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Bill of Complaint.

Filed August 16, 1917.

In Chancery of New Jersey.

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

The complainants, Leslie N. Simson and George W. Hunter, of St. Louis, Missouri, respectfully show:

1. That on the 15th day of March, A. D. 1915, they executed a written instrument, a copy of which is annexed hereto, made a part of this bill and marked Exhibit A, therein and thereby declaring and constituting themselves trustees of all property received or thereafter received by them under the title "Midvale Chemical Works," to be administered by them subject to and in accordance with the terms and conditions of said instrument.

2. That thereafter, to wit: On the 12th day of October, 1915, complainants, as authorized by Article I. of said written instrument, duly designated the City of St. Louis, State of Missouri, as the location of the principal office of the said Midvale Chemical Works.

3. That after the execution of the said written instrument complainants, as trustees under the same, acquired in the name of the "Midvale Chemical Works" a certain tract of land at Elizabeth, Union County, New Jersey, together with the factory buildings located thereon, and machinery, liquid and working assets and other

personal property therefor, and thereafter until about the 29th day of May, 1917, operated the same under the said Exhibit A as a chemical plant.

4. That on the 29th day of May, 1917, complainants as such trustees and in the name of the Midvale Chemical Works entered into a written agreement with Ernest C. Klipstein of the City of East Orange, County of Essex, and State of New Jersey, a copy of which is annexed hereto, made a part of this bill and marked Exhibit B, for the sale of said plant, including liquid and working assets.

5. That said Klipstein paid complainants the sum of $500 and the joint inventory of the said liquid and working assets was made as provided in the said agreement and showed the amount of said assets to be about $55,000, and the said assets were on the 31st day of May, 1917, delivered to the said Klipstein and he accepted possession of and used the same.

6. That as a result of said inventory the purchase price of said plant under the terms of said agreement, Exhibit B, was increased to the sum of at least $205,000.

7. That on the 31st day of May, 1917, complainants likewise delivered to said Klipstein all the real estate and other personal property embraced in said agreement, including the buildings situated thereon and machinery therein contained and he accepted possession of said property and continued the active operation of said plant.

8. That by mutual consent the delivery of the deed and conveyance of the said land and prop-

erty, and the first payment of $50,000 therefor and delivery of the mortgage for the balance of the purchase price, as provided in said agreement, Exhibit B, were adjourned first to the 22nd day of June, 1917, and then to the 3rd day of July, 1917, at one o'clock in the afternoon, at the place in said agreement mentioned.

9. That on the 3rd day of July, 1917, at one o'clock in the afternoon, at the office of Frederick Seymour, 120 Broadway, New York City, the complainants tendered to the said Klipstein a good and sufficient deed of conveyance, conveying to him a good and marketable title to the real estate of the said complainants in said agreement, Exhibit B, described, free and clear of all encumbrances except the mortgages specified in the agreement which the said Klipstein was to assume as a part of the purchase price, which said deed also embraced all buildings and fixed machinery covered by said agreement and the complainants also tendered to the said Klipstein at the said time and place, assignments of all contracts made by the complainants for the purchase or sale of raw material or manufactured products, as contemplated under said agreement, and also assignments of notes, accounts receivable, acceptances receivable and insurance policies, and offered to do any and all things necessary for a complete performance of said agreement, and in every respect duly performed and offered to perform all the conditions of said agreement, Exhibit B, on their part to be performed, but the said Klipstein then and there declined to make said first payment and execute and deliver the said mortgage, and declined to perform any of the covenants and promises contained in the said agreement.

10. That afterwards, to wit, on the 6th day of July, 1917, while the said Klipstein was so in possession of said property and premises in said agreement described, a fire occurred without fault of the complainants which destroyed some portion of the buildings on said premises and the machinery contained therein constituting a part of the said plant, but the legal title to said property and premises still remaining in the complainants and the insurance policies covering the machinery, etc., still remaining in the name of the complainants, the complainants have duly notified the said Klipstein of their willingness to do all necessary things to procure the adjustment of the fire loss and payment of the insurance on the building and premises so partially destroyed, as trustee and for the benefit of the said Klipstein, and pending the final disposition of this suit the complainants have notified the insurance companies of the said loss and taken all necessary steps to protect the interests of the said Klipstein in said property.

11. The complainants were ready, willing and able to complete the said agreement of sale on the 3rd day of July, 1917, according to the terms of said agreement and adjournment, and in fact tendered to the said Klipstein at the time and place so agreed upon their deed of conveyance for the said property and expressed their willingness to accept from him such payment and security as was provided for in said agreement of sale, and since the said 3d day of July, 1917, they have notified said Klipstein that they are ready, willing and able to carry out the said agreement of sale, and they show that they are now ready, willing and able to carry out the said agreement and to do and perform the

matters by them required to be done and performed thereunder, but the said Klipstein has at no time since the 3rd day of July, 1917, been willing to perform the said agreement of sale himself, nor to accept performance thereof by the complainants.

Complainants are without adequate remedy in the courts of law and therefor pray:

1. That Ernest C. Klipstein, who is the defendant to this suit, may answer this bill of complaint without oath and each statement therein made.

2. That the defendant may be decreed to perform said agreement of sale and pay to the complainants the sum of $50,000, with interest thereon from the 3rd day of July, 1917, and execute and deliver to plaintiffs a bond and mortgage for the balance of the purchase price of said plant.

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

HARRY WRIGHT,
Solicitor and Counsel with Complainants.

JOHN W. GRIGGS,
Of Counsel.

EXHIBIT A.

ARTICLES OF ASSOCIATION OF MIDVALE CHEMICAL WORKS.

Article I.

Know All Men by These Presents: That we, Leslie N. Simson and George W. Hunter, of the City of St. Louis, State of Missouri, have associated ourselves together as trustees and hereby form an association to be known as "Midvale Chemical Works," the principal office of which shall be Elizabeth, New Jersey, or at such other place as the trustees may from time to time designate, and the business of which shall be carried on at such place as the trustees may from time to time determine.

Article II.

The trustees shall have the power to contract and carry on in the name of and for the association any business which could be lawfully conducted or carried on by an individual, and, in the conduct of such business, may use and invest any funds of the association, and shall have full general power and authority to buy, sell, pledge, mortgage, grant, convey and exchange property of every description, real, personal or mixed; borrow money and secure the payment thereof by mortgage or any other lien or general obligation for the payment thereof out of the assets of the association; and do all things necessary to the conduct of the business which they may undertake.

Article III.

It shall be the duty of the trustees to manage and direct all business of the association, and,

in the management and direction of such business, the trustees shall have the power to employ such persons as may be needed in the conduct of the business of the association, and to delegate to such persons, or to either of the trustees such powers and duties as may be deemed by the trustees desirable and expedient in the conduct of the business.

ARTICLE IV.

The trustees shall be deemed the absolute owners of all the property of the association and both the legal and equitable title to all such property shall be vested absolutely in them, their successors and the survivor or survivors of them, or to their successors, subject only to all applicable terms and conditions of this instrument.

ARTICLE V.

The trustees shall have the right to issue preferred certificates of interest in the association, to be known as Class A certificates, to the extent of $15,000.00 par value of such certificates, represented by 150 shares or units of the par value of $100.00 each, which certificates shall be entitled to an annual dividend of 8% of the par value, or unretired portion thereof, which dividend shall be cumulative and preferred over any distribution or dividend on Class B certificates of interest, and, on distribution or liquidation of the assets of the assocation, the Class A certificates shall have preference over the Class B certificates to the extent of the par value of the said Class A certificates; provided, however, that when the Class A certificates shall have received from the distribution of the assets of the association their full face value with accrued dividends, they shall be considered fully retired and

shall not participate further in the distribution of dividends or of the assets of the association.

The Class A certificates of interest shall be of the following form:

CLASS A

CERTIFICATES OF INTEREST IN MIDVALE CHEMICAL WORKS.

No..... .....Shares

Par Value of Shares, $100.00 Each.
Total Issue Class A, 150 Shares
Total Issue Class B, 300 Shares

This is to certify that ..... is the owner of ..... shares of $100.00 each of Class A interest in the Midvale Chemical Works, issued in accordance with articles of association, dated the ..... day ....., 191.., and subject to all the provisions thereof, and is entitled to participate annually in the profits of the association pro rata with all other outstanding shares of this class to the extent of 8% and no more, of the par value of this certificate, or the unretired portion thereof. Such participation shall be in preference to any distribution to the Class B certificates issued by the association, and if the said 8% is not distributed to the holder of this certificate in any year, the right to such participation shall be cumulative and shall be paid to the holder hereof out of the profits of the association in subsequent years. 50% of the net profits of the association, after paying the dividends on certificates of this class, shall be set aside for the retirement pro rata of the Class A certificates.

On liquidation or distribution of the assets of the association, certificates of this class shall be entitled to participate to the extent of the unretired portion of the par value of such certificates before any distribution shall be made to the Class B certificates of the association, and when an amount equal to the par value of Class A shares shall have been so distributed, the said Class A shares shall be considered fully retired and shall be entitled to no further participation in the dividends or assets of the association.

The interest represented by this certificate is personal property, irrespective of the nature of the estate of the trustee.

No certificate holder, or his assigns, heirs or legal representatives, shall at any time have or claim any legal or equitable interest in the property, whether real, personal or mixed, of the association, and nothing contained herein shall be considered as creating or giving to any certificate holder any interest in or to said property, but such certificate holder shall have an interest only in the net proceeds or profits which may be derived from the said property, or in the proceeds of the said property on liquidation or distribution, and only when and as such proceeds may become distributable under the terms of the aforesaid articles of association.

This certificate is transferable only by presentation thereof to the trustees, properly endorsed, and by transfer on the books of the association kept for that purpose.

In Witness Whereof, the trustees have caused this certificate to be signed by the chairman of the trustees and attested by the secretary, this ..... day of ....., 191...

.....

Chairman.

Attest:

.....

Secretary.

(Back of Certificate.)

For Value Received, the undersigned hereby sells, assigns and conveys all right, title and interest in the within certificate to..... ..... and hereby authorizes the transfer thereof on the books of the association.

.....

Witness:

.....

DATE	AMOUNT PAID	BY WHOM PAID

ARTICLE VI.

The trustees shall have the power and be authorized to issue Class B certificates of interest of the face value of $30,000.00 represented by 300 shares or units of the par value of $100.00 each, and such certificates shall not participate in the profits of the association until after all payments required to be made on the

Class A certificates of interest shall have been made and, on liquidation or distribution of the assets of the association, shall participate only after the Class A certificates have been retired at their full par value.

The Class B certificate of interest shall be of the following form:

CLASS B

CERTIFICATE OF INTEREST IN MIDVALE CHEMICAL WORKS.

Par Value of Shares, $100.00 Each.

No..... .....Shares

Total Issue Class A, 150 Shares
Total Issue Class B, 300 Shares

This is to certify that .....is the owner of ..... shares of $100.00 each of Class B beneficial interest in the Midvale Chemical Works in accordance with articles of association, dated the ..... day of ....., 191.., and subject to all the provisions thereof, and is entitled to participate in the profits of the association pro rata with all other outstanding certificates of this class.

Certificates of this class shall not be entitled to participate in the profits of the association until an 8% cumulative dividend has been paid on the Class A certificates of interest and until, in addition to the said 8% dividend, 50% of the remaining net profits of the association shall have been set aside for the retirement of the Class A certificates, and, on liquidation or distribution of the assets of the association, this certificate shall not participate in such distri-

bution until the Class A certificates shall have been retired at the par value thereof.

The interest represented by this certificate is personal property, irrespective of the nature of the estate in the trustees.

No certificate holder or his assigns, heirs or legal representatives, shall at any time have or claim any legal or equitable interest in the property, whether real, personal or mixed, of the association, and nothing herein contained shall be considered as creating or giving to any certificate holder any interest in or to said property, but such certificate holder shall have an interest only in the net proceeds or profits which may be derived from the said property, or in the proceeds of the said property on liquidation or distribution, and only when and as such proceeds may become distributable under the terms of the aforesaid articles of association.

This certificate is transferable only by presentation thereof to the trustees, properly endorsed, and by transfer on the books of the association kept for that purpose.

In Witness Whereof, the trustees have caused this certificate to be signed by the chairman of the trustees and attested by the secretary, this ..... day of ....., 191..

.....

Chairman.

Attest:

.....

Secretary.

Bill of Complaint—Exhibit A.

(Back of Certificate.)

For Value Received, the undersigned hereby sells, assigns and conveys all right, title and interest in the within certificate to .....
.....and hereby authorizes the transfer on the books of the association.

.....

Witness:

.....

Article VII.

No Class A certificate shall be issued by the trustees except for cash received by the trustees to the amount of the full face value of the certificate or certificates issued, and no Class B certificate shall be issued except in return for money, or property of fair cash value, equal to the par value of the certificate issued.

Article VIII.

No voluntary lien shall be created by the trustees on the property of the association which shall be prior to the interest herein granted to Class A certificates of interest unless and except with the consent of at least eighty per centum in value of the said Class A certificates then outstanding, and, after paying the 8 per centum cumulative dividend on the Class A certificates, the trustees shall set aside 50% of the remaining net income of the association each year, which amount shall be applied to retiring the Class A certificates, and distribution of the fund set aside for such purpose shall be made pro rata to each certificate; provided, however, that if in any year the amount set aside from the net profits, as aforesaid, shall not equal 5 per centum

of the par value of the Class A certificates, no distribution may be made for such year, but the funds so set aside shall be held over until the succeeding year, or until such time as there shall be available an amount equal to 5 per centum of the par value of the Class A certificates, at which time the said distribution shall be made; provided, however, that whenever such distribution is made to holders of Class A certificates, the sum so distributed shall be endorsed on the back of the certificate and no such distribution shall be paid until the holder of the certificate presents the same for such endorsement. On notice being given to the registered holder of any certificate to send in or present the certificate for endorsement thereon of the sum to be distributed, in retirement of such certificate, the distribution shall be considered made to such extent that thereafter the holder shall not be entitled to any dividend on the part of the share or shares to be retired.

ARTICLE IX.

Each trustee herein named shall continue to fill the office or position of trustee so long as the association shall continue, or until the death or resignation of the trustees, unless sooner removed as hereinafter provided. In the event of the death or resignation of a trustee, the vacancy caused thereby shall be filled by the remaining trustee; provided, however, that if vacancies occur for any reason between the time of giving notice of a meeting of the certificate holders and the date of holding such meeting, such vacancy shall not be filled by the remaining trustee, but shall be filled by the certificate holders at such meeting. All actions of the trustees or certificate holders in

filling vacancies or in removing trustees and electing new trustees shall be made a matter of record and any change in the trustees shall be indicated by a certificate signed by the trustees and attested by the secretary and attached to the original of these articles.

ARTICLE X.

Upon request of a majority in amount of all outstanding certificates, the trustees shall cause a meeting of all certificate holders to be called for the purpose of amending the articles of association, or voting for or against the removal of a trustee or trustees, but the articles of association shall not be amended unless two-thirds (2-3) in amount of the certificates present at the meeting called for such purpose shall vote in favor of such amendment and a like vote shall be required for removing any trustee or trustees; provided, however, that the articles of association shall not be amended in such way as to increase the amount of Class A certificates which the trustees are authorized to issue except with the consent of two-thirds (2-3) of the then outstanding Class A certificates, and no amendment to the articles which affects the preferential rights of the Class A certificates shall be made except on the vote of two-thirds (2-3) of such certificates then outstanding; and, provided further, that in no event shall the articles be so amended as to affect the provisions thereof with respect to the exemptions of the trustees from personal liability.

ARTICLE XI.

The board of trustees, or a majority of the holders of certificates at any time outstanding, may call a meeting of the certificate holders at

any time to consider any matter of interest in or to the association, and all meetings of the association shall be held at the principal office, at least ten (10) days' notice of the said meeting having been given to the certificate holders of the association by mailing such notice to the registered address of each certificate holder, and any holder of a certificate may be represented at such meeting by written proxy.

ARTICLE XII.

The trustees shall elect a chairman and secretary and other officers as they may deem advisable, and the office of chairman or vice-chairman may be held only by members of the trustees. Any power herein vested in the trustees may be exercised by the trustees either by a vote at a meeting of the trustees, or by consent in writing of the trustees. Either trustee may delegate by proper instrument in writing, to the other trustee, or to any other person, any of the powers conferred by these articles, by the execution of a written power of attorney for such purpose.

ARTICLE XIII.

The death, insolvency or bankruptcy of any certificate holder of this association, or the transfer of his interest by sale, gift, devise, or operation of law, or otherwise, during the life of the association, shall not work a dissolution of the association or have any effect upon the same, its operation or mode of doing business, nor shall it entitle the heirs, assigns or representatives, of such certificate holder to an accounting, or to take any action in the courts of law or equity or otherwise against the association, its members, trustees, or officers, or its

property, assets or business operations, which shall remain intact and undisturbed, but such person shall simply and only succeed to the rights of the original certificate holders in the certificates, subject to these articles of association and all amendments thereto.

No certificate holder shall, as such, be a necessary or proper party complainant or defendant in any suit or other judicial proceeding relative to or affecting the property or assets of the association.

ARTICLE XIV.

In every written contract that the trustees shall enter into, relating to the business of the association or estate or any part thereof, reference shall be made to these articles and the person, firm or corporation contracting with said trustees shall look only to the funds and property, legal and equitable, of the estate for the payment under said contract of any debt, damage, judgment or decree, or any money that may become due and payable in any way by reason thereof, and no trustee or certificate holder, present or future, shall be personally liable therefor, or for any debt incurred, or judgment, or contract made or tort committed by the said trustees, or either of them, or any officer, agent or servant acting under them. The funds and property comprising the estate shall primarily and alone stand charged with the burden of paying any money claim or money demand outstanding or existing on account of the operations or business of the trustees, whether said claim be founded on contract or sound in tort.

ARTICLE XV.

These articles of association may be recorded in any county in any State where the trustees may hold or own real estate or personal property, or at any place where the trustees shall deem it necessary or advisable that such articles be recorded.

In the event of any amendment to these articles, the trustees shall cause such amendment to be recorded at all places where the original articles are on record, and in the event of the election of a new trustee or trustees, a certificate setting forth the fact and the name of the new trustee or trustees, shall be duly executed by the proper officers of the association and recorded in all places where the original, or original and amended, articles of the association are on record. Such certificates shall be conclusive evidence of the fact so stated and all persons dealing with the association and the trustees shall be entitled to rely upon the presumption that the persons who, according to the true record where the articles are recorded, appear to be trustees, are in fact such trustees.

No conveyance or assignment of any description shall be required to divest any trustee, dying, resigning or otherwise removed, of his title to the estate, or to vest the same in his successor.

No person dealing with the trustees shall be charged with the duty of making any inquiry as to their authority to deal with the property of the association, nor with the application of the purchase money for any property of the association which they may purchase from the trustees, and all such persons shall be entitled to rely on the truthfulness of any certificate of

the trustees purporting to state the facts with reference to any matter connected with the trustees' administration of the estate.

Copies of these articles shall be furnished on demand to the holders of certificates by the trustees.

ARTICLE XVI.

No Trustee shall be personally liable for the consequences of any action which he shall take as such in the absence of actual bad faith on his part. No Trustee shall under any circumstances incur any personal liability on account of any action taken in his name by any other Trustee acting under his power of attorney, nor for any action by any person other than a Trustee acting under his power of attorney, provided only that the Trustee shall have used reasonable care in the selection of such other person, and no Trustee shall incur or be under any personal liability on account of any act of any servant or agent of the Trustees or the Association.

ARTICLE XVII.

All checks, notes, drafts, contracts, or other instruments, except for the conveyance of real estate and interests therein, shall be signed by such person or persons as may be authorized in writing by a majority of the Trustees.

Contracts for the conveyance of real estate, deeds, mortgages and other instruments affecting real estate titles, shall be sufficiently executed on behalf of all Trustees if executed by the Trustees in office at the date of the execution, or by duly constituted attorney or attorneys in fact of such Trustees.

ARTICLE XVIII.

Neither the Trustees nor the Association shall be required to take any notice of any interest in or claim to any certificate, unless such interest or claim is evidenced on the certificate register signed by the person in whose name such certificate stands and the Trustees shall require every certificate holder to register his address with the Trustees, and the Trustees shall be protected in treating the registered holder of every registered certificate as the true holder thereof for all purposes.

ARTICLE XIX.

No certificate holder shall have the right to take any action affecting the Association property or to protect his interest as a certificate holder therein without having first served on the Trustees a written notice specifying the nature of such action, and requiring the Trustees to proceed to take such action and having tendered to the Trustees indemnification satisfactory to them against any expense which may be incurred in consequence of such action.

ARTICLE XX.

All notices and payments (except payments in retirement of Class A certificates) of the Trustees to any certificate holder shall be treated as given or made when a copy of such notice, or the Trustee's check for such payment, shall have been deposited in the mails directed to the holder at the registered address of such holders, or in the event of the failure of any certificate holder to furnish such registered address, such notice or payment may be given and made by mailing same direct to the certificate holder in care of the principal office of the Association.

ARTICLE XXI.

The trust here created shall terminate at the expiration of 21 years after the death of the survivor of the above named Trustees, unless sooner terminated by the complete liquidation and distribution of the Association property by the Trustees under the authority of these Articles.

ARTICLE XXII.

By subscribing our signatures hereto, we, the undersigned, acknowledge that we hold all property which has been or shall be received by us under the title "Midvale Chemical Works," and will administer the same subject to and in accordance with every term and condition of the foregoing Articles of Association, and we declare that all right, title and interest of certificate holders in the Association is defined and governed by these Articles.

IN WITNESS WHEREOF, we have executed these Articles, this 15th day of March, A. D. 1915.

LESLIE N. SIMSON,
GEORGE W. HUNTER,
As Trustees of Midvale Chemical Works.

STATE OF MISSOURI, }
CITY OF ST. LOUIS. } *ss:*

Before me, personally appeared, Leslie N. Simson and George W. Hunter, to me personally known to be the parties who executed the foregoing instrument as Trustees and acknowledged that they executed the same for the purposes therein set forth.

STEPHEN S. KRAYER,
Notary Public.

(Seal)

My commission expires Nov. 6th, 1916.

EXHIBIT B.

"THESE ARTICLES OF AGREEMENT made and entered into this 29th day of May, 1917, between Midvale Chemical Works, an Association, with its principal office in Saint Louis, Missouri, hereinafter designated as the party of the first part, and Ernest C. Klipstein of the city of East Orange, County of Essex, State of New Jersey, hereinafter designated as the party of the second part:

"WITNESSETH: That the said party of the first part for and in consideration of the sum of one hundred and fifty thousand dollars ($150,000.00), together with such other sum of money as an inventory of the liquid and working assets of the party of the first part will total on the date of the delivery of its personal property, hereby agrees to convey and deliver to the party of the second part all of its real property, consisting of two parcels of land situated at the intersection of the Long Branch division of the Central Railroad of New Jersey at Bayway avenue in the section known as Bayway, Elizabeth, New Jersey,—one 14-22/100 acres and the other 2-92-100 acres, total 17-14/100 acres, being the property on which the chemical plant of the party of the first part is located, and to convey and deliver all the personal property of the party of the first part, excepting cash on hand or on deposit. The party of the first part agrees to convey said land and property by a good and marketable title free and clear of all encumbrances excepting mortgages on its real estate aggregating the sum of nineteen thousand five hundred and ninety-seven dollars ($19,597.00) which are to be assumed by the party of the second part as an addition to the above stated purchase price.

"The party of the second part hereby agrees to purchase said land and property for said sum of one hundred and fifty thousand dollars ($150,000.00), together with such other sum as an inventory of the liquid and working assets of the party of the first part will total on the date of the delivery of its personal property and to pay for the same in the following manner:

"Five hundred dollars ($500.00) upon the signing of this agreement, the receipt of which is hereby acknowledged by the party of the first part.

"Fifty thousand dollars ($50,000.00) upon the delivery of a good and sufficient deed of conveyance of the aforesaid real estate of the party of the first part; the balance to be secured by the delivery to the said party of the first part of a bond and mortgage covering all of the real and personal property conveyed to the party of the second part and providing for the payment of twenty-five thousand dollars ($25,000.00) on the 20th day of each month following the delivery of the deed until the full sum of the purchase price has been paid, together with interest on the deferred payments at the rate of six per cent per annum from and after the delivery of said deed. The bond and mortgage shall give to the party hereto of the second part the right to anticipate any or all payments.

"It is Mutually Agreed that the said mortgage shall contain a clause providing for the use and disposition of materials, supplies and product and changes in equipment, and a clause to the effect that upon default in the payment of any said installments, the principal sum secured thereby shall become due and payable at the option of party of the first part thirty

(30) days after written notice of the exercise of such option with all arrearages of interest.

"It is Further Agreed between the parties hereto that all contracts made by the party of the first part for the purchase or sale of raw materials or manufactured products, a schedule of which is hereto annexed, shall be assigned to and be assumed by the party of the second part; and further that the party of the second part will procure and deliver to the party of the first part a release from A. Klipstein & Company from a certain contract made between the said party of the first part and the said A. Klipstein & Company bearing date July 22d, 1915, and providing for the sale and delivery of anilin oil to the said A. Klipstein & Company for a period extending to July 31, 1918.

"It is Understood and Agreed that the liquid and working assets hereinbefore referred to consist of notes and acceptances receivable, accounts receivable, materials and supplies, product in process, finished product, advanced payments on materials purchased, and the unexpired portion of insurance premiums. The payment of said notes, acceptances and accounts receivable is guaranteed by the party of the first part and any defaulted payment shall be credited to the party of the second part on the next maturing payment under said mortgage.

"It is Further Agreed that an inventory of the aforesaid liquid and working assets of the party of the first part shall be taken jointly by the parties hereto, commencing on the 31st day of May, 1917, at cost of the tangible assets and at face of the notes and acceptances receivable, accounts receivable, advance payments and unexpired insurance.

"It is Further Agreed that the deed and conveyance of the land and property which is the subject of this contract and the mortgage thereon shall be delivered the 20th day of June, 1917, at 12 o'clock noon at the office of Frederick Seymour, No. 120 Broadway, New York City, and that the payment of the aforesaid sum of fifty thousand dollars ($50,000.00) shall be made at the same time and place.

"It is Understood and Agreed between the parties hereto that the covenants and agreements herein contained shall be binding upon the successors, heirs and assigns to the parties hereto.

"In Witness Whereof, the parties hereto have hereunto set their hands and seals this 29th day of May, 1917.

"MIDVALE CHEMICAL WORKS.

By GEORGE W. HUNTER,
LESLIE N. SIMSON,
Trustees.

Witness:

Frederick Seymour.

ERNEST C. KLIPSTEIN.

"The closing of title hereunder is adjourned to July 3, 1917, at 1 o'clock P. M. at the same place.

FREDERICK SEYMOUR,
Att'y for E. C. Klipstein."

June 22, 1917.

Harry Wright,
Att'y for Midvale Chemical Works.

Answer.

The Answer of the Defendant Ernest C. Klipstein to the Bill of Complaint.

Filed October 22, 1917.

I.

This defendant, Ernest C. Klipstein, answering Bill of Complaint, says that:—

1. The defendant admits that on the 15th day of March, 1915, they (the complainants) executed a written instrument, a copy of which is annexed to the Bill of Complaint and made part thereof and marked "Exhibit A," but Paragraph 1 of the Bill of Complaint is denied, except as in this paragraph of the Answer specifically admitted.

2. This defendant has no knowledge or information sufficient to form a belief as to the statements in Paragraph 2 of the Bill of Complaint, but alleges that on or about December 7th, 1915, the complainants filed with the Clerk of Union County, New Jersey, pursuant to Chapter 240 of the Laws of 1906, a sworn statement wherein it was said that the business of Midvale Chemical Works was then conducted and was intended to be conducted in the City of Elizabeth, New Jersey, but said statement did not disclose the names of all the persons connected with said business as owners.

3. Paragraph 3 of the Bill of Complaint is denied, but this defendant admits and alleges that the complainants as trustees as defined in "Exhibit A" attached to the Bill of Complaint after the execution thereof, acquired certain rights, titles and interests in the name of Leslie N. Simson and George W. Hunter as trustees of

Midvale Chemical Works, in two certain tracts of land at Elizabeth, Union County, New Jersey, together with the factory buildings now located thereon, and that said Midvale Chemical Works acquired certain machinery, liquid and working assets and other personal property which were located on said lands and premises on the 29th day of May, 1917, and that the said real and personal property were operated by Midvale Chemical Works, as a manufacturing chemical plant, until about said last mentioned date.

4. Paragraph 4 of the Bill of Complaint is denied, but this defendant admits and alleges that on or about the 29th day of May, 1917, the instrument of which a copy is annexed to the Bill of Complaint as "Exhibit B," was signed by Midvale Chemical Works, acting by the complainants as trustees and managing partners, and that it was signed by the defendant in duplicate, and that one of said duplicate parts was delivered by the defendant to Midvale Chemical Works and that the other was delivered by Midvale Chemical Works to the defendant.

5. Paragraph 5 of the Bill of Complaint is denied, but the defendant admits and alleges that he paid Midvale Chemical Works $500 and that an inventory of the liquid and working assets of Midvale Chemical Works was made shortly after May 29th, 1917, and showed that said assets amounted to $52,000 and no more, and that thereafter the defendant at the request of Midvale Chemical Works accepted possesion of the tangible personal property under an agreement hereinafter set forth, and used the same, but thereafter surrendered the same to Midvale Chemical Works, as hereinafter more fully set forth.

Answer.

6. Paragraph 6 of the Bill of Complaint is denied.

7. Paragraph 7 of the Bill of Complaint is denied, but the defendant admits and alleges that on or about the 31st day of May, 1917, Midvale Chemical Works vacated possession of all the real estate and the tangible personal property described in "Exhibit B" annexed to the Bill of Complaint, and that at the request and solicitation of Midvale Chemical Works and for its accommodation, defendant accepted the possession of said property, pending the closing of the title, and continued the operation of said plant, but thereafter surrendered the same to Midvale Chemical Works, as hereinafter more fully set forth.

8. Paragraph 8 of the Bill of Complaint is denied, but this defendant admits and alleges that the closing of the title under "Exhibit B" annexed to the Bill of Complaint was adjourned to the 22nd day of June, 1917, and then to the 3rd of July, 1917, at one o'clock in the afternoon at the place in "Exhibit B" specified.

9. Paragraph 9 of the Bill of Complaint is denied, but the defendant admits and alleges that on the 3rd day of July, 1917, at the office of Frederick Seymour, 120 Broadway, New York City, the complainants offered to deliver to the defendant a deed purporting to convey certain real estate in the said city of Elizabeth, in which Leslie N. Simson and George W. Hunter, as trustees of Midvale Chemical Works, were parties of the first part and the grantors, which was signed "Leslie N. Simson—George W. Hunter, Trustees of Midvale Chemical Works," in which the defendant was named as party of

the second part and grantee, which deed in form embraced the buildings and fixed machinery thereon, and that the complainants also offered to make and execute assignments of all contracts made by the complainants for the purchase or sale of raw material and manufactured products, and assignments of notes, accounts receivable, acceptances receivable and insurance policies, but that the instruments of assignment were not then prepared or executed and that formal tender on both sides was waived for the reason as then expressed that the title offered was defective, as hereinafter more fully set forth.

10. Paragraph 10 of the Bill of Complaint is denied, except that the defendant admits that on the 6th day of July, 1917, a fire occurred which destroyed a portion of the buildings on the premises, described in "Exhibit B" annexed to the Bill of Complaint and a part of the machinery therein, and admits that the legal title to said real property then remained in the complainants and the title to the personal property then remained in Midvale Chemical Works, both subject to certain liens and encumbrances hereinafter specified, and that the complainants have notified the defendant of their willingness to do all necessary things to procure the adjustment of the fire losses and payment of the insurance on the buildings and premises so partially destroyed, and the defendant has no knowledge or information sufficient to form a belief as to whether the complainants have notified the insurance companies of said loss or have taken the necessary steps to recover the insurance thereon.

Answer.

11. Paragraph 11 of the Bill of Complaint is denied, except so much thereof as alleges the willingness of the complainants to accept from defendant such payment and security as is specified in "Exhibit B" annexed to the Bill of Complaint.

12. The unnumbered paragraph of the Bill of Complaint alleging that complainants are without adequate remedy in the courts of law, is denied.

13. At and before the 29th day of May, 1917, the date on which "Exhibit B" annexed to the Bill of Complaint was signed, the situation was such that Midvale Chemical Works claimed through its trustee and managing partner, George W. Hunter, one of the complainants, to be the owner of a manufacturing chemical plant in the city of Elizabeth, comprising two tracts of land containing an aggregate of 17-14/100 acres of land and the buildings and machinery thereon, the first of which tracts contained 14-22/100 acres of land, bounded on the southwest end by South Front street; on the southerly side by the lands of the East Jersey Telephone & Telegraph Co.; on the northwesterly end by the Elizabethport and Perth Amboy Branch of the Central Railroad of New Jersey, and on the northerly side by an irregular line, extending from the lands of said railroad back to the place of beginning; the second of which tracts contained 2-92/100 acres of land lying between the first tract and Elizabeth River and having a frontage on said river of about 183 feet.

14. The Midvale Chemical Works by and through its trustee and managing partner, George W. Hunter, also represented that sundry

streets and rights of way across said lands which had been dedicated by the prior owners thereof, by filing a map with the Clerk of Union County and by making conveyances, in which reference was made to said map and the streets and ways shown thereon as boundary lines, had been all vacated by the public and that the private rights of individuals had been extinguished and that the land was adapted for use as a single undivided manufacturing chemical plant of substantial dimensions and capacity.

15. At said time the defendant was a large dealer and manufacturer of chemicals and was known by Midvale Chemical Works and its said trustee and managing partner, George W. Hunter, to be desirous of acquiring an additional plant, capable of enlargement and so located and surrounded that it could lawfully be permanently enclosed and of such a character that persons not interested or employed therein would have no right or license to go upon, enter or cross the premises.

16. It was known to the said Midvale Chemical Works and to the said George W. Hunter, its managing trustee and partner, that the manufacture of chemicals such as were then being manufactured by Midvale Chemical Works and which defendant desired to continue upon said premises was accompanied with danger from fire and explosion, and that the defendant was a dealer in and manufacturer of dye-stuffs and desired a plant for the manufacture thereof, and that in the manufacture of dye-stuffs many of the materials used are coal tar products, are the same and like materials as are used in the manufacture of explosives and that some of them are

highly inflammable and others are of an explosive nature and that the manufacturing operation is accomplished by the use of certain trade and manufacturing secrets that are not generally known even in the chemical trade, and said Midvale Chemical Works through its said managing trustee and partner, George W. Hunter, represented that its plant was well adapted for such purposes, inasmuch as the dedicated streets and ways across the same had been vacated by the public and the private ways thereon had been extinguished.

17. The defendant relied upon the representations hereinbefore set forth and believed the same to be true and relying thereon signed the instrument, "Exhibit B" annexed to the Bill of Complaint, and except for such representations would not have signed the same.

18. The map filed as aforesaid was entitled a "Map of Building Lots in the City of Elizabeth, New Jersey, on and near Bayway" and was filed in the office of the Clerk of Union County about the year 1859 by the then owner of a large tract, and included about 780 acres in area of farm land in the outskirts of the City of Elizabeth, including the lands described in "Exhibit B" annexed to the Bill of Complaint, by which the whole of said tract was laid out in streets and blocks and lots and conveyances were thereafter made by the owner thereof, by reference to the streets and ways laid out on said map as boundary lines and by subsequent owners thereof, including owners of the lands described in "Exhibit B" annexed to the Bill of Complaint, and of adjoining lands, and many of the streets and ways shown on said map have been accepted, opened

and used by the City of Elizabeth as public streets, and the streets and ways shown by said map were thereby, and by conveyances as aforesaid, dedicated to public use as streets and highways and the use of subsequent owners of parcels of said tract and the same streets and highways, including those upon the lands described in "Exhibit B" annexed to the Bill of Complaint, were adopted by the Commissioners appointed under the Act of 1867 to lay out streets, avenues and squares in the City of Elizabeth, New Jersey, by a map filed by said Commissioners in the office of the Clerk of Union County in the year 1867, except that as to streets running northwesterly and southeasterly there is a discrepancy of about 25 feet between the lines of streets lying northeast of Bayway, as shown on the Bayway map and lines of streets of the same name, as shown on said Commissioners' map, and the lines of Old Princeton avenue, as shown on the Bayway map, are not coincident with the lines of Princeton avenue as shown on the Commissioners' map. The streets dedicated as aforesaid have been continuously recognized since the filing of said Bayway map in the year 1859, both by the City of Elizabeth and by the owners of the lands described in "Exhibit B" annexed to the Bill of Complaint, and by the owners of adjoining and other lands within said 780-acre tract as dedicated ways and streets, and have been used according to the requirements of the increasing population of said City of Elizabeth and the expansion of its populated area.

19. Among the streets and ways shown upon said maps and crossing the property described in "Exhibit B" annexed to the Bill of Complaint are Clifton street, Brighton street, Chelsea

street and Richmond street, all of which cross the same in a northwesterly and southeasterly direction, and all of which except Clifton street and Brighton street, as shown on said Bayway map, extend from South Front street, which is a public street, northwesterly to and beyond Woodbridge avenue, which is a public street. The said maps also show streets running northeasterly and southwesterly across said lands named Old Princeton avenue, Princeton avenue, Burlington avenue and Amboy avenue, extending from Grove street across Bayway, which is a public highway, to the Elizabeth River, except that Princeton avenue and Burlington avenue, as shown on said Bayway map, extend toward the river only as far respectively as Richmond street and Chelsea street. Said streets and avenues and their location with reference to the lands described in "Exhibit B" annexed to the Bill of Complaint are shown on the map forming part of "Exhibit A" hereto attached.

20. The said Elizabeth River is a navigable stream in which the tide ebbs and flows and said river empties into Staten Island Sound about half a mile from the shore front of the lands described in "Exhibit B" annexed to the Bill of Complaint. Staten Island Sound is also navigable tide water.

21. The said lands and premises were not adapted for use as a single and undivided chemical plant of substantial dimensions and capacity as represented, as aforesaid, and was not such a plant as was so located and surrounded that the same could be lawfully permanently enclosed, and was not such that persons not interested or employed therein would have no right or license

to come upon or enter or cross the premises, nor so located and surrounded that the trade and manufacturing secrets of a chemical manufacturing business could be protected, nor such that said business could be conducted with safety.

22. The title of said lands and property was not and is not a good and marketable title, free and clear of all encumbrances, but was and is encumbered by the streets and rights of way hereinbefore referred to and named Clifton street, Brighton street, Chelsea street, Richmond street, Old Princeton avenue, Princeton avenue, Burlington avenue and Amboy avenue, the last of which is a public highway accepted by the Mayor and City Council of the City of Elizabeth on November 8th, 1907, by an ordinance passed November 1st, 1907, and approved November 8th, 1907, which provided that Amboy avenue from the said Elizabeth River to the city line, as laid out on said "Map of Building Lots in the City of Elizabeth on or near Bayway," and on the map of the Commissioners to lay out streets in the City of Elizabeth under the Act of 1867 should be accepted for a public street, the ordinance to take effect immediately. That the said Amboy avenue as so laid out and accepted crosses the lands described in "Exhibit B" attached to the Bill of Complaint and is a public highway and used as such, but there is upon the land no indication of any other of said streets or ways.

23. On May 29th, 1917, and now the said lands and property, described in "Exhibit B" annexed to the Bill of Complaint, were and are encumbered with outstanding rights of way in

South Front street, in that the same was dedicated, as aforesaid, and laid out on the said "Map of Building Lots in the City of Elizabeth, New Jersey, on or near Bayway," as 100 feet in width, but as accepted by the City of Elizabeth and as laid out, opened and used, the street is but 80 feet wide, and the remaining 20 feet in width lies within the 14-22/100 acres of the larger tract hereinbefore mentioned, and is subject to the private rights of adjoining owners and others as a dedicated street.

24. On or about the 29th day of April, 1915, the complainants, Leslie N. Simson and George W. Hunter, as trustees of Midvale Chemical Works, presented to the Board of Public Works of the City of Elizabeth a petition of which a copy is hereto attached as part of this answer, and marked "Exhibit A."

25. That thereafter the Board of Public Works in the City of Elizabeth, intending to act upon said petition in form adopted what purported to be an ordinance, a copy of which is hereto annexed as part of this answer and marked "Exhibit B," which was thereafter in form approved by the Mayor of said city.

26. It did not appear to the said Board of Public Works of the City of Elizabeth, either from the said petition or otherwise, that the said proposed and dedicated streets and highways, or any part thereof, will not be of public benefit, or that the public interest will be better served by releasing the lands within said dedicated streets, or any part thereof, from such dedication, but it does appear upon the face thereof that the said petition and the said action of the Board of Public Works was based upon and had reference

only to the private benefits which would accrue to the petitioners if the public rights in said dedicated streets should be vacated to the extent specified in said pretended ordinance.

27. No public hearing was granted with respect to any proposed ordinance to release and extinguish the public right arising from said dedication before said pretended ordinance was passed. No notice of any hearing on such an ordinance was advertised in any newspaper circulating in the City of Elizabeth, before the passage thereof, and the petitioners did not pay the cost of any such advertising.

28. It did not appear to the said Board of Public Works that the opening of such dedicated streets or avenues, or any portion thereof, would involve a large expenditure of public funds, or that the opening of such dedicated streets or avenues would be of no public benefit, or that said dedicated streets or avenues would be unsuited to or undesirable for public use, or otherwise useless, burdensome or disadvantageous to the public or to the municipality. The owners of abutting lands did not consent in writing to a vacation thereof by filing their consent, duly acknowledged, as in the case of an acknowledgment to a conveyance of lands, in the office of the City Clerk of the City of Elizabeth. The proposition to so vacate and extinguish public rights was not submitted to or approved by a majority of the qualified voters of the municipality voting at any general election for members of assembly.

29. The said Board of Public Works of the City of Elizabeth had no jurisdiction or power, either upon the facts as made to appear, or otherwise, to adopt said ordinance in the manner

and form in which the same appears from the record thereof as above set forth to have been adopted, or in the manner and form in which the same was adopted, and said ordinance is presumptively void upon the face of the proceedings and is void, and the proceedings of said Board of Public Works had as aforesaid in the pretended adoption of said ordinance are and were forbidden by statute, and no public rights in the streets and avenues therein mentioned were vacated thereby.

30. Said pretended ordinance did not purport to vacate the public rights in Brighton street as laid down on the "Map of Building Lots in the City of Elizabeth, New Jersey, on and near Bayway," or the public rights in any part of said streets or ways outside the lands described in "Exhibit B" annexed to the Bill of Complaint, or in the following parts of said streets and ways, on the lands mentioned in "Exhibit B" annexed to the Bill of Complaint, namely: 20 feet of said South Front street as dedicated lying on the northwesterly side of said South Front street, as accepted and used; so much of Burlington avenue as lies northeast of the southwesterly line of Brighton street, as laid down on said Commissioners' map; so much of Old Princeton avenue as lies northeast of the northeasterly line of Chelsea street, as laid down on said "Map of Building Lots in the City of Elizabeth, New Jersey, on and near Bayway."

31. Said Board of Public Works had no power to vacate, extinguish or in any way affect private rights in the streets and avenues and parts thereof described in said pretended ordinance, and the same did not in anywise affect private rights in said dedicated streets and avenues.

Answer.

32. On May 29th, 1917, and now the lands and property described in "Exhibit B" annexed to the Bill of Complaint were and are further encumbered by an agreement entered into on or about the 1st day of September, 1881, between D. B. Bonnett of Elizabeth, Union County, New Jersey, agent for Margaret B. Bonnett and others, as parties of the first part and the Central Railroad of New Jersey as party of the second part, under which the party of the first part agreed to grant in fee to the party of the second part a strip of land 33 feet wide for two lines of track, extending across the lands described in "Exhibit B" annexed to the Bill of Complaint.

33. The said D. B. Bonnett and Margaret B. Bonnett and others, at the time said agreement was made, were the owners of said lands and under said agreement the Central Railroad of New Jersey entered into, and still continue in possession of the lands described in said agreement and laid tracks thereon and became the owners in fee of said lands, and the lands so conveyed are a part of the 14-22/100 acres of the larger tract above mentioned, and said agreement was subsequently ratified and confirmed in a suit for partition among the several owners and co-tenants and by the deeds made by the parties to said partition suit, to effectuate the decree in partition, which decree in partition was entered in the office of the Clerk of Chancery on or about January 20th, 1883.

34. Said dedicated ways, streets and avenues, and the accepted Streets and the said Railway occupy about two acres of the lands described in "Exhibit B" annexed to the Bill of Complaint.

Answer.

35. On May 29th, 1917, and now the said lands and property described in "Exhibit B" annexed to the Bill of Complaint were and are further encumbered by poles and wires used for the transmission of electrical current standing on and crossing said lands in said Amboy Avenue and in said South Front Street and the same were and are maintained by third parties to the defendant unknown under claim of right and under ordinance adopted by the Mayor and City Counsel of the City of Elizabeth, and the same are obstructions and encumbrances upon the contemplated use of said property.

36. The lands described in "Exhibit B" annexed to the Bill of Complaint are encumbered by several open ditches across the same which are used for the drainage into the said Elizabeth River of adjoining lands, in which the owners of adjoining lands have rights.

37. On May 29th, 1917, and now the lands and property described in "Exhibit B" annexed to the Bill of Complaint were and are further encumbered by the rights of creditors of Midvale Chemical Works and of Leslie N. Simson and George W. Hunter as Trustees and managing partners thereof, under Chapter 237 of the Laws of 1907, inasmuch as the transaction contemplated by "Exhibit B" annexed to the Bill of Complaint involved a sale in bulk of the whole of the merchandise and fixtures and of all the property, real and personal, of Midvale Chemical Works, except cash otherwise than in the ordinary course of trade and otherwise than in the regular and usual prosecution of its business, and was undertaken in contemplation of

the winding and liquidation of the affairs of said Midvale Chemical Works.

38. The defendant, through his attorney, Frederick Seymour, on or about the 8th day of June, 1917, furnished to George W. Hunter and Leslie N. Simson, Trustees and managing partners of Midvale Chemical Works, a copy of the said Act, Chapter 237 of the Laws of 1907, and requested that they furnish as early as possible a list in writing therein mentioned of the names and places of residence or business of and indebtedness to each and all creditors of Midvale Chemical Works for the purposes described in said statute. The said Leslie N. Simson acknowledging the receipt of the written request, stated that the accounts were kept in St. Louis and that he had taken the matter up with the St. Louis office. The said George W. Hunter replied in writing to said request by a letter from St. Louis, which was received by defendant's said attorney on the 18th day of June, 1917, in the following form:

"Noting your letter of 8th to Mr. Simson and myself, please be advised that Midvale Chemical Works will as of June 20th, be indebted to the following persons:

Commercial Acid Company, St. Louis..$7,894.20
David Kaufman & Sons Co., Elizabeth, N. J. 1,800.87
S. L. Moore & Sons, Corp., Elizabeth, N. J. 2,625.08
B. Nicoll & Co., 149 Broadway, N. Y.. 870.93

The Barrett Co., 17 Battery Place, N. Y., for an amount not yet determined, owing to the multiplicity of credits which are unadjusted. We will discuss this item. The same is true of a

few items growing out of our business transactions with A. Klipstein & Company."

39. No other information was furnished by or on behalf of Midvale Chemical Works, or by or on behalf of the said Hunter or Simson as Trustees, or otherwise, respecting the names, places of residence or business of or indebtedness to the creditors of said Midvale Chemical Works on said Simson or Hunter as trustees thereof; and the answer received from the said George W. Hunter was too late to permit of the notice required by the said statute, and said Hunter's letter did not include the names, addresses or indebtedness of all the creditors of Midvale Chemical Works, and defendant by reason of the facts aforesaid was unable to give the notice required by said statute.

40. On the 29th day of May, 1917, and at all times since last said mentioned date, Homer A. Dunn, of the City of New York; Herman W. Gross, of the City of St. Louis, State of Missouri; Stephen S. Krayer, of the City of Elizabeth, State of New Jersey; George F. Langenberg, of the City of St. Louis, State of Missouri; John Jay Nelson, of the City of St. Louis, State of Missouri; Elizabeth Spurgin, of the City of Joplin, State of Missouri; W. C. Smith, of the City of St. Louis, State of Missouri, and Leslie N. Simson and George W. Hunter, the complainants in this action, were severally and respectively owners and holders of certificates of interest in Midvale Chemical Works, which certificates were substantially in the form set forth in Articles V. and VI. of the written instrument attached to the Bill of Complaint and marked "Exhibit A," the blanks in said forms

being properly filled and said certificates were respectively signed by the chairman and the secretary of Midvale Chemical Works, and were delivered to said respective holders prior to said 29th day of May, 1917, and have ever since been held and owned by the persons above named, who in payment therefor, contributed to the capital of said Midvale Chemical Works in the manner set forth in Article VII. of said instrument "Exhibit A" attached to the Bill of Complaint. Each of said certificate holders are now living and since on and before May 29th, 1917, have been and still are members of and partners in said Midvale Chemical Works.

41. Leslie N. Simson and George W. Hunter had not power as Trustees under "Exhibit A" annexed to the Bill of Complaint, or otherwise, to convey all the lands and property excepting cash on hand and on deposit, or to wind up or liquidate, terminate or destroy the business of Midvale Chemical Works as provided in and contemplated by "Exhibit B" annexed to the Bill of Complaint, and that the certificate holders named in paragraph 40 of this Answer were necessary parties to the deed or deeds of conveyance of all the property except the cash on hand and on deposit of Midvale Chemical Works and had an interest in said property as partners under the name of Midvale Chemical Works.

42. On June 20th, 1917, and again on June 22nd, 1917, and on July 3rd, 1917, the defendant requested that the said certificate holders should join in the deeds of conveyance of said property, which was refused by the complainants and the deed of the land and fixtures which the complainants had executed and were willing to

deliver was made by Leslie N. Simson and George W. Hunter as Trustees of Midvale Chemical Works as parties of the first part and grantors and was signed by Leslie N. Simson and George W. Hunter as Trustees of Midvale Chemical Works and by no one else, and the complainants refused to make or deliver any different deed or to procure any conveyance from the said certificate holders, and the deed which the complainants were ready and willing to deliver did not and would not convey a good and marketable title free from encumbrances, and would not convey the interest of the said certificate holders in said property

43. On the 20th day of June, 1917, again on the 22nd day of June, 1917, again on June 25th, 1917, and again on the 3rd of July, 1917, the defendant, by his said counsel, made and stated to the complainants all the objections hereinbefore recited to the title of the lands and property described in "Exhibit B" annexed to the Bill of Complaint and to the conveyance thereof as proposed by the complainants, and requested that the complainants and Midvale Chemical Works cure the same, which they refused and still refuse to do. At all said times, defendant was ready, willing and able and offered to make payment as specified in "Exhibit B" annexed to the Bill of Complaint, and to do and perform every act and thing required of him thereby upon condition that a good and marketable title free from encumbrances of said property be conveyed to him.

