another of said alternative conditions was the abandonment under legislative sanction by the Canal Company and its lessee of said portion of the Canal and the surrender of the Canal Company's right to divert the waters of the Canal above the reservoir site. The terms of this contract will hereinafter be more fully discussed, but it should here be and now is stated that so far as this appeal is concerned the only material provisions of said contract are those embodying the two conditions just referred to, the fulfillment of either of which entitled respondent to the payment of the $500,000. withheld from it under said contract.

Other differences between the parties having thereafter arisen under the original contract of February 28, 1899 Jersey City on August 1, 1905 filed its original bill of complaint in this suit, praying that Flynn and the respondent might be decreed to convey to it the water works and supply agreed to be furnished, or so much thereof as they were able to convey, upon payment by the City of such part of the agreed consideration of $7,595,000. as might be ascertained to be due (Case, p. 388, p. 402). The suit came on for hearing before Vice-Chancellor Stevens, whose opinion is reported in *74 N. J. Eq. 104.* On June 4, 1908 a decree was made ordering respondent to make such conveyance to Jersey City at the contract price of $7,595,000. less (1) several deductions on account of certain terms of the original contract with which Flynn or the respondent had not complied, and (2) the $500,000. reserved by Jersey City under said supplemental contract of July 8, 1901 by reason of said claim of the Canal Company (Case, p. 404, p. 406). This decree with one or two unimportant exceptions was affirmed by

this Court on February 28, 1910. See *76 N. J. Eq. 607.*

The cause was then referred to the late Chancellor Magie as Special Master to ascertain and report the amount of the first-mentioned deductions. The Master having made his report it was confirmed by decree of the Court of Chancery made on November 16, 1910. This decree thus finally determined all of the controversies ever existing between appellant and respondent whether arising under the original or any supplemental contract, save only the single one covering the $500,000. so withheld from respondent solely by reason of the Canal Company's claim (Case, pp. 416-419).

Upon the application to confirm the Master's report respondent claimed that it had theretofore delivered to Jersey City a release of the Canal Company's claim and contended that the $500,000. deduction made by reason of such claim should therefore be eliminated. Vice-Chancellor Stevens, however, refused to then consider the effect of this release holding that the proper course would be to present that matter by a supplemental bill. See *79 N. J. Eq. 212, 215;* affirmed, *79 N. J. Eq. 212, 213, 215, 216.*

Subsequently, in 1918, Jersey City sought leave to file a bill of review to secure further deductions from the contract price because of the alleged failure of the respondent to have fulfilled the original contract. This application was denied and the denial thereof unanimously affirmed by this Court. See *90 N. J. Eq. 14, affirmed 90 N. J. Eq. 603.*

In 1919 respondent filed a supplemental bill alleging that the $500,000. so withheld from it un-

der the supplementary contract of July 8, 1901 by reason of the Canal Company's claim had become due because of the obtaining and delivery by it to Jersey City of said release. The Court of Chancery and this Court, however, held to the contrary upon the ground that it was the manifest intent of the supplementary contract that the $500,000. should not be paid until the delivery of a release presently effective, and that the release in question by its terms was not to take effect until the abandonment of the navigation of the Canal between Dover and Montville under legislative sanction, which had not then taken place. *93 N. J. Eq. 36;* affirmed, *93 N. J. Eq. 620.*

On June 6, 1924 when, as we shall demonstrate under Point I of the following Argument, navigation upon this portion of the Morris Canal had been abandoned under legislative sanction, the respondent filed its second or present supplemental bill alleging that the $500,000. had become due. Answer thereto having been filed by Jersey City, a full hearing was had before Vice-Chancellor Lewis on which hearing Jersey City unsuccessfully urged as grounds for dismissal of the bill all of the matters set forth on the present appeal. The learned Vice-Chancellor in his opinion resulting in the decree in favor of respondent, said as follows:

> "It is now contended by the water supply company that the legislative sanction referred to has been given, through the medium of numerous acts of the Legislature of this State, subsequently enacted; and that all the terms, conditions and requirements exacted by that legislation have been complied with and performed.
>
> Voluminous testimony has been taken upon the present hearing, and the various aspects of this final phase of the litigation presented

by counsel have been exhaustively argued in accordance with their respective contentions.

I am satisfied, however, that the sole material issue now involved is that which was presented by the former supplemental bill; and that the condition which, in that suit, was decreed to be then unfulfilled, has now been fully complied with. It follows, therefore, that the release from the Morris Canal and Banking Company, and its lessee, delivered by the Water Supply Company to the City of Jersey City, and which was to take effect upon their abandonment of the navigation of said canal between Dover and Montville, *under legislative sanction, is a valid release* within the proper construction of the fourth section of the main contract, and an effective compliance with the provisions of that paragraph."

The decree appealed from was entered on this opinion and awarded respondent the $500,000. in question with interest from April 7, 1924, the date of the demand for payment thereof (Case, p. 64, l. 42).