44. At or near the southwesterly corner of the lands described in "Exhibit B" attached to the Bill of Complaint, is the main and only

entrance to the plant of Midvale Chemical Works, except a gateway in the fence between said lands and the lands of the Central Railroad of New Jersey through which a siding is laid for switching freight cars to and from said plant. About three or four acres of said land in this corner are surrounded by a high board fence erected by Midvale Chemical Works or complainants, since July, 1915, which encloses said plant. Otherwise said lands are unenclosed. The main entrance above mentioned is used for vehicular and pedestrian ingress and egress to and from said plant. Outside said entrance and extending therefrom to Bayway, a public street, a distance of about 50 feet is a well travelled way used by all street vehicles and by pedestrians entering and leaving said plant and said way has the appearance of a public street leading from said entrance to said Bayway. It crosses the lands of the East Jersey Telephone and Telegraph Company and the lands of the Baltimore and Ohio Railroad Company which lie between said entrance and Bayway. A station of the Central Railroad of New Jersey is at the Bayway end of said way. Reference was made by the complainant George W. Hunter in the course of negotiations preceding the signing of "Exhibit B" annexed to the Complaint to the convenience and advantage of a station at the entrance to the plant, and of the trolley line a block away.

45. The said way from the said main entrance to Bayway is not a public street, is not a dedicated street and the only rights of Midvale Chemical Works or of complainants of ingress and egress thereby is a license under secret and

unrecorded agreements, one with East Jersey Telephone and Telegraph Company or its successors, The New York and New Jersey Telephone Company, and the other with the Baltimore & Ohio Railroad Company, each by its express terms terminable at the will of the licensor.

46. The defendant relied upon the apparent rights of Midvale Chemical Works over said way and the complainant Hunter's reference to the convenience and advantage thereof, and the unobstructed use thereof by employees and others, was wholly ignorant of the fact that the right to use the same was terminable at the will of said licensors or either of them and no disclosure was made to defendant of said license, agreements or either of them or of any of the terms thereof, until on or about July 3rd, 1917, and until then defendant was utterly uninformed as to their contents.

47. There is contained in said license agreements for said rights of way sundry covenants and agreements between the parties thereto, relative to said dedicated streets and rights of way, the precise terms of which are unknown to the defendant, but in substance they limit or extinguish the rights of the Midvale Chemical Works and of the complainants in said dedicated streets and rights of way, in so far as they cross or affect lands of the said Telephone Company and the said Railroad Company, but do not affect or extinguish the rights of either the Railroad Company or the Telegraph Company in said dedicated streets, in so far as they lie upon the land described in "Exhibit B" annexed to the Bill of Complaint, but the terms of said agree-

ments, except as stated above are unknown to defendant.

48. Between said plant and Amboy Avenue the lands described in "Exhibit B" attached to the Bill of Complaint, are low, wet and marshy, and are unpassable for vehicles and, except in dry weather, for pedestrians, a distance of about 800 feet. The only other access to said plant is by the dedicated streets and avenues hereinbefore named, and an irrevocable right of way to said entrance is essential to the enjoyment of said property.

49. Said license agreements and the contracts therefor, and the fact that the right to use said way was terminable at will, were unfairly concealed and withheld from defendant.

50. On or about the 31st day of May, 1917, before the defendant had an opportunity to examine or investigate the title of the land and property mentioned in "Exhibit B" annexed to the Bill of Complaint, the defendant, at the request of Midvale Chemical Works acting through the complainant George W. Hunter accepted possession of the land and property described in "Exhibit B" attached to the Bill of Complaint, and continued its operation as a chemical plant upon his statement that Midvale Chemical Works wished to discontinue its operations and go out of business, and that it was losing money by continuing its operation, and had not the necessary capital to carry on said business, and that the Trustees of Midvale Chemical Works were not experienced chemical manufacturers, and said possession was so accepted for the accommodation of the complain-

ants and of Midvale Chemical Works, without any written stipulation, and anticipating that a good and marketable title to the property, free of encumbrances, would be conveyed, but with the agreement and understanding that the defendant should make use of materials and supplies on hand and work them and others which he might secure into manufactured product and continue the plant in operation, replacing consumed materials as occasion might permit or require while in possession and until the title to the plant and assets should be examined and should then surrender the same, if the title should not be found good and marketable and free from encumbrances.

51. That upon July 3rd, 1917, after stating the objections to the title, the defendant offered to the said George W. Hunter to surrender possession of all of said property, except the materials and supplies which had been consumed in continuing the manufacturing operations as aforesaid, and had not been replaced by other materials of the same kind; and to account for materials and supplies which had been used up in the course of the manufacturing operation, and which had not been replaced.

52. That the said Hunter then agreed to come to the office of the defendant in New York, on the 5th day of July, and to arrange for resuming possession of the said property; but on the 5th day of July failed to carry out this arrangement.

53. Conferences followed in an effort to adjust differences between the parties, which resulted in failure, and on July 10th, the defendant, through his counsel, Frederick Seymour,

notified the complainants and Midvale Chemical Works that the defendant surrendered possession of said property; that there was a caretaker at the works, who would be withdrawn on the following day.

54. On the following day, July 11th, the defendant, having received no word from the complainants or from Midvale Chemical Works, notified them that in order to preserve the property he would maintain the caretaker until the following day, July 12th, and on the 12th of July, 1917, the defendant through his said counsel, notified the complainants and Midvale Chemical Works that he had withdrawn the caretaker. The keys to the plant were brought to New York, and on the following morning were sent by the defendant to the complainants, who refused to receive the same. Thereupon a temporary arrangement was made through the counsel for the respective parties by which a caretaker was maintained at the plant, at joint expense, without prejudice to the legal rights of either, which arrangement continued until August 14th, 1917, when the defendant, through his said counsel, notified the complainants, through their counsel, that he would not further participate in the expense of the caretaker, and on the following day delivered the keys of the plant to the complainants, who since said time, have maintained the caretaker at said works.

55. Defendant is ready and willing and offers to account for material and supplies so used as equity may require.

Answer.

The defendant further answering the Bill of Complaint, says that:

56. On the 29th day of May, 1917, and again on June 1st, 1917, Midvale Chemical Works and the complainants acting through the said George W. Hunter requested the defendant personally and through his counsel, Frederick Seymour, to submit the question of the title to the property described in "Exhibit B" annexed to the Bill of Complaint, its marketability, and of any encumbrances thereon, to the Fidelity Trust Company of Newark, New Jersey, and requested that the said Hunter be allowed to submit the matter to said Fidelity Trust Company, to which request the defendant assented, and said matter was thereupon submitted in writing to said Fidelity Trust Company by Harry Wright, Esquire, the duly authorized attorney of Midvale Chemical Works and of the complainants, and was thereafter submitted in writing to said Fidelity Trust Company by defendant through his said attorney.

57. The said Fidelity Trust Company, as was known to all of said parties, has for many years been engaged in the business of examining and guaranteeing titles to real estate in the State of New Jersey, has a large organization and plant for that purpose, is generally known to the public as being engaged in that business, and for many years has done a very large proportion in New Jersey of the business of examining titles. Its business in the examination of titles is so large and well known that a large proportion of possible customers or buyers of said property would inevitably apply to said

Answer.

Fidelity Trust Company to pass upon the title thereof.

58. By the terms of the submission aforesaid, said Fidelity Trust Company was given power without formal hearings of the parties and without resort to evidence produced by the parties to make ex-parte investigations respecting the matters submitted, and the said Fidelity Trust Company was selected as aforesaid, by reason of its special facilities for the examination of titles and the parties to such submission intended to rely chiefly upon these things rather than upon evidence to be submitted by the parties. Nevertheless, hearings were granted.

59. On or about June 20th, 1917, the said Fidelity Trust Company reported in writing to the parties making such submission, as aforesaid, and found in its report the encumbrances and defects hereinbefore mentioned except the one relating to the right of way in front of the main entrance to said property, and refused and still refuses to pass or approve the title until said objection should be removed.

60. The adverse report of said Fidelity Trust Company made as aforesaid, with the facts therein disclosed and the probability that they would come to the attention of any future buyer of the property, affect substantially and injuriously the marketability of the title to said property.

61. The complainants are estopped by the said report of the Fidelity Trust Company.

Answer.

The defendant further answering the Bill of Complaint, says that:

Paragraph 40 of this Answer is here referred to as if again set forth at length.

Each of said certificate holders, Homer A. Dunn, Herman W. Gross, Stephen S. Krayer, George F. Langenberg, John J. Nelson, Elizabeth Spurgin, W. C. Smtih, are proper, necessary and indispensable parties to this action.

The defendant, therefore, prays:

That the Bill of Complaint be dismissed; that judgment be rendered for the defendant for costs and counsel fees, and if it should be found that the proper parties are before the Court, that an accounting be had for the materials and supplies used and replaced by the defendant while operating the plant of Midvale Chemical Works, making equitable allowance for the expenses of the defendant incurred in the examination of the title to said property and for the payment of $500, made by the defendant under Exhibit "B" attached to the Bill of Complaint, and that any sum found due the defendant be made a charge upon the realty, and that the defendant have such other and further judgment and relief as may be equitable.

FRED'K SEYMOUR,
Solicitor of Defendant,
Ernest C. Klipstein.

EXHIBIT "A."

(Note: The map forming part of this exhibit is a blue print accompanying. See Exhibit D. 3.)

To the Honorable Board of Works of the City of Elizabeth.

The petition of Leslie N. Simson and George W. Hunter of St. Louis, Mo., Trustees of the Midvale Chemical Works, respectfully shows, that:

They have purchased from Messrs. W. H. Rankin, P. H. Gilhooly and M. Fern fifteen acres of land in the City of Elizabeth, Union County, N. J., lying southeast of and adjacent to lands of the Perth Amboy and Elizabethport Railroad Company and northeast of lands of the East Jersey Telephone and Telegraph Company and between the Elizabeth River and Baltimore and New York Railroad Company, which property is more particularly delineated by yellow lines on a map thereof, hereto annexed and made a part of this petition.

2. A large part of said land consists of marsh land, probably one-half thereof.

3. Said property is crossed by several city streets, which are shown on the map aforesaid, and bearing the names Richmond, Chelsea and Brighton Streets, and Burlington and Princeton Avenues, the dotted lines indicating the lines of such streets as they were originally alineated upon a map entitled "Map of Building lots in the City of Elizabeth, N. J., on and near Bayway," compiled about 1859, and the dash lines indicate the lines of said streets as they appear on a map filed in 1869, by the Commissioners

appointed to lay out streets, avenues and squares in the City of Elizabeth, N. J.

4. That none of the streets above mentioned has been improved, laid out on the ground, used or even recognized as a public thoroughfare and there is nothing and never has been anything upon the ground to indicate the existence of a public street or highway and the land traversed by said paper streets cannot be distinguished from any of the surrounding land.

5. That about 60% of the lands appearing to be affected by said paper streets are salt marsh lands that can neither be used for pedestrians nor for vehicular traffic in their present condition.

6. Your petitioners have purchased said land for the purpose of erecting and establishing a plant for the manufacture of aniline dyes and other chemicals, which work they desire to begin immediately so that they may take advantage of the large market which offers itself at the present time by reason of the European War.

7. They will provide employment for a large force of men.

8. Your petitioners further show it will be impossible for them to use said lands unless said paper streets or parts thereof as hereinafter designated are vacated.

The property is in an industrial neighborhood.

In consideration of the foregoing your petitioners pray that you will vacate the following parts of the above named paper streets:

Chelsea and Richmond Streets from the land of the East Jersey Telephone and Telegraph

Company to lands of the Perth Amboy and Elizabethport Railroad Company as said streets appear on "Map of Building lots in the City of Elizabeth, N. J., on and near Bayway," compiled about 1859, and also as they appear on the map filed in 1869 by the Commissioners appointed to lay out streets, avenues and squares in the City of Elizabeth, N. J.

Brighton Street as laid out on the map filed by the Commissioners appointed to lay out streets, avenues and squares in the City of Elizabeth, N. J., from South Front Street to the southeast line of Amboy avenue and from the northwest line of Amboy Avenue to the southeast line of Burlington Avenue.

Old Princeton Avenue as delineated on "Map of Building lots in the City of Elizabeth, N. J., on and near Bayway," from lands of the Perth Amboy and Elizabethport Railroad Company to the northeast line of Chelsea Street as laid down on last mentioned map.

Princeton Avenue as laid out on map filed by Commissioners appointed to lay out streets, avenues and squares in the City of Elizabeth, N. J., particularly described as follows:

BEGINNING at a point where the northerly line of East Jersey Telephone Company intersects the westerly line of Princeton Avenue; thence along the westerly line of Princeton Avenue north 32 degrees 42 minutes east to a point which is about 681.97 feet from Bayway and also in the boundary line of Rankin, Gilhooly and Fern; thence along said boundary line south 39 degrees 24 minutes east 31.54 feet to a point; thence south 49 degrees 46 minutes east 30.26 feet to a point in the easterly line of Princeton

Avenue, which point is about 686.33 feet from Bayway; thence south 32 degrees 42 minutes west along the easterly line of Princeton Avenue to the line of East Jersey Telephone Company; thence westerly along the Telephone Company's line to the point or place of beginning.

Burlington Avenue from lands of East Jersey Telephone and Telegraph Company to the southwesterly line of Brighton Street as laid down on the Commissioners' Map aforesaid and on said map entitled "Map of Building lots in the City of Elizabeth, N. J., on and near Bayway.

And our petitioners will ever pray, &c.

LESLIE N. SIMSON,
GEORGE W. HUNTER,
Trustees of Midvale Chemical Works.

SIDNEY W. ELDRIDGE, *Attorney,*
215 Broad St., Elizabeth.

Dated April 17, 1915.

Tel. Elizabeth 1007.

EXHIBIT "B."

Be it ordained by the Mayor and Board of Public Works of the City of Elizabeth:

Section 1. That all those portions of the following streets and avenues:

Chelsea and Richmond Streets from the lands of the East Jersey Telephone and Telegraph Company to the lands of the Perth Amboy and Elizabethport Railroad Company, as said streets appear on "Map of Building lots in the City of Elizabeth, New Jersey, on and near Bayway," compiled about the year 1859, and also as they

appear on the map filed in the year 1869, by the "Commissioners appointed to lay out streets, avenues and squares in the city of Elizabeth, New Jersey."

Brighton Street as laid out on the map filed by the "Commissioners appointed to lay out streets, avenues and squares in the City of Elizabeth," from South Front street to the southeasterly line of Amboy Avenue, and from the northwesterly line of Amboy Avenue to the southeasterly line of Burlington Avenue.

Old Princeton Avenue as delineated on "Map of building lots in the city of Elizabeth, New Jersey, on and near Bayway," from the lands of the Perth Amboy and Elizabethport Railroad Company to the northeasterly line of Chelsea Street as laid down on the last-mentioned map.

Princeton Avenue as laid out on "Map filed by the Commissioners appointed to lay out streets, avenues and squares in the city of Elizabeth, New Jersey," particularly described as follows:

Beginning at a point where the northerly line of the East Jersey Telephone Company intersects the westerly line of Princeton Avenue; thence along the westerly line of Princeton Avenue, north 32 deg. 42 min. east to a point which is about 681.97 feet from Bayway, and also in the boundary line of Rankin, Gilhooly and Fern; thence along said boundary line south 39 deg. 24 min. east 31.54 feet to a point; thence south 49 deg. 46 min. east 30.26 feet to a point in the easterly line of Princeton Avenue, which point is about 686.83 feet from Bayway; thence south 32 deg. 42 min. west along the easterly line of Princeton Avenue, to the line of the East Jersey

Telephone Company; thence westerly along the telephone company line to the point or place of beginning.

Burlington Avenue from the lands of the East Jersey Telephone and Telegraph Company to the southwesterly line of Brighton Street, as laid down on commissioners' map aforesaid, and on said map entitled, "Map of building lots in the city of Elizabeth, New Jersey, on and near Bayway," be vacated and closed, under and by virtue of the provisions of an act entitled, "An Act to revise and amend the charter of the city of Elizabeth," approved March 4, 1863, and the supplements thereto, and amendments thereof, and of the laws of this State.

Section 2. That so much of the cost and expense incurred in the making of said improvement as can be lawfully assessed on property specially benefited shall be duly assessed by the commissioners of assessment according to the valid provisions of an act entitled "An act to revise and amend the charter of the City of Elizabeth," approved March 4, 1863, the various supplements thereto or the general laws of the State, so far as they are applicable to the city of Elizabeth.

Section 3. The said improvement shall be made and completed under the supervision and direction of the street commissioner and the Board of Public Works of the City of Elizabeth, and according to the provisions of the city charter and ordinances.

Replication.

Filed November 2, 1917.

The complainants join issue on the answer of the defendant.

HARRY WRIGHT,
Solicitor of Complainants.

Testimony.

Transcript of shorthand notes of testimony taken in the above entitled cause on December 4, 1917, at Chancery Chambers, Newark, New Jersey, before Hon. Merritt Lane, Vice-Chancellor.

Appearances:

Mr. Harry Wright, solicitor for complainants.

Mr. Martin Conboy and Judge Holmes, counsel for complainants.

Mr. Frederick Seymour, solicitor for defendant.

Mr. Borden D. Whiting, counsel.

The Court. The burden is on you, Mr. Whiting, to proceed and show the defects of the title.

It is stipulated that chain of title to the real estate in question is as shown in the chain furnished by the Fidelity Trust Company, which is produced and marked Exhibit D. 1.

Report of the exceptions to the title as furnished by the Fidelity Trust Company offered as a specification, so far as it goes, of the defects in the title claimed by the defendant offered in evidence and marked Exhibit D. 2.

PATRICK S. KEELAN, sworn.

Direct examination by Mr. Seymour.

Q You are the assistant city clerk of the Board of Public Works of the city of Elizabeth? A I am not the assistant; I am the assistant city clerk.

Q The city clerk has the custody of records of the Board of Public Works of the City of Elizabeth? A Yes.

Q And you were subpœnaed to produce certain of those records? A Yes.

Q Have you produced here the records of the petition for the closing of certain dedicated ways on the petition of the Midvale Chemical Works? A Yes, sir.

Q I want the original petition? A Everything is there.

Mr. Seymour. I offer in evidence petition of Leslie N. Simson and George W. Hunter of the city of St. Louis, State of Missouri, trustees, to the Board of Public Works of the city of Elizabeth, with a map attached.

Mr. Conboy. This is not the one that was attached to the answer; there was subsequent one; I have no objection to it except I don't think it is material; it was never acted upon.

The Court. If it was never acted upon it is not material; I overrule that; if that is one that was not acted upon I am not going to cumber up the records.

Mr. Seymour. This seems to be the only petition or copy of petition here, but I don't find any other petition.

Q (*By the Court*) Is that file a complete file of the proceeding which led to the vacation of these streets? A With this paper here it is a complete file.

The Court. Then offer the whole file.

Mr. Seymour. I offer the whole file.

Marked Exhibit D. 3.

The Court. If when I come to decide the case I consider that file immaterial I will strike it out so that it will not be printed for the Court of Appeals.

Q Have you now produced all the papers of the city clerk's office having reference to the ordinance vacating the streets on the petition of Mr. Simson and Mr. Hunter? A I have produced all the papers that were filed in connection with that case.

Q Have you produced in that file all notices and minutes of the Board of Public Works with reference to that? A I have produced notices, but the minutes I have right here; it shows meeting held April 15th, petition of Midvale Chemical Company—

The Court. I am not going to listen to all that; a copy of all those minutes may be made and introduced in evidence and I will admit such portion of the minutes that have to do with the vacation of these streets.

Q Did you bring with you the commissioners' map? A Yes, sir.

Mr. Seymour. I would like to offer in evidence one of those.

It is stipulated that the blueprint of the commissioners' map on smaller scale be introduced in evidence in lieu of the original map produced by the city clerk.

Map offered in evidence and marked Exhibit D. 4.

Mr. Conboy. We object to it on the ground of its competency and on the ground of immateriality and relevancy, and prin-

cipally for the reason that it bears no filing mark and contains no endorsement which would indicate that it was ever acted upon, accepted or received as constituting a dedication of these streets for public purposes.

Mr. Seymour. I find it in the Register's office of Union county; I find it indexed there in a very old book which I have subpœnaed the production of.

Mr. Conboy. It is my instruction that the filed maps have an endorsement of the register and date, and this map has no such endorsement upon it or no such date; this map is definitely referred to in the deeds of this property from 1860 down.

The Court. Let it be marked; I will consider its weight later, if it is evidential at all.

Marked Exhibit D. 5.

THOMAS E. COLLINS, sworn.

Direct examination by Mr. Seymour.

Q You are the city surveyor of the city of Elizabeth? A I am.

Q And how long have you been surveyor? A This is the fifth year.

Q You are familiar with the public streets in the city of Elizabeth? A I am.

Q Is Woodbridge avenue a public street?

Mr. Conboy. Public streets must be proved by something other than the statement of this witness.

Mr. Seymour. The point will be made that dedication only covers as far as private rights are concerned a right of way

in each direction from one public street to another, and I am endeavoring to locate the public streets between which these private rights may run; in other words it will be claimed I fancy if we have a dedication in one part of this map it may not cover private rights except in so far as to give the owner an outlet in each direction from one public street to another public street over his dedicated way to a public street on either side, and I am locating those public streets. That is the purpose of it.

The Court. What street referred to on this map that traverses this property do you claim is a private right of way?

Mr. Seymour. Richmond, Chelsea, Brighton Burlington avenue, Princeton avenue, and on commissioners' map all Princeton avenue, that is, they lie between public streets. Woodbridge is not shown on that small map you are looking at.

The Court. I suppose it can be conceded that the first public street north of the property in question is Woodbridge avenue?

Mr. Conboy. Yes, sir.

The Court. That ends that.

Q Is Woodbridge avenue open to travel and kept in repair by the city? A It is open, but it is not kept in repair, parts of it is open, not all of it.

Q (*By the Court.*) Is there any ordinance establishing it as a public street? A Yes, sir.

Q There is? A Yes, that is certain portions of it.

Q (*By the Court.*) Is any part of it east of Bayway ordained as a public street by ordinance? A A portion of it.

Q (*By the Court*) East of Bayway? A East of Bayway, yes, sir.

Q (*By the Court.*) In this portion in here from Bayway to east toward the Elizabeth river? A Yes, there is a portion in here.

Q (*By the Court*) And as it crosses Bayway— A Between Bayway and Richmond there was a sewer put in there.

Q Between Bayway and Richmond? A Yes.

Q Is Bayway open to travel and kept in repair by the city? A Yes.

Q Is South Front street open to travel and kept in repair by the city? A It is.

Q And is Amboy open to travel and kept in repair by the city? A It is.

Q Now, there is a slight discrepancy between Bayway as shown on the Bayway map and on the commissioners' map, is there not? A There is, yes.

Q What is that discrepancy? A The Bayway map and commissioners' map at Bayway is thirty-five feet and Richmond street, the first street east of Bayway, the difference is twenty-five feet, that is, the line of the commissioners' map is twenty-five feet east of the line laid out on the Bayway map.

Q (*By the Court.*) Is the map of everything as it goes through this plan a public street? A Yes.

Q I did not get clearly the difference between the lines of Bayway itself on the two maps? A Bayway, where?

Q The lines of Bayway as shown on the two maps are not identical, are they? A Bayway, the difference is thirty-five feet.

Q Bayway is narrower on which map? A Bayway is narrower on the commissioners' map.

Q How wide is it there? A Eighty feet.

Q How wide on the Bayway map? A 150.

Q Is the location of South Front street on the two maps identical? A The present South Front street is identical.

Q On the two maps? A On the two maps.

Q Isn't South Front street as laid out and on the commissioners' map eighty feet wide instead of a hundred? A Eighty feet is the correct width.

Q And isn't it shown on the Bayway map as being 100 feet wide? A I think it is, but I haven't got the map in front of me now.

Q Is Amboy avenue identical on the two maps? A It is.

Q And Richmond street, Brighton street and Jersey street as shown on the Bayway map is twenty-five feet east of the streets of the same name shown on the commissioners' map, is that right? A That is correct.

Q Did you have some photographs taken of the approaches to this property? A I did.

Q Have you them with you? A (Handing counsel photographs.)

Q Were you present when these photographs were taken? A Yes.

Q Do they correctly represent the portions photographed? A They do.

Q And you have been there and seen the locations of all the photographs yourself? A I have.

Q This one marked Princeton avenue, from what point was that taken? A That was taken from Bayway looking east and shows the approximate location of Princeton avenue, shows the location of Princeton avenue.

Q (*By Mr. Conboy.*) Shows the approximate location of Princeton avenue? A Approximate is right.

Q How did you ascertain the location of Princeton avenue from that photograph? A By measurements shown on the commissioners' map?

Q By measurements shown on the commissioners' map? A Yes.

Q (*By the Court.*) Where is the approximate location of Princeton avenue? Put a mark on there.

Photograph offered in evidence and marked Exhibit D. 6.

Q Was the camera when that was taken looking straight down Princeton avenue toward the Elizabeth river? A Yes, it was.

Q I show you photograph marked Burlington avenue. Where was the camera when that was taken? A The camera was 500 feet east of Bayway looking along Burlington avenue.

Q Looking down Burlington avenue toward the Elizabeth river? A Towards the Elizabeth river.

Q And is that a correct representation of that, too? A Yes, it is.

The Court. Indicate on there where you think Burlington avenue ought to be.

Q (*By Mr. Conboy.*) Is this location also according to the commissioners' map? A According to the commissioners' map.

Map offered in evidence and marked Exhibit D. 6½.

Q I show you photograph marked Amboy avenue. Where was the camera when that was taken? A About 800 feet east of Bayway on Amboy avenue, looking east along Amboy avenue.

Q Looking toward the Elizabeth river? A Yes.

Q (*By the Court.*) What railroad is that? A Baltimore and Ohio.

Photograph offered in evidence and marked Exhibit D. 7.

Q (*By Mr. Conboy.*) Amboy is a highway, isn't it? A Amboy is an open street.

Q (*By Mr. Conboy.*) Going under the tracks of the B. & O. at the point indicated? A Yes, under the tracks of the B. & O.

Q I show you photograph without any mark upon it and ask you where the camera was when that was taken? A The camera was on Bayway looking east showing the entrance of the Midvale Chemical Company plant.

Q Looking toward the Elizabeth river? A Yes, sir.

Q (*By Mr. Conboy.*) And what approximate street location is that? A The property might be on Princeton avenue; there really is not any street.

Q (*By Mr. Conboy.*) The old location of Princeton avenue on the Bayway map? A On the Bayway map.

Q Then it would be looking about parallel with the Central Railroad of New Jersey,

wouldn't it? A Well, approximately, yes, about parallel.

Photograph offered in evidence and marked Exhibit D. 8.

Q Are there poles and wires on Amboy avenue for the conveyance of electric current from Bayway avenue over to the Elizabeth river? A There are.

Q And are those shown in the photograph Exhibit No. D. 7? A They are shown.

Q Are there poles and wires along South Front street on the northwesterly side? A There are.

Q There is a station, isn't there, just at the entrance of the property which you photographed in Exhibit D. 8, right near this entrance?

The Court. That is apparent.

Q Is the Elizabeth river a navigable river? A The government recognizes it as such.

Q There was an appropriation for dredging it, wasn't there? A Yes.

Q The register furnished you with a copy of the deed, did he not? A He did.

Q What deed was that? A August Whitlock and wife to Catherine H. Putnam.

Q What was the date of that? A 6th day of July, 1863.

Q Have you compared the description in that deed with the Bayway map? A I have.

Q Does the map cover the same property as that described in the deed? A It does.

Q Have you followed the lines or not? A I have.

Q Was that the property described in the deed of Augustus Whitlock and wife to William Graves, is it? A Yes.

Q Dated the 29th day of July, 1863, describes the same property that is shown on the Bayway map? A Yes.

Q The entire 780 acres? A It does.

Q And is your copy certified? A Yes.

Deed offered in evidence and marked Exhibit D 9.

Q Is there a public dock on Staten Island Sound nearly opposite the frontage of this Bayway property on South Front street? A There is a public dock at the foot of Bayway.

Q And is there another one east of that? A One at Clifton street and one at the foot of Elizabeth avenue; the one at Clifton street is not used, it is in dilapidated condition.

Q Not now used? A No.

Q There has been a public dock there, though, and it is under the care of the city? A The city owns it.

Q And Staten Island Sound at that point is navigable water? A Yes.

Q Large boats pass through that sound? A Very large, yes.

The Court. I will take judicial notice of that, Mr. Seymour.

Q What is the condition along Staten Island Sound as to there being factories and manufacturing establishments in that locality between Bayway and the Elizabeth River? A Along the shore front it is practically all built up between Bayway and Elizabeth River, that is, on the Jersey side.

Q And growing factories and manufacturing establishments there? A Yes.

Cross examination by Mr. Conboy.

Q Where do the tracks of the Central Railroad Company of New Jersey cross? A (Witness indicates on map.)

Mr. Conboy. I think it would be well to have that indicated upon some map that is in evidence.

Q Now, that railroad line cuts through the block that is indicated between Princeton avenue and Woodbridge avenue, doesn't it? A Correct, yes.

Q And to the east of Bayway and between it and what is indicated upon the maps as Richmond street? A Yes.

Q Is that right? A That is correct.

Q And then I presume it proceeds in a northeasterly direction cutting across the land lying to the east of that going in the direction of the Elizabeth River, is that true? A That is correct.

Q Now, how is that railroad conducted along the land or on the land coming west until it reaches Bayway, what kind of a structure is there there? A It is on grade.

Q Right on grade? A Yes.

Q And it crosses the grade of that land all the way from Bayway east; that is right, isn't it? A That is true, yes.

Q Part of the way east of that it is on trestles, isn't it, or filled, rather? A The Central?

Q Yes. A You go across to get in Elizabeth proper, the elevation rises.

Thomas E. Collins, cross.

Q (*By the Court.*) As it crosses Richmond and Jersey is it on grade? A It is practically on grade, two foot fill.

Q There is two foot fill across the indicated streets, is that right? A That is correct.

Q (*By the Court*) That road has been there, I suppose, for how many years? A 1872—about 1870.

Q (*By the Court*) Where it crosses Brighton street is it also on two-foot fill? A Two-foot fill.

Q (*By the Court*) Is there anything to indicate physically the continuation of Brighton street from Burlington avenue to the railroad? A Nothing physically; no, sir.

Q (*By the Court*) Nothing physically? A No, sir.

Q (*By the Court*) Never has been anything physically, I suppose? A Not as I know.

Q I presume that is also true of Chelsea and Richmond streets, too?

The Court. He just said so.

Q Are you sure that it is not more than two feet at the north point of our property there, the railroad fill? A Well, as near as I can tell; of course, that railroad being there a great many years, of course, I wasn't there when it was built, but that is my judgment; I may be wrong.

Q You have never attempted to ascertain the height of the fill there? A No, I have not.

Q (*By the Court*) Is there anything physically to indicate Richmond street from the line of the B. & O. to South Front street? A There is nothing.

Q (*By the Court*) Or Chelsea avenue from the line of the B. & O. to South Front street? A Nothing.

Q The Central Railroad Company of New Jersey crosses Bayway at grade, doesn't it? A At grade.

Q (*By the Court*) Does the Central and B. & O. come together there? A They intersect.

Q (*By the Court*) At grade? A No, the B. & O. is above.

Q (*By the Court*) The B. & O. between South Front street, between South Front street and the intersection of the B. & O. with the Central at Bayway is the B. & O. on a fill? A On a trestle.

Q (*By the Court*) All the way on a trestle? A They started to fill it in but did not complete it.

Q (*By the Court*) It is being filled in there? A Yes, sir.

Q (*By the Court*) At what point? A It is being filled in at several points on each side of the Central Railroad.

Q (*By the Court*) Just get what I mean. From this point here South Front street, I suppose it crosses South Front street on trestle? A That is correct.

Q (*By the Court*) Does it continue on trestle all the way from South Front street to its intersection with Bayway? A It does.

Q (*By the Court*) Are they filling in anywhere along here? A They are filling in here gradually; there don't seem to be any stated time or system; whenever they have dirt they fill it in there.

Q (*By the Court*) That B. & O. has been there about how many years? A I couldn't answer exact date; so far as I know thirty or forty years.

PATRICK S. KEELAN recalled.

Direct examination by Mr. Seymour.

Q You were subpoenaed to produce the ordinance opening Woodbridge avenue? A Yes.

Q Have you done so? A No, sir.

Q Why not? A Haven't got any ordinance.

Q There is no ordinance? A No ordinance to open Woodbridge avenue in the city clerk's office.

Q You are subpoenaed to produce the ordinance opening Amboy avenue. Have you produced that? A I produced ordinance accepting Amboy avenue as a dedicated street.

Mr. Seymour. I offer in evidence ordinance of November 1, 1907, of the Mayor and City Council of the City of Elizabeth accepting Amboy avenue from Elizabeth River to the city line as laid out on the map entitled, "Map of Building Lots in the City of Elizabeth, N. J., on and near Bayway, and on map of commissioners to lay out streets, avenues and squares in the city of Elizabeth under an act entitled, 'An Act appointing commissioners to lay out streets, avenues and squares in the city of Elizabeth, approved March 13, 1867, having accepted it on both maps.'"

Marked Exhibit D 10.

Q Do you produce an ordinance accepting South Front street? A I produce the resolu-

tion, record of a resolution accepting South Front street. There is no ordinance accepting South Front street.

MARY FARRELL, sworn.

Direct examination by Mr. Seymour.

Q Are you here in response to a subpoena from the register of Union County? A I am.

Q Have you produced a map entitled, "Map of lots in the city of Elizabeth on or near Bayway"? A I have.

Q Did you get this from the files and records of the register's office? A I did.

Q Did the register give it to you and send you here with it in response to the subpoena? A He did.

This map is offered in evidence and the copy heretofore marked Exhibit D 5 may be used in lieu of the original.

Q Do you produce the index of this map? A I did.

Q Is this book produced from the register's office? A It is.

Q One of the regular records in that office? A Yes.

Q And where is this indexed? A There.

Mr. Seymour. I offer in evidence so much of this book as contains the entry in the first column, figures, ninety-five, and second column under name of owner, Bayway, it runs across two names, name of the owner, where situated; Bayway. Map of building lots in the city of Elizabeth on and near Bayway; date following is blank; the date immediately over it is December

11, 1869, and the date immediately under it is July 10, 1863.

Mr. Conboy. Without further explanation as to that entry I can not see that it has any probative value at all; it refers to a map that is supposed to have been on the register's file in 1859; an entry appears in the book between the dates 1859 and 1873, and where the feature of value would be, that is, in the date of the filing of the map, there is no record at all.

The Court. I will admit it; it apparently was somewhere around that time by the writing in the book.

Q Did you bring with you the Bonnett partition map? A That map was lost years ago.

Q The Bonnett partition map was lost? A Yes, not in the office.

Mr. Conboy. Let it be noted the probative force of the entry from the book of the register's office offered in evidence that this certain map was at a period at least twenty years prior to this date in the register's office of Union County and was considered by the register as being on file with him.

Mr. Seymour. I offer in evidence agreement between D. B. Bonnett of Elizabeth in the county of Union, and State of New Jersey, agent for Margaret B. Bonnett and others, of the first part, and Central Railroad Company of New Jersey second part, dated in the year 1880, with the map thereto attached. This is copy, but by stipulation it will be used in place of the original.

Marked Exhibit D 11.

Mr. Conboy. This instrument I object to on the ground that it is immaterial and irrelevant. I presume these objections can more properly be argued at the time the evidence is all in. I presume it has to do with the right of way of the Jersey Central.

The Court. Is that the purpose?

Mr. Seymour. Right of way across their line near South Front street.

The Court. Is that road there now actually in operation?

Mr. Seymour. Actually in operation.

The Court. In plain sight?

Mr. Seymour. In plain sight.

JAMES A. HAND, sworn.

Direct examination by Mr. Seymour.

Q You are a member of the Board of Public Works of the City of Elizabeth? A Yes.

Q And were in April and August, 1915? A Yes.

Q You are chairman of the street committee, I think? A I am.

Q And was at that time? A Yes.

Q Was there any action of the Board of Public Works respecting the closing of streets on the petition of Simson and Hunter other than those disclosed in the minutes which have been submitted here today?

Mr. Conboy. The entire proceedings have been put in, not only the minutes, but all the proceedings that the clerk brought with him.

The Court. I will let him answer yes or no.

Q (Question read.) A No.

Mr. Seymour. Will you produce the deed which you offered on July 3? I offer in evidence a warranty deed made the 20th day of June, 1917, by George W. Hunter and Leslie N. Simson as trustees of the Midvale Chemical Works, under articles of association recorded in the office of the register of deeds for Union county in the city of Elizabeth, in the county of Union, and State of New Jersey, party of the first part, and Ernest C. Klipstein, of the city of East Orange and county of Essex and State of New Jersey, purporting to convey the premises in question.

Marked Exhibit D 12.

I offer in evidence Fidelity Trust Company policies to Leslie N. Simson and George W. Hunter, trustees of the Chemical Works No. 31114.

Marked Exhibit D 13.

And another policy, being to the same parties, No. 31115.

Marked Exhibit D 14.

Mr. Seymour. Will you produce the agreement between Simson and Hunter and the Baltimore and New York Railroad Company and the telephone company respecting the right of way to the entrance?

I offer in evidence an agreement dated September 18, 1916, between the Baltimore and Ohio Railroad Company and Midvale Chemical Works?

Mr. Conboy. This is objected to on the ground that it is not relevant and material to any issues raised by the pleadings.

Marked Exhibit D 15.

It is admitted that the articles of association, copy of which is annexed to the bill, are not a matter of public record, that they are not recorded anywhere.

Mr. Seymour. Will you produce the deed by which you acquired the Midvale Chemical Works?

Deed offered in evidence dated July 1, 1915, William H. Rankin and wife and Max Fern and wife to railroad company, recorded April 15, 1915.

Marked Exhibit D 16.

Deed of Meyer and wife to Simson and Hunter as trustees dated November 10, 1915, recorded February 2, 1916, offered in evidence and marked Exhibit D 17.

I offer deed from August Whitlock and wife to the Elizabethport Land and Improvement Company, dated November 10, 1855, recorded in Book P 9, page 404.

Marked Exhibit D 18.

I offer in evidence a deed of Elizabethport Land and Improvement Company to Solomon P. Cosey, dated April 13, 1860, covering block 43, on map entitled, "Map of building lots in the city of Elizabeth, N. J."

Marked Exhibit D 19.

The Court. Make a list of those deeds and with names of the grantor and grantee and property conveyed and offer the list; do not offer the deeds; the only material

part is the fact that they refer to the Bayway map and convey certain property in this plot; give the name of the grantor, grantee and the lot. I won't permit the deeds to be offered.

Mr. Seymour. That is satisfactory.

ERNEST C. KLIPSTEIN, sworn.

Direct examination by Mr. Seymour.

Q You are the defendant in this action? A I am.

Q And you are engaged in what business? A I am engaged in the chemical business, merchant and manufacturing.

Q And how long have you been engaged in that business? A Since 1875.

Q And have you factories in various places for manufacturing chemicals and dyestuffs? A Yes.

Q Did you see this property before May 29, 1917? A Yes.

Q Did you go over it with Mr. Hunter? A Yes.

Q And the property as at present used is what, or was—the property was used at that time for what purpose? A Manufacturing aniline oils.

Q And that is used for what purpose?

The Court. How is that material?

Mr. Seymour. I want your Honor to be familiar with the situation.

The Court. I know what aniline oil is used for without being told; it is immaterial what it is used for, I don't think it makes a particle of difference.

Q What was the purpose for which you wished to purchase this property?

The Court. How is that material? He purchased it for the purpose of continuing a chemical business, didn't he, and even if he didn't what difference does it make?

Mr. Seymour. I think your Honor should have before you the situation of the parties.

The Court. I will permit it, but I don't see it is material.

Q (Question read.) A I wished to purchase it for the purpose of continuing the manufacture of aniline oil and for the purpose of making other chemicals that had relation to products which I was manufacturing and expected to manufacture.

Q What was the importance, if any, of the proximity of this property to tide-water and docks on the Staten Island Sound?

Mr. Conboy. There is no suggestion in the answer that such proximity had any importance or non-importance.

The Court. I will permit it.

A The importance of the property as regards its general location was because it was adjacent to sulphuric acid and nitric acid works which were necessary, both of these acids being necessary to carry on the business. Its adjacense to the Sound was due to the fact that it might eventually become necessary to bring in the raw materials for manufacturing the acids on the plant itself or on the property.

Q Was that proximity to the public dock on Jersey street the subject of talks between you and Mr. Hunter? A It was.

Mr. Conboy. I object.

The Court. I will permit it.

Q What was the conversation between you and Mr. Hunter respecting the frontage on South Front street? A Mr. Hunter gave me to understand that there was a frontage on South Front street which permitted egress to the street and in that way an easy access to the dock facilities on Staten Island Sound; he understood—I made him understand plainly that I wanted facilities on Staten Island Sound.

Q Did he go down there with you to this public dock? A Mr. Hunter or Dr. Krayer, I don't remember which it was, or whether it was both, just now, they went there, yes.

Q Showed you the dock? A Yes.

Q Did they go with you to the frontage on South Front street? A I think so, yes.

The Court. Is there any doubt but that they have a frontage on South Front street?

Mr. Seymour. Yes.

The Court. Well, why haven't they?

Mr. Seymour. Because Brighton avenue as laid out on the Bayway map covers the whole of that frontage and has never been vacated.

Q A part of that land is enclosed by a fence now, or was on May 29th? A Yes.

Q What part of the land was that? A It is the part where the plant itself is located, corner of the property.

Mr. Seymour. I don't want to encumber the record too much, but there is a very large map which perhaps for the convenience to give your Honor the idea we might refer to without putting the map in evidence. It is a map made by you people.

Q Does that fairly represent the plant and buildings on that property on May 29? A Yes, I think it does.

Q Without knowing its accuracy, I suppose, the second tract was this tract running off to the Elizabeth River here? A Yes.

Q And adjoining the land crossing Brighton at the intersection of Burlington avenue? A Yes.

Q And where was the fence located with reference to that plant? A The fence was southwest of the plant.

Q Southeast, I guess that is? A Yes, southeast, and also northeast; there is only two sides of the plant, and from the Baltimore and Ohio Railway it came to a corner and then ran again to the Central Railroad or toward it.

Q Isn't there a board fence all the way around not only by these two railroad companies, but out here to the north and northwest surrounding the plant? A Yes, surrounding the whole plant.

Q And as to the rest of the property, of the land, is it enclosed in any way? A No.

Q Except by this trestle of the B. & O. Railroad and poles and wire of the telephone company along their right of way? A Yes.

Q Otherwise it is entirely open clear down—

The Court. Don't go so in details; it appears from the map just what encloses it.

Q What is the relative proportion between the amount of land enclosed in the fence and that which was outside, approximately? A I should say it was about one-fifth perhaps.

Q One-fifth was in the fence? A Yes.

Q Is it necessary in conducting this aniline oil business to exclude strangers and others on account of fire?

Objected to on the ground that it is immaterial.

Q Well, is there danger from fire in this business? A Yes, very great danger from fire.

The Court. I suppose there is danger of fire in every other manufacturing?

A Yes, especially where you are handling benzol and carrying on nitration processes, which are considered especially dangerous.

Q From these same materials much explosives are made, are they not?

The Court. Overruled.

Q Are these materials highly inflammable?

The Court. Overruled. I know they are; he has just said so.

Q Are there ditches across this larger tract? A Yes.

Q Running up under the railroad, under the Baltimore and Ohio Railroad? A Yes; there is a ditch runs across to the Baltimore and Ohio.

Q From the Elizabeth River? A Yes.

Q Were any defects of this title disclosed to you at or before May 29?

Mr. Conboy. Whether they are defects or not is for the Court to say.

The Court. We are not before a jury.

Q Were any of the objections which you made to the title disclosed to you by the complainant on or prior to May 29, 1917? A No.

Q Was any mention made of them in any way? A Not as defects, no.

Q Well, in any other way any mention made of the streets and proceedings to vacate? A Mention was made of the streets in such a way that I understood that the fact that the streets had once been dedicated and then afterwards withdrawn, I don't know what you technically term it, by the city, may be better title than it would be otherwise.

Q What was said with respect to the streets and their vacation, what did Mr. Hunter say, for instance? A Just as I said, I understood from the general conversation that the title was safer after the streets had been withdrawn than it was before, and it was a benefit to the Baltimore & Ohio Railroad to have those streets closed and incidentally benefited the land.

Q Did he tell you the streets crossing that property had been vacated?

The Court. Overruled.

Q (*By the Court.*) Do you see this switch of the Central Railroad Company of New Jersey at the Front street entrance? A Yes.

Q (*By the Court.*) It crosses the entire property, doesn't it? A Yes; the switch of the Central you mean that runs into the property?

Q (*By the Court.*) Switch of the Central that runs down into Front street. A Was that a

Central switch? There is a track runs across there; yes, I saw that; it is a switch into some other plant, yes.

Q You saw the telephone poles along the right of way? A Yes, on Amboy avenue.

Q (*By the Court.*) You saw Amboy avenue running through? A The first time I negotiated was with a view of purchasing part of the property and not the whole of it, and at that time Amboy avenue would have been absolutely necessary in order to have access to the property.

Q You knew Amboy avenue was a public street? A Yes.

Q Will you describe the entrance to the property near the intersection of the railway, its physical appearance.

The Court. Can he describe that any better than the photograph describes it? The photograph is in evidence.

Mr. Seymour. I know it is.

The Court. Then why should he describe it?

Mr. Seymour. I think, perhaps, the photograph should be supported by the evidence of the witness.

The Court. I think a fact once in is in and there is no use repeating it. I have a mental picture of that entrance from the photograph.

Q Is there any other entrance than that to the enclosed plant? A No.

Q It is the only entrance there, this board fence that is around the plant? A Except that a switch comes in from the Central Railroad.

Q Where the switch comes in to the plant, and alongside of the plant, and is that the entrance where employees and visitors and customers and vehicles and pedestrians leave and enter the plant? A Yes.

Q Now, is this property with these claims of rights of ways over it adaptable to the purposes which you had in mind and which you disclosed to Mr. Hunter?

Objected to on the ground that it is immaterial and irrelevant.

The Court. I will overrule that question. Assuming that someone has a right of way across there then you may ask the question.

Q Assuming that there are rights of way across this property, was it adaptable for the purposes which were discussed between you and Mr. Hunter? A No, I never would have considered the purchase of it assuming the rights of way across it.

Q Was it adaptable to the purposes which were discussed between you and Hunter without the South Front street exit to the public dock, without the South Front street frontage and exit to public docks?

Mr. Conboy. That is in line with the last question.

A I gave Mr. Hunter to understand in the beginning that it was essential to have water front connection, and he gave me to understand that this frontage on that street was practically as good as, almost as good as direct frontage of the land on the Sound, but that in order to help this point out that he had bought that sec-

ond strip of land running to the Elizabeth river so as to have that water frontage in any case.

Q To what extent is the Elizabeth river navigable and to what extent does that help out the lack of frontage on the Sound? A Well, it was navigable for canal boats, for instance, to bring coal.

Q Would it be navigable for steamers bringing sulphuric acid, for instance? A It would not be navigable, I think, for a real large steamer, but it would be navigable for barges and smaller vessels; you could bring in a few carloads at a time on barge or lighter; it is adaptable to that.

Q But it was not adaptable for the approach of steamers or large boats? A I don't think it would be adaptable for ocean going vessels.

Q If you had known that there was no frontage on South Front street would you have considered buying that property? A No.

Q Under any circumstances? A No.

Q If you had known that Brighton avenue had been dedicated according to the Bayway map and had not been vacated and that it narrowed this property, would you have bought it notwithstanding?

Mr. Conboy. I object to that.

The Court. I will overrule that question.

Q If you had known that Brighton street had not been vacated would you have bought the property?

Mr. Conboy. These questions infer and imply that those vacation proceedings are—

Mr. Seymour. I understand that.

A I may answer that question in this way, that as I looked at the property there there was a frontage of thirty or forty feet on that street which permitted egress, and also a sufficient sized piece of land, including that part which is said to be the street, to enable anyone to erect a building there and use it for a purpose in connection with the rest of the plant; I supposed that was part of the property I was purchasing.

Q (*By the Court.*) If you had known it was not part of the purchase would you have purchased it? A Would not have purchased it, no.

Q If you had known that there were private rights through Richmond street as shown on the map, would you have purchased the property?

The Court. I overrule that; he has answered it.

Mr. Seymour. This is another street.

The Court. Then make it an omnibus question. I think you have asked him whether or not if he had known, whether if he had known there were any rights of way across this property he would have purchased it, and he said he wouldn't; if that don't cover everything I don't know what will.

Q That is what you said, didn't you? A Yes, that is what I mean, exactly.

Q Now, will you tell the Court how it happened that you took possession of this property.

The Court. I will adjourn here for five minutes.

Examined by the Court.

Q Was anything said about these ditches that ran across the land? A Yes, they were pointed out to me.

Q And what was said about them? A I don't remember anything very particular that was said about them; it was a question whether the land could be built on without necessity of piling; that was the question that was in my mind; it was pointed out those ditches were there for the purpose of draining off that lower land.

Q And also draining land to the west of this land, wasn't it? A Southwest and running across the railroad, I understood, so far as the slope of the land brought water onto that.

Q Ordinary drainage ditches? A Yes, sir.

Q You knew ordinary drainage ditches of that kind could not be closed up, didn't you? A My idea was that that would go as far as the boundary there and could not go any further on account of the railroad.

Q It did not drain under the railroad? A That was the idea that I had, that it was not necessary.

Q Did you or did you not understand that those drainage ditches, so called, could not be closed? A To close the property?

Q That is what I mean. A That they could not be closed, in purchasing the whole property they would not interfere with it in any way, it would be under my own control; I did not understand that those ditches allowed somebody else to have the right of way across there.

Q Not the right of way? A The right of drainage.

Q You know land higher than other land water has a natural drainage? A Yes. As I remember it now there was not any necessity for those ditches beyond the boundaries of the property because they ran right up against the railroad fill, any that would be there.

Q At some other time? A They were in process of putting it there at the time, and I understood it that the railroad wanted these streets closed in order to make it possible to fill them in.

Mr. Conboy. I think Mr. Klipstein is endeavoring to tell your Honor that this ditch he is speaking of did not extend beyond the line of the railroad.

A That is what I say; it was entirely in the property and did not affect the title as long as I had the title to the whole property, it could only go practically to the railroad which was the boundary of the property.

Q How was it that you come to take possession of the property at the time you did? Will you explain that? A I did that at the solicitation and for the accommodation of Mr. Hunter.

Further direct examination.

Q Give in detail how that came about? A And Mr. Hunter gave me to understand—

Q First, you were down there to take an inventory, weren't you of the liquid and working assets, so-called, wasn't that how you happened to be there on the 31st? A Well, I had the inventory taken. You asked me why it was I took possession at the time.

Q That was the cause of your being there, wasn't it? A That was the occasion of my being there, yes, to take possession.

Q Go on now from that point? A Mr. Hunter said his relations with Dr. Krayer was such that it would suit him better to transfer the property by my going down there and having the office and all the working force turned over to me on that particular day. I objected to doing it; I didn't want to do it, but I finally gave in and did it at Mr. Hunter's solicitation.

Q Well, what was said about the using of the materials in continuing the manufacture? A A good many materials were in process and it was understood an inventory should be taken and that we should go on running the plant and account for those materials and also account for the product produced from them. The final outcome being, after I had paid for it, they were all included in the purchase price.

Q What other reason did he give you for wanting you to take over the property, take over possession? A Well, the reason that had considerable influence with me as being more or less friendly to Mr. Hunter was that he wanted to get out of the chemical business, said he didn't understand the chemical business and I did understand it, and he didn't want to carry it on another day, in fact, he said he had come on from St. Louis in order to sell this property and he was not going back until he had sold it and got it off his hands.

Q Was there anything said about your waiving any examination of the title or accepting the property whether the title was good or bad? A No.

Q Was there anything else said about taking possession other than what you have detailed now? A Nothing of importance that I remember.

Q (*By the Court.*) Did you see the title papers? A No, I did not see those. I told Mr. Hunter, in fact, I acted on that, always do in the case of purchase of property, I leave the details of the title to the lawyers who know something about titles; I don't make any pretense —I take all that for granted.

Q (*By the Court.*) You did not ask him whether he had had a search made? A I asked him general questions and he gave me to understand that he had done all that was necessary in order to get his own title before he bought the property himself.

Q (*By the Court.*) He did not show you the Fidelity Trust Company's search? A No; I didn't look into anything of that kind, because as I say those are details that belong to people that understand it and I don't understand it.

Q While we are on that question of title, do you remember an interview between yourself and Mr. Hunter at the club in New York on May 29, whether this property was subject to conversation? A Yes.

Q Now, what did Mr. Hunter say to you about the condition of the title and about your proceeding to have it examined?

Mr. Conboy. There is no allegation in the answer that the title was misrepresented.

A As I understood from the conversation from Mr. Hunter the Title Guarantee and Trust Company, I believe that is the name of it—

Q No, Fidelity. A Or Fidelity company guaranteed the title.

Q To him? A To him or to any purchaser.

Q And what did he say about your having it examined by the Fidelity? A Well, the question was brought up whether I could have it done or not, and as far as I can remember I asked you, I believe it was, who would pay for an examination, and you told me I would have to pay for it.

Q And how did the question come up about your having the Fidelity do it, how did it come about that you considered having the Fidelity company examine the title? A Well, I wanted a good title and I would have been satisfied with the Fidelity title, but I purchase enough property to know that changes take place and it is necessary sometimes to make sure by second examination in the case of the purchase of a piece of property like that.

Q Who suggested that you go to the title company? A I think Mr. Hunter, as far as I know.

Q And did he on that day, May 29, or any time prior thereto, show you any papers affecting the title to this property? A No.

Q Now, it was on July 3, was it not, that the title was finally rejected? A Yes, I think so.

Q Now, what was said then about your surrendering possession? A Well, I told Mr. Hunter that I wanted to give up possession immediately.

Q (*By the Court.*) Was this after the fire? A That was before the fire.

Q What did he say? A I understood him to say that he would take possession next day, send somebody, a representative to take the place of the representative I had there.

Q Well, did he do so? A No.

Q What was said at that time about your accounting for the materials that you used, that you had used while you were running the plant? A I don't remember anything special that was said. It was understood that I would account for what I had used and also account for what had been sold.

Q There followed an interview at your house on the 6th of July, did there not, in the evening? A There was an interview at our house about that time, I don't remember the date exactly.

Q Between yourself, Mr. Hunter, Mr. Wright and myself? A Yes.

Q And that resulted in no agreement between you and Mr. Hunter, and what, if anything, was then said about your surrendering possession and Mr. Hunter resuming it? A I told Mr. Hunter's representative, Mr. Wright, there, that I wanted them to take possession of the property immediately and release me of any further responsibility.

It is stipulated that the interview took place on Saturday night, July 7th.

Q Now, what effect has the conditions of the war upon your desire for this property and for the early possession of it?

Objected to.

The Court. I will permit it.

A The manufacture of these dye products is dependent on the sale of them and the prices which they bring, of course, are dependent on the supply, and there has a great many people gone into the manufacture of them and their manufacture makes a difference in the supply; the prices have been tending downwards ever

since the manufacturing commenced over here. This aniline oil at the time my plant was started was worth $1 a pound; it is selling at the present time for twenty-five or twenty-six cents, and it was just the same with all other products, it was just the same with the product oil I was making, the product oil made was worth $1 a pound when I began and at the present time it is worth about thirty-eight cents or forty cents, that difference; consequently there is a very great object to get to work immediately and as quickly as possible and push the manufacture as rapidly as possible.

Q (*By the Court.*) What is the legitimate price of aniline oil? A Now?

Q (*By the Court.*) Not now; under normal conditions? A Under normal conditions it varied between ten cents and thirteen; the German price made the price everywhere; it was sold here, I believe the Germans sold some at nine cents in order to prevent the manufacture here.

Q While you were in possession did you keep the works in good order and repair? A Yes, we did our utmost to put it in proper shape to produce the oil cheaper than it had been, if possible, for the reason that we expected to keep in possession of it.

Q Was the plant in as good a condition on July 3 and 7 as it was when you went into it? A I considered it in better condition; I will say up to the time of the fire I considered the plant in better condition than when I took possession of it.

Q (*By the Court.*) How much of the plant was destroyed by the fire? A The boiler house was destroyed and still rooms.

Q (*By the Court.*) Did it leave any of the plant left? A Yes, it left several buildings in the plant, but they were of no use without this part of it.

Q Would you have considered the purchase of that property had you known that the title, that the transfer of title to you would have been delayed beyond the time fixed.

Objected to on the ground that it is immaterial.

The Court. I will permit it.

A No, I would not have considered it at all, because I had in view the erection of another plant and that plant would have been considerably modified by having possession of this property or not having possession of it.

Q Did you actually put buildings elsewhere that you intended to put here? A Yes, I have.

Q The property contracted for by you was with the intention of enlarging the works and manufacturing other oils and dyestuffs? A Yes, it was with the intention of commencing the manufacture of at least two different products immediately.

Q And was it at all talked over between you and Mr. Hunter so that Mr. Hunter was familiar with your reasons for buying the property and wanting it immediately?

Mr. Conboy. I object.

The Court. I will let it in, but I do not see its materiality.

A I may say that I talked the matter over very frankly with Mr. Hunter and he understood my circumstances and conditions as well as I did myself and knew why I wanted to act quickly.

The Court. I cannot see how it makes a particle of difference. He had possession. He either rightfully rejected title or he did not. The deed was tendered at the time stated and he elected to refuse to accept title. Now, if he is right and the title was defective he had a right to reject it; if the title was not defective he must take it.

Q Would you have purchased the property if you had known that the entrance at the westerly corner of the intersection of the railroads was revocable at the will of the railroad company?

Mr. Conboy. There is no issue of that.

The Court. I will admit it.

A No, I would not; I would not have done it, for the reason that it was not only an entrance for merchandise, but also on account of its convenience to the trolley line for laborers, to the railroad station.

Q You knew, didn't you, that the entrance was not on the land of the company? A Yes, I knew that.

Q (*By the Court.*) It was on the right of way of the railroad company? A It went under the right of way, but I was given to understand the closing up of these streets and other things that had been done in order to make the title of the property was of such great benefit to the railroad that they were more than willing to have that entrance.

Q But you knew it was under the control of the railroad, it was on their right of way? A I did; I didn't know it was irrecoverable control; those things I left to legal advice, I took

those things for granted, that they were all right.

Q (*By the Court.*) I understand that; I am getting what your thoughts were and what your knowledge was at the time you went over this property. A I had no knowledge as to the title.

Q (*By the Court.*) Not as to the title, but you could see with your eyes the fact that the entrance went on the right of way to the railroad company? A Yes, I could see that.

Q (*By the Court.*) That was easily seen, and, of course, going over the right of way of the railroad company it was under the control of the railroad company, wasn't it? A Yes.

Q (*By the Court.*) You could see that? A Yes, I could see that, but I was informed by Mr. Hunter there were reasons why the railroad company were willing to be very liberal.

Q (*By the Court.*) Yes; they were willing to be liberal, they had benefited by the co-operation of the Midvale in closing up streets to such an extent they were willing to be liberal? A They were more than willing to have it, as I understood it, and the legal question I left to the lawyer.

Q *(By the Court.)* You never were given to understand at that interview that the Midvale had acquired the right to be underneath that railroad, did you? A Well, yes, I must say I took it for granted that it was, to put it in plain English it was irrevocable, that it was a thing just as much as a right to the property; that was what I had in my head.

Q *(By Mr. Conboy.)* That was the inference? A That was the inference that I acted

on, intending, as I say, to leave the whole thing to legal decision afterwards.

Q Did Mr. Hunter say anything to you about that entrance and its relative importance to the property? A He pointed out the convenience of it, the transportation facilities, that is to say, access, as I said for materials and for passengers and workmen.

Q And everybody who entered or went from that plant entered or went out by that way, did they not? A Yes.

Q And did he ever tell you that his right to use that was revocable? A No.

Q Or anything to that effect? A No.

Q And is it a well worn way from Bayway into the entrance of the plant? A Yes.

Q Were there tracks, vehicle and foot? A What would be worn from the use of vehicles and passengers in the course of a year or eighteen months work.

Q Is that the check with which you paid the $500 on May 29th? A Yes, sir.

Mr. Seymour. I offer that in evidence.

The Court. Why? It is admitted in the pleadings.

Marked Exhibit D. 20.

Cross examination by Mr. Conboy.

Q Do ocean-going vessels dock on Bayway, at the Bayway dock? A Ocean-going vessels dock all along the Sound; I don't know particularly about the Bayway dock; the water is deep enough for ocean-going vessels.

Q You were fairly anxious to go in possession of this property of yours, weren't you? A No, I was not anxious to go into it.

Q Well, what was your feeling about it. You wanted to take possession of it, didn't you? A I wanted to take possession as soon as I could do so legally, but I took possession in the way I did and as quick as I did as I say at the solicitation of Mr. Hunter against my better judgment.

Q When you did take possession you immediately began to use the chemicals and materials that were down there in the manufacture of the product, didn't you? A Immediately, yes.

Q And to sell your product wherever you could find a market for it? A Well, under the name of A. Klipstein & Company I had a contract with the Midvale Company to furnish certain goods and I did not want that contract interrupted any more than was necessary.

Q I say you went in there and began the manufacture of your product at once? A The stuff was in process of manufacture, had to be continued.

Q And you continued it? A Well, it would not have been any particular loss, we could have started ten days later just as well.

Q In fact, it was understood and agreed before you signed the contract you were to have immediate possession, was it not? A Well, immediate possession, that is, early possession, yes, as you understand the word "immediate" in such a case.

Q And you went in there on what day? A I don't remember the day, it was on the 31st of May, something like that.

Q And the contract was signed on the 29th? A I think so.

Q And the 30th was Decoration Day? A Yes.

Q You went in there the first non-holiday day? A At Mr. Hunter's solicitation.

Q I understand, you testified to that? A Yes.

Q *(By the Court.)* Was it contemplated you should wait until the 30th day of June, I think, or the 20th of June to go into possession? A I don't remember that there was any contemplation.

Q (*By the Court.*) You knew the date the title was closed? A It was closed on June 20.

Q I mean you knew that? A Yes.

Q *(By the Court.)* Was it ever in your mind that you would not take possession until after the 20th? A Yes, that was in my mind, exactly what was in my mind, that I did not want to take possession until we were sure of the title, and I did not like to delay, and that was one of the things that led me to do an unbusinesslike thing and give way to appeal of friendship, if you like, and take possession earlier.

Q *(By the Court.)* You went ahead with what you did in this thing, which you recognized to be unbusinesslike, simply and solely for friendship for Mr. Hunter because of his appeal? A Not simply and solely on that account.

Q *(By the Court.)* Involving an expenditure of something like $200,000? A They insisted on keeping the plant running; I knew it was better to have the plant running and if I was going to take possession of it it would have been better for me to have had it running than had it still, but I didn't want to do it.

Q Do I understand you dispute at the time this contract was signed you agreed to enter into immediate possession of the property? A Yes.

Q That is true, isn't it? A Yes.

Q And you did enter into immediate possession of the property? A Yes.

Q Now, was there a contract signed at this conference that you testified you had at the Reform Club with Mr. Hunter, or was it signed later or earlier in the day than that conversation? A I think it was signed that same afternoon at my office.

Q Was anybody present at this conversation you had at the Reform Club with Mr. Hunter and yourself? A Mr. Seymour.

Q Your attorney? A He was there also, yes.

Q You and your attorney and Mr. Hunter? A Yes.

Q And I take it that the title of the Midvale Chemical Works came up at that time and was discussed? A Yes.

Q Did Mr. Hunter tell you he had policies of title insurance from the Fidelity Trust Company at Newark, didn't he? A He told me that the title was as I understood it guaranteed.

Q You understand what policies of title insurance are, don't you? A No.

Q Don't you know what policies of title insurance are? A No, I do not.

Q Did you ever hear of them? A I may have heard the words; those are legal questions.

Q Those are what? A Those are legal forms and questions that I leave to legal people.

Q Well, at that time was it you that suggested it or Mr. Seymour suggested it that you wanted to have your own title examination? A I don't know who suggested it; as a matter of precaution it is what I would want to do in any case.

Q Then Mr. Hunter suggested you would go to the Fidelity Trust Company, which concern he told you had already guaranteed his title? A He may have suggested that.

Q That is your testimony, isn't it? A I think he did say something about in that case it would not—I am not very clear just as to the words that were used—but I understood that, as I say, that this company guaranteed the title, of course, I had a right to go there without Mr. Hunter's permission.

Q And you instructed Mr. Seymour to have the title examined? A Yes.

Q And you did that right then and there, didn't you? A I think so.

Q Now, on the 3d of July, 1917, I understood you to say in answer to a question put to you by your counsel, you told Mr. Hunter that you were going to give up the property, the Midvale property; did I understand you correctly in that connection? A I told him, yes, that I was going to give up charge of the responsibility of it.

Q And that you understood that he was going to send a man out there the next day? A I think he said he would.

Q And he did not send a man out there the next day? A No.

Q The next day being Fourth of July; now, you remained there on that day, didn't you? A We remained there because we did not want to leave the property exposed.

Q And you operated the plant also, didn't you? A No, we never operated it after the fire.

Q The fire did not occur until the 6th of July; you did operate it up to the time of the fire, didn't

New Jersey State Library

you? A We in the meantime had bought stuff ourselves and wanted to get that out if possible.

Q And you were operating it at the time the fire occurred, isn't that true? A Yes.

Q You put in a quantity of material and supplies there yourself, didn't you, after you took possession? A We had to in order to continue operating.

Q You did to the extent of about $10,000? A Something like that, yes.

Adjourned until ten o'clock tomorrow morning.

December 5, 1917.

IN CHANCERY OF NEW JERSEY.

Between

LESLIE N. SIMSON and GEORGE W. HUNTER,

Complainants,

and

ERNEST C. KLIPSTEIN,

Defendant.

Continuation of examination pursuant to adjournment on December 5, 1917, at the place and in the presence of the Court and Counsel as before.

ERNEST C. KLIPSTEIN, resumed for *re-direct examination,* by Mr. Seymour.

Q When you took the property over on May 31 it was a running and going concern? A Yes.

Ernest C. Klipstein, re-direct.

Q And there were materials in process of manufacture? A Yes.

Q And there were outstanding contracts for the delivery of the finished product? A Yes.

Q And there were contracts for raw materials? A Yes.

Q You had a labor force there? A Yes.

Q And was the condition of the labor market such that it was necessary to keep that force in operation in order to preserve it? A Yes.

Q And was that same condition prevailing on July 3d? A Yes.

Q And what was the reason that you did not simply abandon the property on the 3d instead of keeping it running? A Because in the event of my having to take it, it was—

The Court. Why, it would have been ruinous, of course.

A It would have been very bad for the property to stop it.

Q And it would have been equally bad for Mr. Hunter if he took it back? A Yes, in either case.

Q And was that the reason it was continued instead of being abandoned? A Yes.

Q You have been engaged for some years in overseas trade, in importing? A Yes.

Q Is that one of the reasons that made a dock on the Sound important to you? A The reason was because I foresaw that it might at any time be necessary to import foreign raw materials.

Q Now, with reference to Brighton street, what was said by Mr. Hunter at the time you were trying to close the title with reference to its having been vacated or your being

able to get it vacated? A Mr. Hunter told me at the time when we were trying to determine whether the title to the property was valid, not in the beginning, however, that that street could not be closed on account of some property that lay on the other side of my property.

Q (*By the Court.*) When did he tell you that? A That was at the time when we were discussing the closing of the title.

Q (*By the Court.*) When, was it before the signing of the contract? A No, that was after this question all came up, after it had been decided that the title was not valid in the beginning; I only understood in a general way that those streets were closed, and I didn't take any particular notice of the names of the streets, or anything of the kind, at that time, because I expected in any case to leave the whole thing to legal decision; I didn't bother my head with it, but when that question came up, the validity of the title, why, then we went into those things more particularly; I think Mr. Seymour went down to look at the thing with me at that time.

Q (*By the Court.*) What was said? A Mr. Hunter said that this particular street, I believe you call it Brighton street, could not be closed on account of some property that lay back of it; I think he said it belonged to Mr. Wetmore, if I am not mistaken; he said I could overcome that difficulty easily enough because I could buy the property in regard to the lower end of it, it was corner property, that was for sale there, that I could easily buy, the Midvale was not in a position to buy, but I could; consequently it would not be any injury to me, while it would be a dis-

advantage to them. That was about the substance of what was said.

Q (*By the Court.*) When did that conversation take place? A That took place when the question of determining the character of the—

Q (*By the Court.*) Was it before July 3? A It was after July 3, as far as I remember. It might have been between the 20th of June and July; I don't remember just the time it was, but it was after this question of the validity of the title came up.

Q Some of those interviews were at my office, were they not? A Yes; and I discussed it several times; I discussed it on the ground, as far as I remember, going over it once, and several times afterwards.

Q (*By the Court.*) Was it discussed at any time before the signing of the contract? A No, not before the signing of the contract. As I say, I didn't take particular note of the names of the streets.

Q (*By the Court.*) You knew there were streets going through there? A I knew that in a general way; I had seen the map, but I didn't hold it in my head.

Q (*By the Court.*) Before you went down to look at the property you had seen this map that showed these streets? A Yes, I had seen that before; I saw that before.

Q This talk with Hunter about Brighton street occurred at my office, didn't it, when we were closing the title or drawing it? A Yes, during that period.

Q And those interviews took place on three days, did they not, June 20, 22d and July 3d? A I don't remember the exact dates, but it was at that time after the title had been questioned.

Q (*By the Court.*) When did you first see this map, or one like it, this Bayway map annexed to the answer? A I couldn't answer, testify to that; I saw so many maps; they had maps down there when they first spoke to me about buying the property, whether it was that map or not I don't know.

Q (*By the Court.*) Whatever maps you did see showed Brighton avenue and Chelsea street and Richmond street running through this property, didn't it? A Yes, it showed those streets, but I didn't take particular note of the names, there were so many of them.

Q (*By the Court.*) They showed streets? A They showed streets, yes; I understood there had been streets through there and they had been closed, that was about the whole idea I had, and with reference to what the names were, what they meant, I assumed that was right, assumed that it would be settled when it came into hands of experts on the question; I didn't imagine any other thing, think about it, bother my head with those kind of details; the more important question to me was the price of the land.

Q (*By the Court.*) The physical property? A Yes; those other things were details I left to somebody else and I avoided them as much as possible.

Q I show you this letter and ask you if you have seen it before? A Yes, I remember this letter.

Q When did you receive that? A Well, it was, I think, the day after or about one day after the question came up as to the validity of the title.

Q Where did you receive it? A You gave it to me in your office.

Q On one of the days when Mr. Hunter and Mr. Wright were there closing the title? A Yes, they were there, you handed me this letter and I turned it over to them as my reply.

Q You turned it over to them as your reply to what? A Well, as to whether we would consider the title valid or not?

Mr. Seymour. I offer the letter in evidence.

Q Did they read it? A Yes, they read it; Mr. Wright, I think it was Mr. Wright read it.

Marked Exhibit D. 21.

Q On June 20 and 22 and on July 3 were you ready and willing and able to make the payment of $50,000? A Yes. I brought a certified check, had it all the time ready to turn over.

Re-cross examination by Mr. Conboy.

Q This certified check was not payable to the order of the Midvale Chemical Works, was it? A I don't remember; I think it was.

Q Where is it now? It might be very embarrassing for you to have certified check payable to the order of Midvale Chemical Works outstanding for $50,000? A I don't remember, but I made out the check as it should be made out.

Q You haven't got that check with you? A I haven't got it with me, no.

Q As a matter of fact it was made out either to the order of yourself or to the order of your son, wasn't it?

The Court. Mr. Conboy, what difference does it make?

A The first check, I think, was made out to the order of my son, now that I come to think of it.

Q Did you attend at these various interviews of June 20 and June 22 and July 3? A Yes.

Q Now, at which of these interviews was it that you asked for a reduction of the purchase price to the extent of $10,000? A I never asked for any reduction of the purchase price at any time.

Q Didn't you say that you would take the title if they took $10,000 off? A I said I would take title provided they would throw off enough to pay for the guarantee of the title by the insurance company.

Q And didn't you fix the amount as $10,000?

Mr. Whiting. May I raise the point here that I don't see how this is material, unless upon the theory that they are tendering the best title they can and tendering compensation at the same time?

The Court. I will permit it.

Mr. Seymour. Not pleaded, your Honor.

The Court. I don't care whether it is pleaded or not; I am not going to stand on technicalities; counsel ought to know that.

Mr. Whiting. I know, but we are here to meet the case as they have set it forth in their bill; I think it ought to be in the record that we ought not anticipate now making out a case—

The Court. I will deal with that when the proofs are in and I will mould the pleadings to fit the proof, if necessary.

Q (Question read.) A As I said, I never made any offer of $10,000 or any other amount as consideration for taking the property over. I spoke to Mr. Wright, and the question was of

guaranteeing the title, and Mr. Wright said that the company would want extra money for guaranteeing something that was not exactly in the ordinary, and I wanted to know how much they would ask or would charge for doing that, because I was very busy at the time and did not want to be bothered with this thing, and I thought the quickest way to get it out of the way would be the better for me, and I told them that I would be willing to pay the company for guaranteeing the title, that is to say provided they would deduct a like amount from the purchase price.

Q Didn't you say that, in substance or effect, that you would take this title if $10,000 was taken off the purchase price? A No, not at all; what I have just stated is what I did say and what I meant.

Q Did you ever ask anybody, Mr. Hunter or anyone else connected with the complainants in this case, to deduct $10,000 from the purchase price? A Not from the purchase price, except so far as would apply to guaranteeing the title on the part of the company.

Q When did you have that conversation with relation to the application of a certain amount of the purchase price in connection with the guaranteeing of the title? A I don't remember the exact moment when it occurred, but it came up several times during the course of the proceedings.

Q Isn't it the fact that after you had suggested, passing for the moment the difference, possible difference that there may be between you and Mr. Hunter as to the manner in which you wanted the $10,000 applied, isn't it a fact that after that Mr. Seymour in your presence wanted them to take off $25,000? A For exact-

ly the same reason, he considered the title was damaged to the extent of $25,000.

Q Exactly, and you wanted $25,000 taken off the purchase price? A It doesn't make any difference—

The Court. Answer the question.

Q That is the fact, isn't it, that he wanted $25,000 taken off the purchase price?

Mr. Whiting. I think the witness has a right to explain his answer.

The Court. The witness has a right to answer questions of counsel, that is all.

A I will give you the intent—

The Court. Strike that out.

Q (Question read.)

The Court. Yes or no to that. On redirect you may draw out any explanation you want to.

Q Is it a fact that you wanted $25,000 taken off the purchase price or not? Yes or no? A I suppose the answer is yes.

The Court. Yes or no.

Mr. Whiting. May I object?

The Court. You may object.

Mr. Whiting. I respectfully object to requiring the witness to answer that way.

The Court. I overrule the objection. Yes or no.

Q When that request or demand, or whatever it may have been, for reduction of $25,000 from the purchase price was made, wasn't it then pointed out that you had only asked for $10,000

to be taken off, and wasn't the suggestion made by Mr. Seymour that you take the title for a reduction of $12,500? A I never asked for any particular sum to be taken off; a sum was simply mentioned as being what it would cost.

Q I say, first the sum mentioned was $10,000, wasn't it? A That sum was mentioned.

Q Then the next sum that was mentioned was $25,000? A Yes, by Mr. Seymour.

Q And then attention was directed to the fact that all that you had asked should be taken off was $10,000 and Mr. Seymour reduced the figure to $12,500? A I did not ask that anything should be taken off at any time.

Q But when Mr. Seymour's attention was directed to the fact that $10,000 had been mentioned by you, I will put it that way, didn't he then reduce his figure to $12,500? Can't you say yes or no to that? A I don't remember about that.

Q Don't you remember any reference to $12,500 at all? A Only a great many different figures mentioned in between as to what it would cost to have that title made clear, and the easiest way, of course, would have been simply to have taken it off the purchase price, but I left all that, that was legal question which I also left to Mr. Seymour, whatever I mentioned there was simply suggestive, more than anything else.

Q Do I understand you to say that the discussion with relation to the amount that should be deducted from the purchase price was for the purpose of paying that money to the Fidelity Trust Company? A Was for the purpose of having the title guaranteed.

Q That is, you were willing to take a title, were you not, and take your chances on getting

it guaranteed as you should desire a guarantee, if a sufficient amount would be taken from the purchase price by the complainants, Mr. Hunter and Mr. Simson? A Yes, as I say—

Q Yes, that is it? A If it would take a sufficient amount to pay for the defect in the title.

Q Now, then, for that purpose first you wanted $10,000, then Mr. Seymour wanted $25,000? A I didn't ask for $10,000, didn't want it; I left those matters to the attorneys.

Q (*By the Court.*) How did the figure $10,000 happen to be fixed? A It was just simply a suggestion.

Q Suggestion by you, wasn't it? A Suggestion of some amount that might make it worth while.

Q And then after you had suggested $10,000 Mr. Seymour subsequently suggested $25,000? A Later on he did suggest $25,000.

Q (*By the Court.*) Will you tell me how the figure $10,000 happened to pop up in your mind, how did the figure $10,000 happen to be mentioned? A As I say, a suggestion.

Q (*By the Court.*) I know, but a suggestion based on what? A Based on my own idea as to what it might cost to have the company do it, and Mr. Wright—

Q (*By the Court.*) What company do it? A The insurance company.

Q (*By the Court.*) You don't mean to say that the Fidelity Trust Company would charge $10,000 for insuring this title against these apparent defects or alleged defects? A It was practically a question I asked Mr. Wright as to whether $10,000 would do it, and I afterwards understood it would not do it.

Q (*By the Court.*) Did you have in your mind that any title company for $10,000 or $25,000 or for $100,000 would insure this title if they thought it were defective? A As I understood it it was a question of investigating further or giving consent of some people which would cost some money, and my suggestion of the sum of $10,000 was simply, was merely a suggestion to know whether that would cover the cost of doing it, because I wanted to get the matter settled; it was as much in Mr. Hunter's interests as my own, because I knew he wanted to close it up, and I was willing to strain a point to help him out on it; for my own sake, I didn't care; Mr. Hunter, I dealt with him more as a friend than anything else all through the whole transaction and I was willing to meet him more than half way to help him out, and this was simply a suggestion that they couldn't make the title good, that is, if the guarantee company would not give them a title how much would it cost to get it; I said $10,000 would do it.

Q (*By the Court.*) What was the $10,000 to be used for? A For paying the insurance company, that is, they would have to pay it, and by taking it off, by making it that much less that would be paid.

Q (*By the Court.*) Paying the insurance company for what? A For guaranteeing the title or looking up the title so they could get it. In the beginning I understood that I was getting the guarantee of this insurance company for the title, and that satisfied me, and then the insurance company said they wouldn't guarantee the title, that there were these exeeptions to it; then I didn't want the title with the exceptions;

then the question was the insurance company by seeing some of the owners and by taking the steps which they know how to take, which would cost money, that they would be willing to guarantee; then I suggested whether $10,000 would be enough; the easiest way would simply be to check up the price so the matter could be closed up, and that was not an offer on my part at all.

Further direct examination.

Q Do you remember that Mr. Wright suggested that he could obtain—

Mr. Conboy. I think from this feature of it it would be better if you would let the witness testify.

Q What, if anything, was said respecting the procuring of releases of all the property owners, mutual releases between all the property owners between the railroad, Elizabeth River and South Front street? A In connection with this question of the title it was said by somebody, I don't know who, that it would be necessary to see a number of people, railroad and other corporations, and that all this would have to be done by somebody and would cost money, either the complainants in the case here could do it or they could get the insurance company to do it.

Q That is, the title company? A The title company.

Q The Fidelity company? A The Fidelity company; I don't know just what the name of it was, but I speak of it as the insurance company. It was a matter as to who would do it, and that is where the question came up, as to how much the insurance company would

charge to do this themselves so as to give their own guarantee of it; that is what I wanted.

Further cross examination.

Q In connection with that, isn't it a fact that you said or Mr. Seymour said that if the releases of the people who had title to property on the east side of the property of the Midvale Chemical Works between it and the river were secured that you did not care anything at all about people on the other side of the railroads? A I don't remember that.

Q But you do not say that that is not a fact, do you? A I don't know what you mean by the other side of the railroad.

Q I mean on—that is, to the west? A No, I don't remember—I don't remember any such conversation.

Q (*By the Court.*) West of the line, the other side of the Baltimore and Ohio Railroad? A I don't remember any such conversation; I don't think it happened. What I do remember very distinctly is that in place of all these searches and everything else Mr. Hunter suggested that I could buy these pieces of property on the other side and have it all in my own hands so as to relieve the insurance company or anybody else of the necessity of making those searches. I told him I did not propose to buy the whole Jersey meadows in order to insure title for him, or something to that effect. I was acting in perfectly good faith; I was anxious to get the matter out of the way because I had too many other things to do to have my time taken up with it.

Q These people were endeavoring to meet all of the objections which were being urged

against this title right along, weren't they? A They were talking about it, but they were not doing anything.

Q Even after the talk that was had on the 3d day of July when you say that you tendered back this property, the very next day, on the 4th of July, a meeting was had out at the Essex County Country Club, wasn't there? A I believe Mr. Hunter, I think, and I don't know, I believe there was a meeting there about the 4th of July, yes.

Q And on the 5th day of July there was a meeting between Mr. Seymour and Mr. Wright, the one representing you and the other representing sellers of this property, at Mr. Seymour's office? A Yes.

Q At which Mr. Seymour made certain suggestions with relation to the relative importance or non-importance of certain of these objections to the title, isn't that true? A It probably is, yes; I don't remember distinctly.

Q And the following day communication was made to Mr. Seymour that the Fidelity Trust Company had agreed so far as these outstanding street rights were concerned to insure this title? A That I cannot testify to.

Q And it was on the following day the fire occurred; then Mr. Seymour wrote to Mr. Wright representing the complainants here that you would not take the property? A I can state the exact facts of the case to be just this, that we, the complainant talked a good deal about what they could do and would do, and asked what could be done, what we would be satisfied to have done, but they didn't do anything, and it was for this reason that we made the sug-

gestion about taking off something of the price and we would undertake to do that ourselves.

Q When did you first make that suggestion? A It was made several times.

Q When was the first time? A I think the first time was after the title was first condemned, when the money was first tendered, something like that could be done; we wanted them to do it, but they didn't.

Q The very first day on which the title was to have been passed, which was the 22d of June, that was the time that you made the first suggestion of a reduction of part of the purchase price? A It was suggested as a means of getting over this difficulty.

Q And then the title, the taking of the title was adjourned until the 3d of July, and at that time the suggestion for a reduction of $25,000 was made? A By Mr. Seymour, yes.

Q And then even after the fire you had a further meeting on the 7th of July, which Mr. Seymour has already called your attention to, on Saturday out at your house in East Orange, isn't that true? A There was a meeting out there, but just what the date was I don't know.

Q It was the day after the fire; the fire was on the 6th, and this was Saturday, the 7th of July, and it was at your house? A There was a meeting there, yes.

Q At that time how much did you want taken off the purchase price? A I don't remember.

Q You then wanted to buy the property for $100,000, didn't you? A I never made any offer to buy the property at any price, anything like that was simply a matter of suggestion as to what could be done.

Q Didn't you then ask them to make a new contract, in which the purchase price would be $100,000? A I didn't ask them to do it, no.

Q Didn't you suggest it? A As I say, I suggested it as a way out of the difficulty.

Q A way out of the difficulty and a way of getting $50,000 off the purchase price? A Well, that was another question altogether; that was really not serious, any suggestion like that.

Q (*By Mr. Seymour.*) Did either Mr. Hunter or Mr. Wright or anybody obtain any releases so far as you know of the rights?

The Court. The answer is no to that. They have not claimed they have.

A No.

CHARLES La. C. HOFF, sworn.

Direct examination by Mr. Seymour.

Q You were present at the office of Mr. Seymour on July 3 when the interview terminated and the title was rejected? A Yes, I was.

Q What was the grounds upon which the title was rejected at that time? A The grounds stated in the report of the Fidelity Trust Company.

Q You were at that time representing the Fidelity Trust Company, were you not? A I was, yes.

Cross examination by Mr. Conboy.

Q What conversation was had at that time, July 3d? A July 3d?

Q Yes. That is the date to which I understand your attention has been directed, Mr. Hoff? A Yes; well, there were lots of conversations.

Q Well, give it, as nearly as you can tell, what was said? A Mr. Seymour was there and Mr. Wright and Mr. Hunter, Mr. Klipstein, and I think Mr. Klipstein's son, and myself, and I was there to close the title on behalf of the Fidelity Trust Company, and I stated the position that the title company took in regard to the title and stated to them that the objections that we made to the title were set forth in our report; and they had a general conversation as to the objections, and I stated to them that not representing the title company, but as an individual that I did not think the objection amounted to very much.

Mr. Seymour. That I object to as immaterial.

The Court. You are entitled to have the conversation if you want it.

A Mr. Seymour then stated what position did we take on the question of the trustees executing the deed.

Q The trustees being Simson and Hunter? A Simson and Hunter, and I said to them that our title officer had waived that part of the report and that we made no objection, we would take a deed from the trustees as trustees provided the agreement was eventually recorded, the trust agreement.

Q Articles of association? A Yes, articles of association. Then they took up the question of the streets crossing the property, and I stated, as reported in our report, that a great many of them had public rights, had been vacated, but the company would not guarantee against the private rights in some of the streets, and while we then discussed the title on that

proposition and I stated as an individual I did not think there was much in the street proposition personally, I would take the title with the exception in the policy. Then I think Mr. Wright—I think at that time the policies, the company's policies on the former guarantee, were brought out, and I think they spoke about the exceptions in those policies, and I think then Mr. Seymour brought up the question of the railroad, an unrecorded agreement referred to in some deed, and I think I hunted through some papers when Mr. Wright produced a copy of it.

Q (*By the Court.*) That referred to the branch of the Central Railroad of New Jersey? A Yes, the branch, and I think they discussed that, and if I am not mistaken Mr. Klipstein spoke about that possibly being an advantage, that it would give him a shipping, trackage; I think Mr. Seymour said, "Well, he thought that was a thing that they could not get rid of." Then Mr. Hunter said, "Well, I am somewhat of a railroad man myself," and he said, "I feel quite sure that by going to the holders of this right of way that they no doubt would release the land from the effects of it."

Q (*By the Court.*) You are not talking about the street rights? A No, I am talking about the railroad.

Q (*By the Court.*) Is this another railroad right rather than the operating branch of the Central Railroad? A No, it is the right under the unrecorded agreement; I think that operated as a branch to run into those factories.

Q (*By the Court.*) It is operating line, it is really operating under that agreement? A I understand so, yes.

Q (*By Mr. Conboy.*) What you are referring to is the railroad that runs in front of the entrance to this property? A It is the railroad, the right that is given under, I think, the Bonnett agreement.

Q (*By Mr. Conboy.*) It is on land that is outside of the complainant's land altogether? A No, I don't think it is outside of it, this land, I understood that it ran across part of the land.

Q (*By Mr. Conboy.*) Are you referring to the land way down in the southern part? A I couldn't tell you now at this time the location of it.

Q (*By the Court.*) Is it within a hundred feet of South Front street? A I think I could identify it; it is the branch line, it is the one under the Bonnett agreement.

Q (*By the Court.*) Is that the one you mean (indicating)? A Yes, I think that is the one, I think that is the one under the Bonnett agreement; this is the one under the Bonnett agreement.

Q (*By the Court.*) There is no other? A No; this is the main line of the railroad.

Q (*By the Court.*) And this is the one you have been referring to marked "Trackage of the Central Railroad of New Jersey"? A Yes.

The Court. That is operating railroad or operating branch?

Mr. Conboy. Yes.

Q What was the question that was raised in connection with that branch of the Jersey Central? A Why, I think either Mr. Klipstein or Mr. Seymour stated that it might interfere with their getting out of the prop-

erty and at that point Mr. Hunter said, "Well, I don't think so at all; from my experience with railroads I know they would give you a right of way across there, more than likely they would build a right of way," something to that effect.

Q Well, was anything further said upon that subject? A No; I think that I simply said that I didn't think it amounted to very much. I was anxious to close the title, I guess, and I said it didn't amount to very much.

Q (*By the Court.*) You accepted it, you thought it didn't amount to very much? A I am speaking personally; I sometimes differed from the company.

Q (*By Mr. Whiting.*) In other words, you were a closer? A I was closing the title.

Q What other matters were discussed at that time? A Well, I think I brought up the question of the amount of our guarantee; I think I brought that up at a former meeting we had, and I think at that time I brought up the question, our application was for $23,000 and this transaction looked to me involving $150,000, our application, the amount of our application would have to be increased; I think they went on with the discussion.

Q At that particular time you were working for the company? A Yes, very hard, made a good showing in my department. I think then we went into a general discussion; I don't know whether we did it at that meeting or at the former meeting; I know we went into a general discussion of the title, and I said, I suggested at that time the possibility of these outstanding rights on the street, which Mr. Wright, I think, said could be gotten rid of.

I suggested that they give a mortgage, fix an amount and give a mortgage back and provide for the mortgage that way. This question of the streets had been eliminated. I think it boiled down to the question whether the statute of limitations had run against them, and I think they figured out only a few years, that then the mortgage could go out of existence; I think then that Mr. Seymour said then that would be a mortgage that would possibly interfere with the transfer of the property, it would be indefinite, there would be no telling when it would really be paid, for somebody would have to be satisfied when the statute of limitation had passed. Then I suggested I would take it up with out title officer on the furnishing of a bond of indemnity, and I think that I did: I took the question up with Mr. Titsworth of our office and Mr. Titsworth, I think, said that we would not guarantee the title on a bond of indemnity, as it was, he thought at that time, a question that affected the marketability of the title. Then I don't know whether he suggested it or I went on suggesting that a certain amount of money be deposited with the Fidelity Trust Company until this question was eliminated from our report. Now, I don't know whether this last meeting—I think this last meeting was after meetings that we had had with Mr. Hood and Mr. Wyckoff and Mr. Titsworth, Mr. Seymour and Mr. Wright in the Fidelity Trust Company's office here in Newark. I have an idea that that suggestion came up afterwards, I am not sure, I think it was at the last meeting.

Q Do you know about the subsequent negotiations coming down to the 5th or 6th of July?

A No, I don't; I think I met Mr. Wright and

Mr. Seymour in the Fidelity after the 3d, I am not positive, when they were still discussing the question of streets, and I think Mr. Hood was there at that time; I think that was after the last meeting, I am not sure.

Q Now, do you recall at this meeting on July 3d any statement made by Mr. Hunter that he would put a man over there in charge of that property on the following day? A No.

Q Did you hear any conversation on that subject? A No.

Q Did you hear any conversation on the subject of the tender of the property back? A No.

Re-direct examination by Mr. Seymour.

Q Do you remember any conversation at that time on the subject of Mr. Wright's procuring the releases or mutual releases between the owners of property lying between the railroads, Elizabeth River and South Front street? A There was some conversation as to getting releases, but I don't know whether it was confined to a certain part of the property, I don't know at this time what part it was, it was only part of the property.

Q That is, it was only part of the possible outstanding rights, wasn't it? A I think it came down to an agreement that a certain amount of the rights on certain side of the property did not amount to anything; I think the Fidelity were willing to guarantee against those, but the other rights they were not willing to guarantee against, and those rights I think there was some talk about getting releases.

Q Wasn't it this, that if we got releases, mutual releases between the owners who had

property between the railroads, the river and South Front street, the company would then guarantee against those rights, but they wou not any way guarantee against rights outside of that? A Why, no; at the last consultation we had with Mr. Hood I understood that if releases were gotten on—I don't know the property now, I have forgotten the layout—but if we got releases on certain part of the property that he was willing to guarantee against any private rights in any of the streets crossing the property; there was a map, I think, at that time that was marked; if I am not mistaken, it was over on this side of the property.

Q (*By the Court.*) That is on the south side? A No, that is the northeast side; I don't think there was any worry about anything on the other side of the railroad; that they did not care anything about it, that the railroad was practically a solid fill and that we were not worried at all about any rights there that were shut off.

Q (*By Mr. Conboy.*) You better describe what you have been indicating on the map more definitely, when you were pointing to the portion which you say— A Yes, it was on this side of the plant, the east side, where the public rights had been vacated, on the east side of the plant.

Mr. Conboy. Witness referring to railroad refers to what railroad?

A Baltimore and New York Railroad.

Re-cross examination.

Q Have you before you the map which you had at the time that the discussion that you have just been testifying about took place? A

Yes, this seems to be the map or a map of like nature.

Q Will you indicate on there— A They were the streets on this side of the railroad.

Q East side? A Still east side.

Q Between that and— A Between the east side of the plant and the Elizabeth River.

Q What was the boundary, down here (indicating)? A Why, I think it was South Front street on this map; I remember we spoke about the Grassman property over here (indicating).

Re-direct examination.

Q The views that you expressed there as to the importance of the objections you stated, if I remember, were yours personally and not the company's? A Yes.

The Court. Yes, he said that.

Q You referred to a talk about a bond of indemnity; in what form was that suggested? A I suggested that bond of indemnity be furnished by a bonding company.

Q By a surety company? A By a surety company, yes, I think I said.

Q To the Fidelity? A To the Fidelity.

Q And then the Fidelity might guarantee the title? A Would guarantee.

Q But that, as I understand, the Fidelity refused to do? A Yes.

Q You went to them about that, didn't you? A Yes, I spoke to Mr. Titsworth on the 'phone.

By Mr. Conboy. That would have been a little—

The Court. I overrule it; it don't make a particle of difference to me what the Fidelity did.

List of deeds offered in evidence and marked Exhibit D. 22.

Mr. Seymour. I introduced yesterday a chain of title provided by the Fidelity company and I would like to correct that by the introduction of this deed, of which I have certified copy.

Mr. Conboy. Deed as I understand it that the Fidelity Trust Company in their chain of title did not turn up at all.

Mr. Seymour. This deed they did not include in their chain of title which they furnished me for this trial.

Marked Exhibit D. 23.

Mr. Seymour. Will you let me have the letter to Mr. Holmes of August 14 and August 15? I offer in evidence letter to Hon. Delevan A. Holmes from Frederick Seymour, August 14, 1917.

Marked Exhibit D. 24.

Mr. Conboy. I do not understand the materiality of these letters.

The Court. I don't, either, but I am letting everything in.

Mr. Conboy. You are not letting them in merely because I do not object?

The Court. Oh, no.

Letter dated August 14, 1917, to Frederick Seymour offered in evidence and marked Exhibit D. 25.

Letter of July 13 from Judge Holmes to Frederick Seymour offered in evidence and marked Exhibit D. 26.

Another letter of the same date, the same parties, offered in evidence and marked Exhibit D. 27.

Another letter from Judge Holmes to Frederick Seymour, dated August 27, 1917, offered in evidence and marked Exhibit D. 28.

Letter to Harry Wright, Esq., from Frederick Seymour, dated June 25, 1917, offered in evidence and marked Exhibit D. 29.

Letter to Harry Wright, Esq., signed Frederick Seymour, dated July 6, 1917, offered in evidence and marked Exhibit D. 30.

Copy of letter signed by Frederick Seymour addressed to Midvale Chemical Works, Messrs. George W. Hunter and Leslie N. Simson, trustees, dated June 8, 1917, offered in evidence and marked Exhibit D. 31.

Reply of Mr. Simson, dated June 9, 1917, offered in evidence and marked Exhibit D. 32.

And the reply of Mr. Hunter, dated June 16, 1917, offered in evidence and marked Exhibit D. 33.

Copy of letter to George W. Hunter, Midvale Chemical Works, from Frederick Seymour, dated June 12, 1917, offered in evidence and marked Exhibit D. 34.

Letter to Mr. Simson with enclosure from Frederick Seymour, dated July 6, 1917, offered in evidence and marked Exhibit D. 35.

Letter to Mr. Hunter from Frederick Seymour dated July 6, 1917, offered in evidence and marked Exhibit D. 36,

Letter from Frederick Seymour to George W. Hunter and Leslie N. Simson, trustees Midvale Chemical Works, dated July 10,

1917, offered in evidence and marked Exhibit D. 37.

Letter to George W. Hunter and Leslie N. Simson, trustees Midvale Chemical Works, from Frederick Seymour, dated July 11, 1917, offered in evidence and marked Exhibit D. 38.

Mr. Seymour. I offer in evidence application of Harry Wright to the Fidelity Trust Company, dated June 1, 1917, for an examination and insurance of the title in question.

The Court. I overrule the offer; you have not laid a proper foundation for it.

Mr. Seymour. And I make like offer of the application of Frederick Seymour.

The Court. I overrule that; you may renew the offer if you lay a proper foundation.

JOHN J. RANAGAN, sworn.

Direct examination by Mr. Seymour.

Q On July 13 state what, if anything, you did with reference to delivering the keys of the Midvale Chemical Works to Mr. Simson and Mr. Hunter? A Mr. Seymour gave me a letter addressed to Mr. Simson and Hunter enclosing the keys, he gave me four keys. I put those in an envelope, the envelope was addressed to Mr. Simson and Mr. Hunter, and sealed it up: I went down to 30 Broad street, that is their office, Haskin & Sells, and I asked for Mr. Hunter, and the young man went in and came out after awhile and said, "He is not in;" so I asked him if he knew how soon he would be back, so he said he did not.

Mr. Conboy. We do not raise any question about the delivery of the keys on the 13th of July.

The Court. It is wasting a lot of time. You tendered back possession and they refused to take it. Why should you waste time on admitted facts?

Q Will you produce register of the certificate holders of the Midvale Chemical Works?

The Court. Now, the only object of that is to show that there are a certain number of certificate holders.

Mr. Seymour. Yes, sir.

The Court. It is conceded that there are a number of certificate holders under the articles of association other than the two complainants.

Mr. Seymour. And that there were?

The Court. And that there were at the time the contract was made, and long before that, and were at the time the bill was filed.

Q Produce the books showing the liability of the Midvale Chemical Works.

Mr. Conboy. We concede the same thing with respect to that, that there were liabilities of the company at the time the contract was made and all dates subsequent to that time, that there were creditors of the corporation.

Mr. Seymour. In what amount?

Mr. Conboy. We furnished you with a list of them.

Mr. Seymour. Is that all of them?

Mr. Holmes. That is my understanding.

STEPHEN S. KRAYER, sworn

Direct examination by Mr. Seymour.

Q Dr. Krayer, were you connected in any way with the Midvale Chemical Works? A Yes, I was the manager.

Q Manager of what? A Of the factory.

Q At Elizabeth? A Yes.

Q For how long? A Why, since the beginning, exactly I don't know. I started the Midvale in connection with Mr. Hunter.

Q You had charge of the factory during all the time it was located at Elizabeth? A Yes, I did.

Q Do you remember the time when Mr. Hunter told you that he had sold the property? A Certainly.

Q What did he say to you?

Objected to.

The Court. What is the importance of this? What are you going to prove by this witness?

Mr. Seymour. I am going to show that there was a winding up process.

The Court. All right.

Q What was said to you by Mr. Hunter?

Mr. Holmes. I think that might be conceded.

The Court. Will it be conceded that this was a winding up process, that they were going to get out of business?

Mr. Holmes. So far as the business was connected with New Jersey.

Mr. Seymour. That is not the full—

Mr. Holmes. The company may have had interests in the West.

Q Go on. A Mr. Hunter and Mr. Ernest Klipstein, Jr., came in and informed me that Mr. Klipstein had bought the place and took possession immediately.

Q (*By the Court.*) When was this? What date was this? A Why, the last day of the month, I think it was the 31st of May, about nine o'clock in the morning, something like that.

Q Did you have a conference with Mr. Hunter afterwards about the division of the proceeds and what share would come to you? A Why, several of them, yes.

Q When? A The dates I don't know.

Q Well, it was after that time? A Surely, because I was not satisfied just the way things was.

Q What did he say with reference to your share? A I was told I would get what was coming to me.

Q Did he state the amount? A No, he figured about—I wanted to have an accounting, and naturally he could not tell me just exactly, but he told me after everything was paid I would have left, there would be left fourteen thousand, which would be divided between him and me, that was about, that there would come to me seven; I was not satisfied, as my holding was twenty-four.

Q That was after all debts were paid? A Yes.

Q And after the "A" certificate holders had been paid off? A Yes.

Q And what was the amount of the "A" certificate holders?

The Court. I overrule that.

Statement under Chapter 240 of the laws of 1906, offered in evidence and marked Exhibit D. 39.

Extract from the proceedings of the Board of Public Works of Elizabeth, New Jersey, referring to the vacation of certain streets offered in evidence and marked Exhibit D. 40.

Also reports of the standing committees appearing on page 103 of said proceeding offered in evidence and marked Exhibit D. 41.

Also ordinance vacating Chelsea and other streets offered in evidence and marked Exhibit D. 42.

Mr. Seymour. That is all. We rest.

HARRY WRIGHT, sworn.

Direct examination by Mr. Conboy.

Q You are an attorney and counsellor at law of the State of New Jersey, are you not? A Yes.

Q And in connection with the negotiations between Simson and Hunter, the complainants in this case, and Ernest C. Klipstein, the defendant, you represented the complainants, did you not? A Yes.

Q When did this matter first come to your attention? A You mean the sale of the property?

Q Yes, the sale of the property? A The day that the contract was signed.

Q And that was when? A May, 1917.

Q May 29? A 29th.

Q Do you recall what was said at that time with relation to the taking possession by Mr. Klipstein? A I was not present. Mr. Klipstein or Mr. Seymour were not present in my presence at any time during that day, so I don't know. I drew the contract and it was submitted to Mr. Seymour by Mr. Hunter; I was not present when it was executed, but I drew the contract or the agreement that was signed.

Q And when was the first time that you had any conversation with the parties? A I think after the reports of the Fidelity Trust Company was made.

Q Copy of that was furnished to Mr. Hunter and Mr. Simson about June 12th? A Yes.

Q And copy of that was furnished by them to you, was it not? A Yes, I believe Mr. Seymour sent me a copy, too, at the time.

Q Have you copy of the letter of June 12th in which you enclosed that report to Mr. Hunter, Mr. Seymour? (No answer.)

Q Now, after that did you have consultation with Mr. Hunter, Mr. Seymour and Mr. Klipstein? A Yes, I had numerous conversations beginning from the day of closing, the first day set for closing, which was the 20th of June, down to and including—the last conversation I had with Mr. Klipstein and Mr. Seymour together was on the evening of July 7th at Mr. Klipstein's home; I had a subsequent conversation with Mr. Seymour a month later up at the Country Club.

Q The first conversation that you had took place, as you say, about the 20th of June? A Yes.

Q At the time of the date which was fixed for the closing of title? A I think, I believe I met Mr. Seymour once before that at the Fidelity Trust Company with reference to this matter, but I am not sure as to the date.

Q Where was this conversation that you had the 20th of June? A At Mr. Seymour's office.

Q Who were present? A All the parties, Mr. Klipstein, his son, Mr. Seymour and Mr. Hunter and myself and Mr. Hoff.

Q And what was said? A We came there, we went there for the purpose of closing the title.

Q Did you bring a deed with you? A Yes.