We submit, that for the following reasons, the decree below should be affirmed:

## ARGUMENT.

### I.

### Condition "Fourth" of the Supplemental Contract of July 8, 1901 has been fully complied with.

This condition was as follows:

"Fourth.—Whenever the contractors shall deliver to Jersey City a valid release from the Morris Canal and Banking Company and its lessee releasing all their rights to divert

> the water of the Rockaway River watershed out of said river above said proposed reservoir site, the same to take effect upon their abandonment of the navigation of the said canal between Dover and Montville under legislative sanction for a sum therein to be named and to be paid upon such abandonment, then there shall be paid over by Jersey City to said contractors all of said sum of $500,000, except the amount named in said release, which last mentioned amount the contractors authorize Jersey City to pay to said Morris Canal and Banking Company and its lessee upon the actual abandonment aforesaid'' (Case, p. 361).

On May 12, 1909 respondent obtained from the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, its lessee, and then delivered to Jersey City a release releasing to Jersey City, its successors and assigns forever—

> ''All our rights to divert the waters of the Rockaway River watershed out of said river above the proposed reservoir site mentioned in said supplemental agreement of July 8th, 1901, upon which site there has since been erected a reservoir below Boonton by the Jersey City Water Supply Company, under its contracts with Jersey City.
>
> This release to take effect upon our abandonment of the navigation of the Morris Canal, between Dover and Montville, under legislative sanction and upon the payment by the Mayor and Aldermen of Jersey City to us of the sum of One Dollar ($1.00) as hereinbefore provided upon such abandonment. TO HAVE AND TO HOLD THE SAME unto the said THE MAYOR AND ALDERMEN OF JERSEY CITY, their successors and assigns forever'' (Case, Ex. D 1, pp. 295-297).

It is abundantly proven and not questioned that respondent paid a valuable consideration for

this release and from the release itself it is clear that it was the intention of the Morris Canal and Banking Company and the Lehigh Valley Railroad Company to execute an instrument in strict conformity with the requirements of paragraph "Fourth" of the agreement of July 8, 1901, in both form and effect. The habendum clause in said release reads as follows: "To have and to hold the same unto the said The Mayor and Aldermen of Jersey City, their successors and assigns forever" (Case, p. 274, l. 26; pp. 288-289).

Obviously this release *in terms* specifically conforms with the "Fourth" condition of the supplemental contract of July 8, 1901. And this is not questioned by appellant. But upon the proceedings had under the prior supplemental bill both Vice-Chancellor Lewis and this Court held that such release did not *then* meet the *requirements* of such condition because it was not intended to become effective until abandonment of navigation on the Canal between Dover and Montville under legislative sanction. What this Court said was as follows:

> "As we have seen, the fourth paragraph of the contract provided that the $500,000. retained should be paid whenever the water supply company should 'deliver to Jersey City a valid release from the Morris Canal and Banking Company and its lessee, releasing all their rights to divert the waters of the Rockaway River watershed out of said river above said proposed reservoir site, the same to take effect upon their abandonment of the navigation of said canal between Dover and Montville, under legislative sanction'.
>
> "Properly construed, that means that the money should be surrendered to the water supply company as soon as a valid release was delivered, which should be presently effective—that is, one which should ex-

> tinguish any future right of appropriation by the canal company. Now, the so-called release which was executed and delivered, although following the form of the contract, does not comply with the manifest intent and purpose of the contract. By its terms it does not take effect until abandonment of the navigation of the canal between Dover and Montville under legislative sanction. Legislative sanction has not been given. The release, therefore, was not effective when it was delivered; it is not effective today, and may never be effective, for the legislature may never release the canal company from its public duty of operating the canal between the points mentioned in the document. Under present conditions, the instrument, while in the form of a release, is not the valid release contemplated by the contract, since it never can become operative in the slightest degree until the provision with relation to abandonment under legislative sanction has been fulfilled.
>
> "The supplemental bill of the water supply company was therefore properly dismissed with costs."

That the situation thus established as the one which must be met before the release would become effective has been fully met is proven by the present appeal record.

(a) *Navigation on the portion of the Canal lying between Dover and Montville has been abandoned.*

This is clearly shown by the book of 32 photographs received in evidence (Ex. A 1, Case, p. 92) and forming part of the appeal record, to which the attention of the Court is first requested. These photographs show conditions along the section of the Canal between Dover and Montville prior to

and at the time of the hearing. In themselves they sufficiently establish the abandonment not only of navigation but of the Canal itself.

This photographic evidence is fully supported by the undisputed testimony of Dr. Henry B. Kummel, the Director of the State's Department of Conservation and Development and General Manager of the Canal Company's property under the supervision of that Department; Mr. Cornelius C. Vermeule, Consulting and Directing Engineer of the Canal property and Mr. John H. Cook, the respondent's Vice-President. All of these gentlemen testified to the complete abandonment of the section of the Canal formerly lying between Dover and Montville. It has not been capable of navigation since May 2, 1924, the work of draining off the water having then been completed (Vermeule, Case, pp. 207-210). At the time of the hearing no water remained in any such portion of the Canal except for a small stretch at Boonton used as a raceway. The feeders had been drained, the aqueducts which formerly carried the Canal over the Rockaway River a short distance east of Peer's Lock and over the Passaic River at Mountainview and at Little Falls had been removed; Peer's Lock near Denville and the Lock at Powerville had been completely filled with rock and earth; the major portion, if not all, of the bridges formerly crossing the Canal had been removed and a large number of roads built across the Canal by solid fill. The continuity of the Canal as a waterway had been completely destroyed not only in the section lying between Dover and Montville but for its entire length from the Hackensack to the Delaware. (Case, Kummel, pp. 124-147; Cook, pp. 177-178; Vermeule, pp. 207-210). An agreement had been made with the City of Dover

for the sale of that portion of the Canal lying in Dover north of Sussex Street and negotiations for the sale of other portions thereof were pending (Kummel, Case, p. 126, p. 161). Much of the work of dismantling and abandonment near Boonton had been actually performed by Jersey City itself under an agreement by which the City had acquired the right to build and maintain a sewer line in what was formerly the bed of the Canal (Kummel, Case, p. 133, Ex. F7½, p. 489).