Q Have you got the deed here? A Yes, I brought a deed and was met by Mr. Seymour with the first suggestion that the title was defective, or the most serious defect in the title was the question of rights being granted or being owned by the Midvale on the Elizabeth River; I was very much surprised at that, because the Fidelity had not raised any question of that kind, in general terms, and I asked for an explanation, and he said, "Why, your deed states that one of the lines of the meadow tract runs five feet or stops at a point five feet from the water line," and he said, "We can't take the title unless it runs to the water line;" I said, "I don't believe that is the situation, and if the Fidelity company has made report of that kind it is erroneous and should be corrected." I showed them my deed I had prepared and he said, "You use that same

description," and he said, "I don't like it," I said, "Well, I have also set up, 'Being the same premises conveyed by a prior deed,'" and I incorporated that old description which carried it to the river; so he said, "Well, I won't take the deed that way," and we sat down and made corrections so that the line actually ran to the river, to meet his objections I ran the line to the river and ignored the stake; I knew about that stake and I knew there was no validity in his claim that it did not run to the river, and I promised to take it up with the Fidelity Trust Company and have them correct their report.

Q (*By the Court.*) What date was this? A This was on the 20th of June, and we adjourned to the 22d for that particular purpose, as he insisted that was the most important part, the most important objection in the whole title.

Q That the title did not run right down to the river? A Yes; yes, and I made notes on the margin of the deed here just to meet the objections to the title, and he also asked me to put in a clause to the effect that the building, machinery and equipments upon said parcels of land &c., should pass with the deed; I made these notes on the deed and made the correction which is in the deed which I tendered later.

Q The deed which you have in your hand there is that, the deed on which you made the corrections Mr. Seymour insisted upon? A Yes.

Deed offered in evidence and marked Exhibit C. 1.

Q You adjourned then until the 22d, for two days? A Yes.

Q What took place then? A On the 21st Mr. Seymour met me at the Fidelity Trust Company and I succeeded in having the Fidelity agree with me with reference to that stake not being a monument in the title; it was put there by a surveyor who did not wish to go out in the mud when he surveyed the property, and therefore the Fidelity seized upon it as a mark to guarantee it, and when I showed them the absurdity of it they readily consented to take it up.

Q That was on— A That was on the 21st I think that conversation took place. Then we met the next day, as agreed upon, adjourned date, and at that time, 23d, was the 23d, that was the day we adjourned the contract meeting, 23d, I guess, no, 22d; the first date was on the 20th; then we went to Newark on the 21st; it was the 22d, 22d of June. I am sure of that.

Q The deed was to be delivered on the 20th according to the contract, and on the 22d closing title was adjourned until the 3d of July? A Well, it was the 22d, at that meeting the same people were present as at the June 20th meeting, and Mr. Seymour then raised all the questions that the Fidelity had raised against the title, and I argued that they were not defects which would prevent us from having a good and clear title. Mr. Seymour at that meeting seriously objected to the conveyance being made by Mr. Simson and Hunter as trustees of the Midvale Chemical Works, insisting that we should have had some authorization by the certificate holders. I informed him that the Fidelity Trust Company had passed on that question and had expressed their

willingness to guarantee our title if the deed was made to Mr. Hanter and Simson as trustees, and a copy of the articles of association to be filed with or accompanying the conveyance. He insisted, nevertheless, that he would not take that kind of a deed, that he wanted the certificate holders to approve of the sale, and in order to give him that approval, which we did not think was necessary, but wanted to give him to satisfy him, we adjourned the title closing until July 3 so that the meeting could be held so that we could give the proper notices and have the meeting to intervene between the 22d of June, on which date you adjourned the closing of title, to enable a meeting of certificate holders to be held, and the 3d of July; the meeting was held on the morning of the 3d day of July and approval was given to this contract. But reverting to the meeting of June 22d again, at that time Mr. Seymour was urging the objections to the title as raised by the Fidelity, and we wanted to do everything that we could to assure them that there was nothing in those objections, and it was at my suggestion that Mr. Hoff telephoned to the Fidelity Trust Company to ask them if they would guarantee the title, if we were willing to indemnify the company in some way, and I understood at the time that the Fidelity would not guarantee unless the questions were removed by releases or something of that kind procured, and Mr. Seymour said that he did not object so much to the rights of owners, of rights of all the owners on the map west of the Baltimore and Ohio railroad and north of the Central railroad, because of the fact that the railroads surrounded our property, and if we could get the Fidelity to except from their

policy the rights only of the people west, east and south of the two railroads that he would be disposed to take the title. I told him that we would try and do that, but that I did not have any fear that there were any rights, but in order to satisfy him we would try to procure those releases; and it was at that time that Mr. Klipstein—we also suggested that Mr. Klipstein retain $10,000 from the consideration money and give us a mortgage back for $10,000 which would run, would have a clause in it to the effect that the mortgage was due, would become due and payable upon the claim of anybody, any person establishing in court that they had private rights down there, otherwise to run until the statute of limitations had run against the rights. In the meantime they were going to fence the property so there could not be any question about adverse possession, and we were willing that that $10,000 should remain at interest for twenty years, if necessary. Mr. Klipstein did not like that; he said he didn't want any mortgages on his property, and he turned around then just as we were about to conclude the meeting and said to Mr. Hunter in my presence that if Mr. Hunter would take off $10,000 from the consideration that he would assume the defects and insure himself. I think that is all that took place at that meeting.

Q When was the next meeting? A The next meeting was on July 3.

Q What took place at that time and who were present? A I think the same men were present as at all of the other meetings, that is, the two former meetings for closing; and we again tendered our deed at that meeting; also tendered the proofs of the meeting of the cer-

tificate holders and the approval, and we went all over the questions again with Mr. Seymour and Mr. Klipstein, principally with Mr. Seymour, and reviewed the whole thing again, I insisting that there were not any defects and he insisting that there were, and I offered my deed and he said, "Well, we will excuse formal tenders of deeds because I haven't prepared my papers and you haven't got all of yours prepared, and we will waive the formal tender." I just stated in a general way just what took place; I did not go into details of it.

The Court. Don't go into the details.

A I won't go into details. A good deal more was said than what I have referred to; I referred to it in a general way. They refused to take the title.

Q (*By the Court.*) On what ground? A On the ground of the exceptions that the Fidelity insisted upon putting in the policy.

Q And was any tender of the property back made at that time? A On July 3 Mr. Seymour, at several of the meetings, and I think it was July meeting, too, asked us to take the property back and we insisted that we would not, and he said, "Oh, well, if you are afraid to take it back because it will prejudice you," he said, "I will offer it back without any prejudice," and I informed him that we would not take it back under any circumstances, we had a good binding contract and we did not propose to and we would sue him for specific performance in order to get the thing straightened out.

The Court. I don't know why you waste time further. There is no question but that after the 3d of July the parties were deal-

ing at arm's length, each were insisting upon their rights.

Q Have you exhausted the conversation that took place at that time, July 3? Was anything said about continuing the conversation? A Yes, after the refusal on my part to take the plant back, Mr. Seymour suggested we meet him on July 4th at the country club for the purpose of seeing if we could not arrive at some kind of a conclusion in this matter. Mr Hunter and myself met Mr. Seymour, as agreed upon, at the country club, July 4th, the afternoon of July 4th, and we rehashed the whole thing over again and arrived at no further conclusion than what we had the day before, had reached the day before. And then on the July 4th meeting we adjourned without any definite arrangement being made about subsequent meeting, but I was notified on either the 5th, no, I was notified, I think, on the morning of the 7th to meet Mr. Hunter again with Mr.—

Q Before you get to the morning of the 7th, did you have a conference with Mr. Seymour at his office on the afternoon of the 5th? A Yes, on the afternoon of the 5th of July I met Mr. Seymour at his office with the idea of getting him to make a statement as to exactly what his objections were to the title, because I had had several interviews with representatives of the Fidelity Trust Company, who notified me that they thought that they would remove these objections that they had raised with reference to private rights, and I wanted to get Mr. Seymour to give me a definite statement as to exactly what his objections were in case I got the Fidelity to decide finally what they would do in the matter.

Q You went over there on the afternoon of

the 5th, did you? A Yes, I met Mr. Seymour at his office.

Q What conversation did you have there? A I had a list of the questions that he had raised against the title, copy of the letter he had sent to me.

Q Of June 25? A Yes.

Q Have you got that copy here? A I think it is among the papers there, I think Judge Holmes has that copy. I have before me a copy of the letter that Mr. Seymour had sent to me on June 25, 1917, and I took up each one of the questions and made a notation on the margin of this memorandum that I had as to just what Mr. Seymour had in mind in reference to each one of these objections.

Q Not what he had in mind unless he expressed it? A He expressed it, so I put it down, put it on the paper.

Q Did you have a conversation with him about these things? A Yes.

Q Did you make this memorandum at the time you had that conversation? A Yes, right in his presence; I asked him in reference to the objection No. 1, outstanding rights of the Central railroad, whether that was important or not, and he said, "We will not insist on this question, it is not important." No. 2, I asked him if the rights of the poles along the streets would bother him much and he said, "Not important." No. 4, outstanding rights and drains across the property; he said he would take his chances on that. The fifth question was with reference to the rights of creditors of the Midvale Chemical Works, and he said that they could be overcome before closing the title. No. 6, rights of certificate holders under the trust agreement. He said

that was all right if accompanied by affidavits of the meeting and copies of the papers which I told him we had and presented to him before in fact, but he said he had not read them, so did not know anything about it. That left the only important outstanding question of private rights in those streets.

The Court. That is the only question I think there is in this case.

A And it was that question that led me to go to the Fidelity Trust Company, this meeting of the 6th of July, and after arguing with them the whole morning, or practically the whole morning, the Fidelity Trust Company under an agreement I made with them agreed that they would guarantee Mr. Seymour or his client, Mr. Klipstein, against these private rights and eliminate them from their policy. I went back to New York, I telephoned over to Mr. Hunter first and then went over to New York and called at Mr., stopped at Mr. Seymour's office, but he was out; I then went to Mr. Hunter's office, Haskell & Sells, and while there Mr. Seymour called up, 'phoned in that he was down at Bayway and there had been a fire in the plant, and at that very same time I informed him the Fidelity were ready to close and they would take that exception out of the policy.

Q What did he say? A Well, he said he would see me later, and that was all. And then after that I received notice on the next day, on July 7th, to meet Mr. Klipstein and Mr. Hunter and Mr. Seymour at Mr. Klipstein's house in East Orange, which I did; I attended that meeting and we went over the same questions again, and I informed them the Fidelity had taken out

the very serious question, the question they alleged was the serious one, and was willing to guarantee. Mr. Klipstein said, "It is too late, you were not ready and willing on the day the contract was to be closed," and he said, "The contract is at an end, that settles it." He says, "There is no use talking any further," then he followed right up, "If you want to make a new contract we are here to talk business." I got very hot under the collar there and said some things to Mr. Klipstein that I would not ordinarily have said. I accused him of trying to get something off of the consideration and these objections were not seriously contended at all. That was the end of that affair at that time.

Cross examination by Mr. Seymour.

Q On July 3 was it not stated when we rejected the title that it was upon all the grounds which I have stated to you in my letter of June 25? A You so stated it, yes.

Q And you got that letter shortly after the Fidelity had reported on the title? A Yes.

Q And was there ever any change in the attitude which was stated in that letter that we would not waive any specific objection until we were prepared to take the whole title? A Your attitude changed so many times I couldn't tell exactly where you were standing, and I asked you to specifically state at different times exactly what your objections were. You stated at several of the meetings that you would be disposed to waive this and waive that or waive the other thing, but you insisted that certain things be done, I couldn't tell exactly what you would waive in the final analysis.

Q It was understood, was it not, all the way through that I would actually waive nothing until I was ready to waive all of the objections or until such— A I did not so understand it.

Q It was so stated in the letter. A You stated it in the letters, yes, but your conversations were altogether different from your letters. You have been very careful in putting down in print exactly one way, stating one thing, then when I would see you, you would hedge and say, "I am disposed to waive that, but I want this other thing out of the way." Then when I told you the other thing is out of the way, you would say this thing comes back again, and that was you attitude in this whole transaction.

Q At what time was it ever intimated to you that we would waive any specific objection until the whole question was settled and that we would pass on it as a whole?

The Court. Is there any use prolonging this examination upon that question?

Mr. Seymour. No.

Q Now, you say you had arranged with the title company on July 7th that they would guarantee against the owners lying between the railroad and river and South Front street? A Yes.

Q And that was an arrangement, was it not, by which you were to deposit $20,000 in the Fidelity Trust Company? A It was.

Q And meantime you were to endeavor to get releases executed between all the owners? A No, sir, that is not so; that is not the arrangement I made with the Fidelity Trust Company; if you want that private arrangement that I made with the Fidelity Trust Company I will

give it to you if you think it is material in this case.

Q It was a deposit of $20,000, however? A Yes. If you want me to tell how long that $20,000 was to remain, I will tell you that. There was $25,000 asked first, then decided on $20,000. Do you want me to tell the whole conversation with the Fidelity with reference to that?

Q (*By Mr. Conboy.*) What was the arrangement?

Objected to.

The Court. Overruled.

RECESS.

Letter of Jan. 3, 1918, from V. C. Lane.

Chambers of
Vice-Chancellor Lane,
Newark.

COURT OF CHANCERY OF NEW JERSEY.

Jan. 3rd, 1918.

Harry Wright, Esq.,
Newark, N. J.

Frederick Seymour, Esq.,
New York City.

Gentlemen:—I have advised the final decree in Simson vs. Klipstein.

It is fully understood that the sole question upon which I passed was whether the contract should be specifically performed. The details as to the manner of performance have been agreed upon by counsel else there would have been a reference to a Master. If counsel are not in accord with this view then application may be made, upon notice, to modify the decree.

This letter is to be printed in case of appeal as a part of the record.

Counsel will furnish me at the earliest possible moment with a copy of the testimony and my conclusions so that a formal opinion may be prepared. The conclusions delivered at the close of the argument are not to be printed unless further direction is given.

Yours very truly,

MERRITT LANE.

Received February 18/18.

February 16th, 1918.

Conclusions of Vice-Chancellor.

IN CHANCERY OF NEW JERSEY.

Between

LESLIE N. SIMSON and GEORGE W. HUNTER,
Complainants,

and

ERNEST C. KLIPSTEIN,
Defendant.

On Bill, Etc. Conclusions.

(Not for Print.)

Mr. Harry Wright (Mr. Martin Conboy and Judge Holmes of the New York Bar) for complainants.

Mr. Frederick Seymour and Mr. Borden D. Whiting for defendant.

LANE, *V. C.*

This is a bill filed (by a vendor) to compel specific performance by the defendant (the vendee) of a contract entered into between Midvale Chemical Works, signed "Midvale Chemical Works by George W. Hunter and Leslie N. Simson, Trustees" and the defendant on May 29th, 1917, providing for the sale by the party of the first part to the defendant of "all of its real property consisting of two parcels of land situated at the intersection of the Long Branch division of the Central Railroad of New Jersey and Bayway avenue in the section known as

Bayway, Elizabeth, N. J., one 14 22/100 acres and the other 2 92/100 acres, total 17 14/100 acres, being the property on which the chemical plant of the party of the first part is located"; the party of the first part also agreed to "convey said land and property by a good and marketable title, free and clear of all encumbrances excepting mortgages on its real estate aggregating the sum of nineteen thousand, five hundred and ninety-seven dollars ($19,597) which are to be assumed by the party of the second part as an addition to the above stated purchase price." It was provided that title should close on June 20th, 1917. On May 31st, 1917, the purchaser went into possession and has remained in possession ever since. The time of closing of title was continued from June 20th to June 22nd and then to July 3rd, 1917.

There were various objections raised by the defendant to the marketability of the title from June 21st to July 3rd. While it appears that the defendant was disposed to waive certain of the objections now raised and was disposed up to the time of the fire, hereinafter referred to, to accept the title if a reduction could be had from the purchase price of certain amounts, ten thousand suggested at one time and twenty-five thousand at another, there is no evidence before me that will permit me to find that the defendant has waived his rght to have a good and marketable title. There is no doubt but that on July 3rd, 1917, the defendant formally tendered to complainants possession of the property, and that the complainants declined to receive it. From July 3rd the parties were dealing at arms length. On July 6th a fire occurred which destroyed so much

of the property as to render the use of the rest valueless for a considerable space of time.

There is no evidence before me from which I can find that the complainants and defendant agreed to submit the question of the marketability of the title to the Fidelity Trust Company and that because of such alleged submission, the complainants are bound by the determination of that company not to insure the title except with certain exceptions.

The first objection raised by the defendant is that the complainants cannot bring this suit without joining all certificate holders and cannot give good title for the Midvale Chemical Works without the assent of the certificate holders. This question was brought to the attention of the Court originally by an answer in lieu of plea. Upon a motion to strike out the plea, I filed conclusions which resulted in an order striking out the answer in lieu of plea. The same question has now been raised upon final hearing, and I adopt on this branch of the case my conclusions heretofore filed, and they are to be printed as a part of the record. So far as the point taken that the sale must have the acquiescence of the certificate holders is concerned it is untenable for at a meeting of the certificate holders called for that purpose assent was, in fact, given to the conveyance. It is agreed that the Articles of Association referred to in my former conclusions will be made a matter of record in Union County so that any question based upon the absence of such a record is removed from discussion.

The defects in the title relied upon by the defendant upon the oral argument were: (1) That the main entrance to the plant is by a right of

way over lands of a railroad company and the right to use the way is subject to be revoked upon a certain length of time of notice. The railroad crosses the right of way on a trestle. (2) That there extends across a portion of the land a switch of a railroad company and that the railroad company has a perpetual right to maintain the switch. (3) Extending along the property to be conveyed are telephone poles, and that the companies maintaining the poles have a perpetual right to so do. (4) Extending across the property are certain ditches which act as drains for other lands. (5) That there is a public street known as Amboy avenue running through the property. (6) That there are dedicated streets not opened but not properly vacated running through the property. (7) That there are certain private rights of way over these dedicated but unopened streets. (8) That the sale by the Midvale Chemical Works is a winding up of the concern to dispose of all its property, and Chapter 237 of the laws of 1907 has not been complied with.

Upon the conclusion of the oral argument I expressed my opinion, as then advised, as to each of these alleged defects except that with respect to the switch of the Central Railroad of New Jersey and as to that the same reasoning that I adopted with respect to the ditches and public streets applies. I expressly stated that the opinion was one reached without a consideration of the law and that I would take briefs. I asked counsel for the defendant at the conclusion of the oral opinion as to whether they desired an opportunity to submit briefs and after consultation, they stated that they did not.

They then forthwith took an appeal.

The result is that I must do either of two things, stand by my original opinion supported by my general knowledge of the law plus such knowledge as I may have obtained from such cursory examination as I may have an opportunity to make of the authorities without doing injustice to other cases fully briefed, or, without the assistance of counsel, make a thorough and exhaustive examination of the law using time which ought to be given to other cases. It must be understood, therefore, that my oral conclusions unless adopted by the Court of Errors and Appeals shall not be considered in any manner, shape or form as a precedent. If I should hold this case a sufficient length of time to permit a proper examination of the authorities, the case could not be heard at the next term of the Court of Errors and Appeals and the rights of the parties might be seriously prejudiced. The property is lying idle; neither side will assume the responsibility of rebuilding and operating it and it is, of course, deteriorating every day. I apologize to the Court of Errors and Appeals, but it seems to me more important that cases should be determined, than that the Court should take the time necessary to prepare an exhaustive brief in support of its own conclusions without the aid of counsel. Undoubtedly the case will be fully and exhaustively briefed in the Court of Errors and Appeals.

Prior to the purchase of this property, the purchaser examined it. He was fully familiar with its physical characteristics; he had examined the maps showing all of the public streets alleged to have been vacated and unless some false representation was made to him by the seller which would permit him to rescind the contract, he is

without relief. I have grave doubt as to whether the evidence is sufficient to charge the complainants with having made any false representation, but in view of the opinion which I expressed orally and to which I adhere, I do not determine that question.

I said orally, "The entrance is not included within the property which was to be conveyed. It is demonstrated that the defendant saw the property, he saw this entrance, he knew it was on railroad land, and there is not sufficient proof that any fraud was practiced upon him. Taking his testimony at its best, it is to the effect that the complainant said that because of past relations or past favors performed by the Midvale Company for the Railroad Company they would be glad to continue the arrangement. There is no proof that this statement was false. There is no fraud."

"Now as to the ditches. He saw the ditches. He acknowledges that he knew that if they were natural water courses they might not be closed. That if they were not natural courses they might."

"As to the telephone poles, he saw those. He knew they had to remain or might remain there. So with respect to Amboy avenue running through the property—he saw that public street; he knew it was a public street."

"With respect to Chapter 237 of the Laws of 1907 it appears upon the request of the defendant the complainants did give a list of creditors. Under that act the burden is upon the buyer. So I say as far as I am now advised, it simmers down as to whether there are private rights across this property which make the title unmarketable. I am disposed to determine this case

now. I will permit counsel, however, to submit briefs within a week. I am inclined to advise a decree for specific performance. The only question I think important is whether or not they are private rights of way over Brighton, Jersey and Richmond streets. These streets are laid out on a map known as 'Bayway Map' or rather called in this case 'Bayway Map' and in another map which has been called in this case 'The Commissioners Map.' The streets were dedicated to public use; were, I think, accepted by the municipality. They became upon paper public thoroughfares, but they were never opened. Sometime prior to 1915 the property now owned by the complainants which lies in a triangle formed by the intersection of the Central Railroad Company of New Jersey and the Baltimore & Ohio Railroad came into the ownership of one party. The lines of the Baltimore & Ohio Railroad and of the Central Railroad effectively prevent any use of Jersey avenue or Richmond street within the bounds of complainants' property. In 1915 the municipality within its authority vacated both Richmond, Jersey and Brighton avenue. There is no claim that there was any private rights over any of these streets except such as may have arisen by reason of conveyances made referring to the filed maps, except with respect to Brighton street. There is shown that by deed made in 1865 there was reserved a private right of way. There is no evidence that such right of way has ever been exercised. While as matter of law upon the dedication to public use the private rights might not have been merged, yet it seems to me that where the streets were dedicated, and accepted by the city and never used either by the public or by those who are

said to have private rights in the public vacated streets, the rights both private and public expired. That is my view as presently advised. I will take briefs."

"With respect to the contention that the existence of Amboy avenue prevents the conveyance of a marketable title, I find as a fact that the parties negotiated with full knowledge that Amboy avenue was a public street running through this property, and it was never contemplated that the land comprised within the boundaries of the street should be conveyed to the defendant. The defendant saw the property, the public street going through there and he admits that at one time he considered that it was a betterment rather than a detriment. I do not have to pass upon the question whether the existence of a public street over land to be conveyed would make a title such as this unmarketable because I find as a fact that the contract contemplated only that the real estate actually owned by the complainants should be conveyed, and did not contemplate the conveyance of the land within the boundaries of Amboy avenue. If counsel desire to submit briefs they may if they see fit. I have not examined the law. It is only my impression as now advised."

Opinion of V. C. Lane on Motion to Strike Out Bill.

Bill by Leslie N. Simson and another against Ernest C. Klipstein. On motion to strike out bill. Motion denied.

Henry Wright, of Newark, and Martin Conboy, of New York City, for the motion. Frederick Seymour, of New York City, opposed.

LANE, *V. C.* The bill in this case was filed to compel specific performance of a contract of sale. The contract is not under seal. It purports to be between the Midvale Chemical Works, an association, as party of the first part, and Ernest C. Klipstein, as party of the second part. It is signed for the party of the first part, Midvale Chemical Works, by George W. Hunter and Leslie N. Simson, trustees. The suit is brought by Leslie N. Simson and George W. Hunter and while in the opening paragraph of the bill they are not termed "trustees," yet by a perusal of the whole bill it is perfectly clear in just what capacity they bring their suit. The contract involves a large amount of property. The consideration is in excess of $200,000. It is dated the 29th day of May, 1917. On the 31st day of May, 1917, Klipstein went into possession of all the real estate and personal property embraced in the agreement, and continued the active operation of the plant. On the 22d day of June, 1917, an adjournment of the closing of the title was had. On the 3d day of July, 1917, deed was tendered. Performance was declined, but Klipstein continued in possession of the property. Annexed to the bill of complaint, and made a part thereof, is an agreement setting forth precisely what the

term "Midvale Chemical Works" imports. Leslie N. Simson and George W. Hunter, under the terms of this instrument, "associate ourselves together as trustees, and hereby form an association to be known as Midvale Chemical Works."

Article 2 provides:

"The trustees shall have the power to contract and carry on in the name of and for the association, any business which could be lawfully conducted or carried on by an individual, and in the conduct of such business, may use and invest any funds of the association, and shall have full general power and authority to buy, sell, pledge, mortgage, grant, convey and exchange property of every description, real, personal or mixed," etc.

Article 4:

"The trustees shall be deemed the absolute owners of all the property of the association, and both the legal and equitable title to all such property shall be vested absolutely in them, their successors and the survivor or survivors of them, or to their successors, subject only to all applicable terms and conditions of this instrument."

Then follows the provisions with respect to the issuance by the trustees of certain classes of stock, A and B. These certificates give all holders right to participate in the profits of the association and in case of distribution to an interest in the assets. The form of the certificate contains the following:

"The interest represented by this certificate is personal property, irrespective of the nature of the estate of the trustee."

"No certificate holder, or his assigns, heirs, or legal representatives, shall at any time have or claim any legal or equitable interest in the property, whether real, personal or mixed, of the association, and nothing contained herein shall be considered as creating or giving to any certificate holder any interest in or to such property, but such certificate holder shall have an interest only in the net proceeds or profits which may be derived from such property, or in the proceeds of the said property on liquidation or distribution, and only when and as such proceeds may become distributable under the terms of the aforesaid articles of association."

Article 13:

"No certificate holder shall, as such, be a necessary or proper party complainant or defendant in any suit or other judicial proceeding relative to or affecting the property or assets of the association."

Article 14:

"In every written contract that the trustee shall enter into, relating to the business of the association or estate or any part thereof, reference shall be made to these articles and the person, firm or corporation contracting with said trustees shall look to the funds and property, legal and equitable, of the estate for the payment under said contract of any debt, damage, judgment or decree, or any money that may become due and payable in any way by reason thereof," etc.

Article 15:

"No person dealing with the trustees shall be charged with the duty of making any inquiry as to their authority to deal with the property

of the association, nor with the application of the purchase money for any property of the association which they may purchase from the trustees," etc.

There are other provisions of the trust agreement which I do not think it necessary, in view of what I have already quoted, to refer to.

To the bill of complaint, an answer in lieu of plea was filed. This answer sets up merely that on the 29th day of May, 1917, and ever since that date certain persons, seven in number, were holders of certificates in the form of Class A, and that, therefore, they are proper, necessary, and indispensable parties to the action. There is no allegation that these certificate holders are all of those holding certificates.

A large portion of the voluminous brief of counsel for the defendant is taken up in the discussion of matters which, in my view, are aside from the mark on this particular application. The sole question before me is whether, assuming that the bill of complaint correctly relates the facts, and that the parties bringing the suit have power to bring it, there is a fatal defect in parties complainant. It will be observed that, although the Midvale Chemical Works is named as the first party in the bill of complaint, the contract is signed, "Midvale Chemical Works, by George W. Hunter and Leslie N. Simson, Trustees." By reference to the articles of association it appears that it is distinctly provided that the trustees shall have full power to contract and buy and sell; that they shall be deemed the absolute owners of all the property of the association, and the legal and equitable title to all such property shall be vested absolutely in them;

that the certificate holders shall have no interest, legal or equitable, in the property, whether real, personal, or mixed; that they shall not be necessary or proper parties complainant or defendant in any suit.

[1] The contract of sale not being under seal, the real parties in interest may be shown. Babcock v. Stobbe, 102 Atl.——. But the question which is before me is not whether the parties bringing this suit have the right to bring it, or in what capacity it should be brought. It is whether, assuming that they have the right to bring the suit, the parties referred to in the answer in lieu of plea are necessary parties. For the purpose of demonstrating this, the defendant must go to the articles of association, and, upon going there, we find that it is expressely provided that they shall not be either necessary or proper parties.

[2] The principle of law that cestui que trustents are, in some instances, necessary parties in suits dealing with the trust property, is for the benefit of the cestui que trustent. It seems to me, upon the whole, that this case is well within the remarks of Mr. Justice Dixon, delivering the opinion of the Court of Appeals, in Smith v. Gaines, 39 N. J. Eq. at page 549, and Vice-Chancellor Pitney in Stevens v. Bosch, 54 N. J. Eq. at page 63, 33 Atl. 294. In the latter case the Vice-Chancellor said:

"This is not a suit to administer a trust, or in which the construction of it or the rights between trustee and cestuis que trust are at all involved. The trustee here represents his cestuis que trust, and the case is clearly within one of the exceptions mentioned by Justice Dixon

in his opinion in Smith v. Gaines [39 N. J. Eq.] 12 Stew. Eq. 545, at pages 549, 550."

Now, with respect to the form of the order or decree. In view of the allegations of the bill, not now denied, that the defendant has been, since the 31st day of May in possession of this large amount of property, and that the complainants have completely performed, on their part, and of my inability to conceive how the defendant can be substantially injured whether the suit be brought in the name of the Midvale Chemical Works by the present complainants as trustees, or by the present complainants individually acting under the articles of association, or by the fact that the contract happens to be signed in the manner in which it is rather than in a different manner, I am not disposed to advise an order or decree in this case which will permit, unless the complainants desire it, a double appeal to the Court of Appeals. My recollection of the law is that, upon the overruling of a plea, that is, under certain circumstances, unless the court otherwise directs, a final decree may be made in favor of the complainant. Whether this has been changed by the sixty-eighth rule (100 Atl. xii), which provides:

"If a defense be stated, which heretofore would have been the proper subject of a plea, the answer need not answer the allegations of the bill of complaint further than is necessary to support such defense,"

—I do not now determine. I draw attention of counsel, however, to the fact that it is further stated:

"In such case, should the answer be found insufficient or untrue, the court may, in its dis-

cretion and on terms, permit the defendant to answer the bill fully, or may make such other order or decree as may be just."

Rule 67 (100 Atl. xii) provides:

"On a hearing of a motion, to strike out a pleading, the court may, in its discretion, order the application to stand over until the hearing, and if the objection is to the bill or counterclaim may require the same to be answered on such terms and conditions as may be ordered."

If I have the power and if complainants so move, I will direct the hearing on the application to strike out this plea to stand over until the final hearing, in the meantime directing the defendant to answer upon the merits. No possible harm can come to the defendant from this course, for he has the same right to set up in his answer the defect that he now sets up as he had by the present answer in lieu of plea. If upon final hearing it appears to the court necessary to bring in the parties which it is alleged should be brought in, there will be no difficulty in doing so, or at least a sufficient number of them to answer the purposes of the rule invoked.

Let an order or decree, approved by both sides, be presented, or let it be settled upon one day's notice.

Supplemental Memorandum.

That portion of the opinion of Vice-Chancellor Stevenson in Babcock v. Stobbe to which I refer reads as follows:

"The proof is ample that when the agreement which is the basis of the complainant's claim, this agreement of May 27, 1909, was executed by Moore, both the complainant Babcock or his agents Shack and Vermilya, and the defendant Stobbe, and also Moore, understood that the subject-matter of the agreement of sale was the Stobbe farm, the farm owned by Stobbe, and that Moore was executing the contract in question, not for himself, but as agent for Stobbe in pursuance of the power of attorney which the complainant's attorney had drawn, and which that attorney and the agent Shack knew well was the whole basis of Moore's authority to execute the contract so as to bind Stobbe."

"It would, it seems to me, be an amazing result of the application of antiquated technicalities if either the complainant Babcock or the defendant Stobbe could, in a court of equity, maintain the proposition that by this contract they were not both bound."

"I have examined with care the numerous and conflicting decisions which counsel have cited bearing upon the technical questions pertaining to the status of these agreements as contracts inter partes under seal, and as contracts in writing under the operation of the statute of frauds and under the force of the rule excluding parol evidence offered to alter the contracts in writing. Without undertaking to discuss these technical legal questions, which could only be done at great length, and with the minute examin-

ation of many cases, I shall merely state my conclusion that this agreement stands, not as a contract under seal, but as a written agreement executed by one party personally, and by the other party through an authorized agent who was not authorized to execute the same under seal. In such a case the seal is a superfluity and may be disregarded, and the instrument has the status of a written contract of the principal not under seal. Long v. Hartwell, 34 N. J. Law, 118; Calhoun v. Buhre, 75 N. J. Law, 439, 441 [67 Atl. 1068]."

"It must be noted that one of the duplicate originals was not in fact executed by Moore under seal notwithstanding the erroneous recitation in the attestation clause, which merely shows that it was the expectation of the draftsman of the instrument that it would be executed under seal."

"With the aid of certain authorities which have been cited, an argument can be made in favor of the proposition that if this instrument in fact must be deemed a deed inter partes under seal, it can be taken in a court of equity as the deed of Stobbe. In my judgment a court of equity would be astute to discover any theory of this transaction consistent with our modern law according to which the absurdity and injustice could be avoided of finding that the complainant paid his $750 upon the execution of this contract without receiving any obligation from Stobbe, the owner, to convey the land, but only the obligation of the agent Moore to convey the land which all the parties to the transaction well knew Moore did not own.

"While I cannot in this memorandum undertake to discuss the numerous cases which have

been cited or which I have examined, in which there is considerable conflict, it may be well to add that in many cases the great principle which is now firmly established, that a contract is to be construed in the light of the circumstances which surrounded the parties when they made it, has been overlooked. Our modern law in dealing with statutes, wills, and contracts permits the court, in endeavoring to interpret these writings, to stand in the place of the Legislature, of the testator, of the contracting parties, so as to see the things which they saw and know the things which they knew to which the written words are to be applied."

"That distinguished equity lawyer, Vice-Chancellor Van Fleet, in deciding the case of Schenck v. Spring Lake Beach Improvement Co., 47 N. J. Eq. 44, 19 Atl. 881 (from which case I may say in passing the one at bar is plainly distinguishable) says (47 N. J. Eq. page 48, 19 Atl. page 881): 'That a written contract, whether within the statute of frauds or not, and whether under seal or not, which is free from ambiguity and perfect in itself, and not the product of fraud, or the result of mistake, and which has not been changed by a subsequent contract, cannot be changed, varied, or contradicted by oral evidence, but must be accepted as the only evidence by which the rights and liabilities of the contracting parties shall be measured and determined.' This may be accepted as an accurate statement of the law where the contract in question is 'perfect in itself,' and where the effort is made by parol evidence to have it 'changed, varied or contradicted.' The vast majority of contracts are not 'perfect in themselves,' but relate to things which have to be de-

scribed and defined—things which the contracting parties knew and had before their eyes, but which the court cannot know unless parol testimony in regard to them is admitted. A contract is not 'changed, varied or contradicted by oral evidence' when it is interpreted by the court after the court has been placed in the position in which the contracting parties stood when they expressed themselves in the language of the contract."

"The correct exposition in our modern law of the rule excluding parol evidence 'to change, vary or contradict,' a written instrument may be ascertained upon reference to the following authorities: 1 Greenleaf on Ev. §§277, 286, 287; 1 Wigmore on Ev. §2470; 21 Am. & Eng. Ency. (2d Ed.) 1108, 1109; 17 Cyc. 673, where a very large number of American and English decisions are cited; 2 Taylor on Ev. § 108; Mumford v. Gething, 7 C. B. (N. S.) 305; 141 English Reprint, 384; Krell v. Henry [1903], 2 K. B. 753; Sullivan v. Visconti, 68 N. J. Law, 543, 547 [53 Atl. 598]."

It must not be overlooked that the complete performance of the contract by the complainant takes it out of the statute of frauds.

Final Decree.

Filed January 5, 1918.

This case coming on to be heard on December 4th and 5th, 1917, in the presence of Harry Wright, of counsel with the complainants, Martin Conboy and Hon. Delevan A. Holmes, both of the New York Bar, of counsel with him, and in the presence of Frederick Seymour, of counsel with defendant, Borden Whiting, of counsel with him, and it appearing to the satisfaction of the court that Leslie N. Simson and George W. Hunter, complainants herein, are duly associated together as trustees of Midvale Chemical Works, and that by virtue of a certain agreement in writing, duly made and executed by and between Leslie N. Simson and George W. Hunter, the complainants, as such trustees of said Midvale Chemical Works, and Ernest C. Klipstein, the defendant, on the 29th day of May, 1917, the defendant, Ernest C. Klipstein, agreed to purchase of the said complainants, and the said complainants agreed to sell to the said defendant all of the real property of said Midvale Chemical Works, together with the factory buildings located thereon, and the machinery, liquid and working assets and other personal property, excepting cash on hand or on deposit, and to pay to the said complainants therefor the sum of one hundred and fifty thousand dollars ($150,000.), together with such other sum as an inventory of the liquid and working assets belonging to the said complainants as the said terms were thereinafter in said agreement defined, should total on the date of the delivery of the personal property, and to take the said premises and plant subject to five (5) certain mortgages thereon, ag-

gregating in amount the sum of nineteen thousand five hundred ninety-seven dollars ($19,597.) and to assume the said mortgages; and it further appearing to the satisfaction of the court that the said Leslie N. Simson and George W. Hunter, the complainants, have always been and still now are ready and willing in all things to comply with the stipulations of the said articles of agreement on their part to be performed and have prayed the order and decree of this court directing the defendant, Ernest C. Klipstein, to comply with and fulfill the same in all things on his part to be performed; and it further appearing to the satisfaction of the court that the defendant, Ernest C. Klipstein, has hitherto wholly neglected and refused to comply with the stipulations of the said articles of agreement on his part to be performed, except that the defendant, Ernest C. Klipstein, has paid to said complainants the sum of five hundred dollars ($500.00) on account of his obligation thereunder, and the Chancellor being of opinion that the complainants are entitled to specific performance of the stipulations of the said articles of the agreement of the said defendant, Ernest C. Klipstein, as in complainants' said bill has been prayed, it is on this 3rd day of January, one thousand nine hundred and eighteen by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey,

Ordered, Adjudged and Decreed as follows:

The said Chancellor doth by virtue of the power and authority of this court hereby order, adjudge and decree, as follows:

(1) that the articles of agreement by and between the complainants and defendant, Ernest

C. Klipstein, be in all things specifically performed by said defendant;

(2) that the said complainants within 20 days from the date of this decree do make, execute and acknowledge in due form of law and deliver to said defendant, Ernest C. Klipstein, a good and sufficient warranty deed of the said premises as hereinabove set forth and that the said complainants at the same time do make, execute and acknowledge in due form of law and deliver to the said defendant, Ernest C. Klipstein, a good and sufficient bill of sale of the personal property pertaining to the business of the Midvale Chemical Works excepting cash on hand or on deposit, and that at the same time the said complainants do make, execute and acknowledge in due form of law and deliver to the said defendant, Ernest C. Klipstein, good and sufficient assignments of all contracts made by the said complainants for the purchase or sale of raw materials or manufactured products, and that the said complainants at the same time do assign, transfer and set over in due form of law and deliver to the said defendant, Ernest C. Klipstein, due assignments of any and all policies of fire insurance which may at the date of this decree cover the premises and the property thereon;

(3) that upon payment by the defendant of the moneys herein adjudged to be due by him to complainants, he shall be allowed as a credit thereon such sum of money as complainants may have collected on the unexpired portion of the inventory insurance premiums due from insurance companies as rebates on policies cancelled following the fire of July 6th, 1917, and

in the event that complainants shall have collected nothing on account thereof, or merely a part of the sum to be rebated on said policies, that complainants do make, execute and acknowledge in due form of law and deliver to the defendant an assignment or assignments of complainants' interest in said rebates and claims against such insurance companies on account of said rebates;

(4) that the said complainants at the same time assign, transfer and set over in due form of law and deliver to the said defendant, Ernest C. Klipstein, all fire insurance policies covering the buildings and personal property on the said premises at the time of the said fire, and that the said complainants do make, execute and acknowledge in due form of law and deliver to the defendant, Ernest C. Klipstein, an assignment of all claims and demands under said policies against the insurers for and on account of the said loss, and that until transfer of the legal title of the said premises from complainants to the defendant, Ernest C. Klipstein, the complainants hold the same in trust to receive and collect the same for the defendant, Ernest C. Klipstein, at the expense of the said defendant;

(5) that the said defendant, Ernest C. Klipstein, upon delivery to him of the instruments hereinabove set forth, pay to the said complainants the sum of one hundred ninety-eight thousand, two hundred and twenty-nine and 75/100 dollars ($198,229.75) together with interest thereon at the rate of six per centum (6) per annum from the 3d day of July, 1917;

(6) that the said defendant, Ernest C. Klipstein, upon delivery to him of the instruments hereinabove set forth, pay to the said complainants the sum of one thousand twenty-six and 50/100 dollars ($1,026.50), together with interest thereon at the rate of six per centum (6%) per annum from the 10th day of November, 1917;

(7) that the said defendant, Ernest C. Klipstein, upon delivery to him of the instruments hereinabove set forth, pay to the said complainants the sum of four thousand four hundred fifty-one and 35/100 dollars ($4,451.35) with interest at the rate of six per centum (6%) per annum upon the following items thereof as follows: fifty dollars ($50.00) thereof from the 6th day of June, 1917, upon twenty-five dollars ($25.00) thereof from the 16th day of June, 1917, upon one thousand and eighty dollars ($1,080.00) thereof from the 27th day of August, 1917, upon two thousand two hundred twenty dollars ($2,220.00) thereof from the 14th day of September, 1917, upon one thousand sixty-two and 60/100 dollars ($1,062.60) thereof from the 20th day of October, 1917, and upon thirteen and 75/100 dollars ($13.75) thereof from the 27th day of November, 1917;

(8) that the said defendant, Ernest C. Klipstein, upon delivery to him of the instruments hereinabove set forth, pay to the said complainants the sum of two hundred sixty-one and 89/100 dollars ($261.89) with interest at the rate of six per centum (6%) per annum, upon the following items thereof, as follows: Upon one hundred thirty and 50/100 dollars ($130.50) from the 10th day of October, 1917, upon ninety-

six and 90/100 dollars ($96.90) from the 24th day of October, 1917, upon nineteen dollars ($19.00) from the 26th day of November, 1917, upon two and 49/100 dollars ($2.49) thereof from the 27th day of November, 1917, upon thirteen dollars ($13.00) from the 30th day of November, 1917;

(9) that the said defendant, Ernest C. Klipstein, at the same time assume as of the 3rd day of July, 1917, the mortgages affecting the said premises with the exception of the Meyer mortgage, the said mortgages to be assumed by the said defendant aggregating in face value eighteen thousand five hundred ninety-seven dollars ($18,597.);

(10) that at the same time the said defendant, Ernest C. Klipstein, procure and deliver to the complainants a release from A. Klipstein & Company releasing complainants from all obligations under a certain contract made by and between the complainants and the said A Klipstein & Company on the 22nd day of July, 1915, and which said contract provided for the sale and delivery by the complainants to the said A. Klipstein & Company of anilin oil for a period extending to the 31st day of July, 1918;

(11) that the said defendant, Ernest C. Klipstein, be and hereby is entitled to apply to this court for relief against the complainants on account of all notes, acceptances and accounts receivable of the said chemical plant, payment upon which shall be defaulted by the persons or corporations obligated to pay the same, in the event that such default by the said persons or corporations so obligated be not due to the

fault or wrongful act of the defendant, Ernest C. Klipstein;

(12) that the sums of money hereinbefore referred to in this decree and ordered to be paid by the defendant, Ernest C. Klipstein, to the complainants, together with interest thereon as provided herein, be and remain a specific lien upon the premises conveyed to the said defendant, Ernest C. Klipstein, by complainants until the said sum shall have been paid and discharged, and that the said defendant, Ernest C. Klipstein, pay to the complainants a counsel fee in the sum of three hundred and fifty dollars ($350.) to be taxed as part of the taxed costs in this cause; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the said defendant, Ernest C. Klipstein, shall within 20 days after service upon him of a copy of this decree, and of the taxed bill of costs in this cause, pay to the complainants the amounts hereinabove adjudged to be due from him to the complainants, and that in default thereof an execution issue therefor, and that the complainants shall serve a copy of this decree upon the defendant or his solicitor within ten days from the date hereof, and either party shall be at liberty to apply to this court for further direction or relief in the premises if the occasion shall require.

Respectfully advised,

MERRITT LANE,
V. C.

Notice of Appeal.

Filed Jan. 7, 1918.

Ernest C. Klipstein, the above named defendant, hereby appeals from the final decree filed in this cause and dated the third day of January, 1918, and from the whole and every part thereof, to the Court of Errors and Appeals in the last report in all causes.

Dated, January 4th, 1918.

FREDERICK SEYMOUR and
BORDEN D. WHITING,
Solicitors for and of Counsel with Defendant.

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

BORDEN D. WHITING,
Of Counsel.

Petition of Appeal.

Filed Jan. 23, 1918.

New Jersey Court of Errors and Appeals

LESLIE N. SIMSON and GEORGE W. HUNTER, *Complainants-Respondents,* and ERNEST C. KLIPSTEIN, *Defendant-Appellant.*	*On Appeal.* *Petition.*

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

The petition of Ernest C. Klipstein, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by final decree made in the Court of Chancery, by His Honor Edwin R. Walker, Chancellor of New Jersey, bearing date the 3rd day of January, 1918, wherein said Leslie N. Simson and George W. Hunter were complainants, and your petitioner Ernest C. Klipstein was defendant, in this respect to-wit:

That the said decree adjudges that the Articles of Agreement, by and between the complainants and defendant, be in all things specifically performed by said defendant, and directs him to make sundry payments therein specified (the amounts not being objected to, but only the direction to make payments) and directing the defendant to assume certain mortgages, aggregating eighteen thousand five hun-

dred and ninety-seven dollars ($18,597.) and to procure a release from A. Klipstein & Company, releasing the complainants from all obligations under a certain contract made by and between the complainants and the said A. Klipstein & Company on the 22nd day of July, 1915, which contract provides for the sale and delivery by the complainants to said A. Klipstein & Company of Aniline Oil for a period extending to the 31st day of July, 1918, and awarding costs and counsel fees to complainants directing execution against the defendant in case payment should not be made within 20 days after the service upon him of the copy of said decree.

And your petitioner humbly appeals from said decree upon the grounds that the same is erroneous, for that there was no agreement made, or executed by or between Leslie N. Simson and George W. Hunter, the complainants, as trustees of Midvale Chemical Works, and Ernest C. Klipstein, the defendant, whereby the defendant agreed to purchase of said complainants, and the complainants agreed to sell to the defendant the property in said decree described; and for that, the complainants were not ready or willing or able to comply with the stipulations of the alleged Articles of Agreement on their part to be performed: and for that, the defendant, Ernest C. Klipstein, at all times up to and including July 3rd, 1917, was ready and willing and able and offered to perform all the terms and conditions by him to be performed and contained in Exhibit "B" attached to the Bill of Complaint: and for that, the complainants are not entitled to specific performance, either of the alleged contract

described in said decree, or of Exhibit "B" attached to the Bill of Complaint, for the reason that they were not able at the time specified therein, or at any other time to perform the terms and conditions thereof to be by them performed, and have never been ready and willing and have never offered to perform the same: and for that, the lands and premises described in Exhibit "B" attached to the Bill of Complaint at the time the same was signed and ever since, were and are encumbered by sundry streets and rights of way on and across said lands, which had been dedicated by the prior owners of said lands and among the said streets and rights of way are Richmond street, Chelsea street, Brighton street, Clifton street, South Front street, Amboy avenue, Burlington avenue, Princeton avenue and Old Princeton avenue, of which South Front street and Amboy avenue are public streets, accepted, opened and used by the City of Elizabeth and by the public: and for that, it was contemplated by the parties to Exhibit "B" attached to the Bill of Complaint, that the lands and premises therein described were adapted for use as a single and undivided chemical plant of substantial dimensions and capacity—were so located and surrounded that they could be lawfully and permanently enclosed to the exclusion of all persons not invited thereon by the owner and that said lands were not so adapted and were not so located or surrounded: and for that, the title to said lands and property was not and is not a good and marketable title, and the said lands and premises are not free and clear of all encumbrances: and for that, neither the complainants nor Midvale Chemical Works

ever had a good and marketable title to said lands and premises, or a title thereto free and clear of encumbrances: and for that, the proceedings by and before the Board of Public Works of the City of Elizabeth, to vacate sundry of said streets, are invalid as a whole, and that said Board of Public Works did not purport to vacate Brighton street as laid down on the "Map of Building Lots in the City of Elizabeth, on and near Bayway" and did not purport to vacate Amboy avenue or South Front street as dedicated, and the public rights in Brighton street, Amboy avenue and South Front street are still in full force and effect: and for that, the private rights in all streets and avenues dedicated as aforesaid are unaffected by the said proceedings before the Board of Public Works of the City of Elizabeth, purporting to vacate the public rights in the same: and for that, the said lands and property described in Exhibit "B" annexed to the Bill of Complaint, are encumbered by an agreement entered into on or about the first day of September, 1881, between Bonnett and others, the then owners of said lands and property and the Central Railroad Company of New Jersey, under which said Central Railroad Company of New Jersey entered into possession, and under which said Central Railroad Company of New Jersey is now in possession, and under which said Railroad Company has laid and is now operating a railroad: and for that, access from South Front street to any but a very small part of the lands in question, was barred by the lands owned and occupied by the Central Railroad Company of New Jersey, under the said Bonnett agreement: and for

that, the said lands and premises are encumbered by poles and wires used by parties other than the parties to this action, for the transmission of electrical current, standing on and crossing said lands in Amboy avenue and in South Front street: and for that, on the 29th day of May, 1917, and at all times since said date, Homer A. Dunn, of the City of New York; Herman W. Gross, of the City of St. Louis; Stephen S. Krayer, of the City of Elizabeth; George W. Langenberg, of the City of St. Louis; John Jay Nelson, of the City of St. Louis: Elizabeth Spurgin, of the City of Joplin, and W. C. Smith, of the City of St. Louis, and Leslie N. Simson and George W. Hunter, the complainants in this action, were and are severally and respectively owners of certificates of interest in Midvale Chemical Works, which certificates were substantially in the form set forth in the Exhibit "A" attached to the Bill of Complaint, and said certificate holders respectfully contributed to the capital of said Midvale Chemical Works, and are and were severally members of and partners in said Midvale Chemical Works, having an interest in the property which is the subject of this action, and were necessary and proper parties to any deed of conveyance thereof, but refused to join therein and they were necessary and proper parties complainant to this action: and for that, Leslie N. Simson and George W. Hunter, as Trustees under Exhibit "A" attached to the Bill of Complaint, or otherwise, had not power to convey said lands and property in the manner and form required by the terms of Exhibit "B" attached to the Bill of Complaint, and the complainants refused to deliver a deed in

which said certificate holders should join, and the deed which the complainants offered or were ready and willing to deliver, did not and would not convey a good and marketable title to said property, free from encumbrances, and would not convey the interest of said certificate holders: and for that, the conveyance of the land and property which is the subject of this suit, was presumptively on its face, and was in fact a part of a plan framed by the complainants to wind up, liquidate and terminate the business and affairs of Midvale Chemical Works, and the complainants had not the power or authority so to do, and could not convey a good and marketable title of said property, pursuant to said plan, and were not authorized so to do by Exhibit "A" attached to the Bill of Complaint or otherwise: and for that, all the holders of certificates of interest in Midvale Chemical Works were general partners and were necessary parties to any deed of conveyance or partnership property and to the covenants of title and warranty therein contained: and for that, the defendant specified and stated all the objections and encumbrances aforesaid, and requested the complainants and Midvale Chemical Works to cure the same, which they refused to do: and for that, the right of way, across the lands of the Baltimore and New York Railway Company to and from the entrance to the property described in Exhibit "B" attached to the Bill of Complaint, was held under a license terminable at the will of said Railway Company, and the fact that it was so terminable at will, was unfairly concealed and withheld from the defendant at the time said Exhibit "B" was signed; and for

that, the question of whether the title to be conveyed to the defendant of the lands and property mentioned in Exhibit "B" attached to the Bill of Complaint was a good and marketable title, free from all encumbrances, was submitted in writing by all parties in interest to the Fidelity Trust Company of Newark, New Jersey, and said company reported adversely to the marketability of said title, and held that the encumbrances upon said lands hereinbefore referred to were substantial, and refused to pass or approve said title, until said objections should be removed, and the complainants are estopped thereby from claiming the contrary in this action: and for that, upon the trial of this cause, the defendant was required to assume the affirmative and the burden of showing defects in the title: and for that, the defendant was not permitted to prove the statements of George W. Hunter, one of the complainants, that the streets and rights of way aforesaid had been vacated: and for that, the defendant was not permitted to describe the entrance to the property in question, and its physical appearance: and for that, the defendant was not permitted to prove that he would not have bought the property, and if he had known that Brighton street had not been vacated: and for that, the defendant was not allowed to prove that he would not have bought the property in question, had he known that there were private rights through Richmond street: and for that, the defendant was not permitted to offer in evidence the application of Harry Wright, the attorney for the complainants, to the Fidelity Trust Company, dated June 1st, 1917, for an examination and insurance of the title in ques-

tion, and a like application of Frederick Seymour, attorney for the defendant: and for that, as a condition precedent to offering the applications above mentioned, the defendant was required to lay a foundation, by showing that the parties had agreed to abide by the result of the examination of the Fidelity Trust Company: and for that (in case the opinion of the Court shall be adverse to the appellant upon any of the grounds above stated), it must nevertheless be held that there are involved in each of said grounds doubtful questions of fact and of law, particularly in the construction and legal effect of Exhibits "A" and "B", attached to the Bill of Complaint, and the powers of the complainants, the ownership of the legal and equitable title to the lands and property in question, the effect of the dedication and reservation of streets and rights of way as disclosed by the record, and the effects of the proceedings to vacate sundry of said streets and ways, the rights and equities of the parties arising out of the fact that Amboy avenue and the tracks of the Central Railroad of New Jersey crossing said lands were visible and known to all the parties.

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

And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

FREDERICK SEYMOUR,
Solicitor for Defendant-Appellant.

BORDEN D. WHITING,
Of Counsel with Defendant-Appellant.

Answer to Petition of Appeal.

The service of the Petition of Appeal is hereby acknowledged this 22d day of January, 1918.

HARRY WRIGHT,
Solicitor of Complainants-Respondents.

Answer to Petition of Appeal.

Filed February 18, 1918.

THE ANSWER OF THE ABOVE NAMED COMPLAINANTS-RESPONDENTS TO THE PETITION OF APPEAL OF THE ABOVE NAMED DEFENDANT-APPELLANT.

These respondents not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless say and admit, that a decree was on the 3rd day of January last past made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these respondents.

GRIGGS & HARDING,
Solicitors of Complainants-Respondents.

Notice.

Filed February 18, 1918.

IN THE COURT OF CHANCERY OF NEW JERSEY.

LESLIE N. SIMSON and GEORGE W. HUNTER, Trustee, *Plaintiffs*, *against* ERNEST C. KLIPSTEIN, *Defendant.*	*Notice.*

To Ernest C. Klipstein and Frederick Seymour, His Attorney:

YOU WILL PLEASE TAKE NOTICE that the complainants in the above entitled action have retained Messrs. Griggs & Harding of Paterson, New Jersey, as solicitors to appear in the Court of Errors and Appeals on behalf of the plaintiff-respondents in place of Harry Wright, Esq., the attorney of record herein.

Dated, New York, February 13, 1918.

GEORGE W. HUNTER,
Trustee, One of the Parties Plaintiff Above Named.

Exhibit C. 1.

EXHIBITS.

EXHIBIT C. 1.

THIS INDENTURE, made the twentieth day of June, in the year of Our Lord One Thousand Nine Hundred and Seventeen, BETWEEN GEORGE W. HUNTER and LESLIE N. SIMSON, as Trustees of the Midvale Chemical Works, under Articles of Association, recorded in the Office of the Register of Deeds for Union County, of the City of Elizabeth, in the County of Union, and State of New Jersey, of the First Part:

AND

ERNEST C. KLIPSTEIN, of the City of East Orange, in the County of Essex, and State of New Jersey, of the Second Part:

WITNESSETH, That the said party of the first part, for and in consideration of lawful money of the United States of America; to them 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, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm, to the said party of the second part, and to his heirs and assigns forever, ALL those certain tracts or parcels of land and premises, hereinafter particularly described, situate, lying, and being in the City of Elizabeth, in the County of Union and State of New Jersey.

Exhibit C. 1.

First Tract: Beginning at a point in the northwest line of South Front street distant 890 feet northeast from the intersection formed by the northeast line of Bay Way and the northwest line of South Front street; thence along the northwest line of South Front street south 50 degrees 10 minutes west 48.01 feet to lands of the East Jersey Telephone and Telegraph Company; thence along their land north 59 degrees 19 minutes west 509.15 feet; thence on a curve to the left or south with a radius of 4653 feet be the distance more or less, to the east right of way line of the Elizabethport and Perth Amboy Branch of the Central Railroad of New Jersey; thence along their right of way north 32 degrees 42 minutes east 655.07 feet to lands of George Peabody Wetmore; thence along that line south 31 degrees 44 minutes east 125.33 feet; thence south 39 degrees 24 minutes east 122.9 feet; thence south 49 degrees 46 minutes east 261.4 feet; thence south 82 degrees 57 minutes east 127.3 feet; thence south 73 degrees 22 minutes east 90.1 feet to lands of Wood; thence along said land south 70 degrees 33 minutes east 114.02 feet to lands now or late of the Chemical Trading Company; thence along said lands south 39 degrees 50 minutes east 1102.52 feet to the point or place of Beginning. Containing 14.22 acres.

Being the same premises conveyed to the parties of the first part by deed from William H. Rankin et als., recorded in Book 671 of Deeds for Union County on page 57.

Second Tract: Beginning at a stake in the mouth of a ditch on the southerly side of the Elizabeth River at a corner of lands now or late of Daniel Spinning; thence along his line South

Exhibit C. 1.

thirty-five degrees, seven minutes West seven hundred sixty-six and ninety-two one hundredths feet to a corner of lands of the Midvale Chemical Company, said line being about in the centre of a ditch of varying width; thence along their line of lands and lands of the Chemical Trading Company South seventy degrees thirty-three minutes East two hundred and seven and twenty-four one hundredths feet to lands now or formerly of Samuel Halsey; thence along Halsey's line North thirty-two degrees eight minutes East six hundred fifty-four and thirty-five one hundredths feet more or less to southerly high water mark on the southwesterly bank of the Elizabeth River; thence northwesterly along the southwesterly bank of the Elizabeth River, following its various courses to the point or place of beginning. Containing 2.92 acres to high water mark; together with all the right, title and interest of the parties of the first part in and to the lands lying between high and low water mark in the above described premises.

It being the intention hereof to convey all buildings, fixtures, equipment and implements upon said parcels of land and each of them which are attached to the freehold and all such buildings, fixtures, equipment, machinery and implements shall for all purposes be deemed real property by the parties hereto.

Being the same premises conveyed to the parties of the first part by Clarence D. Meyer and wife, recorded in Book 677 of Deeds for said County, on page 94.

The First Tract is conveyed subject to the following mortgages:—

No. 1. Mortgage given by Leslie N. Simson and George W. Hunter, Trustees of Midvale

Exhibit C. 1.

Chemical Works, to Economy Realty Company, a New Jersey corporation, dated July 1, 1915, acknowledged October 8 and 12, 1915, and recorded October 15, 1915, in mortgage book 378, pages 349-353; secures $4299.25.

No. 2. Mortgage given by Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works, to William H. Rankin, dated July 1, 1915, acknowledged October 8 and 12, 1915, recorded October 15, 1915, in mortgage book 378, pages 353-357; secures $4299.25.

No. 3. Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works, to Max Fern, dated July 1, 1915, acknowledged October 8 and 12, 1915, recorded October 15, 1915, in mortgage book 378, pages 357-361; secures $8598.50.

The Second Tract is conveyed subject to the following mortgages:—

No. 1. Mortgage given by Clarence D. Meyer and Sarah Jaquith Meyer, his wife, to Sarah B. Wood, Sole surviving executrix and trustee of E. M. Wood, deceased, Lizzie D. Halsey and Gertrude Atwater, dated November 10, 1915, recorded December 16, 1915, in mortgage book 382, page 507-9, to secure $2,000.

No. 2. Mortgage given by George W. Hunter and Leslie N. Simson, Trustees of Midvale Chemical Works, to Clarence D. Meyer, dated November 10, 1915, acknowledged January 17, 1916, recorded February 2, 1916, in mortgage book 384, pages 528-532, to secure $1400.

This conveyance is made subject to the public and private rights in streets and avenues crossing or bounding the hereinabove described premises.

Exhibit C. 1.

Together with all and singular, the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining:

Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

To Have and to Hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever; and the said parties of the first part, do for themselves, their heirs, executors and administrators covenant and grant to and with the said party of the second part his heirs and assigns, that they the said George W. Hunter and Leslie N. Simson, as Trustees of the Midvale Chemical Works, are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever:

And Also, that the said party of the first part now have good right, full power and law-

Exhibit C. 1.

ful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid,

And Also, that the said parties of the first part, will warrant, secure, and forever defend the said land and premises unto the said Ernest C. Klipstein, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrances whatsoever.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered
in the presence of

State of New York, }
County of New York. } *ss.*

Be it Remembered, That on this day of June, in the year of our Lord, One Thousand Nine Hundred and Seventeen, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared George W. Hunter and Leslie N. Simson, Trustees of the Midvale Chemical Works, who, I am satisfied are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed:

EXHIBIT D. 1.

[Letterhead of Fidelity Trust Co.]

Elizabeth, N. J., November 19, 1917.

In re. title No. 38453.

Messrs. Seymour & Seymour,
120 Broadway,
New York City.

Dear Sirs:—

We attach hereto a list of the instruments affecting title to premises described in deed recorded in Book 671 of deeds for Union County, pages 57, etc.; there were purchase money mortgages given which are not shown herein.

This list is given for your information only and no pecuniary liability is assumed by Fidelity Trust Company.

Yours very truly,

FIDELITY TRUST COMPANY,
H. SCHLITTENHART,
Manager.

H. S.....H.

Instrument	Grantors	Grantees	DATE OF Instrument	DATE OF Record	Liber	Page	
					Essex Co.		
Deed	Saml. Marx, Executor of will of Edward C. Mayo, decd.	James C. Blake	Apr. 25, 1854	May 11, 1854	Z 8	165	
Deed	Sam'l. Marx, Executor Edward C. Mayo, decd.	Joseph Moulton	Aug. 15, 1854	Aug. 15, 1854	H 9	577	
Deed	James C. Blake	Augustus Whitlock	Oct. 4, 1855	Jan. 26, 1856	(202) 217	459	
Deed	Adeline Mayo, widow of Edward C. Mayo, decd.	James C. Blake	Apr. 25, 1854	May 11, 1854	Z 8	168	
Deed	James C. Blake	Joseph Moulton, in trust for party of the first part, etc.	May 4, 1854	May 11, 1854	Z 8	169	
Deed	Mary W. Niles, widow of Wm. W. Niles, decd. Wm. W. Niles	Isaac T. Smith	Dec. 16, 1854	Aug. 13, 1855	213	178	
Deed	Wm. J. Magie, Guardian, Nathaniel Niles, Mary Elizabeth Niles, Marston Niles, infant children and heirs of Wm. W. Niles, decd.	Isaac T. Smith	Mar. 9, 1855	Aug. 13, 1855	213	180	
Deed	Isaac T. Smith and Elizabeth P., his wife.	Augustus Whitlock	Aug. 17, 1855	Jan. 26, 1856	217	457	
Deed	Joseph Moulton, Isaac T. Smith, Francis V. Noyes.	Augustus Whitlock	Oct. 24, 1855	Nov. 17, 1855	215	398	
Deed	Augustus Whitlock and Margaret T., his wife.	The Elizabethport Land Improvement Co.	Nov. 10, 1855	Nov. 17, 1855	215	404	
					Union County		
Mtg.	The Elizabethport Land Improvement Company.	Samuel Marx, Executor of Edward C. Mayo	May 5, 1856	May 21, 1857	1	69	
Mtg.	The Elizabethport Land and Improvement Company	Samuel Marx, Executor of Edward C. Mayo	May 5, 1856	May 21, 1857	1	73	
Asst. Mtg.	Samuel Marx, Executor of Edward C. Mayo	Josephine Gracie, wife of Archibald Gracie, Jr., formerly Josephine Mayo, etc.	May 27, 1857	June 13, 1859	1	207	
Deed	Frederic B. Ogden, Sheriff	Adeline Mayo	May 29, 1863	June 5, 1863	11	664	
Deed	Adeline Mayo	Augustus Whitlock	May 29, 1863	June 5, 1863	11	671	
Deed	Henry L. Scott and Cornelia, his wife, Goold Hoyt and Camilla, his wife, Charles Carroll McTavish and Ella, his wife	Adeline Mayo, widow of Edward C.	May 29, 1863	Jan. 9, 1871	52	507	
Deed	Josephine Gracie and Adeline Mayo and Harriet Richards and Howard, her husband, Emma Mayo and Julia Mayo	Peter Bonnett, as trustee	Oct. 6, 1870	Jan. 9, 1871	52	509	
Deed	Edward Mayo and Kate R., his wife, William C. Mayo and Ellen W., his wife, George W. Mayo and Louisa R., his wife	Peter Bonnett, as trustee	Nov. 19, 1870	Jan. 9, 1871	52	511	
Deed	Augustus Whitlock and wife	Wm. Graves and Joseph Moulton	July 29, 1863	June 22, 1864	14	269	
Deed	Augustus Whitlock and wife	Catharine H. Putnam	July 6, 1863	Aug. 17, 1863	12	153	
Deed	Catherine H. Putnam	George P. Putnam, in trust	Aug. 31, 1867	Jan. 29, 1869	32	568	
Deed	Catherine H. Putnam	George P. Putnam, trustee	Aug. 31, 1867	Nov. 13, 1869	42	131	
Deed	Elizabeth P. Smith and Isaac T., her husband	Daniel B. Whitlock, Peter B. Bonnett and Robert C. Gwyer, executors of Augustus Whitlock, Catherine H. Putnam, William Graves, Joseph Moulton	June 20, 1868	Jan. 3, 1870	43	129	
Deed	Executors of Augustus Whitlock	Margaret Bonnett	Apr. 1, 1872	Apr. 9, 1872	66	459	
Deed	Victorine H. Putnam	Isaac T. Smith	Dec. 12, 1877	Nov. 1, 1878	129	406	
Deed	George H. Putnam and wife	Isaac T. Smith, Trustee	Jan. 2, 1877	Dec. 11, 1877	121	479	
Deed	Isaac T. Smith, Trustee	John T. Lord	Nov. 23, 1880	Nov. 24, 1880	144	392	
Chy.	Margaret B. Bonnett (Complainant)	John T. Lord, et als. (Defendants)	May 26, 1881	May 26, 1881	1	381	
Deed	Margaret B. Bonnett (party of first part), Joseph Moulton, et al. (party of second part)	John T. Lord (party of the third part)	Feb. 20, 1882	June 23, 1882	155	418	
Decree	Margaret B. Bonnett, Complainant	John T. Lord, et als., Defendants, and John T. Lord, Grantee		Nov. 30, 1883	165 (deed book)	99	
Deed	John T. Lord	"The East Jersey Telephone and Telegraph Company," a corporation of New Jersey	June 26, 1896	Aug. 26, 1896	311	309	Adjoining lands
Deed	Janet H. Lord, wife of John T. Lord	East Jersey Telephone and Telegraph Company	Sept. 15, 1896	Apr. 10, 1897	321	23	Adjoining lands
Deed	The East Jersey Telephone and Telegraph Company	The Northeastern Telephone and Telegraph Company	June 3, 1903	Sept. 10, 1903	421	31	Adjoining lands
Deed	Northeastern Telephone and Telegraph Company	New York Telephone Company	Jan. 21, 1910	Feb. 18, 1910	544	91	Adjoining lands
Deed	Janet Hay Lord, widow of John Taylor Lord, deceased, party of the first part, Edward P. Hatch, Trustee, party of the second part.	Janet Hay Lord and Janet Gifford Hamilton, as trustees under the last will and testament of John Taylor Lord, party of the third part.	Aug. 29, 1906	Dec. 18, 1906	477	162	
Deed	Janet Hay Lord, wife of John Taylor Lord, Edward P. Hatch, Trustee under will of John Taylor Lord	Janet Hay Lord, Janet Gifford Hamilton, upon the same trusts as such lands have heretofore been held by party of the first part as Trustees under will of John Taylor Lord	Aug. 29, 1906	July 2, 1907	489	286	
Deed	Janet Gifford Hamilton, widow, Edith Rebecca Lord and Rowland Edmund Prothero, substituted Trustee under will of John Taylor Lord	Max Fern	Feb. 28, 1908	Mar. 26, 1908	502	512	
Deed	Max Fern and Frieda B., his wife	Patrick H. Gilhooly	Feb. 28, 1908	Mar. 26, 1908	502	507	
Deed	Patrick H. Gilhooly and Grace K., his wife	Economy Realty Company, a New Jersey Corp.	May 1, 1914	May 22, 1914	641	506	
Deed	Max Fern and Frieda B., his wife	William H. Rankin	Feb. 28, 1908	Mar. 26, 1908	502	510	
Deed	Max Fern and Frieda B., his wife	Anna E. Fern	Feb. 16, 1912	Feb. 23, 1912	588	413	
Deed	Anna E. Treitman (nee Fern) and Otto Treitman, her husband	Max Fern	Apr. 7, 1915	Apr. 16, 1915	658	532	
Deed	William H. Rankin and Mary J. Rankin, his wife, Max Fern and Frieda B. Fern, his wife, Economy Realty Co. a corporation organized under the laws of the State of New Jersey.	Leslie N. Simson and George W. Hunter, of the City of St. Louis and State of Missouri, Trustees of Midvale Chemical Works, located in Elizabeth, N. J.	July 1, 1915	Oct. 15, 1915	671	57	

Exhibit D. 2.

EXHIBIT D. 2

Form 16C 6-16 4M

FIDELITY TRUST COMPANY

TITLE DEPARTMENT

REPORT TO APPLICANT

Application No. 37966.

(In writing please refer to this number).

Dated at Newark, N. J., June 4th, 1917, 8 A. M.

Fidelity Trust Company hereby certifies to the applicant for guaranty under above application and under the provisions thereof that it has examined the title to land in the City of Elizabeth, Union County, New Jersey, described hereinafter for a Deed about to be made by GEORGE W. HUNTER and LESLIE N. SIMSON, Trustees of Midvale Chemical Works, to ERNEST C. KLIPSTEIN, for $23,000.00, and finds title of record is in Leslie N. Simson, and George W. Hunter, Trustees of Midvale Chemical Works, by deed from William H. Rankin and others recorded in book 671-57 (for Tract A) and from Clarence D. Meyer recorded in book 677-94 (for Tract B), subject only to the following estates, liens, defects and questions which, together with any others which may be found in continuing the search are to be excepted in the guaranty which it will issue in the above amount when the title is properly closed and satisfactorily reported, unless documentary evidence of their removal be submitted which shall be satisfactory to this company:

Exhibit D. 2.

EXCEPTIONS AFFECTING TRACT A.

1. Mortgage given by Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works to Economy Realty Company, a New Jersey corporation, dated July 1, 1915, acknowledged October 8 and 12, 1915 and recorded October 15, 1915 in mortgage book 378 pages 349-353; secures $4299.25 in five years with interest at 6% payable half yearly.

Said mortgage contains the following stipulation and provision:

"This mortgage is equal in lien and priority to two certain other mortgages made by party of the first part to Max Fern and William H. Rankin, of even date, and any payments made by the party of the first part or their successors shall be made pro rata upon all three mortgages.

Provision made for payment of $500. of principal, or more, on any interest date, and privilege of paying all on any interest date."

Said mortgage was assigned by Economy Realty Company to William H. Rankin, by assignment dated October 9, 1915, proved October 9, 1915 and recorded October 16, 1915 in assignment of mortgage book 58 pages 124-125.

2. Mortgage given by Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works, to William H. Rankin, dated July 1, 1915, acknowledged October 8 and 12, 1915, recorded October 15, 1915 in mortgage book 378 pages 353-357; secures $4299.25 in five years with interest at 6% payable half yearly.

New Jersey State Library

Exhibit D. 2.

Said mortgage contains the following stipulation and provision:

"This mortgage is equal in lien and priority to two certain other mortgages made by party of the first part to Max Fern and Economy Realty Company, of even date, and any payments made by party of the first part or their successors shall be made pro rata upon all 3 mortgages.

Privilege of paying $500. or more on principal on any interest date with privilege of paying the whole at any time."

3. Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works, to Max Fern, dated July 1, 1915, acknowledged October 8 and 12, 1915, recorded October 15, 1915 in mortgage book 378 pages 357-361; secures $8598.50 in 5 years with interest at 6% payable half yearly.

Said mortgage contains the following stipulation and provision:

"This mortgage equal in lien and priority to two certain other mortgages made by party of the first part to William H. Rankin and Economy Realty Company, of even date, and any payments made by party of the first part or their successors shall be made pro rata upon all three mortgages. $500. or more may be paid on principal on any interest date, with privilege of paying whole at any time."

Said mortgage was assigned by Max Fern to William H. Rankin by assignment dated October 9, 1915, acknowledged October 11, 1915 and recorded October 16, 1915 in book 58 of Assignments pages 122-123.

Exhibit D. 2.

4. Mortgage given by George W. Hunter, Trustee of Midvale Chemical Works of Elizabeth, New Jersey, to James D. Hamilton, dated December 1, 1915, acknowledged same day, recorded Dec. 1, 1915 in mortgage book 382 pages 333-336, to secure $52,500. payable in 6 months from its date with interest at 6%.

Contains the following statement: "This mortgage next in priority to three mortgages amounting to $17,197. and is intended to cover all improvements including buildings, machinery and trade fixtures."

5. Tax search O. K. to June 6, 1917.

6. Trenton judgment search O. K. to June 6, 1917.

7. Outstanding rights under unrecorded agreement between D. B. Bonnett, agent &c., and others, with the Central Railroad Company of New Jersey, September 1, 1881, referred to in deed book 155, page 418.

8. Outstanding estates or rights in lands lying in bed of right of way of a branch of Central Railroad crossing easterly part of premises in question.

9. Rights, if any, of owner of poles along South Front street in front of premises in question.

10. Outstanding rights in the following streets:

(1) Amboy Avenue.

(2) South Front Street as dedicated 100 feet in width which would encroach 20 feet upon the southerly part of premises in question.

Exhibit D. 2.

(3) Brighton Street as laid out on Map of Building Lots &c. on and near Bayway, and so much thereof laid out on the Commissioners Map as lies northwest of the southeast line of Burlington Avenue.

(4) So much of Burlington Avenue as lies northeast of the southwest line of Brighton Street as laid down on Commissioners Map.

(5) So much of Old Princeton Avenue as lies northeast of the northeast line of Chelsea Street as laid out on Map of Building Lots &c. on or near Bayway.

11. Private rights in the following streets:

(1) Old Princeton Avenue (Commissioners Map).

(2) Princeton Avenue (Bayway Map).

(3) Burlington Avenue (Bayway Map).

(4) Richmond Street (Commissioners Map and Bayway Map).

(5) Chelsea Street (Commissioners Map and Bayway Map).

(6) Brighton Street, as laid down on the Commissioners Map.

12. Outstanding rights in ditch across premises in question.

EXCEPTIONS AFFECTING TRACT B.

13. Mortgage given by Clarence D. Meyer and Sarah Jaquith Meyer, his wife, to Sarah B. Wood, Sole surviving executrix and trustee of E. M. Wood, deceased, Lizzie D. Halsey and Gertrude Atwater, dated November 10, 1915, recorded December 16, 1915 in mortgage book 382 page 507-9, to secure $2,000. payable in two years from its date with interest at 6%.

Exhibit D. 2.

14. Mortgage given by George W. Hunter and Leslie N. Simson, Trustees of Midvale Chemical Works, to Clarence D. Meyer, dated November 10, 1915, acknowledged January 17, 1916, recorded February 2, 1916 in mortgage book 384 pages 528-532, to secure $1400. payable in three years from its date with interest at 5% payable half yearly.

15. Tax search dated June 6, 1917 shows taxes for 1916 amounting to $17.91.

16. Rights of the United States, the State of New Jersey and neighboring owners in Elizabeth River crossing and bounding premises in question.

17. Rights of New Jersey Harbor Commission to supervise plans for any building or other improvement or development to be erected or made on water front and to abate as a public nuisance any improvements thereon commenced or made since April 8, 1914, without the approval of the said commission, under authority given by Pamphlet Laws of New Jersey 1914 page 205 section 4.

18. Outstanding rights in all ditches, drains and streams crossing and bounding premises in question.

20. Outstanding public rights in Brighton Street, Clifton street, Burlington Avenue and an unnamed street crossing premises in question between Clifton Street and the Elizabeth River as shown by survey made by W. W. Luster, dated November, 1915.

21. Estates and liens adverse to Abner Miller, grantor in Deed Book M 2 page 446 and prior to May 28, 1822.

Exhibit D. 2.

EXCEPTIONS AFFECTING TRACTS A AND B.

22. Liability to Mechanics' Liens, if any, not of record.

23. Terms of Contract of Sale which is to be examined.

24. Rights of tenants, if any.

25. Proof required parties to transaction are not alien enemies.

26. *As to Tract A.* Subject to changes in lines of possession, if any, since April, 1915, date of survey by W. H. Luster, C. E.

27. *As to Tract B.* Subject to change in lines of possession, if any, since November, 1915, date of survey by W. H. Luster, C. E.

28. As the sale of premises in question is of all the real and personal property of the Midvale Chemical Works, except cash, we should get the signatures of all certificate holders and their wives to the deed as parties. Affidavit of treasurer should be annexed showing the names of all certificate holders.

DESCRIPTION OF PREMISES REPORTED UPON.

Tract A.

Beginning at a point in the northwest line of South Front Street distant 890 feet northeast from the intersection formed by the northeast line of Bay Way and the northwest line of South Front Street; thence along the northwest line of South Front Street south 50 degrees 10 minutes west 48.01 feet to lands of

Exhibit D. 3.

the East Jersey Telephone and Telegraph Company; thence along their land north 59 degrees 19 minutes west 509.15 feet, thence on a curve to the left or south with a radius of 4653 feet be the distance more or less, to the east right of way line of the Elizabethport and Perth Amboy Branch of the Central Railroad of New Jersey; thence along their right of way north 32 degrees 42 minutes each 655.07 feet to lands of George Peabody Wetmore; thence along that line south 31 degrees 44 minutes east 125.33 feet; thence south 39 degrees 24 minutes east 122.9 feet; thence south 49 degrees 46 minutes east 261.4 feet; thence south 82 degrees 57 minutes east 127.3 feet; thence south 73 degrees 22 minutes east 90.1 feet to lands of Wood; thence along said land south 70 degrees 33 minutes east 114.02 feet to lands now or late of the Chemical Trading Company; thence along said lands south 39 degrees 50 minutes east 1102.52 feet to the point or place of Beginning. Containing 14.22 Acres.

Tract B.

Beginning at a stake in the mouth of a ditch on the south side of the Elizabeth River at a corner of lands now or late of Daniel Spinning; thence along his line south 35 degrees 7 minutes west 766.92 feet to a corner of lands of the Midvale Chemical Company, said line being about in the centre of a ditch of varying width; thence along their line of lands and lands of the Chemical Trading Company, south 70 degrees 33 minutes east 207.24 feet to lands now or formerly of Samuel Halsey; thence along Halsey's line north 32 degrees 8 minutes east 649.35 feet to a stake 5 feet south from high

Exhibit D. 3.

water mark on the south bank of the Elizabeth River; thence north 45 degrees 50 minutes west 113.42 feet to a stake on the south bank of the Elizabeth River; thence north 14 degrees 26 minutes west 69.95 feet to the point or place of Beginning. Containing 2.92 acres to high water mark.

Fidelity Trust Company will not guarantee accuracy of descriptions or such a state of facts as a survey would show unless it has procured a survey at the request of the applicant.

This certificate will not bind this Company, unless the charges referred to in the application are paid when demanded, nor after guaranty has been issued. Any liability hereunder is limited by the conditions and the amount of the guaranty offered.

Respectfully submitted,
WM. R. DAVIS, JR.,
Title Officer.

EXHIBIT D. 3.

Proceedings on vacating Brighton, Burlington, Chelsea, Richmond streets and Princeton avenue.

References:

Minute book No. 1, pages 45, 53, 60, 63, 63, 71, 115, 137, 140.

Ordinance Book No. 1, pages 21.

(1) Blueprint.

Title on City Clerk's File.

Exhibit D. 3.

Referred to Committee on Streets, April 29, 1915.

Referred, etc., May 6, 1915.

To the Honorable Board of Public Works of the City of Elizabeth:

The petition of Leslie N. Simson and George W. Hunter of the City of St. Louis, in the State of Missouri, trustees of the Midvale Chemical Works, respectfully shows, that:

1. They have purchased from Messrs. W. H. Rankin, P. H. Gilhooly and M. Fern fifteen (15) acres of land in the City of Elizabeth, Union County, N. J., lying southeasterly of and adjacent to lands of the Perth Amboy and Elizabethport Railroad Company and northeasterly of lands of the East Jersey Telephone and Telegraph Company and between the Baltimore and New York Railroad Company, and the Elizabeth River, which property is more particularly delineated by yellow lines on a map thereof, hereto annexed and made a part of this petition. *

2. A large part of said land consists of marsh land, probably one-half thereof.

3. Said property is crossed by several paper streets, which are shown on the map aforesaid, and bearing the names Richmond, Chelsea and Brighton streets, and Burlington and Princeton avenues, the dotted lines indicating the lines of such streets as they were originally delineated upon a map entitled "Map of Building Lots in the City of Elizabeth, N. J., on and near Bayway," compiled about 1859, and the dash lines indicate the lines of said streets as they appear on a map filed in 1869, by the Commis-

*See Book of Maps and Photographs.

Exhibit D. 3.

sioners appointed to lay out streets, avenues and squares in the City of Elizabeth, N. J.

4. That none of the streets above mentioned has been improved, laid out on the ground, used or even recognized as a public thoroughfare and there is nothing and never has been anything upon the ground to indicate the existence of a public street or highway and the land traversed by said paper streets cannot be distinguished from any of the surrounding land

5. That about 60 per cent of the lands appearing to be affected by said paper streets are salt marsh lands that can neither be used for pedestrians nor for vehicular traffic in their present condition.

6. Your petitioners have purchased said land for the purpose of erecting and establishing a plant for the manufacture of aniline dyes and other chemicals, which work they desire to begin immediately so that they may take advantage of the large market which offers itself at the present time by reason of the European War.

7. They will provide employment for a large force of men, not only in the erection and establishing of said plant, but in the business which they propose to carry on in the City of Elizabeth as aforesaid.

8. Your petitioners further show it will be impossible for them to use the lands above mentioned and purchased by them for the purpose aforesaid, unless the paper streets or parts thereof, to be hereinafter designated are vacated.

9. The property in the immediate vicinity is given over to business purposes and is occu-

Exhibit D. 3.

pied by large manufacturing plants and is essentially an industrial neighborhood, and in the opinion of your petitioners, the vacation of said streets as hereinafter prayed, will be detrimental to the interests of no person and will enable your petitioners to bring to the City of Elizabeth not only property of large value, but employment of many of its citizens.

In consideration of the foregoing, your petitioners pray that your Honorable Body will vacate the following parts of the above named paper streets:

Chelsea and Richmond streets from the lands of the East Jersey Telephone and Telegraph Company to lands of the Perth Amboy and Elizabethport Railroad Company as said streets appear on "Map of Building Lots in the City of Elizabeth, N. J., on and near Bayway," compiled about 1859, and also as they appear on the map filed in 1869 by the Commissioners appointed to lay out streets, avenues and squares in the City of Elizabeth, N. J.

Brighton street as laid out on the map filed by the Commissioners appointed to lay out streets, avenues and squares in the City of Elizabeth, N. J., from South Front street to the southeasterly line of Amboy avenue and from the northwesterly line of Amboy avenue to the southeasterly line of Burlington avenue.

Old Princeton Avenue as delineated on "Map of Building Lots in the City of Elizabeth, N. J., on and near Bayway," from lands of the Perth Amboy and Elizabethport Railroad Company to the northeasterly line of Chelsea street as laid down on last mentioned map.

Exhibit D. 3.

Princeton avenue as laid out on map filed by Commissioners appointed to lay out streets, avenues and squares in the City of Elizabeth, N. J.," particularly described as follows:

Beginning at a point where the northerly line of East Jersey Telephone Company intersects the westerly line of Princeton Avenue; thence along the westerly line of Princeton avenue north 32 degrees 42 minutes east to a point which is about 681.97 feet from Bayway and also in the boundary line of Rankin, Gilhooly and Fern; thence along said boundary line south 39 degrees 24 minutes east 31.54 feet to a point; thence south 49 degrees 46 minutes, each 30.26 feet to a point in the easterly line of Princeton avenue, which point is about 686.83 feet from Bayway; thence south 32 degrees 42 minutes west along the easterly line of Princeton avenue to the line of East Jersey Telephone Company; thence westerly along the Telephone Company's line to the point or place of beginning.

Burlington avenue from lands of East Jersey Telephone and Telegraph Company to the southwesterly line of Brighton street, as laid down on the Commissioners' map aforesaid and on said map entitled "Map of Building Lots in the City of Elizabeth, N. J., on and near Bayway."

And your petitioners will ever pray, &c.

LESLIE N. SIMSON,
GEORGE W. HUNTER,
Trustees of Midvale Chemical Works.

Sidney W. Eldridge,
Atty. of Petitioners.

Endorsed:

Dated April 7th, 1915.

Exhibit D. 3.

COPY ORIGINAL PETITION.

(Amended Petition Filed.)

To the Honorable Board of Public Works of the City of Elizabeth:

The petition of Leslie N. Simson and George W. Hunter of the City of St. Louis, in the State of Missouri, trustees of the Midvale Chemical Works, respectfully shows, that:

(1) They have purchased from Messrs. W. H. Rankin, P. H. Gilhooly and M. Fern about fifteen (15) acres of land in the City of Elizabeth, County of Union, New Jersey, lying southeasterly of and adjacent to lands of the Elizabethport and Perth Amboy Railroad Company, northeasterly of lands of the East Jersey Telephone and Telegraph Company and between the Baltimore and New York Railroad Company, and the Elizabeth River, which property is more particularly delineated by red lines on a map thereof, hereto annexed and made a part of this petition.

(2) A large part of said land consists of marsh land, probably one-half thereof.

(3) Said property is crossed by several paper streets, which are shown on the map aforesaid, and bear the names Richmond, Chelsea and Brighton streets, and Burlington and Princeton avenues, which streets were delineated upon an old map entitled "Map of Building Lots in the City of Elizabeth, N. J., on and near Bayway," compiled about 1859.

(4) That none of the streets above mentioned has been improved, laid out on the ground, used or even recognized as a public

thoroughfare and there is nothing and never has been anything upon the ground to indicate the existence of a public street or highway and the land traversed by said paper streets cannot be distinguished from any of the surrounding land.

(5) That about 60 per cent of the lands appearing to be affected by said paper streets are salt marsh lands that can neither be used for pedestrians nor for vehicular traffic in their present condition.

(6) Your petitioners have purchased said land for the purpose of erecting and establishing a plant for the manufacture of aniline dyes and other chemicals, which work they desire to begin immediately so that they may take advantage of the large market which offers itself at the present time by reason of the European War.

(7) They will provide employment for a large force of men, not only in the erection and establishment of said plant, but in the business which they propose to carry on in Elizabeth as aforesaid.

(8) Your petitioners further show it will be impossible for them to use the lands above mentioned and purchased by them unless the paper streets or parts thereof to be hereinafter designated are vacated.

(9) The property in the immediate vicinity is given over to business purposes and is occupied by large manufacturng plants and is essentially an industrial neighborhood, and in the opinion of your petitioners, the vacation of said streets as hereinafter prayed, will be detrimental to the interests of no person and will enable

Exhibit D. 3.

your petitioners to bring to the City of Elizabeth not only property of large value, but employment for many of its citizens.

In consideration of the foregoing your petitioners pray that your honorable body will vacate the following parts of the above-named paper streets:

Richmond and Chelsea streets from the lands of the East Jersey Telephone and Telegraph Company, to the lands of the Elizabethport and Perth Amboy Railroad Company.

Brighton street from Front street to the point about sixty-one feet northwesterly of the northwesterly line of Burlington avenue.

Princeton avenue from the lands of the East Jersey Telegraph and Telephone Company to the southwesterly side of Brighton street.

Burlington avenue from the lands of said East Jersey Telegraph and Telephone Company to the northeasterly line of Brighton street.

And your petitioners will ever pray, etc.

LESLIE N. SIMSON,
GEORGE W. HUNTER,
Trustees of Midvale Chemical Company,

SIDNEY N. ELDRIDGE,
Attorney.

Endorsed:

Dated April 7, 1915.

Exhibit D. 3.

May 18, 1915.

The Board of Works of the City of Elizabeth.
Gentlemen:

As agents of George P. Wetmore, the owner of property located in the vicinity of land in this city acquired by the Midvale Chemical Company, we object to the closing of certain streets asked for by the Midvale people as advertised for in the notice of intention of the Street Commissioners under date of May 8, 1915. Before any action is taken Mr. Wetmore or his attorney would like to be heard.

Truly yours,
P. J. & W. H. RYAN.

July 20, 1915.

The Hon. R. B. Cissel, James A. Hand and James J. Higgins, Board of Public Works, Elizabeth, N. J.

Gentlemen:

Through inadvertence, the Street Commissioner informed me that the public hearing on the vacation of Princeton Avenue and other streets in that vicinity, would be held on Thursday next, and owing to a previous engagement I am unable to appear in person today in response to the public notice. However, I wish to enter a formal objection to the closing of Princeton avenue for the reason that the vacation of that street would deprive me of the only direct access to my property from Bayway, a distance of about six hundred and fifty feet, as shown on the accompanying diagram. All of the adjoining meadows front on the

Exhibit D. 3.

Elizabeth River, and while I have endeavored to procure an outlet in that manner, I have been utterly unsuccessful in an attempt to acquire any land for that purpose.

I give this notice for the purpose of preserving whatever rights, I have in premises.

Very respectfully,

CLARENCE D. MEYER.

COPY.

May 22, 1915.

Messrs. P. J. &. W. H. Ryan,
#200 Broad street,
Elizabeth, N. J.

Gentlemen:

Referring to your protest on behalf of George P. Wetmore in the matter of Midvale Chemical Company's petition for vacation of certain streets, this board will be glad to give you a hearing on any afternoon between 1:30 and 5:30 P. M., excepting Thursdays and Saturdays.

Respectfully yours,

JAS. A. HAND,
Chairman Committee on Streets.

J. A. H./S.

NOTE.

Mr. Ryan and Governor Voorhees appeared before the board on May 26, 1915, and confined their objections to closing of Burlington avenue, from Bayway to property of Geo. P. Wetmore.

Notice is hereby given of a public hearing to be held at the office of the Board of Public Works in the City Hall, in the City of Eliza-

Exhibit D. 3.

beth, N. J., at two o'clock in the afternoon of Tuesday, the 20th day of July, 1915, with respect to the petition of Leslie N. Simson and George W. Hunter, trustees of Midvale Chemical Works, and the proposed ordinance thereon for the vacation and closing of all those portions of the following named streets and avenues, and the releasing of the lands within such portions from any dedication thereof, viz.:

Chelsea and Richmond streets from the lands of the East Jersey Telephone and Telegraph Co. to the lands of the Perth Amboy and Elizabethport Railroad Company, as said streets appear on "Map of Building Lots in the City of Elizabeth, N. J., on and near Bayway," compiled about the year 1859, and also as they appear on the map filed in the year 1869 by the "Commissioners Appointed to Lay Out Streets, Avenues and Squares in the City of Elizabeth, N. J."

Brighton street as laid out on the map filed by the "commissioners appointed to lay out streets, avenues and squares in the City of Elizabeth" from South Front street to the southeasterly line of Amboy avenue, and from the northwesterly line of Amboy avenue to the southeasterly line of Burlington avenue.

Old Princeton avenue as delineated on "Map of Building Lots in the City of Elizabeth, N. J., on and near Bayway," from the lands of the Perth Amboy and Elizabethport Railroad Company to the northeasterly line of Chelsea street, as laid down on the last mentioned map.

Princeton avenue, as laid out on "Map filed by commissioners appointed to lay out streets, avenues and squares in the City of Elizabeth, New Jersey," particularly described, as follows:

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BEGINNING at a point where the northerly line of the East Jersey Telephone Company intersects the westerly line of Princeton avenue; thence along the westerly line of Princeton avenue north 32 degrees 42 minutes east to a point which is about 681.97 feet from Bayway and also in the boundary line of Rankin, Gilhooly and Fern; thence along said boundary line south 39 degrees 24 minutes east 31.54 feet to a point; thence south 49 degrees 46 minutes east 30.26 feet to a point in the easterly line of Princeton avenue, which point is about 686.83 feet from Bayway; thence south 32 degrees 42 minutes west along the easterly line of Princeton avenue to the line of the East Jersey Telephone Company; thence westerly along the Telephone Company's line to the point or place of beginning.

Burlington avenue from the lands of the East Jersey Telephone and Telegraph Company to the southwesterly line of Brighton street, as laid down on commissioners' map aforesaid, and on said map entitled "Map of Building Lots in the City of Elizabeth, N. J., on and near Bayway," to be vacated and closed, under and by virtue of the provisions of an act entitled "An Act to revise and amend the Charter of the City of Elizabeth," approved March 4, 1863, and the supplements thereto and amendments thereof and of the laws of this State.

R. B. CISSEL,
JAMES J. HIGGINS,
JAMES A. HAND,
Board of Public Works, Elizabeth, N. J.

JOHN F. KENAH,
Clerk of the Board.

Published July 3, 10 and 17, 1915.

Exhibit D. 3.

PROCEEDINGS OF BOARD OF PUBLIC WORKS.

(OFFICIAL)

Elizabeth, N. J., April 15, 1915.

A regular meeting of the Board of Public Works was held this afternoon.

Present—President Cissel and Commissioners Hand and Higgins—3.

Absent—None.

* * * *

Petition of the Midvale Chemical Company, asking that portions of Richmond, Chelsea and Brighton streets, Burlington and Princeton avenues, as shown on "Map of Building lots in City of Elizabeth, New Jersey, on and near Bayway," be vacated and closed.

Which was referred to the Committee on Streets.

* * * *

PROCEEDINGS OF BOARD OF PUBLIC WORKS.

(OFFICIAL)

Elizabeth, N. J., April 29, 1915.

A regular meeting of the Board of Public Works was held this afternoon.

Present—President Cissel and Commissioners Hand and Higgins—3.

Absent—None.

* * * *

Amended petition from the Midvale Chemical Co., asking that portions of Richmond, Chelsea and Brighton streets and Burlington and Princeton avenues be vacated.

Exhibit D. 3.

Which was referred to Committee on Streets.

* * * *

By Commissioner Hand:

Resolved, That the Street Commissioner be and he is hereby directed to publish a notice that it is the intention of the Board of Public Works to order and cause the parts or portions of the following named streets to be vacated; the parts to be vacated being described as follows:

Richmond and Chelsea streets from the lands of the East Jersey Telephone and Telegraph Company to the lands of the Perth Amboy and Elizabethport Railroad Company, as they appear on a map entitled, "Map of building lots in the City of Elizabeth, New Jersey, on and near Bayway," compiled about the year 1859, and also as they appear on a map filed in the year 1869, by Commissioners appointed to lay out streets, avenues and squares in the city of Elizabeth, New Jersey.

Brighton street as laid out on the map filed by the Commissioners appointed to lay out Streets, Avenues and squares in the City of Elizabeth, from South Front street to the southerly line of Burlington avenue.

Princeton avenue, as delineated on "Map of Building lots in the City of Elizabeth, New Jersey, on and near Bayway," from the lands of the Perth Amboy and Elizabethport Railroad Company to the northeasterly line of Chelsea street, as laid down on the last mentioned map.

Princeton avenue as laid out on a map filed by the Commissioners appointed to lay

Exhibit D. 3.

out Streets, Avenues and Squares in the City of Elizabeth, particularly described as follows:

BEGINNING, at a point where the northerly line of the East Jersey Telephone Company intersects the westerly line of Princeton avenue; thence along the westerly line of Princeton avenue 32 degrees 42 minutes east to a point which is about 681.97 feet from Bayway and also in the boundary line of Rankin, Gilhooly and Fern; thence along said boundary line south 39 degrees 24 minutes east 31.54 feet to a point; thence south 49 degrees 46 minutes east 30.26 feet to a point in the easterly line of Princeton avenue, which point is about 686.83 feet from Bayway; thence 32 degrees 42 minutes west along the easterly line of Princeton avenue to the line of the East Jersey Telephone Company; thence westerly along the Telephone Company line to the point or place of beginning.

Burlington avenue from the lands of the East Jersey Telephone and Telegraph Company to the southwesterly line of Brighton street as laid down on the Commissioners map aforesaid.

Which was adopted by the following vote:

Affirmative—President Cissel and Commissioners Hand and Higgins—3.

Negative—None.

Adopted May 6, 1915.

* * * * *

Exhibit D. 3.

PROCEEDINGS OF BOARD OF PUBLIC WORKS.

(OFFICIAL)

Elizabeth, N. J.,
Thursday, May 6, 1915.

A regular meeting of the Board of Public Works was held this afternoon.

Present—President Cissel and Commissioners Hand and Higgins—3.

Absent—None.

* * * *

Amended petition of the Midvale Chemical Co., asking that portions of Chelsea, Richmond and Brighton streets, Princeton and Burlington avenues be vacated and closed.

Referred to the Committee on Streets.

* * * *

MISCELLANEOUS BUSINESS.

Commissioner Hand moved that the resolution directing the Street Commissioner to publish notice of intenton to vacate Chelsea, Richmond and Brighton streets, Princeton and Burlington avenues, adopted at the regular meeting of the Board held April 29, 1915, be reconsidered.

Which was carried by the following vote:

Affirmative—President Cissel and Commissioners Hand and Higgins—3.

Negative—None.

Commissioner Hand moved that the resolution be laid on the table.

Which was carried.

By Commissioner Hand:

Resolved, That the Street Commissioner be and he is hereby directed to publish a notice

Exhibit D. 3.

that it is the intention of the Board of Public Works to order and cause all those parts or portions of the following named streets to be vacated and closed, described as follows:

Chelsea and Richmond streets from the lands of the East Jersey Telephone and Telegraph Company to the lands of the Perth Amboy and Elizabethport Railroad Company, as said streets appear on "Map of Building Lots in the City of Elizabeth, New Jersey, on and near Bayway," compiled about the year 1859 and also as they appear on the map filed in the year 1869, by the Commissioners Appointed to lay out Streets, Avenues and Squares in the City of Elizabeth, New Jersey."

Brighton street as laid out on the map filed by the "Commissioners Appointed to lay out Streets, Avenues and Squares, in the City of Elizabeth," from South Front street to the southeasterly line of Amboy avenue, and from the northwesterly line of Amboy avenue to the southeasterly line of Burlington avenue.

Old Princeton avenue as delineated on "Map of Building Lots in the City of Elizabeth, New Jersey, on and near Bayway," from the lands of the Perth Amboy and Elizabethport Railroad Company to the northeasterly line of Chelsea street as laid down on the last mentioned map.

Princeton avenue, as laid out on "Map filed by Commissioners Appointed to lay out Streets, Avenues and Squares in the City of Elizabeth, New Jersey," particularly described as follows:

Exhibit D. 3.

Beginning at a point where the northerly line of the East Jersey Telephone Company intersects the westerly line of Princeton avenue; thence along the westerly line of Princeton avenue north 32 degrees 42 minutes east to a point which is about 681.97 feet from Bayway and also in the boundary line of Rankin, Gilhooly and Fern; thence along said boundary line south 39 degrees 24 minutes east 31.54 feet to a point; thence south 49 degrees 46 minutes east 30.26 feet to a point in the easterly line of Princeton avenue, which point is about 686.83 feet from Bayway; thence south 32 degrees 42 minutes west along the easterly line of Princeton avenue to the line of the East Jersey Telephone Company; thence westerly along the Telephone Company line to the point or place of beginning.

Burlington avenue from the lands of the East Jersey Telephone and Telegraph Company to the southwesterly line of Brighton street, as laid down on Commissioners' Map aforesaid.

Which was adopted by the following vote:

Affirmative—President Cissel and Commissioners Hand and Higgins—3.

Negative—None.

* * * * *

Exhibit D. 3.

PROCEEDINGS OF BOARD OF PUBLIC WORKS.

(OFFICIAL)

Elizabeth, N. J., May 20, 1915.

A regular meeting of the Board of Public Works was held this afternoon.

Present—President Cissel and Commissioners Hand and Higgins—3.

Absent—None.

* * * * *

The Clerk presented the following from the Street Commissioner:

May 20, 1915.

To the Board of Public Works.

Gentlemen: I respectfully report that a notice of intention to vacate and close all those portions or parts of the following named streets: Chelsea and Richmond streets, Brighton street, Princeton avenue, Old Princeton avenue and Burlington avenue, as petitioned for by the Midvale Chemical Company was duly published and the attached objection was received.

Respectfully submitted,

W. P. NEAFSEY,
Street Commissioner.

Which was referred to the Committee on Streets.

* * * * *

Exhibit D. 3.

PROCEEDINGS OF BOARD OF PUBLIC WORKS.

(OFFICIAL)

Elizabeth, N. J.,
Thursday, July 1, 1915.

A regular meeting of the Board of Public Works was held this afternoon.

Present—President Cissel and Commissioners Hand and Higgins—3.

Absent—None.

* * * * *

ORDINANCES ON FIRST AND SECOND READINGS.

(Same form as on page 106.)

The ordinance was taken up, read and adopted on its first reading.

The ordinance was taken up, read and adopted on its second reading and ordered published two weeks.

Commissioner Higgins moved that the Board do now adjourn.

Which was carried.

* * * * *

PROCEEDINGS OF BOARD OF PUBLIC WORKS.

(OFFICIAL)

Elizabeth, N. J.,
Thursday, July 22, 1915.

A regular meeting of the Board of Public Works was held this afternoon.

Present—President Cissel and Commissioners Hand and Higgins—3.

Absent—None.

The minutes of the meetings held July 15 and 16, 1915, were read and approved.

Exhibit D. 3.

ORDINANCES ON THIRD READING.

An ordinance to order and cause all those portions of the following named streets and avenues, viz.:

Chelsea and Richmond streets, from the lands of the East Jersey Telephone and Telegraph Company to the lands of the Perth Amboy and Elizabethport Railroad Company, as said streets appear on "Map of Building lots in the City of Elizabeth, New Jersey, on and near Bayway," compiled about the year 1859, and also as they appear on the map filed in the year 1869, by the "Commissioners appointed to lay out Streets, Avenues and Squares in the City of Elizabeth, New Jersey."

Brighton street as laid out on the map filed by the "Commissioners appointed to lay out Streets, Avenues and Squares in the City of Elizabeth," from South Front street to the southeasterly line of Amboy avenue, and from the northwesterly line of Amboy avenue to the southeasterly line of Burlington avenue.