These actions taken as a whole not only indicate and establish an intent to abandon but in themselves constitute a complete abandonment of the Canal as a waterway.

(b) *Such abandonment has been effected under legislative sanction.*

All of this work has been done not merely with legislative sanction, but at the express direction of the Legislature in order to effect an abandonment of the Canal and its appropriation to other public uses. The following series of statutes enacted from 1922 to 1925 establishes this.

The 1922 Session of the Legislature appointed a commission to negotiate for the acquisition of the Canal by the State. (Ch. 212, P. L. 1922, p. 367). On November 29, 1922 an agreement was entered into between this Commission and the Morris Canal and Lehigh Valley Railroad Companies providing for such acquisition (Kummel, Case, pp. 108-109, unmarked exhibit, Case, p. 437). This agreement was consummated on March 1, 1923 by the complete transfer of title, the State acquiring title to the Canal and all its appurtenances with certain exceptions, none of which were located between Dover and Montville or have any bearing in this suit (Kummel, Case, pp. 109-113).

By its Act approved March 12, 1924 (P. L. 1924, p. 506) *the Legislature not only authorized, but expressly directed the discontinuance as a means of transportation of all portions of the Canal and its feeders lying between the Hackensack River in the Town of Kearny and the Town of Phillipsburg.* Section 1 of this Act reads as follows:

> "The Morris Canal and Banking Company is hereby authorized and directed to discontinue the use as a means of transportation by water of that portion of the property, the title to which is vested in the said company in trust for the State of New Jersey, which has heretofore been used as a means of transportation by water and which is located between the westerly shore or bank of the Hackensack River in the town of Kearny and the southerly line or side of Main Street adjacent to Green's bridge in the town of Phillipsburg, which portion of said property is referred to in this act as the "Morris Canal" or as the "Canal"; and to discontinue the use as a means of transportation of water to the canal of those portions of such property which have heretofore been used as feeders to the canal; and for such purpose the said company is hereby authorized and directed to drain off the water from the canal and feeders, whenever and wherever such action may be taken, in its judgment, without the creation of insanitary conditions or the impairment of contract obligations. Such portions of such property shall be applied and are hereby dedicated, subject to the limitations hereinafter provided, to the public use as public highways for the transportation and passage thereon of persons and property and for any and all other purposes of public highways."

This Act further authorized and directed that as soon as the water should have been drained off, the

highway and road bridges theretofore maintained by the company at intersections of the Canal with existing highways and roads should be removed, and the Canal bed at these points filled, graded and paved or surfaced to conform to the adjoining highways or roads respectively. (Sec. 7). The sale of all structures and parts thereof and all materials to be removed on dismantling the Canal was directed. (Sec. 5). Authority was given to dispose of the Canal bed to the municipalities respectively through which it passed for use as a county road, and so much thereof as might not be purchased by them was directed to be sold at public sale. (Secs. 4 and 5). Other evidence of the legislative sanction for the abandonment not only of navigation on the Canal, but of the Canal itself will be found in the following additional statutes: Chapter 11, Pamphlet Laws of 1923, p. 34, approved February 28, 1923, Chapter 28, Pamphlet Laws of 1923, p. 60, approved March 2, 1923, Chapter 110, Pamphlet Laws of 1923, p. 208, approved March 19, 1923, Chapter 111, Pamphlet Laws of 1923, p. 209, approved March 19, 1923, Chapter 112, Pamphlet Laws of 1923, p. 210, approved March 19, 1923, Chapter 71, Pamphlet Laws of 1924, p. 139, approved March 8, 1924, Chapter 77, Pamphlet Laws of 1924, p. 150, approved March 8, 1924, Chapter 78, Pamphlet Laws of 1924, p. 151, approved March 8, 1924, Chapter 79, Pamphlet Laws of 1924, p. 154, approved March 8, 1924, Chapter 80, Pamphlet Laws of 1924, p. 156, approved March 8, 1924, Chapter 218, Pamphlet Laws of 1924, p. 482, approved March 12, 1924, Chapter 75, Pamphlet Laws of 1925, p. 248, approved March 13, 1925.

The State had caused the former Canal to be posted with notices reading as follows:

> "The property of the Morris Canal Company belongs to the State of New Jersey. Municipalities and individuals are warned that the canal is no longer a water course * * *". (Photo., No. 18A).

There is thus shown to have been fully accomplished the very things which this Court determined in the above quoted portion of its opinion upon the first supplemental bill were needed to make the release in question a valid release within the terms of condition "Fourth" of the supplementary contract, and a compliance with such condition.

(c) *As to the arguments of appellant that the release is still ineffective.*

Notwithstanding said previous decision of this Court and the demonstration made by the present appeal record of the fulfillment of the condition upon which this Court held that the release would become effective, appellant's brief argues at length that it has not become effective. This argument seems to divide itself into two propositions, each of which we will now briefly consider.