Old Princeton avenue as delineated on "Map of Building lots in the City of Elizabeth, New Jersey, on and near Bayway," from the lands of the Perth Amboy and Elizabethport Railroad Company, to the northeasterly line of Chelsea street, as laid down on the last mentioned map.

Princeton avenue, as laid out on "Map filed by Commissioners appointed to lay out Streets, Avenues and Squares in the City of Elizabeth, New Jersey," particularly described as follows:

Beginning at a point where the northerly line of the East Jersey Telephone Company intersects the westerly line of Princeton avenue; thence along the westerly line of Princeton avenue north 32 degrees 42 minutes east to a

Exhibit D. 3.

point which is about 681.97 feet from Bayway and also in the boundary line of Rankin, Gilhooly and Fern; thence along said boundary line south 39 degrees 24 minutes east, 31.54 feet to a point; thence south 49 degrees 46 minutes east 30.26 feet to a point in the easterly line of Princeton avenue, which point is about 686.83 feet from Bayway; thence south 32 degrees 42 minutes west along the easterly line of Princeton avenue, to the line of the East Jersey Telephone Company; thence westerly along the Telephone Company line to the point or place of beginning.

Burlington avenue from the lands of the East Jersey Telephone and Telegraph Company to the southwesterly line of Brighton street, as laid down on Commissioners map aforesaid, and on said map entitled, "Map of Building lots in the City of Elizabeth, New Jersey, on and near Bayway," to be vacated and closed.

Be it ordained by the Mayor and Board of Public Works of the City of Elizabeth:
following streets and avenue:

Chelsea and Richmond streets from the lands of the East Jersey Telephone and Telegraph Company to the lands of the Perth Amboy and Elizabethport Railroad Company, as said streets appear on "Map of Building lots in the City of Elizabeth, New Jersey, on and near Bayway," compiled about the year 1859, and also as they appear on the map filed in the year 1869, by the "Commissioners appointed to lay out Streets, Avenues and Squares in the City of Elizabeth, New Jersey."

Brighton street as laid out on the map filed by the "Commissioners appointed to lay out Streets, Avenues and Squares, in the City of

Exhibit D. 3.

Elizabeth," from South Front street to the southeasterly line of Amboy avenue, and from the northwesterly line of Amboy avenue to the southeasterly line of Burlington avenue.

Old Princeton avenue as delineated on "Map of Building lots in the City of Elizabeth, New Jersey, on and near Bayway," from the lands of the Perth Amboy and Elizabethport Railroad Company to the northeasterly line of Chelsea street, as laid down on the last mentioned map.

Princeton avenue as laid out on "Map filed by Commissioners appointed to lay out Streets, Avenues and Squares in the City of Elizabeth, New Jersey," particularly described as follows:

Beginning at a point where the northerly line of the East Jersey Telephone Company intersects the westerly line of Princeton avenue; thence along the westerly line of Princeton avenue north 32 deg. 42 min. east to a point which is about 681.97 feet from Bayway, and also in the boundary line of Rankin, Gilhooly and Fern; thence along said boundary line south 39 deg. 24 min. east, 31.54 feet to a point; thence south 49 deg. 46 min. east, 30.26 feet to a point in the easterly line of Princeton avenue, which point is about 686.83 feet from Bayway; thence south 32 deg. 42 min. west along the easterly line of Princeton avenue to the line of the East Jersey Telephone Company; thence westerly along the Telephone Company line to the point or place of beginning.

Burlington avenue from the lands of the East Jersey Telephone and Telegraph Company to the southwesterly line of Brighton street, as laid down on Commissioners map aforesaid, and on said map entitled "Map of Building lots in

Exhibit D. 3.

the City of Elizabeth, New Jersey, on and near Bayway," be vacated and closed, under and by virtue of the provisions of an act entitled, "An Act to revise and amend the Charter of the City of Elizabeth," approved March 4, 1863, and the supplements thereto and amendments thereof, and of the laws of this State.

Section 2. That so much of the costs and expenses incurred in the making of the said improvement as can be lawfully assessed on property specially benefited shall be duly assessed by Commissioners of Assessment according to the valid provisions of the act entitled, "An Act to revise and amend the Charter of the City of Elizabeth," approved March 4, 1863, the various supplements thereto and the general laws of the State, so far as they are applicable to the City of Elizabeth.

Section 3. That said improvement shall be made and completed under the supervision and direction of the Street Commissioner and the Board of Public Works of the City of Elizabeth, and according to the provisions of the City Charter and Ordinances.

Which had been read twice and adopted on its first and second readings at a meeting of the Board of Public Works, held July 1, 1915, and ordered published. Annexed to the ordinance was an affidavit certifying that said ordinance had been published two weeks.

The ordinance was taken up, read and adopted on its third reading and final passage by the following vote:

Affirmative—President Cissel and Commissioners Hand and Higgins—3.

Negative—None.

* * * *

Exhibit D. 3.

PROCEEDINGS OF BOARD OF PUBLIC WORKS.

(OFFICIAL)

Elizabeth, N. J.,
Thursday, July 22, 1915.

A regular meeting of the Board of Public Works was held this afternoon.

Present—President Cissel and Commissioners Hand and Higgins—3.

Absent—None.

* * * *

REPORTS OF STANDING COMMITTEES.

The Committee on Streets reported the following:

July 22, 1915.

To the Honorable Board of Public Works.

Gentlemen: Your Committee on Streets, having under consideration the petition of the Midvale Co., for the closing of Chelsea and other streets, would respectfully report that a public hearing was held on Tuesday afternoon, July 20, 1915, on the ordinance vacating said streets, due notice of said public hearing having been published in the local newspapers, and that no objectors to the vacating of the said streets appearing at said public hearing, your committee respectfully recommends the adoption of the ordinance on third reading.

Respectfully,

JAS. A. HAND,
Chairman of Street Committee.

Which was adopted.

Exhibit D. 9.

EXHIBITS D. 4 and D. 5 are Blue Prints of Maps.

EXHIBITS D. 6, D. 6½, D. 7 and D. 8 are Photographs.

The above exhibits, together with the blue prints attached to Exhibits D. 3 and D. 11, are bound in a separate book marked "Blue Prints of Maps and Photographs."

EXHIBIT D. 9.

AUGUSTUS WHITLOCK & WIFE
to
CATHARINE H. PUTNAM.

This Indenture made the Sixth day of July, One thousand Eight hundred Sixty three Between Augustus Whitlock of the City of New York and Margaret T. his wife parties of the first part; and Catharine H. Putnam of the same city party of the second part, Witnesseth, That the said parties of the first part for and in consideration of the sum of Two hundred and fifty dollars lawful money of the United States of America to them 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 unto the said party of the second part and to her heirs and assigns forever the equal undivided one fourth part of all that tract or parcel of land and premises hereinafter particularly described situate lying and being in the City of

Exhibit D. 9.

Elizabeth (formerly in the County of Essex now) in the County of Union and State of New Jersey.

Beginning at a corner of the land Known as the Haviland property at a post standing on the corner of the road leading from Elizabeth to Morss' Mills, which is also the corner of a lane leading from said road to Egypt Woods: and from thence running along said road South forty two and one half degrees East fifteen chains and forty-one links; thence South sixteen and one-quarter degrees East nine chains and ninety-eight links to a post on the corner: thence across and over the road leading to Morss' Mills to a post that stands on the Southerly side of the lane leading from the Morss' Mill road unto the Walnut Hill farm: thence North fifty and three quarter degrees East seventeen chains and fifty two links: thence South thirty eight and three quarter degrees East Nineteen chains and fifty five links to the Woods: thence North sixty nine and one half degrees East three chains and eighty links; Thence North Seventy four and three quarter degrees East five chains and six links; thence South thirty six and three quarter degrees East Nine Chains and five links; thence South twenty six and one quarter degrees East one chain and fifty four links along a ditch; thence South thirty five and one quarter degrees East three chains; thence South forty degrees East two chains and twelve links along a ditch; thence South fifty one and three quarter degrees East four chains and thirty links along a ditch; thence South eighty four and one quarter degrees East two chains and thirty one links along a ditch; thence South seventy three degrees East four chains and thirty three links along a ditch; thence North twenty eight and one half degrees East Nine chains and

Exhibit D. 9.

eighty-five links to the Elizabeth Town Creek; thence following the said Creek the several courses thereof to the Staten Island Sound; thence along the said Sound to the mouth of Morss' or Thompsons Creek thence up the said Creek about fourteen chains to the first brook or worm about thirty links in width; thence from the middle of said brook or worm along Morss's or Thompsons Creek seven chains and fifty links to a ditch; thence along said ditch North sixty degrees West five chains and fourteen links; thence along the same ditch North thirty and one quarter degrees West seventy eight links; thence along a ditch South forty one and three quarter degrees West two chains and seventy two links to the middle of a brook or worm; thence along said brook or worm South forty six and one half degrees West three chains and fifty links; thence along a brook or worm about twenty chains to a ditch; thence along said ditch South thirty one degrees West six chains and eighty eight links to another ditch; thence along the said last mentioned ditch North sixty four and one quarter degrees West fifteen chains and nineteen links to another ditch; thence along the said last mentioned ditch South forty one and one half degrees West —— chains and ninety four links to another ditch; thence along said last —— ditch North sixty four and three quarter degrees West one chain and Sixty Eight links to another ditch; thence along the said last mentioned ditch South eighty two and one half degrees West four chains and ninety four links to another ditch; thence along said last mentioned ditch South five and three quarter degrees East one chain and eleven links to another ditch; thence along said last mentioned ditch South

Exhibit D. 9.

seventy six and three quarter degrees East five chains and sixty one links to a worm or brook; thence along the said worm or brook to Morss' or Thompsons Creek; thence along said Morss or Thompsons Creek to a brook about one chain wide which brook is about twenty chains above the bridge that crosses the said Morss' or Thompson's Creek; thence along the said brook about twenty two chains direct distance to a post that stands five chains and sixty six links from the road leading to John T. Winans; thence from said post North thirty three degrees East eight chains and thirty five links crossing the Winans road along a fence; thence along the fence North twenty five and one half degrees East Eighty seven links; thence along the fence North ten and one quarter degrees East two chains and ninety links; thence North fifteen degrees East seventy six links; thence North eighteen and one half degrees East three chains and eighteen links; thence North twenty one and one half degrees East one chain and seventy two links; thence North twenty six degrees East four chains and eleven links thence North sixty nine and one half degrees East eight chains and seventeen links; thence North forty one and one half degrees West Nine chains and eighty two links; thence North fifty degrees East Nine chains and sixty one links; thence North forty degrees West six chains and fifty nine links to a lane; thence along said lane North forty three and three quarter degrees East nineteen chains and sixty one links; thence still along the said lane forty two and one half degrees East Nineteen chains and Ninety eight links to the place of beginning. Containing Seven hundred and Eighty acres of land more or less, Excepting and Reserving from

Exhibit D. 9.

the said land included within the above boundaries a piece of Salt Meadow land belonging to Job Winans and containing about three acres and thirty seven hundredths of an acre lying in that part of the land as above described which is known as the Hetfield Farm. Also Excepting and Reserving from the said land included within the above described boundaries a piece of Salt Meadow land now or late belonging to James Ewin and containing about Six acres and lying in that part of the land as above described which is Known as the Walnut Hill Farm. Also Excepting and Reserving from the said land included within the above described boundaries a Tract of land of about Five and one half acres lying upon the shore of said Morss' or Thompson Creek and Staten Island Sound and belonging to the New York Brick Manufacturing Company. Also Excepting and Reserving from the above described land two certain pieces of land belonging to James Horner and James Ludlum, bounded and described as follows: viz:

The first Lot beginning at a point in the Southeasterly line of Mayo Street as the same is lad down on a Map entitled "Map of Building Lots in the City of Elizabeth N. J. on or near Bay Way, "Which point is distant Northeasterly along said line of Mayo Street Seven hundred and twenty feet from the corner formed by the Intersection of said line of Mayo Street and the Northeasterly line of Bay Way as the same is also laid out on said last mentioned Map; thence running Southeasterly at right angles to said Mayo Street and parallel to said Bay Way three hundred and ten feet to Staten Island Sound: thence Northeasterly along the edge of said Staten Island Sound the various courses thereof

Exhibit D. 9.

to a point in the line of said Sound where it would be intersected by a line drawn Southeasterly at right angles from said Mayo Street from a point distant three hundred and sixty feet Northeasterly along the Northeasterly line of Mayo Street from the beginning corner; thence parallel to the first above mentioned course and at right angles to Mayo Street one hundred and Ninety eight feet to Southeasterly line of Mayo Street; thence South westerly along said line of Mayo Street three hundred and sixty feet to the beginning. Containing two acres and nine hundredths of an acre.

The Second Lot. Beginning in the North Westerly line of Mayo Street distant eight hundred and eighty feet Northeasterly along said line of Mayo Street from the corner formed by the intersection of said Northwesterly line of Mayo Street and the North easterly line of Bay Way; thence running Northwesterly at right angles to said Mayo Street and Parallel to Bay Way Six hundred feet; thence Northeasterly at right angles to said last mentioned course and parallel with Mayo Street two hundred feet; thence Southeasterly and parallel to said first mentioned course and at right angles to said Mayo Street Six hundred feet to the North Westerly line of Mayo Street; thence South Westerly along the said line of said street two hundred feet to the beginning. Containing Two acres and seventy five hundredths. Also Excepting and Reserving from the first above described land two certain lots of land belonging to Louis F. Therafson bounded and described as follows to wit; All those tracts or parcels of land and premises situate lying and being in the City of Elizabeth in the said County of Union, being Known num-

Exhibit D. 9.

bered and designated as Blocks Numbers Thirty five (35) and Sixty four (64) as laid down on a Map entitled "Map of Building Lots in the City of Elizabeth, N. J. on and near Bay Way" on file in the office of the Clerk of the said County of Union, said Block Number thirty five is bounded North West by Brunswick Avenue; North east by Grove Street, South East by Trenton Avenue and South West by Factory Street, said Block Number thirty five (35) contains six lots each one hundred feet in width and three hundred feet in depth, said block Number Sixty four (64) is bounded Northwest by Trenton Avenue Northeast by Grove Street South East by Woodbridge Avenue and South West by Factory Street and contains twenty four lots, each fifty feet in width and one hundred and fifty feet in depth.

Together with all and singular the rights, liberties and priveleges, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and reversions and remainders rents issues and profits thereof, And also, all the estate right title interest dower right of dower use property claim and demand of the said parties of the first part of in and out of the same. 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 parties of the first part of in and to the above described premises and every part and parcel thereof with the Appurtenances. To Have and To Hold all and

Exhibit D. 9.

singular the above mentioned and described premises together with the appurtenances unto the said party of the second part her heirs and assigns forever. Subject Nevertheless to the payment of four several Mortgages all made by the said parties of the first part to Adeline Mayo and dated on the twenty Ninth day of May One thousand Eight hundred and Sixty three, One of said Mortgages being given to secure the payment of Five thousand Dollars and interest as therein mentioned, and recorded in the office of the Clerk of the County of Union in Book 3 of Mortgages page 679 &c, the second of said Mortgages being given to sure the payment of Twenty thousand Dollars and interest as therein mentioned, and recorded in the office aforesaid in Book 3 of Mortgages page 683 &c. The third of said Mortgages being given to secure the payment of Twenty Thousand Dollars and interest as therein mentioned and recorded in the office aforesaid in Book 3 of Mortgages page 687 &c and the fourth of said Mortgages being given to secure the payment of Eighteen thousand three hundred and Eighty four dollars and twenty eight cents and recorded in the office aforesaid in Book 3 of Mortgages page 691 &c. And the said Augustus Whitlock for himself his heirs executors and administrators, doth hereby covenant promise and agree to and with the said party of the second part her heirs and assigns, that he hath not made, done, committed executed or suffered any act or acts thing or things whatsoever, whereby or by means whereof the above mentioned and described premises or any part or parcel thereof now are or at any time hereafter, shall or may

Exhibit D. 9.

be impeached charged or incumbered in any manner or way whatsoever except as aforesaid.

In Witness Whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Augs. Whitlock (L. S.)
Margaret T. Whitlock (L. S.)

Sealed and Delivered in the presence of:

The words "dower and right of dower" being: first interlined near the foot of the seventh page: before execution.

Alex Ostrander.

State of New York, City & County New York. *ss.*

On this twenty second day of July Eighteen hundred and Sixty three before the subscriber a Commissioner for the State of New Jersey for taking the acknowledgement and proof of Deeds personally came Augustus Whitlock and Margaret T. his wife known to me to be the grantors in the foregoing Indenture Named And the contents thereof being by me first made known to them they severally acknowledged that they signed sealed and delivered the same as their voluntary act and deed. And this said Margaret T. being by me examined privately and apart from her said husband, acknowledged that she signed sealed and delivered the same freely without any fear threat or compulsion of her said hus-

Exhibit D. 9.

band, All which I certify under my hand official Seal.

(Seal) ALEX. OSTRANDER,
Commissioner for New Jersey in New York.

(Seal) Revenue Stamp 50c

Received in the Office August 17, 1863.
No. 9580.

UNION COUNTY REGISTER'S OFFICE

State of New Jersey, }
County of Union, } *ss:*

I, FRANK H. SMITH, Register of the County of Union, do hereby certify that the foregoing is a true and correct copy of the record of a certain DEED made by Augustus Whitlock & wife to Catherine H. Putnam, and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book 12 of DEEDS for said County on Pages 153, etc.

In Testimony Whereof, I have hereunto set my hand and official seal this 20th day of November A. D. 1917.

(L. S.) FRANK H. SMITH,
Register.

Exhibit D. 10.

EXHIBIT D. 10.

An ordinance to accept the dedication to public use of all that street or highway known as Amboy Avenue.

Be it ordained by the Mayor and City Council of the City of Elizabeth:

Section 1. That the dedication to public use of all the street or highway known and designated as Amboy Avenue, from the Elizabeth River to the city line, as laid out on the map entitled, "Map of building lots in the City of Elizabeth, N. J., on and near Bayway," and on the map of the Commissioners to lay out streets, avenues and squares in the City of Elizabeth, under an act entitled, "An act appointing Commissioners to lay out streets, avenues and squares in the City of Elizabeth, approved March 13, 1867, be and the same is hereby accepted, and that all lands and real estate embraced within said street, be and the same are hereby accepted, and appropriated for the purpose of a public street, for which the same are dedicated.

Section 2. This ordinance shall take effect immediately.

Passed November 1, 1907.

President of the City Council.

Approved November 8, 1907.

Mayor.

Attest:

John F. Kenah,
City Clerk.

Exhibit D. 11.

EXHIBIT D. 11.

This Agreement made the day of in the year eighteen hundred and eighty-one, Between D. B. Bonnett, of Elizabeth in the County of Union and State of New Jersey, Agent for Margaret B. Bonnett and others, of the first part, and The Central Railroad Company of New Jersey, of the second part.

Witnesseth:

Whereas, the party of the first part desires to procure facilities for Railroad transportation for the property belonging to the Whitlock estate fronting on Staten Island Sound, South of the mouth of Elizabeth Creek, and to that end wishes a track built from the line of the New York and Long Branch Railroad to the said property—And—

Whereas, the party of the second part desires to secure the transportation of such rail freight as the Manufactories existing or to be built along said water-front may have to offer—

Now, Therefore, it is Agreed by the parties hereto, that the party of the first part will grant without further consideration a strip of land thirty-three feet wide for two lines of track, extending from a point on the Central Railroad of New Jersey near Bayway Station, Eastward on the line indicated on the map annexed to, and forming part of this agreement, * and diverging from this line by convenient curves North and South along the Westerly side of South Front Street as far North as the lands of the said Whitlock estate may extend, and as far South as the Southerly line of Laurel Street; and also strips of land sufficient for building switches from this line

See book of Maps and Photographs.

Exhibit D. 11.

crossing South Front Street into the manufactories now existing or hereafter to be built on the said water front.

The party of the second part agrees to construct as soon as practicable after the signing of this agreement and the conveyance of said strip of land, the necessary tracks to do the business offered by the said manufactories, and that it will transport materials to and from the said Manufactories, charging on such materials, rates which shall not be higher than those which are charged from time to time to tide-water in New York Harbor. In local transportation the charges shall not exceed those which shall from time to time be current between similar points on competing railroads, This agreement shall remain in force as long as any of the property on the said water-front reached by the said Railroad shall remain in use for manufacturing purposes. At the expiration of this agreement the party of the second part shall be at liberty for the term of thirty days to remove from the land herein agreed to be granted, all the ties, rails, and other materials which they have placed there, and shall re-convey the same to the parties of the first part.

In Witness Whereof, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused its corporate seal to be hereunto affixed, and the same to be signed by its President and attested by its Secretary the day and year first above written.

D. B. BONNETT, Agent,
The Central Railroad Co. of N. J.,
By JOHN KEAN,
Second Vice-President.

Exhibit D. 12.

Sealed and Delivered
in the presence of

F. COLLINGWOOD,
(L. S.)

Attest:

SAMUEL KNOX,
Secretary.

EXHIBIT D. 12.

Warranty Deed.

THIS INDENTURE, made the twentieth day of June, in the year of Our Lord, one thousand nine hundred and seventeen,

Between

GEORGE W. HUNTER and LESLIE N. SIMSON, as Trustees of the Midvale Chemical Works, under Articles of Association, recorded in the Office of the Register of Deeds for Union County, of the City of Elizabeth, in the County of Union, and State of New Jersey, of the First Part: and

ERNEST C. KLIPSTEIN, of the City of East Orange, in the County of Essex, and State of New Jersey, of the Second Part:

WITNESSETH, That the said party of the first part, for and in consideration of lawful money of the United States of America, to them 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,

Exhibit D. 12.

contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm, to the said party of the second part, and to his heirs and assigns forever, ALL those certain tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Elizabeth, in the County of Union, and State of New Jersey.

FIRST TRACT: BEGINNING at a point in the northwest line of South Front Street distant 890 feet northeast from the intersection formed by the northeast line of Bay Way and the northwest line of South Front Street; thence along the northwest line of South Front Street south 50 degrees 10 minutes west 48.01 feet to lands of the East Jersey Telephone and Telegraph Company; thence along their land north 59 degrees 19 minutes west 509.15 feet, thence on a curve to the left or south with a radius of 4653 feet be the distance more or less, to the east right of way line of the Elizabethport and Perth Amboy Branch of the Central Railroad of New Jersey; thence along their right of way north 32 degrees 42 minutes east 655.07 feet to lands of George Peabody Wetmore; thence along that line south 31 degrees 44 minutes east 125.33 feet; thence south 39 degrees 24 minutes east 122.9 feet; thence south 49 degrees 46 minutes east 261.4 feet; thence south 82 degrees 57 minutes east 127.3 feet; thence south 73 degrees 22 minutes east 90.1 feet to lands of Wood; thence along said land south 70 degrees 33 minutes east 114.02 feet to lands now or late of the Chemical

Exhibit D. 12.

Trading Company; thence along said lands south 39 degrees 50 minutes east 1102.52 feet to the point or place of Beginning. Containing 14.22 acres.

Being the same premises conveyed to the parties of the first part by deed from William H. Rankin et als., recorded in Book 671 of Deeds for Union County on page 57.

SECOND TRACT: BEGINNING at a stake in the mouth of a ditch on the southerly side of the Elizabeth River at a corner of lands now or late of Daniel Spinning; thence along his line South thirty-five degrees, seven minutes West seven hundred sixty-six and ninety-two one hundredths feet to a corner of lands of the Midvale Chemical Company, said line being about in the centre of a ditch of varying width; thence along their line of lands and lands of the Chemical Trading Company South seventy degrees thirty-three minutes East two hundred and seven and twenty-four one-hundredths feet to lands now or formerly of Samuel Halsey; thence along Halsey's line North thirty-two degrees, eight minutes East six hundred fifty-four and thirty-five one-hundredths feet more or less to southerly high water mark on the southwesterly bank of the Elizabeth River; thence Northwesterly along the Southwesterly bank of the Elizabeth River following its various courses to the point or place of Beginning. Containing 2.92 acres to high water mark; together with all the right, title and interest of the parties of the first part in and to the lands lying between high and low water mark in the Elizabeth River in front of the above described premises.

Exhibit D. 12.

It being the intention hereof to convey all buildings, fixtures, equipments and implements upon said parcels of land and each of them which are attached to the freehold and all such buildings, fixtures, equipments, machinery and implements, shall for all purposes be deemed real property by the parties hereto.

Being the same premises conveyed to the parties of the first part by Clarence D. Meyer and wife, recorded in Book 677 of Deeds for said County, on page 94.

The First Tract is conveyed subject to the following mortgages:

No. 1. Mortgage given by Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works, to Economy Realty Company, a New Jersey Corporation, dated July 1, 1915, acknowledged October 8 and 12, 1915 and recorded October 15, 1915 in mortgage book 378 pages 349-353; secures $4299.25.

No. 2. Mortgage given by Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works to William H. Rankin, dated July 1, 1915, acknowledged October 8 and 12, 1915, recorded October 15, 1915, in mortgage book 378 pages 353-357; secures $4299.25.

No. 3. Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works, to Max Fern, dated July 1, 1915, acknowledged October 8 and 12, 1915, recorded October 15, 1915, in mortgage book 378, pages 357-361; secures $8598.50.

The Second Tract is conveyed subject to the following mortgages:

No. 1. Mortgage given by Clarence D. Meyer and Sarah Jaquith Meyer, his wife, to Sarah B. Wood, Sole surviving executrix and trustee

Exhibit D. 12.

of E. M. Wood, deceased, Lizzie D. Halsey and Gertrude Atwater, dated November 10, 1915, recorded December 16, 1915, in mortgage book 382 page 507-9, to secure $2,000.

No. 2. Mortgage given by George W. Hunter and Leslie N. Simson, Trustees of Midvale Chemical Works, to Clarence D. Meyer, dated November 10, 1915, acknowledged January 17, 1916, recorded February 2, 1916 in mortgage book 384 pages 528-532, to secure $1400.

This conveyance is made subject to the public and private rights in streets and avenues crossing or bounding the hereinabove described premises, and also to the right of way of the Central Railroad of New Jersey across a portion of the premises lying between Amboy Avenue and South Front Street.

TOGETHER with all and singular, the house, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining: ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof, TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever; and the said parties of the first part, do for themselves, their heirs, executors and administrators covenant and grant to and with the said party of the second part his heirs and assigns, that they the said GEORGE W. HUNTER AND LESLIE N.

Exhibit D. 12.

SIMSON, as Trustees of the Midvale Chemical Works, are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever: AND ALSO, that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid AND ALSO, that the said parties of the first part, will WARRANT, secure, and forever defend the said land and premises unto the said

ERNEST C. KLIPSTEIN, his

heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrances whatsoever.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

GEORGE W. HUNTER (L. S.)
LESLIE N. SIMSON (L. S.)
As Trustees of the Midvale Chemical Works.

Exhibit D. 13.

Signed, Sealed and Delivered in
the presence of

HARRY WRIGHT.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } *ss.*

BE IT REMEMBERED, That on this twenty-second day of June, in the year of our Lord One Thousand Nine Hundred and Seventeen, before me, the subscriber,

A Master in Chancery of New Jersey,

personally appeared

GEORGE W. HUNTER and LESLIE N. SIMSON, as Trustees of the Midvale Chemical Works,

who, I am satisfied are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

HARRY WRIGHT,
Master in Chancery of New Jersey.

EXHIBIT 13.

FIDELITY TRUST COMPANY
NEWARK, NEW JERSEY.

TITLE DEPARTMENT.

No. 31114. Premium—None
$19,000.00

THIS GUARANTY WITNESSETH—That FIDELITY TRUST COMPANY, hereinafter called the Company, in consideration of the payment of its

Exhibit D. 13.

charges for the insuring of the title to the land hereinafter stated, hereby covenants that it will indemnify, keep harmless and guarantee .....Leslie N. Simson and George W. Hunter.....Trustees of Midvale Chemical Works, located in Elizabeth, N. J., hereinafter called Party Guaranteed, and all persons or corporations to whom this Guaranty may be transferred with the assent of the Company testified by the signature of its proper officers endorsed thereon, from all loss or damage not exceeding the sum of Nineteen Thousand dollars which the said Party Guaranteed shall sustain, by reason of defects in the title of the Party Guaranteed to the estate, mortgage or interest described in Schedule A, hereto annexed, or because of liens or encumbrances charging the same at the date of this Guaranty (unless some other date be mentioned in Schedule A, and then at the last mentioned date); saving the estates, defects, objections, liens and incumbrances excepted in Schedule B, and by the conditions of this Guaranty hereto annexed and hereby incorporated into this contract, the loss and the amount to be ascertained in the manner provided in the said conditions, and to be payable upon compliance by the Party Guaranteed with the stipulations of said conditions, and not otherwise. This Guaranty is issued upon an application numbered—33583—, and agreed by all persons or corporations claiming under this Guaranty to be a warranty of the facts therein stated.

In Witness Whereof, Fidelity Trust Company has caused its corporate seal to be hereunto affixed and these presents signed by its

Exhibit D. 13.

President, and attested by its Secretary, this Fifteenth day of October, in the year of our Lord one thousand nine hundred and fifteen (1915).

(SEAL) UZAL H. McCARTER,
President.

ATTEST:

JAMES H. SHACKLETON,
Secretary.

Page 4

Guaranty
No.....

CONDITIONS OF THIS GUARANTY

SCOPE OF THIS GUARANTY.

1. FIDELITY TRUST COMPANY will at its own cost defend the party guaranteed in all actions of ejectment or other proceedings founded upon a claim of title or incumbrance prior in date to this Guaranty, and hereby guaranteed against. No claim shall arise under this Guaranty unless (I) the party guaranteed has been actually and lawfully evicted from the premises covered by this Guaranty or from some part or undivided share or interest therein under an adverse title guaranteed against; or (II) there has been a final judgment or decree against the party guaranteed upon or because of a defect, lien or incumbrance not excepted in this Guaranty; or (III) unless there is a lawful tax or assessment or sale thereunder against said premises which was a lien at the date to which this Guaranty

Exhibit D. 13.

indemnifies and which was not excepted in this Guaranty; or (IV) where the Guaranty is upon the interest of a mortgagee, and the mortgage has been adjudged by final determination in a court of competent jurisdiction to be invalid or ineffectual to charge the premises described in this Guaranty, or subject to a prior lien or incumbrance not excepted in this Guaranty; or (V) where the party guaranteed shall have transferred the title guaranteed by an instrument containing covenants in regard to title herein guaranteed, or warranty thereof, and there has been a final judgment in a court of competent jurisdiction against the party guaranteed, on any of such covenants or warranty because of some defect of title or incumbrance not excepted in this Guaranty; or (VI) unless the party guaranteed shall have contracted in good faith in writing to sell the guaranteed estate or interest, and the title has been rejected because of a defect or incumbrance not excepted in this Guaranty, and notice in writing, specially stating such defect and rejection, shall have been given to the Company within ten days thereafter. For thirty days after receiving this notice the Company shall have the option in discharge of its liability because of said rejection, of (a) paying the loss (of which the party guaranteed must present proper proof) not exceeding the amount of the Guaranty; or (b) instituting, maintaining or defending either in its own name, or at its option in the name of the party guaranteed, some proper action or proceeding begun or to be begun in a court of competent jurisdiction for the purpose of determining the validity of the objection alleged by the vendee to the title, in which event the

Exhibit D. 13.

Company shall be liable on this Guaranty only in case the final determination is made in such action or proceeding sustaining the objection to the title.

2. Defects and incumbrances arising after the date to which this Guaranty indemnifies, or created or suffered by the party guaranteed and assessments not confirmed at said date, the legal status of parties hereby guaranteed and the capacity of corporate parties hereby guaranteed, are not to be deemed covered by it, and no approval of any transfer of this Guaranty shall be deemed to make it cover any such defect, incumbrance, assessment, status or capacity.

3. Any untrue statement or answer concerning, or any suppression of any material fact before the issuing of this Guaranty by the party to be guaranteed, his agent or the person making the application for it, shall avoid the Guaranty.

CONTINUATION PRIVILEGES.

4. Whenever the holder of a Guaranty of this Company of title in fee shall, within seven years from the date of the Guaranty, sell or mortgage any or all of the real estate therein described, and application shall within thirty days thereafter be made for a continuation of said Guaranty, then if the risk be again accepted by the Company and the former Guaranty surrendered and cancelled by proper endorsement thereon (see form on cover hereof), premium will be charged at one-half the then current rate on the new Guaranty to the amount of the old Guaranty.

Exhibit D. 13.

5. A Guaranty held by an owner or mortgagee may be transferred to a mortgagee or assignee of the mortgage estate or interest, or to a purchaser at foreclosure sale under said mortgage, if he be the party guaranteed, with the consent of the Company endorsed on the Guaranty, provided, however, that no transfer shall alter the character or extent of the original liability of the Company on the Guaranty so assigned. All liability of the Company on this Guaranty (saving for damages accrued) shall cease by the transfer thereof without such consent so endorsed. The liability of the Company to any collateral holder of a Guaranty shall in no case exceed the amount of the pecuniary interest of such collateral holder in the premises described in said Guaranty. The transfer fee for assigning a Guaranty shall be one dollar. No transfer shall be necessary in case of the death of the party hereby guaranteed, but in such event this Guaranty shall continue for the benefit of the person or persons upon whom the guaranteed estate or interest devolves from the party hereby guaranteed by descent, devise, legacy or the laws governing intestacy.

6. In case a new Guaranty is issued to his mortgagee in lieu of one previously issued to the owner of the property, the whole premium originally paid by such owner shall be applied on the new premium upon the surrender and cancellation of the former Guaranty.

REQUIREMENTS.

7. Within five days after receipt by the party guaranteed, of notice or knowledge of any matter injuriously affecting, or which may

Exhibit D. 13.

injuriously affect, the title guaranteed, the party guaranteed shall notify the Company thereof in writing, and within five days after receipt or service of every notice, process or pleading affecting said title, shall deliver the same to the Company. Upon request the party guaranteed shall secure to the Company the right to defend any action or suit brought, or to prosecute any action or suit affecting said title it may desire, including opportunity and right for review by the highest appellate court, give it all reasonable aid and permit it to use the name of the party guaranteed. In default of performance of any of the requirements hereby made, or if without its written consent any suit or legal proceeding shall be commenced by any person interested in this Guaranty, the result of which suit or proceeding may cause any liability to the Company hereunder, the Company may declare this Guaranty void.

PROCEDURE UPON LOSS.

8. In every case where the liability of the Company has been definitely fixed in accordance with these conditions, the Company shall within thirty days after written notice to it of the loss or damage and proof of loss, pay at its option (a) the loss or damage or (b) the amount of the Guaranty, subject to the following provisions:

9. Whenever there shall appear to be an outstanding estate, interest or lien in or on any portion or all of the premises guaranteed which might be acquired by the party guaranteed either by agreement or by the exercise of any power, privilege, franchise or authority vested in said party guaranteed, the latter shall upon request by the Company acquire such estate,

interest or lien, provided the same shall not cost more than the amount of this Guaranty, in the negotiation or proceedings to acquire which the Company may, if it so elects, represent the party guaranteed; if such party guaranteed shall upon the request of the Company proceed for the acquirement of any estate, interest or lien in or upon said premises, or any part thereof as above provided for, the Company shall be obligated for the actual cost of all proceedings taken in addition to its obligation under the other provisions of this Guaranty.

10. Whenever in the opinion of the Company the loss or damage shall approximate or exceed the value of the estate or interest guaranteed, this Company may demand a valuation of the guaranteed estate or interest, less estates and incumbrances not hereby guaranteed, to be made by three disinterested arbitrators of any two of them, one to be chosen by the party guaranteed, the other by the Company and they two choosing the third. No right of action shall thereupon accrue until thirty days after written notice of such valuation shall have been served upon the Company accompanied by a tender of conveyance of such appraised estate or interest to the Company, or its nominee at its option, at such valuation, and unless within said time the Company shall neither pay said loss or damage, the amount of the Guaranty, nor accept said tender. Acceptance of such conveyance and payment of the consideration fixed as aforesaid shall discharge all obligations of the Company under this Guaranty.

11. Payments which shall be made by the Company on account of loss or damage hereunder, shall discharge the Company *pro tanto*.

Exhibit D. 13.

No payment or settlement can be demanded without producing the Guaranty for endorsement of the fact of such payment or settlement. If Guaranty be lost, indemnity must be furnished to the satisfaction of the Company. Whenever the Company shall have settled a claim under this Guaranty, it shall be subrogated to, and shall have, all the rights and remedies which the party guaranteed would have had against any other person or property in respect to such claim, had this Guaranty not been made, including the right to use the name of the party guaranteed for the recovery or defense thereof; and the party guaranteed shall transfer or cause to be transferred all such rights to said Company. If the payment does not cover the loss of the party guaranteed, the Company shall be subrogated to such rights, in the proportion which said payment bears to the amount of said loss; and the party guaranteed warrants that such right of subrogation shall vest the estate or interest guaranteed in the Company unaffected by any act of the party guaranteed.

SCHEDULE A.

An Estate in fee simple, as Trustee as aforesaid.

By Warranty Deed given by William H. Rankin and Mary J. Rankin, his wife, Max Fern and Frieda B. Fern, his wife, and Economy Realty Co., a corporation of the State of New Jersey, to Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works,

Exhibit D. 13.

located in Elizabeth, N. J., dated July 1st, 1915, and recorded in the Register's Office of Union County October 15th, 1915.

ALL that certain tract or parcel of land hereinafter particularly described, situate, lying and being in the City of Elizabeth, in the County of Union and State of New Jersey:—

BEGINNING at a point in the Northwesterly line of South Front Street distant 890 feet Northeasterly from the intersection formed by the Northeasterly line of Bay Way and the Northwesterly line of South Front Street; *thence* along the Northwesterly line of South Front Street South 50 degrees 10 minutes West 48—1/100 feet to lands of the East Jersey Telephone and Telegraph Company; *thence* along their land North 59 degrees 19 minutes West 509—15/100 feet; thence on a curve to the left or South with a radius of 4653 feet, be the distance more or less, to the Easterly right of way line of the Elizabethport and Perth Amboy Branch of the Central Railroad of New Jersey; *thence* along their right of way North 32 degrees 42 minutes East 655—7/100 feet to lands of George Peabody Wetmore; *thence* along that line South 31 degrees 44 minutes East 125 and 3/100 feet; *thence* South 39 degrees 24 minutes East 122 and 9/10 feet; *thence* South 49 degrees 46 minutes East 261—4/10 feet; *thence* South 82 degrees 57 minutes East 127—3/10 feet; *thence* South 73 degrees 22 minutes East 90—1/10 feet to lands of Wood; *thence* along said land South 70 degrees 33 minutes East 114—2/100 feet to lands now or late of the Chemical Trading Co.; *thence* along said lands South 39 degrees 50 minutes East 1102—52/100 feet to the point or place of *Beginning*.

Exhibit D. 13.

Containing 14—22/100 acres, including streets and branch of railroad.

SCHEDULE B.

Showing estates, defects, or objections to title, and liens, charge, and incumbrances thereon, which do, or my now exist and against which the Company does not agree to guarantee or indemnify.

(*1*) *Purchase Money Mortgage to secure the sum of $4299.25,* payable in five years, from date, with interest at the rate of six per cent. per annum, given by Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works, to Economy Realty Co., dated July 1st, 1915, and recorded in the Register's Office of Union County October 15th, 1915.

(*2*) *Purchase Money Mortgage to secure the sum of $8598.50,* payable in five years from date, with interest at the rate of six per cent. per annum, given by Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works, to Max Fern, dated July 1st, 1915, and recorded October 15th, 1915.

(*3*) *Purchase Money Mortgage to secure the sum of $4299.25,* payable in five years from date, with interest at the rate of six per cent. per annum, given by Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works, to William H. Rankin, dated July 1st, 1915, and recorded October 15th, 1915.

The foregoing three mortgages are equal in lien and priority and any payments made by the mortgagors or their successors shall be made pro rata upon all three mortgages.

Exhibit D. 13.

(4) *Terms of trust under which the assured hold title.*

(5) *Outstanding rights under unrecorded agreement* recited in Deed Book 155 page 418.

(6) *Outstanding estates or rights in lands lying in bed of right of way of a branch of Central Railroad* crossing east part of premises in question.

(7) *Rights, if any, of owner of poles along South Front Street front of premises in question.*

(8) *Liability, if any, to mechanics' liens not of record.*

(9) *Outstanding rights in the following street:—*

1, Amboy Avenue,

2, South Front Street as dedicated 100 feet in width which would encroach 20 feet upon Southerly part of premises in question.

3, Brighton Street, as laid out on Map of Building Lots &c. on or near Bayway, and so much thereof as laid out on the Commissioners Map as lies Northwesterly of the Southeasterly line of Burlington Avenue.

4, So much of Burlington Avenue as lies Northeasterly of the Southwesterly line of Brighton Street as laid down on the Commissioners Map.

5, So much of "Old Princeton Avenue" as lies Northeasterly of the Northeasterly line of Chelsea Street as laid out on "Map of Building Lots &c. on or near Bayway."

Exhibit D. 14.

(*10*) *Private rights in the following streets:—*

1, Old Princeton Avenue, Commissioners Map.

2, Princeton Avenue, Bayway Map,

3, Burlington Avenue, Bayway Map,

4, Richmond Street, Commissioners Map and Bayway Map,

5, Chelsea Street, Commissioners Map and Bayway Map,

6, Brighton Street, as laid down on the Commissioners Map;

And such public rights in said streets as may result from certiorari proceedings upon ordinance vacating public rights therein.

(*11*) *Outstanding rights in ditch across premises in question.*

This Guaranty is issued by Fidelity Trust Company and accepted by the assured in lieu of Guaranty Policy No. 27695, said to be lost—it being understood that the sum of Nineteen Thousand Dollars is the extent of the liability of Fidelity Trust Company.

EXHIBIT 14.

Same as Exhibit 13, except date February 2nd, 1916, and Schedules A and B forming part thereof which are as follows:

SCHEDULE A.

An Estate in fee simple, as Trustees as aforesaid.

By Bargain and Sale Deed given by Clarence D. Meyer and Sarah Jaquith Meyer, his wife,

Exhibit D. 14.

to George W. Hunter and Leslie N. Simson, Trustees of Midvale Chemical Works, located in the City of Elizabeth, N. J., dated November 10th, 1915, and recorded in the Register's Office of Union County, February 2nd, 1916.

ALL that certain tract or parcel of land situate, lying and being in the City of Elizabeth, in the County of Union and State of New Jersey:

BEGINNING at a stake in the mouth of a ditch on the Southerly side of the Elizabeth River at a corner of lands now or late of Daniel Spinning; *thence* along his line South 35 degrees 7 minutes West 766-92/100 feet to a corner of lands of the Midvale Chemical Company, said line being about in the centre of a ditch of varying width; *thence* along their line of lands of the Chemical Trading Company, South 70 degrees 33 minutes East 207-24/100 feet to lands now or formerly of Samuel Halsey; *thence* along Halsey's line North 32 degrees 8 minutes East 649-35/100 feet to a stake 5 feet Southerly from high water mark on the Southerly bank of the Elizabeth River; *thence* North 45 degrees 50 minutes West 113-42/100 feet to a stake on the Southerly bank of the Elizabeth River, *thence* North 14 degrees 26 minutes West 69-95/100 feet to the point or place of *Beginning.*

Containing 2-92/100 acres to high water mark.

SCHEDULE B.

Showing estates, defects, or objections to title, and liens, charge, and incumbrances thereon, which do, or may now exist and against

Exhibit D. 14.

which the Company does not agree to guarantee or indemnify.

1. *Mortgage to secure the sum of $2000.,* payable in two years, with interest at the rate of six per cent. per annum, given by Clarence D. Meyer and Sarah Jaquith Meyer, his wife, to Sarah B. Wood, Sole Surviving Executrix and Trustee of E. M. Wood, deceased, Lizzie D. Halsey and Gertrude Atwater, dated November 10th, 1915, and recorded in the Register's Office of Union County, December 16th, 1915, in Book 382 of Mortgages, on pages 507 to 509.

2. *Purchase Money Mortgage to secure the sum of Fourteen Hundred Dollars,* payable in three years, with interest at the rate of five per cent. per annum, given by George W. Hunter and Leslie N. Simson, Trustees of Midvale Chemical Works, located in Elizabeth, N. J., to Clarence D. Meyer, dated November 10th, 1915, and recorded February 2nd, 1915.

3. *Rights of the United States, State of New Jersey and neighboring owners* in Elizabeth River crossing and bounding premises in question.

4. *Outstanding rights in all ditches, drains and streams crossing and bounding premises in question.*

5. *Terms of trust under which assured holds title.*

6. *Outstanding public rights in Brighton Street, Clifton Street, Burlington Avenue and an unnamed street crossing the premises in question,* between Clifton Street and the Elizabeth River, as shown by survey made by W. H. Luster, dated November, 1915.

Exhibit D. 15.

7. Subject to estates and liens adverse to Abner Miller, grantor in Deed Book M. 2 for Essex County, pages 446, &c., prior to May 28th, 1822.

This Guaranty is issued by Fidelity Trust Company and accepted by the assured in lieu of Guaranty Policy No. 28111 said to be lost, it being understood that the sum of Four Thousand Dollars is the extent of the liability of Fidelity Trust Company.

EXHIBIT D. 15.

THIS AGREEMENT, made this 18th day of September, 1916, between THE BALTIMORE AND NEW YORK RAILWAY COMPANY, as First Party, and THE MIDVALE CHEMICAL WORKS, as Second Party.

WITNESSETH, That the First Party does hereby License and Permit the Second Party to take possession of the land held by said First Party, hereinafter described, but only on the conditions and terms hereinafter set forth, and to maintain thereon private road to be used for ingress and egress between Bay Way and its property lying north of the trestle of the First Party.

The land which the First Party agrees may be thus occupied by the Second Party is situated in the City of Elizabeth, County of Union and State of New Jersey and described as follows:

A strip of land thirty feet wide extending from Bay Way across the right of way of the First Party and underneath its trestle to property of the Second Party and being immediately adjoining and binding on the right of way line of the Central Railroad of New Jersey.

Exhibit D. 15.

Being the property shown on the attached plat as the portion thereof colored green.

The terms and conditions of this license are are follows:

1st. That the Second Party shall keep the premises in a neat and cleanly condition.

2nd. That the Second Party or its assigns, shall at all times assume and take upon itself all risks of accidents and fires, and of the danger thereof to such property of the Party of the Second Part on said premises whether communicated from the engines of the First Party, or from whatever cause; and from all loss or damage consequent therefrom, whether caused by accident or from negligence of the agents or employes of the First Party, or from whatever cause, the said Second Party hereby releases said First Party from all liability therefor.

3rd. That the Second Party upon the receipt of a notice in writing from the First Party to vacate said premises will vacate said premises within thirty days from the receipt of said notice, and will remove the roadway erected under this license, and will restore said premises to the same condition as before the construction of the roadway if the First Party so desires. It being understood and agreed that if the rental for this property shall at any time be thirty days in arrears, or if the Second Party shall not within thirty days of the receipt of a notice in writing from said First Party as aforesaid to vacate said property, remove said roadway erected thereon by said Second Party, that then after the expiration of said thirty days that Second Party shall

Exhibit D. 15.

absolutely forfeit all right, title and interest in said roadway erected upon said property, and the title to it shall vest absolutely in said First Party, and the Second Party hereby agrees that the title shall so vest. It being understood and agreed that it shall thereafter be lawful and the right of said First Party, its agents, or assigns, to take possession of said property and roadway erected thereon, and to hold absolute possession of said premises and roadway with or without legal process, and to remove the same. It being understood, however, that in cases of emergency or accident such as injury to or destrcution of bridge or renewal of same, or for other reasons, the First Party shall have the right to repossess itself of the premises hereby licensed without notice to the Second Party, but the right of the Second Party to passage over this strip of land shall be maintained during the period of reconstruction work.

4th. That the Second Party shall have the right to assign this license to any other person or persons, without notice to the First Party.

5th. That the Second Party shall pay all taxes and assessments on the property hereby licensed as well as upon all improvements placed thereon, and shall also pay as rent for the privilege hereby granted One Dollar ($1.00) per annum. Provided that the payment of said sum in advance shall not be held to create an irrevocable license for the period for which the same is paid, but said First Party may terminate the license as herein provided and refund the rent for the balance of the period for which the same has been paid. Said rent is to be paid within ten days from date it is

Exhibit D. 15.

due, or this license shall immediately terminate at the option of the First Party.

6th. Neither the Second Party, nor its legal representatives or assigns, shall at any time own or claim any interest in the land covered by this license, nor shall its possession for any length of time become ground for any claim to any right, except permission to occupy on the conditions aforesaid.

The Second Party accepts this license and grant of the above named privileges on the terms and conditions above set forth and hereby convenants and agrees to perform on its part the same, and especially to vacate said property on the expiration of said notice to vacate; and to remove said roadway and restore said premises to the same condition as before the construction of said roadway.

The First Party, in consideration of the premises, hereby licenses and permits the Second Party to take possession of, and occupy said premises, so above described, for the purpose aforesaid, and none other until this license shall be revoked and terminated by notice in the manner herein stipulate, or by a breach of one or more of the terms and conditions above set forth be terminated *ipso facto.*

It is further understood and agreed between the parties hereto that if at any time before it becomes necessary for the Party of the First Part to reconstruct its bridge over Bay Way and over the right of way of the Central Railroad of New Jersey, the City of Elizabeth vacates Princeton avenue, Burlington avenue, Richmond street and Chelsea street, then in that event the Party of the First Part will so reconstruct its said bridge to provide spans

Exhibit D. 15.

for a roadway thirty feet wide next adjoining the right of way of the Central Railroad of New Jersey, and will thereupon grant unto the Second Party and its assigns, a perpetual easement to maintain its roadway underneath said bridge. If, however, the City of Elizabeth fails or refuses to vacate the above mentioned Avenue and Streets, or any one of them and the Party of the First Part is required to keep said Streets and Avenues or any one of them open over its right of way, then and in that event this license shall immediately terminate and be null and void.

This contract is the obligation of the Midvale Chemical Works, an unincorporated association, and liability hereunder is limited to the assets of the association. Neither the Trustees nor any certificate holder shall be under any personal liability on account of the obligations herein expressed.

Witness the following signatures and seals.

The Baltimore and New York Railway Company,

By

Vice-President.

Witness:

Midvale Chemical Works,

By

Trustee.

Witness:

Exhibit D. 16.

Saint Louis, May 31, 1917.

For and in consideration of one dollar and other valuable considerations, receipt of which is hereby acknowledged, the undersigned hereby sells and conveys the within contract to Ernest C. Klipstein.

MIDVALE CHEMICAL WORKS,

By

EXHIBIT 16.

THIS INDENTURE, made the first day of July, in the year of our Lord, One Thousand Nine Hundred and Fifteen, between WILLIAM H. RANKIN and MARY J. RANKIN, his wife, MAX FERN and FRIEDA B. FERN, his wife, of the City of Elizabeth, in the County of Union and State of New Jersey, and ECONOMY REALTY Co., a corporation organized under the laws of the State of New Jersey, having its principal office in the City of Elizabeth, in the County of Union and State of New Jersey, parties of the First Part, and LESLIE N. SIMSON and GEORGE W. HUNTER, of the City of St. Louis, and State of Missouri, Trustees of Midvale Chemical Works, located in the City of Elizabeth, in the County of Union and State of New Jersey, parties of the Second Part:

WITNESSETH: That the said Parties of the First Part, for and in consideration of the sum of one dollar and other good and valuable considerations, lawful money of the United States of America, to them in hand well and truly paid by the said Parties of the Second Part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowl-

Exhibit D. 16.

edged, and the said Parties of the First Part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said Parties of the Second Part, and to their successors, heirs and assigns, forever, ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Elizabeth, in the County of Union, and State of New Jersey.