(1) *The release was never and is not ultra vires.*

Appellant's claim to the contrary is sought to be based upon the ground that a corporation holding a franchise from the State to perform a public function can not by any act or contract effectually divest itself of any property or rights necessary for the performance of its franchise obligations. With this general principle we agree. It, however, has no application to the present case. By its terms the release under consideration was only "to take effect upon our abandonment of the navigation of the Morris Canal, between Dover and Montville, under legislative sanction" * * *

(Case, p. 296, l. 34). The right released was the right to divert the waters of the Rockaway River Watershed subsequent to the time when navigation upon the Canal should be abandoned with the consent of the State. It was not until after the State should relieve the Canal Company from the further performance of its franchise duties or obligations that the release was to speak. This, as we have seen, the State has now done through the above cited Acts of its Legislature. The mere fact that the release was executed and delivered prior to that time but upon condition that it was not to be effective until the State had so acted could not make it *ultra vires.*

The absolute delivery of the release was made in 1909, and although it was to take effect upon a contingency, when that contingency happened it became absolute as the releasors' deed by relation as from the first delivery. From the date of its delivery it has never been and is not now within the power of the releasors, or their assigns, to revoke or in any way recall or modify it. Appellant concedes this at page 19 of its brief. See also, *Timothy* v. *Wright,* (8 Gray) 74 Mass. 522, 527, opinion by Chief Justice Shaw.

When the Canal Company with the authority and approval of the State transferred and conveyed to the State the portion of the Canal lying between the Hackensack River and Phillipsburg, and the State directed abandonment of navigation and the Canal to be dismantled the Canal Company no longer had any further public duty to perform. Nor did it thereafter have any right to divert the waters of the Rockaway River Watershed, as the only right which it ever had or claimed to have so to do was for the maintenance of navigation on the Canal. Nowhere in the Act creating the Canal Company was it given

authority to divert the waters of the Rockaway River for any other purpose. Section 27 of the Act creating said Company (P. L. 1824, pp. 158, 170) expressly provided:—

> "* * * that the said corporation shall not be authorized to take or appropriate to the use of said canal or under color or pretence that the same are necessary therefor, any lands, waters or streams of water, but such only as are actually necessary for the erection and use of said canal for the purposes of navigation only and its necessary towing paths and works * * * that the said corporation or any other person shall not be authorized to use or appropriate any part of said waters for mills or any other purpose than the mere navigation of said canal; and all waters not used for that purpose shall be permitted without unnecessary interruption to flow into their ancient and natural courses and channels; * * *"

That the Legislature in 1871 (P. L. 1871, pp. 444, 445) made it lawful for the Canal Company to use the surplus water of the Canal or any of its feeders not needed for the purposes of navigation in furnishing a municipal water supply has no bearing upon the validity of the release. For when the release became effective the Canal Company had conveyed its Canal and appurtenances to the State, the latter had directed the abandonment of navigation on the Canal (P. L. 1924, p. 506) and the Canal Company no longer had any surplus water. Appellant concedes this on page 15 of its brief, lines 18 to 22 thereof. Were authority needed to support this conclusion it will be found in *Fox* v. *Cincinnati,* 104 U. S. 783, 785, 786 (1881), and the cases there cited. Moreover, by an agreement made between the Canal Company, its lessee the Lehigh Valley Railroad Com-

pany, and Flynn under date of November 21, 1898 the Canal and Railroad Companies expressly agreed that they would not thereafter divert, sell or supply for any use any waters from the Rockaway River Watershed above Boonton to any person or corporation under the provisions of the Act of March 14, 1871 or under any other authority (Ex. A, Case, pp. 301, 306), and no claim is made by appellant that any surplus water was ever attempted to be disposed of by the Canal Company or its lessee under the authority of this Act.

Upon the abandonment of the Canal with legislative sanction, this being the time the release first became effective, the Canal Company no longer had any right to divert or use the waters, the claim of which right so to do was the sole cause of the making of the supplementary contract of July 8, 1901.

(2) *The supplementary contract of July 8, 1901 in nowise obligated respondent to vest in Jersey City the title to the water rights then claimed by the Canal Company, or any other water rights.*

While in terms this contract stated that the modification thereby made of the original contract of February 28, 1899 should not relieve Flynn and the respondent from furnishing or delivering to Jersey City the quantity and quality of water required by the original contract, it only obligated them to convey to Jersey City upon its purchase of the plant and supply without additional compensation "all of *their* rights in the waters of the Rockaway River Watershed" (Case, p. 362, l. 31). As appellant admits on page 3 of its brief, the supplementary contract became necessary only because of the Canal Company's claim. As far as

any water rights claimed by the Canal Company were concerned the sole purpose and effect of this supplementary contract was to provide for the retention by Jersey City of $500,000. until the Canal should be abandoned with legislative sanction and these rights released by the Canal Company. The terms of the supplemental contract expressly stipulated a release. No mention is made of the necessity of any grant to or the vesting in Jersey City of the water rights claimed by the Canal Company. The release which has been delivered follows verbatim the language of the "Fourth" paragraph of the agreement of July 8, 1901, and now that navigation upon the Canal has been abandoned under legislative authority the release in every respect, in effect as well as in words, has become a complete fulfillment of the term of said agreement. This Court has expressly said:

> "Properly construed, that (said clause) means that the money should be surrendered to the water supply company as soon as a valid release was delivered, which should be presently effective—that is, one which should extinguish any future right of appropriation by the canal company."

No more terse statement of the correct construction of the "Fourth" paragraph of this contract can be made. An extinguishment of the Canal Company's right to divert was all that was intended.

Even had this Court not already so ruled, there could be no substantial controversy on this point for it is well settled that the effect of a deed founded on a valuable consideration is not restricted by any literal interpretation of the words used. *Havens* v. *Sea Shore Land Co.*, 47 N. J. Eq. 365, 372.

## II.

### Condition "Third C" of the Supplementary Contract of July 8, 1901 has also been fully complied with.

Paragraph "Third C" of the agreement of July 8, 1901 provides that said sum of $500,000. shall be paid to the respondent upon "the abandonment under legislative sanction by the Morris Canal and Banking Company and its lessee of the portion of the Morris Canal lying between Dover and Montville and the surrender of all of its rights to divert the waters of the Rockaway River above said proposed reservoir site" (Case, p. 360, l. 38).

The performance of this condition involved only two things, both of which have occurred: (1) The abandonment under legislative sanction by the Canal Company and its lessee of the portion of the Morris Canal lying between Dover and Montville, and (2) The surrender of all the Canal Company's rights to divert the waters of the Rockaway River above the reservoir site at Boonton.

1. Nothing need be added to what has already been said to show that the portion of the Canal formerly lying between Dover and Montville has been abandoned under legislative sanction.

2. Nor can it be doubted that the Canal Company and its lessee have surrendered all of the Canal Company's rights to divert the waters of the Rockaway River above the reservoir at Boonton. As appears by Ex. F-3 (Case, pp. 452-457) and Dr. Kummel's testimony (Case, pp. 110-113) the Canal Company and its lessee the Lehigh Valley Railroad Company, as the party of the

first part, on March 1, 1923, conveyed to the State, as the party of the second part, not only all lands and rights of way of the said party of the first part between the Hackensack River in the Town of Kearny and the Town of Phillipsburg in the County of Warren, and all of the right, title and interest of the said party of the first part in and to all that part of the Canal property and its feeders so located, but also "all the lands which said party of the first part owns which are appurtenant to or used in connection with the aforesaid part of the Canal and its feeders, and also all lands, land under water, water and water rights, rights of flowage, pondage and diversion of water appurtenant to the Canal, together with all rights of the party of the first part, or of any one claiming under them or either of them appurtenant to, or used in connection with the Canal, to take, use, impound, divert, sell and dispose of water" (Case, p. 453, ll. 9-33). The instrument by which this conveyance was made continues as follows: "This conveyance is intended to embrace *the surrender* to the party of the second part by the party of the first part of, and the party of the first part does hereby give, grant, sell and convey to the party of the second part, all the right and title acquired by or vested in said party of the first part, to impound, divert or take water at any point within the State of New Jersey, for any use or purpose in any way incident or pertaining to the Canal, or to the operation of the Canal, its feeders, works or appurtenances" (Case, pp. 453-454).

The State accepted this surrender expressly subject to the terms of the release in favor of Jersey City of the Canal Company's alleged rights to divert waters of the Rockaway Watershed above Boonton, and has confirmed the actions of its representatives in the acquisition of the Canal Com-

pany's property and water rights by authorizing the *abandonment* of the Canal as a means of transportation by water, directing it to be dismantled and the property of the Canal Company to be sold (P. L. 1924, p. 506).

The undisputed evidence shows that at the time this surrender was made there were no agreements in existence obligating the Canal Company to maintain a Canal between Dover and Montville or in any way affecting its property located in this section; and that no rights to use the water of the Morris Canal derived from the Rockaway Watershed were then in existence (except three incidental license agreements which have been terminated) (Case, pp. 171-175).

It will be observed that the conveyance of property and water rights so made by the Canal Company and its lessee was to the State of New Jersey. It was a surrender thereof to the State, and not to the appellant that this condition "Third C" provided for, as distinguished from the release in favor of the appellant provided for in "Condition Fourth".

It is of no materiality that subsequently, by act of its Legislature, the State re-vested in the Canal Company the title to the property and water rights which it thus acquired to be held in trust by said Company for the State (P. L. 1923, p. 34), for such conveyance clearly and in terms constituted a surrender to the State of all of the rights of the Canal Company and its lessee to divert the waters of the Rockaway River above the reservoir site.

The abandonment of the section of the Canal in question under legislative sanction and this surrender constituted a complete compliance with condition "Third C" above set forth.

## III.

**The Supplementary Contract of July 8, 1901, under which the release in question was given, did not require respondent to extinguish other "paramount rights" to divert water above the Boonton Reservoir, and in fact no such rights exist.**

(a) *This contract, in so far as its provisions are material to this appeal, relates only to the release or surrender of water rights which the Canal Company claimed to have at the time the contract was executed.*

Of possible outstanding water rights of anyone other than the contractors or the Canal Company this contract makes no mention, and no obligation thereof extends thereto. The supplementary contract has nothing to do with the right of anyone else to divert water, and appellant is in error in stating as it does on page 3 of its brief that said contract provided that the $500,000. in question was to be retained by Jersey City, not only because of the Canal Company's claim, but until the provisions of the original contract of February 28, 1899 between Flynn and Jersey City should have been completely carried out. The supplementary contract, by paragraphs 3 and 4 thereof, make it clear that this money was to be withheld from the respondent only until any one of the conditions relating to the claim of the Canal Company had been fulfilled. The contract is capable of no other construction, and such construction has been uniformly placed upon it by this Court in the earlier proceedings in this suit hereinabove outlined.