BEGINNING at a point in the northwesterly line of South Front street distant eight hundred and ninety (890) feet northeasterly from the intersection formed by the northeasterly line of Bay Way and the northwesterly line of South Front street; thence along the northwesterly line of South Front street South fifty degrees ten minutes West forty-eight and one one-hundredths (48-1/100) feet to lands of the East Jersey Telephone and Telegraph Company; thence along their land North fifty-nine degrees nineteen minutes West five hundred and nine and fifteen-hundredths (509-15/100) feet; thence on a curve to the left or South with a radius of forty-six hundred and fifty-three (4653) feet, be the distance more or less, to the easterly right of way line of the Elizabethport and Perth Amboy Branch of the Central Railroad of New Jersey; thence along their right of way North thirty-two degrees forty-two minutes East six hundred and fifty-five and seven-hundredths (655-7/100) feet to lands of George Peabody Wetmore; thence along that line South thirty-one degrees forty-four minu-

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tes East one hundred and twenty-five and thirty-three hundredths (125-33/100) feet; thence South thirty-nine degrees twenty-four minutes East one hundred and twenty-two and nine-tenths (122-9/10) feet; thence South forty-nine degrees forty-six minutes East two hundred and sixty-one and four-tenths (261-4/10) feet; thence South eighty-two degrees fifty-seven minutes East one hundred and twenty-seven and three-tenths (127-3/10) feet; thence South seventy-three degrees twenty-two minutes East ninety and one-tenth (90-1/10) feet to lands of Wood; thence along said land South seventy degrees thirty-three minutes East one hundred and fourteen and two-hundredths (114-2/100) feet to lands now or late of the Chemical Trading Co.; thence along said lands South thirty-nine degrees fifty minutes East eleven hundred and two and fifty-two hundredths (1102-52/100) feet to the point or place of BEGINNING.

Containing fourteen and twenty-two hundredths (14-22/100) acres.

INCLUDING in said premises twenty-eight hundredths (28/100) of an acre which comprises that part of Amboy avenue crossing said premises, subject to the rights of the public in said street.

SUBJECT to the right of the Central Railroad Company of New Jersey to the use of a track or tracks crossing part of said premises just West of Front street, and also subject to any right of the Central Railroad Company of New Jersey acquired under agreements heretofore made with owners of said premises, if any.

Being part of the same premises conveyed to the said Max Fern by Janet Gifford Hamil-

Exhibit D. 16.

ton, et al., by deed dated February 28th, 1908, and recorded in Book 502 of Deeds for Union County, on pages 512, etc.

The said Max Fern and wife conveyed an undivided one-quarter part of said premises and others each to Patrick H. Hilhooly and William H. Rankin, by deeds dated February 28th, 1908, and recorded in Book 502 of Deeds for said county, on pages 507 and 510 respectively.

The said Max Fern and wife conveyed one-fourth interest in said premises to Anna E. Fern by deed dated February 16th, 1912, and recorded in Book 588 of Deeds for said county, on pages 413, etc. Anna E. Treitman (nee Fern) and husband, on April 7th, 1915, reconveyed their interest in said premises to the said Max Fern by deed dated on said April 7th, 1915.

The said Patrick H. Gilhooly and wife conveyed their interest in said premises and others to the Economy Realty Co., by deed dated May 1st, 1914.

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining:

ALSO all the estate, right, title, interest, property, claim and demand whatsoever, of the said parties of the first part, of, in and to the same, and of, in and to every part and parcel thereof.

TO HAVE AND TO HOLD all and singular, the above described land and premises, with the appurtenances, unto the said parties of the second part, their successors, heirs and assigns, to the only proper use, benefit and behoof of

Exhibit D. 16.

the said parties of the second part, their successors, heirs and assigns forever:

And the said parties of the first part do for themselves, their successors, heirs, executors and administrators covenant and agree to and with the said parties of the second part, their successors, heirs and assigns, that they are now the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said parties of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered, or defeated in any way whatsoever, except as aforesaid:

And also, that the said parties of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid:

And also, that the said parties of the first part will Warrant secure, and forever defend the said land and premises unto the said parties of the second part, their successors, heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of incumbrances whatsoever, except as aforesaid.

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In Witness Whereof, the said William H. Rankin and Mary J. Rankin and Max Fern and Frieda B. Fern have hereunto set their hands and seals the day and year first above written, and the Economy Realty Co. has caused these presents to be signed by its president and attested by its secretary and its corporate seal to be hereto affixed the day and year first above written.

WILLIAM H. RANKIN,
MARY J. RANKIN,
MAX FERN,
FRIEDA B. FERN,
(SEAL) *Economy Realty Co.,*

By

Patrick H. Gilhooly,
President.

Signed, Sealed and Delivered
In Presence of

Edward P. Mohr.

Attest:—

Gertrude L. Norris,
Secretary.

Duly acknowledged and recorded.

EXHIBIT 17.

This Indenture, made the tenth day of November, in the year of our Lord One Thousand Nine Hundred and Fifteen, between Clarence D. Meyer and Sarah Jaquith Meyer, his wife, of the City of Elizabeth, in the County of Union

Exhibit D. 17.

and State of New Jersey, parties of the first part, and GEORGE W. HUNTER and LESLIE N. SIMSON, of the City of St. Louis and State of Missouri, Trustees of MIDVALE CHEMICAL WORKS, located in the City of Elizabeth, in the County of Union, and State of New Jersey, parties of the second part:

WITNESSETH: That the said parties of the first part, for and in consideration of the sum of Four thousand two hundred and fifty dollars ($4,250) lawful money of the United States of America, to them in hand well and truly paid by the said parties of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged and the said parties of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said parties of the second part, and to their heirs, successors and assigns, forever ALL that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Elizabeth, in the County of Union and State of New Jersey,

BEGINNING at a stake in the mouth of a ditch on the southerly side of the Elizabeth River at a corner of lands now or late of Daniel Spinning: thence along his line South thirty-five (35°) degrees seven (07′) minutes West seven hundred sixty-six and ninety-two one hundreths (766.92) feet to a corner of lands of the Midvale Chemical Company, said line being about in the centre of a ditch of varying width: thence along their line of lands and lands of

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the Chemical Trading Company South seventy (70°) degrees thirty-three (33′) minutes East two hundred and seven and twenty-four one hundredths (207.24) feet to lands now or formerly of Samuel Halsey: thence along Halsey's line North thirty-two (32°) degrees eight (08′) minutes East six hundred forty-nine and thirty-five one hundredths (649.35) feet to a stake five feet southerly from high water mark on the southerly bank of the Elizabeth River: thence North forty-five (45°) degrees fifty (50′) minutes West one hundred thirteen and forty-two one hundredths (113.42) feet to a stake on the southerly bank of the Elizabeth River: thence North fourteen (14°) degrees, twenty-six (26′) minutes West sixty-nine and ninety-five one hundredths (69.95) feet to the point or place of beginning.

Containing two and ninety-two one hundredths (2.92) acres to high water mark.

The above description was furnished by W. H. Luster, Jr., C. E., who made a survey of the premises.

Being the same premises conveyed to Clarence D. Meyer by deed of Sarah B. Wood, widow, et als., bearing date November 10th, 1915, and recorded in Book 673 of Deeds for Union County on pages 414, etc., wherein said land is described as follows:

Beginning at a stake by the Southerly side of Elizabeth Creek, at a corner of Daniel Spinning's meadow, or formerly his; thence with his line South thirty-two degrees, West eleven chains and sixty-two links to a stake in William Halstead's line, thence with his line South seventy-six degrees, East three chains and fourteen links to a stake, being a corner of Samuel Hal-

sey's meadow; thence North twenty-nine degrees, East ten chains and twelve links to a stake by the southerly side of said creek; thence along the said creek to the place of BEGINNING. Containing three acres more or less.

An this conveyance is made subject to a certain mortgage for two thousand dollars given by the said parties of the first part to the said Sarah B. Wood, Elizabeth D. Halsey and Gertrude Atwater, which mortgage the said parties of the second part hereby assume and agree to pay as part of the consideration that is herein expressed, and the said parties of the second part will also pay and assume the taxes for the year 1915, payable December 20th, 1915.

Together with all the right, title and interest of the parties of the first part in and to the lands lying between high and low water mark in the Elizabeth River, in front of the above described premises.

It being the intention hereof to convey all riparian rights to the said parties of the second part, their heirs, successors and assigns.

The above premises are conveyed subject to a mortgage of $1400 made by George W. Hunter and Leslie N. Simson, Trustees, of Midvale Chemical Works, the parties of the second part hereto, to Clarence D. Meyer, one of the parties of the first part hereto, dated November 10th, 1915.

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining:

ALSO all the estate, right, title, interest, property, claim and demand whatsoever, of the

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said parties of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

To have and to hold all and singular, the above described land and premises, with the appurtenances unto the said parties of the second part, their successors, heirs and assigns, to the only proper use, benefit and behoof of the said parties of the second part, their successors, heirs and assigns forever:

And the said Clarence D. Meyer and Sarah Jacquith Meyer, his wife, for themselves, their heirs, executors and administrators, do covenant, promise and agree to and with the said parties of the second part, their heirs, successors, and assigns, that they have not made, done, committed, executed or suffered any act or acts, thing or things whatsoever, whereby or by means whereof the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or encumbered, in any manner or way whatsoever, except as above mentioned.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

CLARENCE D. MEYER,
SARAH JACQUITH MEYER.

Signed, Sealed and Delivered
In Presence of

W. B. Parrot.

(seal)

Duly acknowledged and recorded.

Exhibit D. 18.

EXHIBIT D. 18.

AUGUSTUS WHITLOCK & WIFE

TO

THE ELIZABETHPORT LAND IMPROVEMENT COMPANY.

THIS INDENTURE, made this tenth day of November, in the year of our Lord One Thousand Eight Hundred and Fifty-five, BETWEEN Augustus Whitlock and Margaret T., his wife, of the City, County and State of New York, of the first part and The Elizabeth Port Land Improvement Company, a company incorporated by an act of the Legislature of New Jersey of the second part, WITNESSETH, That the said party of the first part for and in consideration of the sum of Four hundred and twenty-five thousand dollars lawful money of the United States of America to them in hand well and truly paid by the said party of the second part at and 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 have given, granted, bargained, sold, alienated, released, enfeoffed, conveyed and confirmed and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part and to their successors and assigns forever, ALL that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Elizabeth in the County of Essex and State of New Jersey.

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Beginning at a corner of the land known as the Haviland property at a post standing on the corner of the road leading from the City of Elizabeth to Morss' Mill, which is also the corner of a lane leading from said road to Egypt Woods and thence running along said road South forty two and one half degrees East fifteen chains and forty one links; thence South sixteen and one quarter degrees, East nine chains and ninety-eight links to a post on the corner, thence across and over the road leading to Morss' Mills to a post that stands on the southerly side of the lane leading from the Morss' Mill road into the Walnut Hill Farm; thence North fifty and three quarter degrees East seventeen chains and fifty two links, thence South thirty eight and three quarter degrees, East nineteen chains and fifty five links to the woods, thence North sixty nine and one half degrees, East three chains and eighty links; thence North seventy four and three quarter degrees East five chains and six links thence South thirty six and three quarter degrees East nine chains and five links thence South twenty six and one quarter degrees East one chain and fifty four links along a ditch thence South thirty five and one quarter degrees East three chains thence South forty degrees East two chains and twelve links along a ditch thence South fifty one and three quarter degrees East along a ditch four chains and thirty links thence South eighty four and one quarter degrees East two chains and thirty one links along a ditch thence South seventy three degrees East four chains and thirty three links along a ditch thence North twenty eight and one half degrees East nine chains and eighty five links to the Elizabeth

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Town Creek thence following the said Creek the several courses thereof to the Staten Island Sound thence along the said sound to the mouth of Morss' or Thompson's Creek, thence up said Creek about fourteen chains to the first crook or worm (about thirty links in width) thence from the middle of said crook or worm along Morss' or Thompson's Creek seven chains and fifty links to a ditch thence along said ditch North sixty degrees West five chains and fourteen links thence along the same ditch North thirty and one quarter degrees west seventy eight links thence along a ditch South forty one and three quarter degrees West two chains and seventy two links to the middle of a crook or worm thence along said crook or worm South forty six and one half degrees West three chains and fifty links thence along a crook or worm about twenty chains to a ditch thence along said ditch South thirty one degrees West six chains and eighty eight links to another ditch thence along said other ditch north sixty four and one quarter degrees West fifteen chains and nineteen links to another ditch thence along said last mentioned ditch South forty one and one half degrees West six chains and ninety four links to another ditch thence along said last mentioned ditch North sixty four and three quarter degrees West one chain and sixty eight links to another ditch thence along said last mentioned ditch South eighty two and one half degrees West four chains and ninety four links to a ditch thence along said ditch South five and three quarter degrees East one chain and eleven links to a ditch, thence along said ditch South seventy six and three quarter degrees East five chains and sixty one links to a worm or Crook

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thence along the said worm or crook to Morss' or Thompson's Creek thence along the said Morss or Thompson's Creek to a brook (about one chain wide) which brook is about twenty chains above the bridge that crosses the said Morss' or Thompson's Creek thence along the said brook about twenty two chains (direct distance) to a post that stands five chains and sixty six links from the road leading to John T. Winans' house thence from the said post north thirty three degrees East eight chains thirty five links (crossing the Winans Road) along a fence thence along the fence north twenty five and one half degrees East eighty seven links thence along the said fence north ten and one quarter degrees East two chains and ninety links thence north fifteen degrees East seventy six links thence North Eighteen and one half degrees East three chains and eighteen links thence north twenty one and one half degrees east one chain and seventy two links thence North twenty six degrees East four chains and eleven links thence north sixty nine and one half degrees East eight chains and seventeen links thence north forty one and one half degrees West nine chains and eighty two links thence North fifty degrees East nine chains and sixty one links thence North forty degrees West six chains and fifty nine links to a lane thence along said lane north forty-three and three quarter degrees East nineteen chains and sixty one links thence still along said lane North forty two and one half degrees East nineteen chains and ninety eight links to the place of Beginning. Containing seven hundred and eighty acres of land more or less. Excepting and reserving from the said land included within the above described boundaries a piece of

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Salt Meadow land belonging to Job Winans and containing about three acres and thirty seven one hundredths of an acre lying in that part of the land as above described which is known as the Hetfield Farm, Also excepting and reserving from the said land included within the above described boundaries a piece of Salt Meadow land now or late belonging to James Erwin containing six acres and lying in that part of the land as above bounded which is known as the Walnut Farm, Also excepting and reserving from the said land included within the above described boundaries three certain tracts of land which were conveyed to one George C. Bellows by Joseph Moulton, Isaac T. Smith and Frances V. Noyes by their deed dated the seventh day of May in the year of our Lord one thousand eight hundred and fifty five and recorded in Book Number 210 of the record of deeds for said Essex County on pages 269, 270, 271 and 272 and therein described as follows:

The First Tract: Beginning at a stake on Staten Island Sound thence running north thirty eight degrees west seven and one half chains thence north fifty two degrees east six chains to Elizabeth Town Creek thence north seventy degrees east ten chains thence along said Creek the general courses and distances being north eighty two and one half degrees east two chains thence south eighty two and one half degrees east three chains thence south twenty five and three quarter degrees west two chains thence along Staten Island Sound to the place of beginning. Enclosing ten and one half acres of ground more or less.

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THE SECOND TRACT: COMMENCING at a Hickory Stake on the margin of the Marsh at the South East corner of a certain lot containing five acres now used and occupied as a brick yard thence along the certain boundaries of said lot North forty one and one quarter degrees west six chains and eighty two links to a stake; thence north forty two and one half degrees eight chains and twenty five links to a stake on the margin of a ditch thence South fifty six and one quarter degrees East seven chains and seventy seven links or whatever the course or distance may be along said ditch thence along the margin of the Marsh and round to the place of beginning. The general course and distance being from last Station South twenty eight degrees west six chains and south seventy one and one half degrees west five chains more or less enclosing seven and one half acres more or less.

THE THIRD TRACT: BEGINNING at the northwesterly side of Mayo Street at a stake distant two hundred feet from the corner formed by the intersection of the southwesterly line of Bayway with the northwesterly line of Mayo Street which stake stands in a southwesterly direction from said corner and from said stake running north forty one degrees and fifty minutes west thirty chains and thirty four links to the edge of the lane thence north fifty one degrees and two minutes west fourteen chains and seventy two links along said lane thence south forty eight degrees and ten minutes west through the centre of a Hickory tree fifteen chains and seventy links thence north thirty one degrees and sixteen minutes west twenty one chains and twelve links thence south thirty five degrees west three chains and eight links thence south forty

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and one half degrees west thirty nine links thence south thirty one degrees and fourteen minutes east twenty seven chains and eighty eight links thence north fifty four degrees and thirty five minutes east three chains and twenty links thence north seventy four degrees and forty three minutes east five chains and nine links thence north eighty six degrees and thirty seven minutes east nine chains and eight links thence south sixty one degrees and fifty four minutes east eight chains and seventy two links thence south forty seven degrees and twelve minutes east thirteen chains and fifty five links to a stone thence south thirty seven degrees and eight minutes east seven chains and thirty links thence north forty eight degrees and ten minutes east along Mayo Street five chains and seventy nine links to the beginning corner. Containing fifty acres and forty six one hundredths of an acre. Also excepting and reserving from the said land included within the above described boundaries one certain other lot of land which was conveyed to one Horatio Allen by Joseph Moulton, Isaac T. Smith and Frances V. Noyes by their deed dated the twenty ninth day of December in the year of our Lord one thousand eight hundred and fifty four and recorded in Book number 212 of the record of deeds for said Essex County on pages 66, 67 and 68 and therein described as follows:

BEGINNING in the edge of the New Jersey Shore on the southerly side of Staten Island Sound at a point distant southwesterly two hundred feet from the southwesterly side of Bayway in a course at right angles thereto thence parallel to said southwesterly side of said Bayway north forty one degrees and fifty

Exhibit D. 18.

minutes west five hundred and twelve feet to the southeasterly line of Mayo Street thence along the said southeasterly side of said Mayo Street south forty eight degrees and ten minutes west six hundred and seventy feet to Morss' sometimes called Thompson's Creek thence southeasterly along the edge of said creek and of Staten Island Sound the various courses thereof eight hundred and seventy feet more or less to the place of beginning. Containing five and one half acres more or less and is particularly laid down on a map now on record in the office of the Clerk of Essex County entitled "Map of the Water Front of the Mayo Farm in the Township of Elizabeth, Essex County, N. J.," the above described tract of land and premises except the above reserved tracts being the same which was conveyed to the said Augustus Whitlock by Joseph Moulton, Isaac T. Smith and Francis V. Noyes by deed dated the—day of—in the year of our Lord one thousand eight hundred and fifty and is hereby conveyed subject to a certain mortgage made by one James C. Blake to one Samuel Marx, Executor of Edward C. Mayo, deceased, for the sum of ninety thousand dollars bearing date the twenty fifth day of April in the year of our Lord one thousand eight hundred and fifty four and recorded in Book E 3 of the record of mortgages in the said County of Essex on pages 384, 385, 386 and 387 and which mortgage the said party of the second part hereby assumes as part of the consideration money of these presents.

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in any wise appertaining.

Exhibit D. 18.

Also all the estate right, title, interest, property, claim and demand whatsoever of the said party of the first part of in and to the same and of in and to every part and parcel thereof, TO HAVE AND TO HOLD all and singular the above described tracts of land and premises with the appurtenances unto the said party of the second part, their successors and assigns forever. Also the said Augustus Whitlock doth for himself, his heirs, executors and administrators covenant and grant to and with the said "The Elizabeth Port Land Improvement Company," their successors and assigns that he the said Augustus Whitlock hath not done, caused, suffered or procured to be done any act, matter or thing whereby the title of the said "The Elizabeth Port Land Improvement Company" 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 Augustus Whitlock and his wife have hereunto set their hands and seals the day and year first above written.

AUG. WHITLOCK (L. S.)
MARGARET T. WHITLOCK (L. S.)

Signed, sealed and delivered in the presence of
The words "their Successors" first written over an erasure on page 1, before execution hereof. The words tenth & November on 1st line 1st page interlined in place of twenty-fourth of October erased.

JONAS B. PHILLIPS.

Exhibit D. 18.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } *ss.*

BE IT REMEMBERED that on this fifteenth day of November in the year 1855 before me, Moses B. Maclay, a commissioner, resident in the City of New York, duly commissioned and qualified under the laws of the State of New Jersey to take the acknowledgment of deeds &c, personally appeared Augustus Whitlock & Margaret T., his wife, who, I am satisfied are the grantors mentioned in the foregoing Indenture & to whom I first made known the contents thereof & thereupon they acknowledged that they had signed, sealed & delivered the same as their voluntary act and deed for the uses & purposes therein expressed & the said Margaret T. Whitlock being by me privately examined, separate & apart from her husband acknowledged that she signed, sealed & delivered the same as her voluntary act and deed freely without any fear, threats or compulsion of her husband.

MOSES B. MACLAY,
Commissioner for New Jersey
in New York.
51 Liberty St.

Received in the Office November 17, A. D. 1855.
Form R. 17-500-5-17

ESSEX COUNTY REGISTER'S OFFICE

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

I, WALTER A. EVANS, Register of the County of Essex, do hereby certify that the foregoing is a true and correct copy of the record of a

Exhibit D. 19.

certain deed made by Augustus Whitlock & Wife, to the Elizabeth Port Land Improvement Company and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book (215) p. 9, of deeds for said County on pages 404-408.

In Testimony Whereof, I have hereunto set my hand and official seal this 30th day of November A. D. 1917. [seal]

WALTER A. EVANS,
Register.

EXHIBIT D. 19.

The Eliz'th Port Improvement Co.

to

Salmon B. Colby

This Indenture, made the thirteenth day of April in the year of Lord, one thousand eight hundred and sixty between The Elizabeth Port Land Improvement Company, incorporated by an Act of the Legislature of the State of New Jersey, approved March 30, A. D. 1855 of the first part and Salmon B. Colby, of the City of Brooklyn, in the County of Kings, and State of New York, of the second part;

Witnesseth, that the said party of the first part for and in consideration of the sum of five hundred dollars, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part

Exhibit D. 19.

at and 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, have given, granted, bargained sold aliened, released, enfeoffed, conveyed and confirmed and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part and to his heirs and assigns forever, All those twenty four lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Elizabeth in the County of Union, and State of New Jersey.

And which are more particularly known numbered and distinguished on a certain Map entitled "Map of Building Lots, in the City of Eliazbeth, N. J. on and near Bay Way" filed or to be filed in the Office of the Clerk of said County of Union, as lots numbered from one (1) to twenty four (24) both inclusive on the Block on said Map numbered forty three (43) each being fifty feet wide in front and rear by one hundred and fifty feet deep and the whole comprising all of said Block forty three (43) which is butted and bounded as follows, on the north by Brunswick Avenue, on the east by Ivy Street on the south by Trenton Avenue, and on the west by Bloom Street.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages with the appurtenances to the same belonging or in anywise appertaining, also, all the estate, right title, interest, property, claim and demand whatsoever of the said party of the first part of, in and to the same, and of, in and to every part and parcel thereof. To

Exhibit D. 19.

have and to hold all and singular the above described tract or parcel of land and premises, with the appurtenances, unto the said party of the second part his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part his heirs and assigns forever, and the said "The Elizabeth port Land Improvement Company, do for themselves, and their successors, covenant and grant to and with the said party of the second part his heirs and assigns that the said The Elizabethport Land Improvement Company are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging, and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents are not encumbered by any mortgage, judgment or limitation or by any incumbrance whatsoever, by which the title of the said party of the second part hereby made or intended to be made for the above described land and premises, can or may be changed, charged, altered, or defeated in any way whatsoever, and also, that the said party of the first part now have good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises. in manner aforesaid, and also that The Elizabeth Port Land Improvement Company, will warrant, secure and forever defend the said land and premises, unto the said Salmon B. Colby, his heirs and assigns forever, against the lawful claims and demands of all and every person or persons. freely and clearly freed and discharged of and from all manner of incumbrances whatsoever.

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In Witness Whereof, the said The Elizabeth port Land Improvement Company, have hereunto affixed their Corporate seal, and caused the hand of their President to be hereunto set the day and year first above written.

T. B. STILLMAN (SEAL)
President.

Signed, sealed and delivered
in the presence of

JAMES MORAN
Secretary pro tem.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*

I hereby certify that on this eighteenth day of April in the year of our Lord, one thousand eight hundred and sixty before me the subscriber Charles Nettleton, a Commissioner under and by virtue of the Laws of New Jersey to take the acknowledgment and proof of Deeds residing in the State of New York, personally appeared James Moran, who being by me duly sworn, on his oath, said that he is the Secretary of "The Elizabethport Land Improvement Company" the grantors named in the within deed, that he knows the corporate seal of the said Company. that the seal affixed to the within deed is such corporate seal, that it was so affixed by the order of the Board of Directors of the said Company, and that he signed his name thereto as Secretary of the said Company by the like order, that he also knows Thomas B. Stillman the President of The Elizabethport Land Improvement Company and that the signa-

Exhibit D. 19.

ture Thomas B. Stillman subscribed to the said deed is the genuine handwriting of the said Stillman and was thereto subscribed in the presence of the said James Moran by the like order of the said Board of Directors.

CHARLES NETTLETON,
Commissioner for New Jersey in New York.

Received in the Clerks Office April 20th, 1860. No. 2400.

UNION COUNTY REGISTER'S OFFICE

STATE OF NEW JERSEY, } *ss:*
COUNTY OF UNION. }

I, FRANK H. SMITH, Register of the County of Union, do hereby certify that the foregoing is a true and correct copy of the record of a certain deed made by The Elizabethport Land Improvement Co. to Salmon B. Colby and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book 6 of deeds for said County on Pages 331 &c.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 23d day of November, A. D. 1917.

[SEAL] FRANK H. SMITH,
Register.

Exhibits D. 20—D. 21.

EXHIBIT D. 20.

New York, May 29, 1917. No. 4121

THE NATIONAL PARK BANK,
of New York.

Pay to the order of Midvale Chemical Works
$500.00

Five hundred Dollars.

E. C. KLIPSTEIN.

Endorsed:

Pay to the order of The National Bank of Commerce, in St. Louis.

MIDVALE CHEMICAL WORKS.

Pay Chase National Bank New York, or order
Jun 1 1917

The Nat'l Bank of Commerce in St. Louis
T. A. Lewis, Cashier.

Received payment through New York Clearing House Jun 2 1917 Night Mail Chase National Bank New York

EXHIBIT D. 21.

(Letterhead of Seymour & Seymour.)

June 22, 1917.

Mr. E. C. Klipstein,
644 Greenwich Street,
New York, N. Y.

My dear Mr. Klipstein:

With reference to the purchase of the real and personal property of the Midvale Chemical

Exhibit D. 21.

Works, after a painstaking examination and with reluctance I am compelled to advise against the acceptance of the title by reason of defects, which in my judgment do not at present permit of the conveyance by a good and marketable title, free and clear of encumbrances other than the mortgages aggregating $19,597.

These defects include:

(1) Outstanding rights of the Central Railroad of New Jersey under an unrecorded agreement which is referred to in Deed Book 155, p. 418. And such rights as the railroad may have acquired in other ways, notice of which will be imputed to us from their possession.

(2) Rights of the owners of poles and wires along South Front Street and Amboy Avenue.

(3) Outstanding rights in Amboy Avenue, South Front Street, Brighton Street, Burlington Avenue, Old Princeton Avenue, Richmond Street, as laid down on the Commissioner's map and on the Bayway Map (and on the Surveys of William H. Luster.)

(4) Outstanding rights in drainage ditches crossing the premises.

(5) Rights of creditors of Midvale Chemical Works under Chapter 237, Laws of New Jersey of 1907.

(6) Rights of certificate holders under the Trust Agreement or Declaration of Trust executed by George W. Hunter and Leslie N. Simson, under which the Association, Midvale Chemical Works, was organized.

These defects are perhaps all susceptible of being removed, except the outstanding rights in Amboy Avenue and the outstanding rights

Exhibit D. 22.

of the Central Railroad of New Jersey, and as to the latter, it may be possible to acquire a right of way for a crossing where the tracks cross this property, which would partially relieve that situation and give an outlet to South Front Street not far from the right of way leading to the public dock, and perhaps time might be given to the owners to cure these defects, if they desire it.

Yours very truly,

FRED'K SEYMOUR.

EXHIBIT D. 22.

AUGUSTUS WHITLOCK and WIFE *to* ELIZABETHPORT LAND IMPROVEMENT COMPANY.	*DEED dated November 10th, 1855, recorded in Essex County, Book P-9, p. 404.*

Conveys entire tract shown on "Bayway Map" by meets and bounds, in evidence as Exhibit D-18.

ELIZABETHPORT LAND IMPROVEMENT COMPANY *to* SOLOMON B. COLBY.	*DEED dated April 13th, 1860, recorded in Union County, Book 6, p. 331.*

Conveys Block 43 on "Bayway Map" and bounds it by Brunswick Avenue, Ivy Street, Trenton Avenue and Bloom Street.

Exhibit D. 22.

Elizabethport Land Improvement Company *to* Reinhard Reitemeyer,	*DEED dated May 28th, 1860; recorded in Union County, Book 6, p. 594.*

Conveys Block 6 on "Bayway Map" bounded by Myrtle Street, Milton Avenue, Grove Street, and road leading to John D. Winans.

Elizabethport Land Improvement Company *to* Charles Wright.	*DEED dated July 2nd, 1860; recorded in Union County, Book 10, p. 630.*

Conveys Blocks 35 and 64 on "Bayway Map" "on file in the office of the Clerk of said County of Union and mentions as boundaries: Brunswick Avenue, Grove Street, Trenton Avenue, Factory Street and Woodbridge Avenue.

Augustus Whitlock and Wife *to* Catherine H. Putnam.	*DEED dated July 6th, 1863; recorded Union County, Book 12, p. 153.*

Conveys an undivided interest in all the property shown on "Bayway Map" with exceptions; one of the exceptions being Blocks 35 and 64, as laid down on the "Bayway Map"—"on file in the Office of the Clerk of said County of Union, and mentions as boundaries;—Brunswick Avenue, Grove Street, Trenton Avenue, Factory Street, Woodbridge Avenue.

Exhibit D. 22.

AUGUSTUS WHITLOCK and WIFE *to* WILLIAM GRAVES, *et al.*	*DEED dated July 29th, 1863; recorded in Union County, Book 14, p. 269.*

Conveys by meets and bounds an undivided interest in the 780 acres shown on "Bayway Map," excepting from the conveyance, lands described by reference to the "Bayway Map" mentioning Mayo Street and Bayway.

AUGUSTUS WHITLOCK and WIFE *to* ANDREW J. RICHARDSON.	*DEED dated March 15th, 1865; recorded in Union County, Book 19, p. 353.*

Conveys land by "Bayway Map," bounded by Bayway, the center line of Amboy Avenue, the easterly line of Brighton Street to the southerly line of South Front Street, as originally laid on said map, the shore of Staten Island Sound, and reserves a right of way over Brighton Street, as laid on said map, and reserves—"for a street or right of way a strip of land thirty (30) feet wide from and along said center line of Amboy Avenue, and a right of way from South Front Street, as now laid out on said map, a strip of land for a street one hundred (100) feet in width and parallel to said South Front Street, and two hundred (200) feet further back from said Staten Island Sound, and the present location of said South Front Street, in case the location of said street shall be changed, and also reserving the right of way over Brighton Street as the same is laid on said map."

Exhibit D. 22.

CATHERINE H. PUTNAM *to* GEORGE P. PUTNAM.	*TRUST DEED dated August 31st, 1867; recorded in Union County, Book 32, p. 568.*

Conveys the 780 acres by meets and bounds, with exceptions, reserving among others a lot on Mayo Street as laid down on the "Bayway Map," 720 feet northeasterly from the intersection of Mayo Street and Bayway, as laid on said map, reserving and excepting also Blocks 35 and 64, as laid down on "Bayway Map,"—"on file in the Office of the Clerk of said County of Union."

Blocks are described by street boundaries as above.

(The same Deed is again recorded in Book 32, p. 568, with a different proof of execution).

DANIEL B. WHITLOCK, *Executor of Augustus Whitlock, deceased,* *to* MARGARET B. BONNETT.	*DEED dated April 1st, 1872; recorded Union County, Book 66, p. 459.*

Conveys the 780 acres, above mentioned, by meets and bounds, and excepts Block 6, as laid down on "Bayway Map," and Blocks 35 and 64, "as aforesaid," conveyed by Deed recorded Union County, Book 10, p. 630.

GEORGE H. PUTNAM and WIFE *to* ISAAC T. SMITH.	*DEED dated January 2nd, 1877; recorded Union County, Book 121, p. 479.*

Conveys the same 780 acres, by meets and bounds, excepting and reserving several parcels, —among them, one on Mayo Street, as laid down on the "Bayway Map" and Blocks 35

Exhibit D. 22.

and 64, as laid down on the "Bayway Map"; —"on file in the Office of the Clerk of said County of Union, bounding the blocks by the same streets above mentioned, and excepts property conveyed to Richardson bounded by Staten Island, Bayway, Amboy Avenue and the lands of Horner & Company, as by reference to "Bayway Map";—"made by Ernest L. Meyer, City Surveyor of Elizabeth, New Jersey, 1859, on file in the Clerk's Office in the County of Union, State of New Jersey.

Also exception reserves a further tract as shown on said map. Also excepts Block 107, as shown on the "Bayway Map."

VICTORINE H. PUTNAM *to* ISAAC T. SMITH.	*DEED dated December 12th, 1877; recorded Union County, Book 129, p. 406.*

Conveys the same 780 acre tract by meets and bounds with exceptions of lots as laid down on "Bayway Map" and excepts Blocks 35 and 64 as laid down on "Bayway Map," and gives the boundaries by streets and avenues, same as above.

Also excepts Block 107, as laid down on "Bayway Map."

JOHN T. LORD, *et al*, 1st party; JOSEPH MOULTON, *et al*, 2nd party, and MARGARET B. BONNETT, 3rd party.	*PARTITION DEED dated February 20th, 1882; recorded Union County, Book 155, p. 134.*

Conveys by meets and bounds a part of the 780 acres. Excepts Blocks 35 and 64, as laid

Exhibit D. 22.

down on "Bayway Map," and in the description reference to Broad Street and Bayway, Brunswick Avenue, Woodbridge Avenue, South Front Street; and excepts from the conveyance lots 35 and 64 as laid down on the "Bayway Map"; and excepts a further tract bounded on one side by Amboy Avenue. Reference to the Bonnett partition map expressly recognizes Brunswick Avenue, Woodbridge Avenue and Amboy Avenue, Bayway and South Front Street; "but said parties do not by this Deed recognize or dedicate to the public any other streets mentioned in this deed or laid down upon any map herein mentioned."

This Deed ratifies and confirms the agreement of D. B. Bonnett, as Agent, &c., with the Central Railroad of New Jersey, and recites the agreement at length.

MARGARET B. BONNETT, 1st party; JOSEPH MOULTON, 2nd party; JOHN T. LORD, 3rd party.	*PARTITION DEED dated February 20th, 1882; recorded Union County, Book 155, p. 418.*

Confirms the right of way to the Central Railroad of New Jersey same as Deed last above mentioned.

Conveys the property which is the subject of this action; and makes use of Amboy Avenue, Bayway, The Perth Amboy & Elizabethport Railroad and South Front Street as boundaries.

Contains the same clause as last above Deed respecting recognition of streets and avenues and not recognizing or dedicating others.

Exhibit D. 23.

The words,—"Bayway Map" have been used for convenience in this statement as an abreviation of "Map of Building Lots in the City of Elizabeth, New Jersey, on and near Bayway," which are the words used in the deeds.

EXHIBIT D. 23.

AUGUSTUS WHITLOCK & OTHERS,

to

ANDREW J. RICHARDSON, & ALBERT H. EMERY.

This Indenture, made the fifteenth day of of March in the year one thousand eight hundred and sixty five, between Augustus Whitlock of the City, County & State of New York, Merchant and Joseph Moulton of Newbury Port, in the State of Massachusetts, Jeweller and Elizabeth L. Moulton, his wife, and William Graves of Newburyport aforesaid Merchant and Mary P. Graves, his wife, and Catharine H. Putnam of the City of New York, widow, parties of the first part and Andrew J. Richardson, Merchant and Albert H. Emery, Civil Engineer both of the City, County and State of New York, parties of the second part;

Witnesseth, that the said part—of the first part for and in consideration of the sum of twenty thousand dollars, lawful money of the United States to them in hand paid by the said parties of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged, and the said parties of

Exhibit D. 23.

the second part their heirs, executors and administrators forever released and discharged from the same by these presents have granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said parties of the second part and to their heirs and assigns forever, all that certain lot, piece or parcel of land situate, lying and being in the City of Elizabeth formerly in the County of Essex now in the County of Union & State of New Jersey, which is shown & laid out on a certain map entitled "Map of building lots in the City of Elizabeth, N. J., on and near Bayway" and which said lot, parcel or piece of ground is bounded and described as follows, to wit:

Beginning in the centre of said Bayway and at the shore of Staten Island and running thence northwesterly along the centre of said Bayway to the centre of Amboy Avenue, thence at right angles to said Bay Way Northeasterly along the centre of said Amboy Avenue, nine hundred and fifty five (955) feet to the easterly line of Brighton street or to the line of the land now or late of James Horner, & James Ludlam, thence southeasterly parallel to said Bay Way along the easterly line of Brighton Street by the westerly line of a piece of land now owned by James Horner & James Ludlam seven hundred and thirty feet (730) to the southerly line of South Front Street as originally laid out on said Map, which is also the northerly line of another piece of land now or late owned by the said Horner & Ludlam, thence along the said southerly line of South Front Street and said northerly line of said piece of land of Horner & Ludlam southwesterly

Exhibit D. 23.

parallel to Amboy Avenue, one hundred & sixty (160) feet to a stake, standing in the westerly line of said land of said Horner & Ludlam which stake is seven hundred and ninety five (795) feet from the centre of Bay Way thence along the said Horner & Ludlam's line parallel to said Bay Way southeasterly to the shore of Staten Island, Sound thence along said Staten Island Sound to the place of beginning, and embracing all the water rights, in front of and connected with and belonging to said lands from the northeasterly line of Bay Way to said Horner & Ludlam land, but reserving for a street or right of way a strip of land fifty feet wide from and along said centre line of Bay Way & also reserving the water and water rights, at the foot of said Street & also reserving for a street a right of way a strip of land thirty feet wide, from and along said centre line of Amboy Avenue, and also reserving a right of way over South Front Street as now laid out on said map a strip of land for a street one hundred feet in width and parallel to said South Front Street and two hundred feet further back from said Staten Island Sound than the present location of said South Front Street in case the location of said Street shall be changed, and also reserving the right of way over Brighton Street as the same is laid out on said map.

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 dower & right of dower, property, possession, claim and demand whatsoever, as well in law as in equity

Exhibit D. 23.

of the said parties of the first part of, in and to the same and every part and parcel thereof, with the appurtenances, To have and to hold the above granted bargained, and described premises with the appurtenances unto the said parties of the second part their heirs and assigns to each & their own proper use, benefit and behoof forever, and the said Augustus Whitlock, Joseph Moulton, Wm. Graves & Catharine Putnam for themselves their heirs, executors and administrators do hereby covenant grant and agree to and with the said parties of the second part their heirs and assigns that the said Augustus Whitlock, Joseph Moulton, Wm. Graves & Catharine Putnam at the time of the sealing and delivery of these presents are lawfully seized in their own right of a good, absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted and described premises, with the appurtenances, and have good right full power and lawful authority to grant, bargain, sell and convey the same in manner aforesaid, and that the said parties of the second part their heirs and assigns shall and may at all times hereafter peaceably and quietly have, hold use, occupy, possess and enjoy the above granted premises and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation eviction or disturbance of the said parties of the first part their heirs or assigns or of any other person or persons, lawfully claiming or to claim the same, and that the same now are free, clear, discharged and unencumbered of and from all former and other grants titles, charges, estates judgments, taxes, assessments and encumbrances of what nature or kind sover, and also, that the said parties of the first

Exhibit D. 23.

part and their heirs and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title or interest of, in or to the hereinbefore granted premises by from under or in trust for them shall and will at any time or times hereafter upon the reasonable request and upon the proper costs and charges in the law, of the said parties of the second part their heirs and assigns, make do and execute or cause to be made done and executed all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby granted or so intended to be in the said parties of the second part their heirs and assigns forever, as by the said parties of the second part their heirs or assigns or their counsel learned in the law shall be reasonably advised or required, and the said Augustus Whitlock, Joseph Moulton, Wm. Graves, and Catharine Putnam for themselves their heirs, the above described and hereby granted and released premises and every part and parcel thereof, with the appurtenances, unto the said parties of the second part their heirs and assigns against the said parties of the first part and their heirs and against all and every person and persons whomsoever, lawfully claiming or to claim the same shall and will warrant, and by these presents forever defend.

Exhibit D. 23.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

AUG. WHITLOCK (L. S.)
JOSEPH MOULTON (L. S.)
ELIZABETH L. MOULTON (L. S.)
WILLIAM GRAVES (L. S.)
MARY P. GRAVES (L. S.)
C. H. PUTNAM (L. S.)

Sealed and delivered in the presence of

GEO. T. ANGELL, to J. M., E. L. M., W. G., & MARY P. G.

EDWIN F. COREY Jur. as to AUG. WHITLOCK.

MOSES B. MACLAY, as to C. H. PUTNAM.

STATE OF MASSACHUSETTS,
COUNTY OF SUFFOLK, } *ss.*
CITY OF BOSTON,

BE IT REMEMBERED, that on this eleventh day of April, A. D., eighteen hundred and sixty five, before me the undersigned Geo. T. Angell, a Commissioner resident in the City of Boston, duly commissioned and qualified under and by virtue of the laws of the State of New Jersey to take depositions, affidavits acknowledgement of Deeds &c., to be used as recorded therein personally appeared Joseph Moulton and Elizabeth L. Moulton, his wife, and William Graves and Mary P. Graves, his wife, who I am satisfied are the grantors mentioned in the within deed and to whom I first made known the contents thereof,

Exhibit D. 23.

and thereupon they severally acknowledged that they had respectively signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed; and the said Elizabeth L. Moulton and Mary P. Graves being by me privately examined, separately and apart from their said husbands, severally acknowledged that they signed, sealed and delivered the same freely and as their voluntary act and deed, without any fear threats or compulsion of their husbands.

In Witness Whereof, I have hereunto set my hand and official seal the day and year aforesaid.

(Seal) GEO. T. ANGELL.
Commissioner of New Jersey in Boston.

United States of America,
State of New York, City
and County of New York, } *ss.*

Be it remembered, that on this twelfth day of April in the year one thousand eight hundred and sixty five, before me the undersigned Edwin F. Corey Jr., a Commissioner resident in the City of New York, duly commissioned and qualified by the executive authority and under the laws of the State of New Jersey to take the acknowledgement of Deeds &c., to be used or recorded therein personally appeared Augustus Whitlock who I am satisfied is the grantor in the annexed instrument named, and who executed the same and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed;

Exhibit D. 23.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

EDWIN F. COREY, JUR.,
Commissioner for the State of New Jersey.
Office 54 Wall Street, New York.

(SEAL)

STATE OF NEW YORK, CITY AND COUNTY OF NEW YORK. } *ss.*

Be it remembered, that on this 13th day of April, in the year 1865, before me the undersigned Moses B. Maclay a Commissioner resident in the City of New York, duly commissioned and qualified by the Executive authority and under the laws of the State of New Jersey to take the acknowledgements of Deeds &c., to be recorded or used therein personally appeared Catharine H. Putnam who I am satisfied is the grantor mentioned in the annexed deed and to whom I first made known the contents thereof, and thereupon she acknowledged that she had signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed;

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal the day and year aforesaid.

MOSES B. MACLAY.
Commissioner for New Jersey in New York City.

(SEAL)

Rev. Stamp $20.00

Rec'd in the Office March 23rd, 1866.
No. 2793.

Exhibit D. 24.

UNION COUNTY REGISTER'S OFFICE

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

I, FRANK H. SMITH, Register of the County of Union, do hereby certify that the foregoing is a true and correct copy of the record of a certain deed made by Augustus Whitlock & others to Andrew J. Richardson, & Albert H. Emery, and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book 19 of deeds for said County on Pages 353

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 24th day of November, A. D. 17.

(SEAL) FRANK H. SMITH,
Register.

EXHIBIT D. 24.

[LETTERHEAD SEYMOUR & SEYMOUR.]

New York, N. Y., August 14, 1917.

Subject: The Re Midvale Chemical Works.

Hon. Delevan A. Holmes,
20 Broad St., N. Y.

My dear Judge Holmes:

Mr. Klipstein has decided not to participate further in the expense of a caretaker for Midvale Chemical Works. If you wish to continue the caretaker, will you kindly let me know before 12 o'clock to-day. I am not sure that the telephone at the Midvale Works is still in

Exhibit D. 25.

operation, but I think the caretaker can be reached through another phone, by communicating with the Chrome Works.

I would be glad to facilitate you in any way in the matter, but shall discontinue the caretaker at 12 o'clock to-day, unless I hear from you, that you prefer some other arrangement.

Yours very truly,

FRED'K SEYMOUR.

AM/FS

EXHIBIT D. 25.

[Letterhead Holmes, Rogers & Carpenter.]

New York, August 14th, 1917.

Mr. Frederick Seymour,
120 Broadway, City.

Dear Mr. Seymour:—

Your favor of this date is before me in which you advise that you will discontinue the caretaker at the Midvale plant at twelve o'clock to-day, and will not continue him under the arrangement which I made with you on July 13th.

If our theory of the law is right, the contract between Mr. Klipstein and the Midvale Chemical Works of May 29th of this year was fully performed on the part of the Midvale Chemical Works so far as it related to the personal property, possession of which was accepted by Mr. Klipstein on May 31st, and we are equally confident that the Midvale Chemical Works did everything incumbent upon it to accomplish the complete performance of the con-

Exhibit D. 26.

tract, and if Mr. Klipstein now elects to abandon the property, it will be at his own risk.

As the legal title to the real estate still remains in the vendor, I shall advise Mr. Hunter and Mr. Simson to take all necessary steps for the protection of the property against destruction pending the determination of the suit for specific performance which Messrs. Griggs, Baldwin & Baldwin, acting for the trustees are now instituting, but in doing so, I wish to notify you as attorney for Mr. Klipstein that whatever steps may be taken in that direction will be for the benefit and at the ultimate expense of Mr. Klipstein if the Court of Chancery in New Jersey shall hold, as we believe it will, that he must perform the entire contract and pay the purchase price of the property as provided in the contract, and that such action will be taken without prejudice to any of the legal rights of the parties as they exist at this time.

Very truly yours,

DELEVAN A. HOLMES.

DAH/S

EXHIBIT D. 26.

[Letterhead Holmes, Rogers & Carpenter.]

New York, July 13, 1917.

Frederick Seymour, Esq.,
120 Broadway,
New York City.

Dear Sir:

confirming my talk with you on the telephone, pending the return of Mr. Klipstein if you will attend to having the property of the Midvale Chemical Works guarded so as to protect it

Exhibit D. 27.

against damage, I will see that one half of the expense incurred in that connection is paid and that your guarding of the property shall not be in prejudice of any of the legal rights of either the Midvale Chemical Works or Mr. Klipstein. Upon Mr. Klipstein's return we will join in some arrangement that will be mutually safe and agreeable for the future protection of the property pending litigation.

Yours very truly,

DELEVAN A. HOLMES.

H/H.

EXHIBIT D. 27.

[Letterhead Holmes, Rogers & Carpenter.]

New York, July 13, 1917.

Frederick Seymour, Esq.,
120 Broadway,
New York City.

Dear Sir:

I note your willingness to exchange views with myself or with Messrs. Griggs, Baldwin & Baldwin in relation to the controversy between the Midvale Chemical Works and Mr. Klipstein. In reply I beg to say: I had assumed that all matters had been closed so far as negotiations were concerned at the time that I advised bringing suit, and as I am not a member of the New Jersey Bar, I retained Messrs. Griggs, Baldwin & Baldwin to assist Mr. Wright in the conduct of the litigation. Subsequently my attention was called to your letter of July 10th, from which I inferred that possibly I had not fully understood the situation and that there

Exhibit D. 28.

were still matters which you thought it desirable to discuss, and my letter to you of the 11th was for the purpose of correcting any false impression that may have existed.

I am under the impression that you and Mr. Klipstein had discussed matters quite fully with Mr. Hunter and Mr. Wright before the matter came to me, and I assume that Mr. Klipstein's present attitude does not result from any misunderstanding as to existing conditions and that perhaps the controversy has resolved itself into one of legal right.

If I am correct about this there would probably be no profit in our conferring together about the matter. If I am wrong in my conclusions and there are any questions of fact or terms that should be discussed, I shall be glad to see you at any time that you find it convenient to call.

Yours very truly,

DELEVAN A. HOLMES.

H/H.

EXHIBIT D. 28.

[Letterhead Holmes, Rogers & Carpenter.]

New York, Aug. 27, 1917.

Frederick Seymour, Esq.,
120 Broadway,
New York City.

Dear Sir:

The caretakers of the Midvale Chemical Works inform me that at the time Mr. Klipstein surrendered his possession of the Midvale plant a car was on the side track partially loaded

Exhibit D. 28.

with iron oxide which was about to be taken away by Samuel Sons & Company under their contract for the purchase of this oxide, which contract as I understand it was entered into by the Midvale Chemical Works with Samuel & Sons Company in the autumn of 1916 and continued for a year, which contract has been assigned to Mr. Klipstein.

When I arranged for the caretakers to look after this property I instructed them to permit nothing to be removed from the premises. The matter of this car partially loaded was not brought to my attention until afterwards.

I understand that this iron oxide is a waste product and that it is advantageous to have it removed as it is of no value to any one except the dealers in scrap. The railroad people of course want their car. The query arises whether we should have the car unloaded and the stuff left on the ground pending the determination of our suit or whether it shall be removed and the proceeds of its sale held for the benefit of whoever the court may determine is the owner of the property.

I should like to have your views on the subject at your early convenience.

Yours very truly,

D. A. HOLMES.

H/H.

Exhibit D. 29.

EXHIBIT D. 29.

[Letterhead Seymour & Seymour.]

June Twenty-fifth, 1917.

Harry Wright, Esq.,
209 Market Street,
Newark,
New Jersey.

Dear Sir:—

Re: MIDVALE CHEMICAL WORKS TITLE.

Since our conference on the morning of June 23rd at the office of the Fidelity Trust Company, I have given consideration to the matters involved in this title, and in my judgment, the facts require me to renew to Mr. Klipstein the advice which I gave him on the afternoon of June 22nd against the acceptance of the title by reason of defects which do not permit of the conveyance of a good and marketable title, free and clear of encumbrances other than mortgages aggregating $19,597., as specified in the contract of May 29th.

These defects include:—

(1) Outstanding rights of the Central Railroad of New Jersey under an unrecorded agreement which is referred to in Deed Book 155, p. 418. And such rights as the Railroad may have acquired in other ways, notice of which will be imputed to us from their possession.

(2) Rights of the owners of poles and wires along South Front Street and Amboy Avenue.

(3) Outstanding rights in Amboy Avenue, South Front Street, Brighton Street, Burlington Avenue, Old Princeton Avenue, Richmond

Exhibit D. 29.