In so stating we desire to remind the Court:

(1) That this supplementary contract was made more than four years before the original bill of complaint herein was filed; and (2) That as a result of the various above recited decrees of this Court and of the Court of Chancery made thereon between 1908 and 1918, when leave was denied to reopen them, Jersey City was allowed and received deductions from the contract price for all of the water or water rights which Flynn or the respondent might have agreed to furnish but had failed to furnish, in addition to being permitted to withhold the $500,000. here involved until the abandonment of the Canal between Dover and Montville under legislative sanction and the release or surrender of the Canal Company's claim (Decree of Court of Chancery of June 4, 1908, Case, p. 404; affirmed March 18, 1910, Case, p. 410; Decree of Court of Chancery of November 15, 1910, after reference to the late Chancellor Magie as Master, from which no appeal was taken, Case, p. 416). The Court of Chancery, as well as this Court, found and decreed that respondent had largely but not completely performed its contract obligations and they accordingly decreed that Jersey City was entitled to a conveyance of the water works and water supply as they then existed upon the payment of the contract price less the specific deductions allowed on account of the respondent's unperformed obligations, and subject to the retention of $500,000. solely as security against the Canal Company's claim.

In his opinion (*74 N. J. Eq. 104-196*) Vice-Chancellor Stevens said:

> "The City has elected to take the works. The case, therefore, comes within the rule laid down in *Bozarth* v. *Dudley, 44 N. J. Law*

> (*15 Vr.*) *304,* and *Feeney* v. *Bardsley, 66 N. J. Law* (*37 Vr.*) *240.* In this last case, Justice Van Syckel, speaking for the court of errors and appeals, approved the following direction: 'If the contractor has substantially performed his contract, even though he has failed to do so in some minor particulars, he is entitled to recover the contract price, less what will be a fair allowance to the owner to make good the defects in the performance of the contract.' This rule seems applicable to the case in hand. * * *''

Jersey City then accepted the water works and supply upon the terms so decreed and at no time since then has it been in a position to claim, as it now does, that the original contract had not been performed.

This was so held when in 1918 Jersey City by an application for leave to file a bill of review sought to reopen the question as to whether the respondent had fulfilled the obligations of the original contract, and the Court of Chancery and this Court as well refused to permit it so to do. In his opinion denying such application, and which was adopted by this Court, Vice-Chancellor Stevens pointed out that the works had been transferred and delivered to Jersey City in 1911 pursuant to the earlier decrees referred to, that ever since then Jersey City had continued to operate and use these works and that the original contract could no longer be regarded as open to further litigation in respect to any alleged failure of the contractor to perform it. See *90 N. J. Eq. 14,* affirmed, *90 N. J. Eq. 603.*

This Court in its opinion under the first supplemental bill said, ''The purpose of the retention of the $500,000. was to protect Jersey City against the abstraction of water from the Rockaway River by the Canal Company and its lessee * * *''.

And in his opinion resulting in the present appeal, Vice-Chancellor Lewis said, "I am satisfied, however, that the same material issue now involved is that which was presented by the former supplemental bill; and that the condition which, in that suit, was decreed to be then unfulfilled, has now been fully complied with".

(b) *The alleged "paramount rights" of others than the Canal Company to divert water above the reservoir site do not exist.*

Notwithstanding their conviction that enough has been said to show that the decree below should be affirmed, counsel for respondent feel it incumbent upon them to guard the Court against misunderstanding the effect sought to be given by appellant to the testimony appearing on pages 6 to 10 of its brief. This testimony is apparently quoted upon the theory that the $500,000., reserved under the supplemental contract of July 8, 1901 and the earlier decrees of this Court, was withheld to protect Jersey City not only against the water rights asserted by the Canal Company, but against the claims of anyone else whomsoever in the waters of the Rockaway River Watershed above Boonton Reservoir. The fallacy of this view we think has been completely demonstrated. Certainly there is nothing in the contract itself or the previous decrees to indicate that the $500,000. reserved thereunder was to be withheld on account of any other such rights.

In fact, the evidence shows that there are no "paramount" or other rights to divert water above the Boonton Reservoir that diminish the flow of the waters of the Rockaway River Watershed into the Jersey City Reservoir at Boonton. Appellant's view to the contrary is based upon

three situations disclosed by the evidence, each of which will now be considered.

**1. Scott or Cooper-Lord Estate agreement.**

This agreement will be found on pages 501 to 508 of the State of Case. It was made in 1829. By it Scott acquired the right to use the Canal facilities at Boonton as a raceway for the purpose of running a mill on the property which he owned there. (Ex. F9, Case, p. 501; Kummel, p. 168). This property came into the ownership of the Cooper-Lord Estate. The Rockaway River at this section did not cross the Canal. The River was dammed so that water could be taken into the Canal and allowed to flow from the Canal to the mill. (Case, Kummel, pp. 190, 197, 198, Vermeule, Case, p. 212). This is the only portion of the former Canal in which there was any water at the time of the hearing. The testimony makes it entirely clear, however, that such waters of the Rockaway River as are permitted to pass through this raceway are not diverted from the Watershed and *that all thereof are returned to the River above the reservoir* (Case, Kummel, pp. 141-142; p. 168, l. 35; p. 198, l. 15; Cook, pp. 179-181; p. 183, l. 23). The effect of this Scott agreement and of all that has been done or can be done thereunder is to pass some of the water of the River through this former section of the Canal above the reservoir but in nowise to prevent all thereof from reaching the reservoir. In other words, neither Scott nor his assigns has acquired or attempted to exercise any rights to divert the waters of the Rockaway River from the reservoir but have merely used a portion of the Canal as a raceway to convey the waters which Scott as riparian owner independently of said agreement

would have had the right to use for mill purposes.

Even were the contrary true, it could not affect the issues in the present proceeding for the reason that the supplementary contract of July 8, 1901 must necessarily be construed in the light of the facts that existed at the time of its execution, and consequently cannot be held to have contemplated the extinguishment of any right to divert the waters of the Rockaway River which the Canal Company had granted prior to that time. As already sufficiently appears, the contract has merely to do with the alleged water rights of the Canal Company itself.

**2. Cook or Capstick Agreement.**

This agreement was made in 1849. It appears at pages 510 to 513 of the State of Case. Prior to its execution, as a result of the building and operation of the Canal, some water which had theretofore reached Cook's mill by a brook had been diverted therefrom, and he had been permitted by the Canal Company to withdraw an equal amount of water from the Canal. The agreement of 1849 provided for the continuance of this arrangement and authorized Cook "to pass a stream of water the size of a twelve-inch square without head to the mill pond of said Cook" (Case, Ex. F-10, pp. 510, 511, l. 36). But this agreement ceased to have any effect before the pending supplemental bill was filed. In 1905 the Canal Company in anticipation of the possible abandonment of the Canal entered into a new agreement with the Messrs. Capstick, successors in title to Cook, whereby in consideration of the conveyance of certain other lands to the Capsticks and the payment to them of $29,000. the rights existing under the 1849 agreement with Cook

ceased upon the abandonment of the Canal under legislative sanction (Case, Ex. F-11, p. 513, Kummel, pp. 169-170). The Canal Company has fully performed its agreement with the Capsticks by causing the required conveyance and stipulated money payment to be made (Case, Ex. F-14, p. 529; Cook, p. 183). As a consequence this right of diversion ceased upon the abandonment of the Canal, and the waters which formerly flowed from the Canal through the Cook property under the agreement made with him in 1849 have in fact ever since July 1924 entered the Jersey City reservoir (Case, Kummel, pp. 170, 171; Cook, p. 181).

### 3. Brook at Boonton.

Mr. Vermeule testified that there is a stream which comes out of Boonton and joins the Canal just east of the Boonton Lock; that from a physical examination of the terrain it would seem that this stream formerly ran across the Canal and into the Rockaway River above the dam at Boonton, but that at the time of the hearing it emptied into the Canal east of the Boonton Lock and its waters reached the Rockaway River below the Jersey City reservoir (Case, p. 211). Mr. Potts, in his description of this stream, included a number of other streams with which it had been artificially connected. He stated the extent of the watershed drained by the stream constituted about 125 acres (Case, pp. 218-219). There is no evidence as to the extent of territory which this Boonton Brook drained before it was diverted from its original course, nor how much it would drain if returned thereto. But in any event the area is insignificant and it is uncontradicted that the only waters that flow into this brook are those which fall upon the Town of Boonton and are filled

with sewage. If permitted to flow into the original course of the brook to the Rockaway River above the Jersey City reservoir the contents of this brook would not perceptibly increase the water supply from the Rockaway Watershed and would contaminate the waters of the reservoir (Case, Cook, pp. 181-182; Kummel, p. 193). Mr. Vermeule testified: "We have not dared to make the cut at the point where that brook should go out. The law directs us to make these cuts and restore the natural drainage, but this is a case in which if we really made the cut, it would send the sewage of Boonton down into the reservoir of Jersey City" (Case, p. 217, l. 25).

Appellant's claim that the respondent is not entitled to the payment of the $500,000. reserved under the supplemental contract of July 1901 because this small amount of badly contaminated water does not reach its reservoir is a striking illustration of the fallacy of its views with regard to the effect of such contract. On page 14 of its brief it says:

> "This water belongs to Jersey City. It has contracted to buy this very water and, whether it is polluted or not, is no concern of the Water Works Company (Jersey City), because under the decision of Vice-Chancellor Stevens in 74 Eq. above quoted the answer is that the water should be delivered in accordance with the standard of quality called for in the contract of Jersey City. *We believe we could rest our argument here that the supplemental bill must be dismissed on these undisputed facts.*"

The fact is that this present sewage situation at Boonton is a necessary development, due to increase in population, of the very one which existed at the time the original contract of 1899

between Flynn and Jersey City was made. This contract required Flynn to build an intercepting sewer to take care of this sewage. This had not been done by the time the original bill came on for hearing and this then appearing, a deduction of $58,300. from the contract purchase price was decreed unless the respondent entered into a bond (Case, p. 418, l. 18). In the opinion then rendered by Vice-Chancellor Stevens he said:

> "Boonton is largely built on a steep hillside which sinks abruptly into the Rockaway River. It is so near the reservoir that, from the outset, it has been conceded on all sides that a drain is necessary. The intercepting drain above referred to is designed to catch any polluting matter that would otherwise find its way into the stream.
>
> As under its contract the water supply Company is bound to give a good title to its plant, of which this drain is an important part, it would seem clear that it does not fulfill its obligation when it gives a drain subject to alteration at the pleasure of the canal company, the title to which, as above stated, may expire at any time. On the other hand, it would seem unjust to withhold from the water company indefinitely, the cost of the intercepting sewers that may never have to be substituted. This cost the master has reported to be $58,300. I think that if the water company will give bond with sufficient surety to reimburse the city, up to this amount, for what it may be obliged to expend, when the drain shall cease, for any lawful reason, to be as efficient as it now is, the city will be adequately protected."

This, therefore, is another of the matters that was concluded by the decree in the original suit and has no relation whatever to the $500,000. involved in this suit. The attempt made by Jersey

City in 1918 to reopen the previous decrees dealt with the same general pollution situation. Vice-Chancellor Stevens and this Court then held that the obligations of the respondent on account thereof had been disposed of by the original decree. *90 N. J. Eq. 14,* affirmed *90 N. J. Eq. 603.*

Moreover the Canal Company, as appears and as is conceded, has released to Jersey City all of its rights to divert any of the waters of the Rockaway Watershed, which become effective upon the abandonment of the Canal. The Legislature has directed that this brook be returned to its original course. If Jersey City desires to have the waters of the brook in question flow into the Rockaway River above its reservoir it can do so in accordance with the above-mentioned provisions of the original decree in this suit.

We deem it unnecessary to discuss the statements in appellant's brief with reference to Lake Hopatcong as its waters are not in the Rockaway Watershed but in the Delaware Watershed (Case, Kummel, p. 104, p. 196, l. 27, Map opposite p. 436).

## IV.

### The issue in this suit is not res adjudicata.

This issue is as to whether any one of the conditions prescribed in paragraph "Third" or paragraph "Fourth" of the supplemental contract which had not been performed at the time of the hearing upon the first supplemental bill have now been performed. In the nature of things this issue could not have been presented in any earlier stage of the suit.

At the top of page 25 of its brief appellant says that this Court in 1911 held in *79 N. J. Eq. 212,*

*215*, that the release was not a compliance with the supplementary contract. A reference to the opinion there referred to and quoted from shows that all that was then stated was that respondent was not then entitled "to the immediate payment of the money" because the Canal had not then been abandoned with legislative sanction.

Neither Vice-Chancellor Lewis nor this Court in affirming his decree in the proceedings had under the prior supplemental bill did more than hold that paragraph "Fourth" of the supplementary contract of July 8, 1901, contemplated the actual abandonment of the Canal between Dover and Montville under legislative sanction as a condition precedent to the payment of the $500,000 involved and that at the time of the hearing upon such prior supplemental bill such abandonment had not occurred. The only fair inference that can be drawn from the opinion of this Court in such earlier proceedings is that the release in question would become a valid release contemplated by the "Fourth" paragraph of July 8, 1901, when the Canal between Dover and Montville had been abandoned with legislative sanction. In his opinion in the present proceeding Vice-Chancellor Lewis expressly holds that the condition upon which said money was to be paid has now been fully complied with (Case, p. 63).

## V.

### The present Supplemental Bill was not prematurely filed.

The Legislature by Ch. 229 of the Laws of 1924, approved March 12, 1924, not only authorized but

directed the discontinuance of the Canal as a means of transportation by water (P. L. 1924, p. 506). The present bill was filed June 6, 1924. The undisputed proofs already reviewed under Point I hereof show that by May 2, 1924, not only had navigation upon the Canal between Dover and Montville been abandoned, but that this section of the Canal had then been dismantled and filled in to such an extent that navigation thereon was an impossibility. Certainly nothing more can be required to show that navigation on the section of the Canal in question, as well as that section of the Canal itself, had been abandoned under the legislative sanction at the time the bill was filed.

Even were the contrary true, there is no claim that such abandonment had not been accomplished at the time of the hearing. While a decree in equity generally operates upon the parties and subject matter as they stood at the commencement of the suit, it does so only to subserve the ends of justice, and in a case like the present, where the issue is only one as to whether the title to be delivered conforms with the pre-existing contract, the decree is addressed to the rights existing not at the commencement but at the time of the hearing of the suit.

*Oakey* v. *Cook,* 41 N. J. Eq. 350; *Moore* v. *Galupo,* 65 N. J. Eq. 194, 198, and *Agens* v. *Koch,* 74 N. J. Eq. 528, 529, 530.

## CONCLUSION.

We respectfully submit that the Appeal Record discloses that condition "Fourth" and condition "Third C" of the agreement of July 8, 1901, has each been complied with; that respondent by reason of the fulfillment of either one of said condi-

tions is entitled to the payment of the $500,000 heretofore withheld from it with interest from April 7, 1924, the date of the demand for payment, and that the decree below should therefore be affirmed with costs.

Respectfully submitted,

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