Street, as laid down on the Commissioner's map and on the Bayway map.

(4) Outstanding rights in drainage ditches crossing the premises.

(5) Rights of creditors of Midvale Chemical Works under Chapter 237, Laws of New Jersey of 1907.

(6) Rights of certificate holders under the Trust Agreement or Declaration of Trust executed by George W. Hunter and Leslie N. Simson, under which the association, Midvale Chemical Works, was organized.

These items in my judgment are substantial and seriously affect the marketability and therefore the value of the property.

In response to your suggestion that I should now go on record in detail as to what, if anything, I would advise accepting in lieu of a good and marketable title, free from encumbrances,—I can only say that the objections above enumerated include all the substantial objections that are at present known to me, but that I must be free to pass upon the entire matter at the time of closing the title, and that by enumerating the above items I am not to be considered as waiving other defects or encumbrances, if any, which may in the mean time come to my notice, and I have not included in the enumeration taxes or mortgages, all of which except an aggregate of $19,597. I understand the vendor intends to discharge at or before the time of closing the title.

In order that you may have before you my own thought in the matter, I may add that in my judgment the enumerated defects impair the value of the property by not less than $25,000.,—when consideration is given to the present use

Exhibit D. 30.

of the property, the uses to which it is adaptable and the uses for which Mr. Klipstein intended to put it, in connection with the necessity of maintaining trade and manufacturing secrets in the chemical business.

Yours very truly,

FRED'K SEYMOUR.

EXHIBIT D. 30.

[Letterhead Seymour & Seymour.]

July 6th, 1917.

Harry Wright, Esq.,
209 Market St., Newark, N. J.

Dear Sir:—

RE: MIDVALE CHEM. WORKS TITLE.

Confirming our conversation this morning, I have to request that your clients arrange to receive possession of the Midvale property without unnecessary delay, in accordance with the arrangement which we made at the Essex County Country Club on July 4th.

Very truly yours,

FRED'K SEYMOUR.

Exhibit D. 31.

EXHIBIT D. 31.

June 8th, 1917.

Midvale Chemical Works,
Messrs. Geo. W. Hunter and Leslie M. Simson,
Trustees,
St. Louis, Missouri.

Gentlemen:—

RE: TRANSFER OF MIDVALE CHEMICAL WORKS PROPERTY TO E. C. KLIPSTEIN.

I am enclosing you herewith a copy of Chapter 237 of the New Jersey Laws of 1907, and I am requesting you to furnish me, as Mr. Klipstein's Attorney, and as early as possible the list in writing therein mentioned of the names and places of residence or business of and indebtedness to each and all creditors of the Midvale Chemical Works for the purposes therein set forth.

Thanking you for your early attention to this matter, I remain

Yours very truly,
FRED'K SEYMOUR.

(Enc.)

CHAPTER 237. LAWS OF 1907.

An Act to prohibit sales of merchandise in bulk in fraud of creditors.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. The sale in bulk of the whole or a large part of the stock of merchandise and fixtures, or merchandise or fixtures, otherwise than in the ordinary course of trade, and in the regular

Exhibit D. 31.

and usual prosecution of the seller's business, shall be void as against the creditors of the seller, unless the purchaser shall, in good faith and for the purpose of giving the notice herein required make inquiry of the seller and receive from him a list in writing of the names and places of residence or business of and indebtedness to each and all of such creditors, and unless the purchaser shall, at least five days before the consummation of the sale, give personal notice of said proposed sale to each of the creditors of the seller as appearing on said list, or use reasonable diligence to cause personal notice to be given to them, or shall deposit in the mail a registered letter of notice, postage prepaid, addressed to each of the seller's said creditors at his post-office address, according to the written information furnished; provided, however, that no proceedings at law or equity shall be brought against the purchaser to invalidate any such voidable sale after the expiration of ninety days from the consummation thereof.

2. The seller shall make full and truthful answer, in writing, to each and all of the inquiries made of him by the purchaser, as required in section one; and if such seller shall knowingly and wilfully make or deliver, or cause to be made or delivered, to said purchaser any false answer to such inquiries, or shall induce a sale by refusing to make answer to such inquiries, or by fraudulently claiming or pretending ignorance of the matters called for by such inquiries, then, in each of said cases, said seller shall be deemed guilty of a misdemeanor, after indictment, upon conviction thereof.

Exhibit D. 32.

3. Sellers and purchasers under this act shall include corporations, associations, copartnerships and individuals; but nothing contained in this act shall apply to sales made under any order of a court, or to any sale made by executors, assignees for the benefit of creditors, administrators, receivers, or any public officer in his official capacity, or by any officer of a court.

4. This act shall take effect immediately.

Approved June 11, 1907.

EXHIBIT D. 32.

[Letterhead Haskins & Sells.]

June 9, 1917.

Mr. Frederick Seymour,
Of Messrs. Seymour & Seymour,
120 Broadway, New York.

Dear Sir:

I am in receipt of a copy of your letter of the 8th instant addressed to the Midvale Chemical Works, covering the procedure necessary to comply with Chapter 237 of the New Jersey Laws of 1907 in connection with the sale of the plant to Mr. Klipstein.

The accounting records are kept in St. Louis and I have today taken the matter up with our office with a view to having the requirements met at as early a date as a complete list can be compiled.

Yours very truly,

L. N. SIMSON.

Exhibit D. 33.

EXHIBIT D. 33.

June 16, 1917.

Mr. Frederick Seymour,
Equitable Building,
New York.

My dear Sir:—

Noting your letter of 8th to Mr. Simson and myself, please be advised that Midvale Chemical Works will, as of June 20th, be indebted to the following persons:

Commercial Acid Company, Saint Louis,	$7,894.20
David Kaufman & Sons Co., Elizabeth, N. J.,	1,800.87
S. L. Moore & Sons, Corp., Elizabeth, N. J.,	2,625.08
B. Nicoll & Company, 149 Broadway, New York,	870.93

The Barrett Company, 17 Battery Place, New York, for an amount not yet determined, owing to a multiplicity of credits which are unadjusted. We will discuss this item. The same is true of a few items growing out of our business transactions with A. Klipstein & Company.

Yours very truly,

GEORGE W. HUNTER.

New Jersey State Library

Exhibit D. 34.

EXHIBIT D. 34.

June 12, 1917.

Mr. George W. Hunter,
Midvale Chemical Works,
St. Louis, Missouri.

My dear Mr. Hunter:

I have just received a report from the Fidelity Trust Company and I am enclosing you a copy of the items which they specify as requiring to be cleared up in a manner satisfactory to the Company before issuing the policy and the closing of the title.

They, of course, require also the clearing up of any other items which may appear on the continuance of the search.

I am sending this to you for your information, so that you may take such action as will avoid delay when the time comes or closing the transaction.

If you have opportunity we could perhaps go over this before the 20th.

Yours very truly,

FRED'K SEYMOUR.

(Enc.)

Exhibit D. 35.

EXHIBIT D. 35.

[Letterhead Seymour & Seymour.]

July
Sixth
1917.

Mr. L. R. Simson,
Haskins & Sells,
30 Broad St.,
New York, N. Y.

Dear Sir:

I am enclosing you a copy of a letter of even date to Mr. Hunter, your co-Trustee in the Midvale Chemical Works, which will explain itself.

If Mr. Hunter is out of town, will you be good enough to take this matter up and receive possession of the Midvale Chemical Works, and let me know when you will do it.

Very truly yours,
FRED'K SEYMOUR.

(Enc.)

COPY.

July 6th, 1917.

Mr. George W. Hunter,
C/o Haskins & Sells,
30 Broad Street,
New York, N. Y.

Dear Sir:

Mr. Klipstein was disappointed that you did not carry out yesterday the arrangement which was made on July 3rd and again at the Essex County Country Club on July 4th,—to receive possession of the Midvale Works.

Exhibit D. 36.

He is ready to surrender possession and requests that you appoint a time for carrying out the arrangement.

As I explained to Mr. Wright, further delay in this matter may embarrass you in carrying out your contracts for the purchase of raw material and for the delivery of the finished product of the works.

Yours very truly,

F. S.

EXHIBIT D. 36.

(Letterhead Seymour & Seymour.)

July
Sixth
1917

Mr. George W. Hunter,
C/o Haskins & Sells,
30 Broad Street,
New York, N. Y.

Dear Sir:

Mr. Klipstein was disappointed that you did not carry out yesterday the arrangement which was made on July 3rd and again at the Essex County Country Club on July 4th,—to receive possession of the Midvale Works.

He is ready to surrender possession and requests that you appoint a time for carrying out the arrangement.

As I explained to Mr. Wright, a further delay in this matter may embarrass you in carrying out your contracts for the purchase of raw material

Exhibit D. 37.

and for the delivery of the finished product of the Works.

Yours very truly,

FRED'K SEYMOUR.

EXHIBIT D. 37.

[LETTERHEAD SEYMOUR & SEYMOUR.]

July Tenth, 1917.

Messrs. George W. Hunter and
Leslie N. Simson, Trustees,
Midvale Chemical Works,
c/o Haskins & Sells,
30 Broad Street,
New York, N. Y.

Gentlemen:—

In view of your failure to convey a good and marketable title to the property described in the contract of May 29, 1916, between yourselves and Mr. Ernest C. Klipstein, and in view of the apparent termination by Judge Holmes of the negotiations which have been pending for an adjustment of differences—I beg to advise you on Mr. Klipstein's behalf, that he now surrenders possession of the property which he assumed at your request after the contract was signed.

He has now a caretaker at the Works but will withdraw him at 12 o'clock noon on Wednesday (July 11, 1917) unless for your convenience it should be desirable to continue him temporarily and for a short time until you shall have had ample opportunity to select a suitable man to put in his place.

I am returning you herewith Policy #2284555 of the United States Fidelity & Guaranty Co.,

Exhibit D. 37.

covering workmen's compensation and employers' liability at the Works, which was assigned by you to Mr. Klipstein, and I am enclosing you in duplicate the re-assignments of this Policy to Midvale Chemical Works.

These assignments require your acceptance after which they may be forwarded to the U. S. Fidelity & Guaranty Co., or to its Agency in St. Louis, where they will be accepted by the Company.

I will attend to this detail for you if you desire and will return the Policy and the assignments with your acceptance.

I am also enclosing you The Hartford Steam Boiler Inspection and Insurance Co. Policy #78010 with riders attached. Upon the Policy is a re-assignment by Mr. Klipstein to Midvale Chemical Works covering losses from and after noon of this date.

I will attend to the detail of securing the consent of the Insurance Company to this re-assignment if you desire.

Mr. Klipstein will account to you at the earliest possible moment for the materials used with your consent during his occupation of the Works.

Judge Holmes mentioned the fire insurance upon the Works, but it is my present understanding that Mr. Klipstein has no interest in that matter, but if you should be advised differently, Mr. Klipstein will co-operate with you in any proper way to secure compensation for the fire loss.

If there are other matters which should be attended to irrespective of the disposition of the main subject of controversy, both Mr. Klipstein and myself will be glad to co-operate with

Exhibit D. 38.

you in the adjustment of any such question or subject without prejudice to either party as respects matters in dispute.

Very truly yours,

FRED'K SEYMOUR.

(Enc.)

EXHIBIT D. 38.

[Letterhead Seymour & Seymour.]

July Eleventh, 1917.

Messrs. George W. Hunter and
Leslie N. Simson, Trustees,
Midvale Chemical Works,
c/o Haskins & Sells,
30 Broad St., N. Y. City.

Gentlemen:—

I beg to advise you that Mr. Klipstein has withdrawn the Caretaker from the Midvale Chemical Works at Elizabeth, as I have received no suggestion from you that you required further time to obtain a man to take his place.

I am handing you herewith a tracing, which I overlooked yesterday.

Very truly yours,

FRED'K SEYMOUR.

(Enc.)

Received 2:55 P. M.

Exhibit D. 39.

EXHIBIT D. 39.

To Whom It May Concern:

George W. Hunter and Leslie N. Simson hereby make the following statement in pursuance of the provisions of Chapter 240 of the Laws of 1906, entitled "An Act to regulate the use of business names."

1. The name under which we are transacting business and intend to transact business hereafter is the Midvale Chemical Works.

2. The business so conducted by us and to be conducted by us is that of manufacturing chemicals and dye-stuffs.

3. The place where the said business is now conducted and is intended to be conducted is in the City of Elizabeth, County of Union and State of New Jersey.

4. The full name or names and post office address or addresses of the person or persons connected with the said business as owner or owners, viz:—

George W. Hunter, Trustee, Saint Louis.
Leslie N. Simson, Trustee, Saint Louis.

. . . . . .

: Revenue :
: 10 cts :
: Stamp :

. . . . . .

State of Missouri, :
City of St. Louis. : *ss.* George W. Hunter
: being duly sworn says that he is one of the persons named in the foregoing certificate and that the statements therein are true.

GEORGE W. HUNTER.

Exhibit D. 39.

Sworn and subscribed before me this
28 day of Nov. A. D., 1915.

[SEAL] WM. P. CLARK,
Notary Public.

My commission expires Dec. 18, 1915.

STATE OF MISSOURI, :
CITY OF ST. LOUIS. : *ss.* Leslie N. Simon, being duly sworn says that he is one of the persons named in the foregoing certificate and that the statements therein are true.

LESLIE N. SIMSON.

Sworn and subscribed before me this
1st day of Dec. A. D., 1915.

[SEAL] WM. P. CLARK,
Notary Public.

My commission expires Dec. 18, 1915.

STATE OF MISSOURI, :
CITY OF ST. LOUIS. : *ss.* I, CHAS. R. GRAVES, Clerk of the Circuit Court, City of St. Louis, the same being a Court of Record in and for said City and State, do hereby certify that Wm. P. Clark who subscribed the foregoing Certificate of Jurat was at the time of taking such affidavit a Notary Public residing in said City and duly authorized to take and certify the same by the laws of said State, and to take and certify the acknowledgement and proof of deeds, to be re-

[SEAL]

Exhibit D. 39.

corded in the State, and that the same is taken and certified in all respects as required by the laws of said State. That I am well acquainted with the handwriting of said Wm. P. Clark, and verily believe that the signature attached to the foregoing Certificate is the genuine signature of said WM. P. CLARK.

WITNESS my hand and seal of the Circuit Court, City of St. Louis, at my office in said City this Second day of December, nineteen hundred and fifteen.

CHAS. R. GRAVES,
Clerk, Circuit Court.

(SEAL)

STATE OF NEW JERSEY :
COUNTY OF UNION. :

I, WILLIAM B. MARTIN, Clerk of the County of Union, do hereby certify the foregoing to be a true and correct copy of a certain Certificate of Business Name of Midvale Chemical Works, as the same remains on file in my office under date of the Seventh day of December, Nineteen Hundred and Fifteen.

[SEAL]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this Ninth day of October, A. D., Nineteen Hundred and Seventeen.

WM. B. MARTIN,
Clerk.

EXHIBIT D. 40.

April 15, 1916.

Petition of the Midvale Chemical Company asking that portions of Richmond, Chelsea and Brighton Streets, Burlington and Princeton Avenues, as shown on "Map of Building lots in City of Elizabeth, New Jersey, on and near Bayway" be vacated and closed.

Which was referred to the Committee on Streets.

EXHIBIT D. 41.

REPORTS OF STANDING COMMITTEES.

The Committee on Streets reported the following:

July 22, 1915.

To the Honorable Board of Public Works.

Gentlemen: Your Committee on Streets, having under consideration the petition of the Midvale Co., for the closing of Chelsea and other streets, would respectfully report that a public hearing was held on Tuesday afternoon, July 20, 1915, on the ordinance vacating said streets, due notice of said public hearing having been published in the local newspapers, and that no objectors to the vacating of the said streets appearing at said public hearing, your committee respectfully recommends the adoption of the ordinance on third reading.

Respectfully,

JAS. A. HAND,

Chairman of Street Committee.

Which was adopted.

Exhibit D. 42.

EXHIBIT D. 42.

On July 1, 1915, the following ordinance was taken up, read and adopted on its first reading. At the same meeting the said ordinance was taken up, read and adopted on its second reading and ordered published two weeks. (See proceedings of Board of Public Works, pages 79, 80 and 81).

ORDINANCES ON THIRD READING.

An ordinance to order and cause all those portions of the following named streets and avenues, viz.:

Chelsea and Richmond streets, from the lands of the East Jersey Telephone and Telegraph Company to the lands of the Perth Amboy and Elizabethport Railroad Company, as said streets appear on "Map of Building lots in the City of Elizabeth, New Jersey, on and near Bayway," compiled about the year 1859, and also as they appear on the map filed in the year 1869, by the "Commissioners appointed to lay out Streets, Avenues and Squares in the City of Elizabeth, New Jersey."

Brighton street as laid out on the map filed by the "Commissioners appointed to lay out Streets, Avenues and Squares in the City of Elizabeth," from South Front street to the southeasterly line of Amboy avenue, and from the northwesterly line of Amboy avenue to the southeasterly line of Burlington avenue.

Old Princeton avenue as delineated on "Map of Building lots in the City of Elizabeth, New Jersey, on and near Bayway," from the lands of the Perth Amboy and Elizabethport Railroad

Exhibit D. 42.

Company, to the northeasterly line of Chelsea street, as laid down on the last mentioned map.

Princeton avenue, as laid out on "Map filed by Commissioners appointed to lay out Streets, Avenues and Squares in the City of Elizabeth, New Jersey," particularly described as follows:

Beginning at a point where the northerly line of the East Jersey Telephone Company intersects the westerly line of Princeton avenue; thence along the westerly line of Princeton avenue north 32 deg. 42 min. east to a point which is about 681.97 feet from Bayway and also in the boundary line of Rankin, Gilhooly and Fern; thence along said boundary line south 39 deg. 24 min. east, 31.54 feet to a point; thence south 49 deg. 46 min. east 30.26 feet to a point in the easterly line of Princeton avenue, which point is about 686.83 feet from Bayway; thence south 32 deg. 42 min. west along the easterly line of Princeton avenue, to the line of the East Jersey Telephone Company; thence westerly along the Telephone Company line to the point or place of beginning.

Burlington avenue from the lands of the East Jersey Telephone and Telegraph Company to the southwesterly line of Brighton street, as laid down on Commissioners map aforesaid, and on said map entitled, "Map of Building lots in the City of Elizabeth, New Jersey, on and near Bayway," to be vacated and closed.

Be it ordained by the Mayor and Board of Public Works of the City of Elizabeth:

Section 1. That all those portions of the following streets and avenues:

Chelsea and Richmond streets from the lands of the East Jersey Telephone and Telegraph

Exhibit D. 42.

Company to the lands of the Perth Amboy and Elizabethport Railroad Company, as said streets appear on "Map of Building lots in the City of Elizabeth, New Jersey, on and near Bayway," compiled about the year 1859, and also as they appear on the map filed in the year 1869, by the "Commissioners appointed to lay out Streets, Avenues and Squares in the City of Elizabeth, New Jersey."

Brighton street as laid out on the map filed by the "Commissioners appointed to lay out Streets, Avenues and Squares, in the City of Elizabeth," from South Front street to the southeasterly line of Amboy avenue, and from the northwesterly line of Amboy avenue to the southeasterly line of Burlington avenue.

Old Princeton avenue as delineated on "Map of Building lots in the City of Elizabeth, New Jersey, on and near Bayway," from the lands of the Perth Amboy and Elizabethport Railroad Company to the northeasterly line of Chelsea street, as laid down on the last mentioned map.

Princeton avenue as laid out on "Map filed by Commissioners appointed to lay out Streets, Avenues and Squares in the City of Elizabeth, New Jersey," particularly described as follows:

Beginning at a point where the northerly line of the East Jersey Telephone Company intersects the westerly line of Princeton avenue; thence along the westerly line of Princeton avenue north 32 deg. 42 min. east to a point which is about 681.97 feet from Bayway, and also in the boundary line of Rankin, Gilhooly & Fern; thence along said boundary line south 39 deg. 24 min. east, 31.54 feet to a point; thence south

Exhibit D. 42.

49 deg. 46 min. east, 30.26 feet to a point in the easterly line of Princeton avenue, which point is about 686.83 feet from Bayway; thence south 32 deg. 42 min. west along the easterly line of Princeton avenue to the line of the East Jersey Telephone Company; thence westerly along the Telephone Company line to the point or place of beginning.

Burlington avenue from the lands of the East Jersey Telephone and Telegraph Company to the southwesterly line of Brighton street, as laid down on Commissioners' map aforesaid, and on said map entitled, "Map of Building lots in the City of Elizabeth, New Jersey, on and near Bayway," be vacated and closed, under and by virtue of the provisions of an act entitled, "An Act to revise and amend the Charter of the City of Elizabeth," approved March 4, 1863, and the supplements thereto and amendments thereof, and of the laws of this State.

Section 2. That so much of the costs and expenses incurred in the making of the said improvement as can be lawfully assessed on property specially benefited shall be duly assessed by Commissioners of Assessment according to the valid provisions of the act entitled, "An act to revise and amend the Charter of the City of Elizabeth," approved March 4, 1863, the various supplements thereto and the general laws of the State, so far as they are applicable to the City of Elizabeth.

Section 3. That said improvement shall be made and completed under the supervision and direction of the Street Commissioner and the Board of Public Works of the City of Eliza-

Exhibit D. 42.

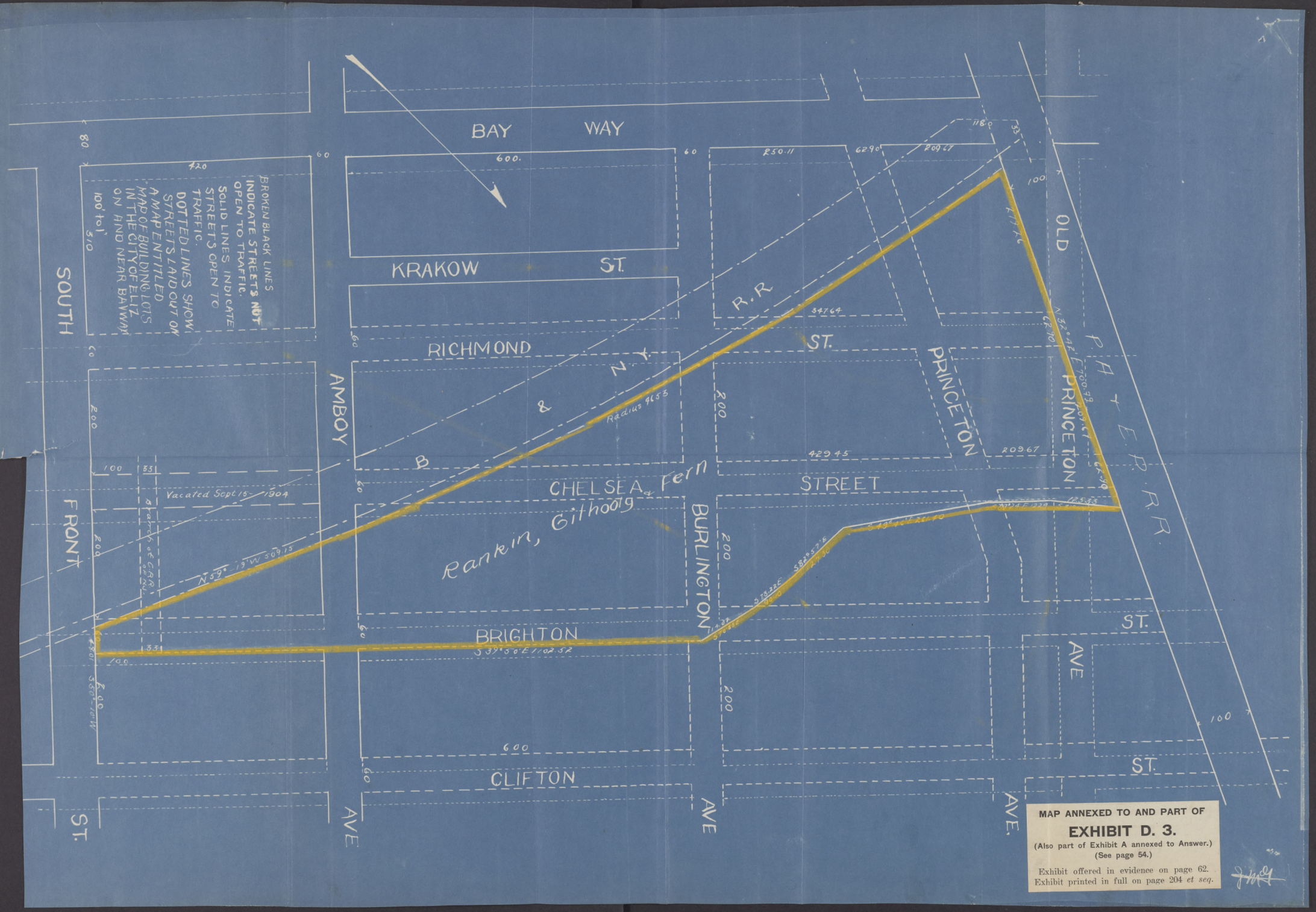
beth, and according to the provisions of the City Charter and Ordinances.

Which had been read twice and adopted on its first and second readings at a meeting of the Board of Public Works, held July 1, 1915, and ordered published. Annexed to the ordinance was an affidavit certifying that said ordinance had been published two weeks.

The ordinance was taken up, read and adopted on its third reading and final passage by the following vote:

Affirmative—President Cissel and Commissioners Hand and Higgins—3.

Negative—None.



MAP ANNEXED TO AND PART OF

EXHIBIT D. 3.

(Also part of Exhibit A annexed to Answer.)

(See page 54.)

Exhibit offered in evidence on page 62.

Exhibit printed in full on page 204 *et seq.*

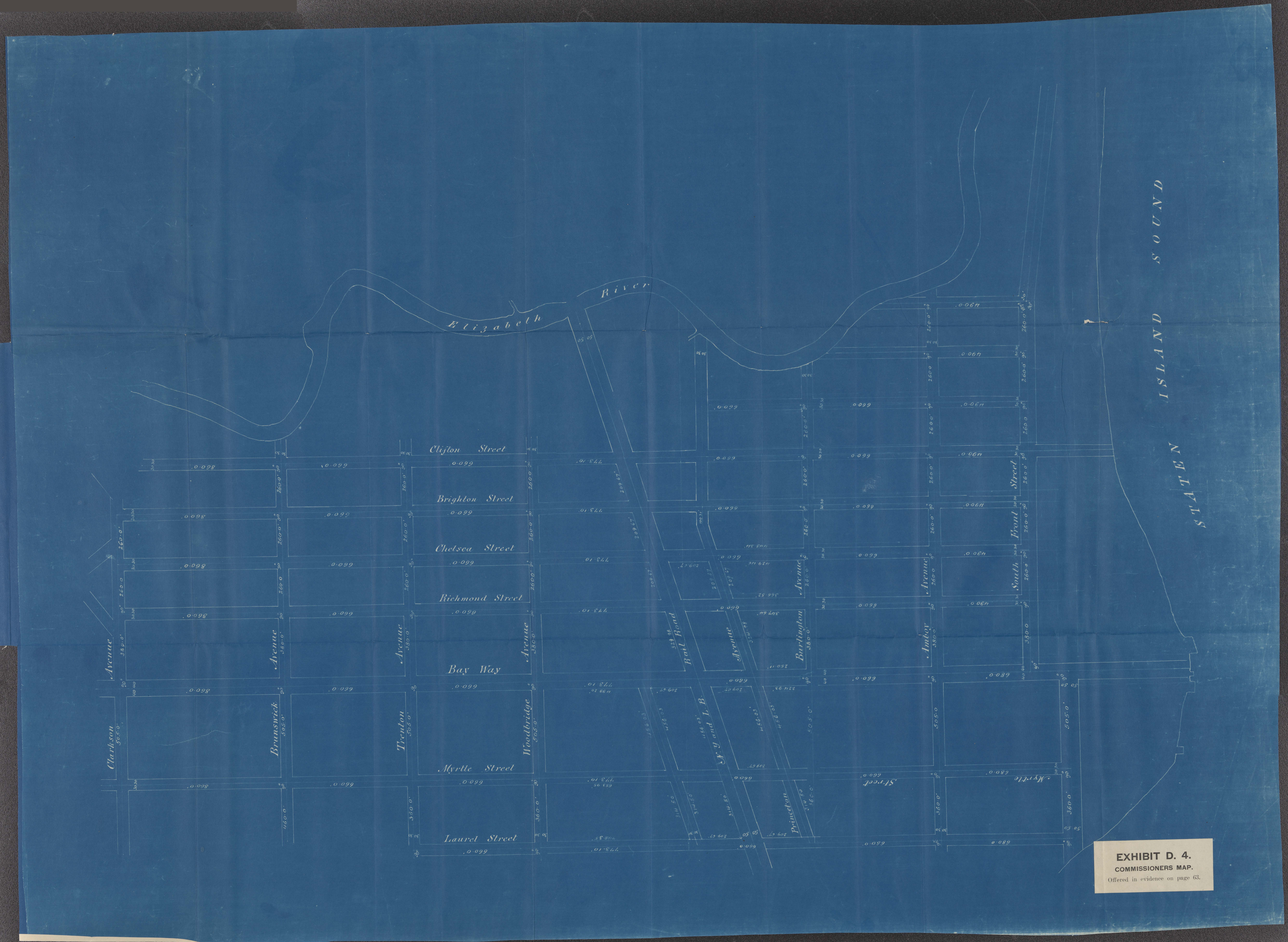


EXHIBIT D. 4.
COMMISSIONERS MAP.
Offered in evidence on page 63.

MAP OF BUILDING LOTS IN THE CITY of ELIZABETH N.J. ON AND NEAR BAYWAY

CITY of ELIZABETH, N.J.



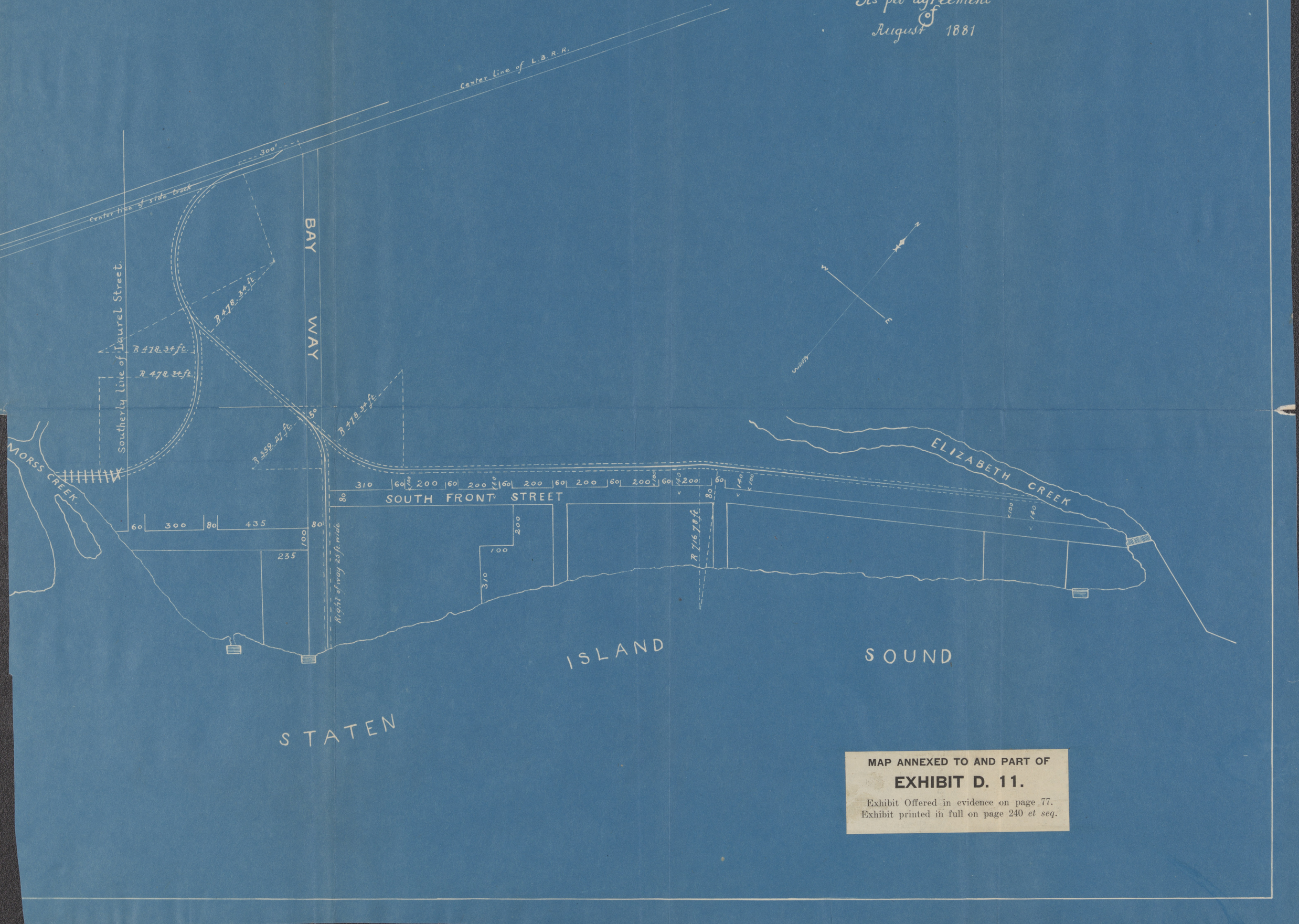
SCALE 300 FEET TO ONE INCH.

NOTE.
Lots lying north of Richmond Street are 25 Ft. wide and 100 Ft. deep.

EXHIBIT D. 5.
BAY WAY MAP.
Offered in evidence on page 64; also page 76.

Filed

SKETCH SHOWING RIGHT OF WAY TO BE CONVEYED TO C. R. R. of N. J. BY D. B. Bonnett, Agent. As per agreement of August 1881



MAP ANNEXED TO AND PART OF

EXHIBIT D. 11.

Exhibit Offered in evidence on page 77.
Exhibit printed in full on page 240 *et seq.*


Exhibit D. 6.

Exhibit D. 6½.



Exhibit D. 7.





Exhibit D. 8.

New Jersey Court of Errors and Appeals

LESLIE N. SIMSON and GEORGE W. HUNTER, Complainants-Respondents, against ERNEST C. KLIPSTEIN, Defendant-Appellant.	On Bill, etc. On Appeal from Chancery.

BRIEF FOR RESPONDENTS.

Statement of Facts.

The Complainants sued to compel the specific performance of a contract for the sale of certain property, real and personal, situated at Elizabeth, Union County, New Jersey.

The contract (Exhibit B, Bill of Complaint, pp. 23-26) is in the name of Midvale Chemical Works, as grantor and is executed in that name by complainants as trustees.

Attached to the bill as Exhibit A, is a declaration of trust executed by the complainants on the 15th day of March, 1915 (pp. 6-22).

By the contract (Exhibit B), complainants agreed to convey and deliver to the party of the

New Jersey State Library

second part (defendant-appellant) *"all of its real property, consisting of two parcels of land situated at the intersection of the Long Branch Division of the Central Railroad of New Jersey, at Bayway Avenue in the section known as Bayway, Elizabeth, New Jersey,—one* 14-22/100 *acres and the other* 2-92-100 *acres, total* 17-14/100 *acres, being the property on which the chemical plant of the party of the first part is located and to convey and deliver all the personal property of the party of the first part, excepting cash on hand or on deposit. The party of the first part agrees to convey said land and property by good and marketable title free and clear of all encumbrances" (excepting certain mortgages which are assumed)* (p. 23).

The consideration to be paid by defendant-appellant was $150,000 for the real estate and an additional sum equalling the amount in value of the personal property, to be determined by an inventory thereafter to be taken. The bill alleges that the entire consideration thus determined was $205,000 (par. 6. p. 2).

Immediately after the execution of said agreement of sale, to wit, on May 31, 1917, the complainants delivered to the defendant the possession of all the real and personal property described in said agreement of sale, and the defendant accepted the possession and continued the active operation of the plant (par. 2, p. 7).

The time for the closing of the title was by mutual agreement adjourned from time to time until the 3rd day of July, 1917, at which time the complainants tendered to the defendant good and sufficient deed of conveyance to the real estate

and all other assignments and conveyances necessary to complete the transaction (p. 3).

Afterward on the 6th day of July, 1917, while the defendant-appellant was still in possession of the premises, a fire occurred which destroyed a portion of the buildings and complainants-respondents still retaining the legal title to the premises, notified the defendant-appellant of their willingness to assist him in collecting the insurance (p. 4).

The answer admits the execution of the agreement of sale (par. 4, p. 28).

Admits the taking of possession of the plant and that the value of the personal property was $52,000 (par. 5, p. 28).

Admits that on the 3rd day of July, 1917, the complainants offered to deliver a deed to the property in controversy and that formal tender was waived (par. 9, p. 29).

Alleges that at the time of making the agreement of sale, George W. Hunter, one of the complainants, represented that sundry streets and rights-of-way across the land in controversy which had been dedicated by prior owners had been vacated and that the private rights of individuals had been extinguished (par. 14, p. 31).

The answer at great length alleges that certain streets had at one time been laid out and dedicated as such across said premises and that the same had never been properly vacated, and that certain public and private rights existed which created encumbrances upon the said premises, and that the attempted vacation of the said public ways was insufficient to vacate the same (pp. 33-41).

The answer also alleges the failure of the complainants to comply with certain provisions of

the laws of New Jersey regulating the carrying on of business in the State of New Jersey by an unincorporated association (pp. 41-43).

It also alleges that interests in the said property existed in various persons who are holders of certificates of interest in Midvale Chemical Works and that the complainants had not the power to convey the property (pars. 40-41, pp. 43-44).

Alleges that the requests by the defendant that the said certificate holders be joined in the deeds of conveyance, were refused (par. 42, p. 44).

Alleges that the defendant by his counsel stated all the objections to the title and requested that the complainants cure the same, which they refused to do (par. 43, p. 45).

Alleges certain misrepresentations by the complainants regarding the entrance to the premises in controversy (pars. 44-47, pp. 45-47-48).

That on July 3, 1917, after stating the objections to the title, the defendant offered to surrender possession of the property back to the complainants and that Hunter, one of the complainants, agreed to arrange for resuming possession but failed to do so (pars. 51-52; p. 49).

That conferences followed between the parties in an effort to adjust differences, but as they resulted in failure, finally on August 14th, the defendant abandoned the property (pars. 53-54, pp. 49-50).

The answer further alleges an agreement to submit the question of title to the Fidelity Trust Company of Newark, New Jersey, and that the parties intended to rely upon the report of the said company rather than upon evidence to be submitted by the parties (pp. 51-52).

That the Fidelity Trust Company reported the encumbrances and defects in the title mentioned in

said answer, except the one relating to the right of way in front of the main entrance and refused and still refuse to pass or approve the title and that their adverse report affected the marketability of the title (pars. 59-60, p. 52).

The report of the Fidelity Trust Company upon said title (pp. 196-204) showed that the title to the premises in controversy was in the complainants, trustees of Midvale Chemical Works, subject to certain enumerated "liens, defects and questions." The liens referred to are limited to the mortgages which by the agreement of sale the defendant was to assume. The so-called defects and questions refer to the possible public and private rights in the streets shown by the plat to have been laid out and dedicated over and across said premises.

The evidence of Harry Wright (pp. 137-150) is to the effect that he is an attorney and counsellor-at-law in the State of New Jersey and that he acted for the complainants in the negotiations of the agreement of sale and the subsequent attempt to close the title. The first conference with regard to the closing was on June 20, 1917, and the last on July 7, 1917 (p. 138). Certain objections were made at the beginning to the description in the deed of one piece of property. This was overcome (pp. 140-141). At the first meeting, Mr. Seymour (counsel for the defendant) objected to the conveyance being made by Mr. Simson and Mr. Hunter as trustees, insisting that some authorization by the certificate holders should be had. That Seymour was informed that the Fidelity Trust Company was satisfied as to that point providing the articles of association were filed or accompanied the conveyance. He insisted that he wanted the certificate holders to approve of the sale and an adjournment

was taken for the purpose of having a meeting of the certificate holders (pp. 141-142). Mr. Seymour did not object to the rights of owners of land outside the railroads which surrounded the property and would be disposed to accept the title if the Fidelity Trust Company excepted only such rights (p. 143). Mr. Klipstein at that meeting agreed to assume the defects if Mr. Hunter would take off $10,000 from the consideration (p. 143). Mr. Wright had a further conference with Mr. Seymour on July 5th (p. 145). At that time he had before him a copy of a letter of Mr. Seymour dated June 25th in which the objections to the title are enumerated (letter is Exhibit D-29, p. 315). At that conference Mr. Wright made a memorandum upon this letter as to Mr. Seymour's position. All objections to the title were withdrawn except the objection marked 3 in said letter:

> "Outstanding rights in Amboy Avenue, South Front Street, Brighton Street, Burlington Avenue, Old Princeton Avenue, Richmond Street, as laid down on the Commissioner's map and on the Bayway map."

As to the 6th objection as to the rights of certificate holders:

> "He said that was all right if accompanied by affidavits of the meeting and copies of the papers which I told him we had and presented to him before in fact, but he said he had not read them, so did not know anything about it. That left the only important outstanding question of private rights in those streets" (pp. 146-147).

Following this conference, Mr. Wright had a conference with the Fidelity Trust Company on July 6th, the result of which he states as follows:

> "After arguing with them the whole morning, or practically the whole morning, the Fidelity Trust Company under an agreement I made with them agreed that they would guarantee Mr. Seymour or his client, Mr. Klipstein, against these private rights and eliminate them from their policy" (p. 147).

Wright then went back to New York and called at Mr. Seymour's office and he was out. He then went to Mr. Hunter's office and while there Mr. Seymour 'phoned that he was down at Bayway and there had been a fire in the plant. Wright said: "and at that very same time I informed him the Fidelity were ready to close and they would take that exception out of the policy." Seymour answered: "Well, he said he would see me later, and that was all" (p. 147).

On July 7th, Wright met Mr. Klipstein and Mr. Seymour with Mr. Hunter, one of the complainants at Klipstein's house in East Orange. Concerning this meeting, he says: "We went over the same questions again and I informed them the Fidelity had taken out the very serious question, the question they alleged was a serious one, and was willing to guarantee." Mr. Klipstein said: "It is too late, you were not ready and willing on the day the contract was to be closed," and he said: "The contract is at an end, that settles it. If you are here to make a new contract we are here to talk business" (pp. 147-148).

The record also shows that subsequently, about July 11th, the defendant withdrew the caretaker

from the premises (p. 327) and on the 13th, an arrangement was made betwen the parties for the continuance at joint expense of a caretaker. On August 14th, the defendant by his counsel notified counsel for the complainants that such arrangement would be terminated from that date (see Exhibit 24, p. 309), whereupon complainants by their counsel advised defendant's counsel that as the legal title still remained in the vendor all necessary steps would be taken for the protection of the property for the ultimate benefit of Mr. Klipstein, the defendant (Exhibit 25, p. 310).

The first six points made in the appellant's brief (pp. 7-61, both inclusive), are all addressed to the question AS TO THE RIGHTS AND POWERS OF THE COMPLAINANTS WITH RESPECT TO THE SALE AND DISPOSITION OF THE PROPERTY IN CONTROVERSY AND AS TO THE RESPECTIVE RIGHT, TITLE AND INTEREST IN SAID PROPERTY HELD BY THE COMPLAINANTS AND THE CERTIFICATE HOLDERS.

For the purpose of this brief, we shall treat the above mentioned points collectively.

ARGUMENT.

POINT I.

The complainants, Simson and Hunter, are the owners of the property in controversy and by their deed can convey good title thereto.

The complainants are trustees of an express trust. Their rights, powers and duties are clearly

expressed in paper Exhibit A to the bill of complaint (p. 6). This paper seems to have been executed in the State of Missouri (see acknowledgment, p. 22). It is entitled "ARTICLES OF ASSOCIATION OF MIDVALE CHEMICAL WORKS." Evidently the draftsman of this paper had under special consideration at the time of its preparation, the laws of the State of Missouri, which seem to recognize associations thus informally organized. At least, the Court of Appeals of that state has, in several cases, permitted trustees for unincorporated associations to enforce obligations and has held that their rights are to be determined by the laws and articles of association (see *Miles* vs. *Davis,* 19 Mo. App., 414; *Kuhl* vs. *Meyer,* 35 Mo. App., 206; *Hysinger* vs. *Supreme Lodge,* 42 Mo. App., 627).

It may be conceded that under the statutes of New Jersey, Midvale Chemical Works would not have, as an unincorporated association, any legal standing, but there is no law in New Jersey that would in any way invalidate the instrument as a declaration of trust and prevent the trustees therein named from exercising all the rights and powers conferred upon them. Section 3, p. 2611, Vol. 2. Compiled Statutes of New Jersey, provides

> "That all declarations and creations of trust or confidence of or in any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is or shall be by law enabled to declare such trust, * * * or else they shall be utterly void and of no effect, provided always that when any conveyance hath been or shall be made of any lands, tenements or hereditaments by which a trust or confidence shall or may arise

> by implication or construction of law or be transferred or extinguished by act or operation of law, such trust or confidence shall be of the like force and effect as the same should have been if this act had not been made" (Rev. 1877, p. 445).

In *Brown* ads. *Combs, et al.*, 29 N. J. L. 886, it is said:

> "To establish a trust, no particular form of expression is necessary in a deed. It may be created by any writing showing that a trust is intended."

In Tiedeman on Real Property, it is said:

> "If the legal and equitable estates of the trust become lawfully united in one person, the equitable is merged in the legal estate in accordance with the general law of merger." Section 512 and cases cited.

Among the cases referred to in support of this text is *Bowles* vs. *State Trust Co.*, 27 N. J. Eq. 308, where the Court in discussing certain powers and rights of trustees and cestui que trust says:

> "The powers that either may have in active trusts and which are peculiar to such trusts are wholly dependent upon the particular provision of each trust and no general rule can be laid down in explanation of them."

This is in harmony with the decisions in England and in other states to which attention will be called later on in this brief.

We are justified then in looking to the declaration of trust itself for a determination of the rights of all parties in the property.

First it may be desirable to call attention to the fact that this instrument is signed only by the trustees. It begins with the statement that the trustees have associated themselves together as trustees, the business to be carried on at such place as the trustees may determine. By Article II (p. 6), the trustees are given full power to "pledge, mortgage, grant, convey and exchange property of every description, real, personal and mixed." By Article IV (p. 7) it is declared that the trustees shall be deemed the absolute owners of all the property, and both the legal and equitable title shall be vested absolutely in them, their successors and the survivor or survivors of them. Section 5 expressly defines the right of certificate holders. Their interests are in the annual profits or upon liquidation or distribution are as defined in the assets. On page 9, it is expressly provided "the interest represented by this certificate is personal property irrespective of the nature of the estate of the trustees," and the following paragraph specifically provides that no certificate holder shall have or claim any legal or equitable interest in the property except as to the profits or the distribution of the assets. The above quoted provisions are with respect to the Class A, or preference certificates and the provisions with respect to the Class B certificates so far as they relate to the property, are substantially identical (p. 13).

In Article XIII it is provided "No certificate holder shall as such, be a necessary or proper party complainant or defendant in any suit or other judicial proceeding relative to or affecting the prop-

erty or assets of the association." In Article XV, in the last paragraph, on page 19, it is provided "No person dealing with the trustees, shall be charged with the duty of making any inquiry as to their authority to deal with the property of the association." And Article XVII provides that contracts, deeds, etc., affecting real estate titles shall be sufficiently executed on behalf of all trustees if executed by the trustees in office at the date of the execution.

It is submitted that language could not be selected to more clearly define the rights and interests of all parties to this trust and all those who purchased or became the owners of certificates of interest, thereby became parties to the agreement and were equally bound by all its provisions with the same force and effect as though they had actually signed the same, and we know of no principle of law which would prevent the court from giving full effect to the agreement of the parties. Nothing illegal, nothing immoral is contained in the instrument and no reason can be suggested why a court of equity should refuse to carry into effect the agreement and understanding of the parties.

Both the legal and equitable title to the property is therefore, vested in the trustees and the deed executed by them was sufficient to vest in the purchaser all interest in the same.

But if this were not so, the failure to tender a deed executed by the certificate holders is no defense to this action. From the record it clearly appears that up to the time of filing the answer herein, no claim was made by the defendant that a deed to convey the title should and must be signed by all of the certificate holders. The testimony of Mr. Wright, to which reference has been previously

made is to the effect that at the first meeting for closing the title, Mr. Seymour insisted that some authorization by the certificate holders should be had (p. 141). He wanted the certificate holders to approve the sale (p. 142).

It will be noted that he did not ask for a deed signed by the certificate holders and the evidence shows that an adjournment was then taken for the purpose of having a meeting of certificate holders. That meeting was held on the morning of the 3rd day of July and approval was given to the contract (p. 142), and when they again met Klipstein and Seymour, the deed was again tendered, also proofs of the meeting of the certificate holders of the approval, and Mr. Seymour said:

> "Well, we will excuse formal tenders of deeds because I haven't prepared my papers and you haven't got all of yours prepared, and we will waive the formal tender" (pp. 143-144).

It is submitted in all confidence that this conduct on the part of defendant and his counsel constituted a waiver of the right to object to the title on this ground, especially in view of the fact that time was not of the essence of the contract, and the complainants were entitled to a reasonable time in which to perfect their title if it was on that account insufficient (See 36 Cyc. 718, and authorities cited).

Also *Krasnow* vs. *Topp,* 112 N. Y. Suppl., 546, where the Court says:

> "The fact that the person contracting to convey land does not at the time have title to all of it, does not render specific performance of

> the contract impossible so as to deprive equity of jurisdiction, where it does not appear that it might not acquire title to all of it."

Point 7 of the appellant's brief (p. 62) presents the question as to whether the defendant is entitled to a deed from the certificate holders. In addition to what has been said on this point, it may be sufficient to add that if the court shall be of the opinion that such deed is necessary, this point can be fully protected by a modification of the decree.

POINT II.

The title which the complainants-respondents offered to convey to the defendant and are now able and ready to convey, is a good and marketable title.

As has been heretofore pointed out, the defendant in his answer alleged that the parties to the contract agreed to submit the question of the marketability of the title to the Fidelity Trust Company and intended to rely chiefly upon the decision of the Trust Company rather than upon evidence to be submitted by the parties (pars. 56, 57, 58, pp. 51, 52).

It is true that upon the trial, the learned Vice-Chancellor excluded evidence offered in support of said allegations of the answer, but it sufficiently appears by the evidence of the defendant Klipstein that up to the time of the partial destruction of the plant by fire, he was willing to accept the title as marketable if guaranteed by the Fidelity Trust Company.

In answer to a question on direct examination, Mr. Klipstein said:

> "Well, I wanted a good title and I would have been satisfied with the Fidelity title" (p. 95).

And again:

> "Q. Didn't you say that you would take the title if they took $10,000 off? A. I said I would take title provided they would throw off enough to pay for the guarantee of the title by the insurance company" (p. 112).

> "Q. Did you ever ask anybody, Mr. Hunter or anyone else connected with the complainants in this case, to deduct $10,000 from the purchase price? A. Not from the purchase price, except so far as would apply to guaranteeing the title on the part of the company" (p. 113).

Again:

> "Q. Is it a fact that you wanted $25,000 taken off the purchase price or not? Yes or no? A. I suppose the answer is yes" (p. 114).

> "Q. Do I understand you to say that the discussion with relation to the amount that should be deducted from the purchase price was for the purpose of paying that money to the Fidelity Trust Company? A. Was for the purpose of having the title guaranteed.
>
> Q. That is, you were willing to take a title, were you not, and take your chances on getting it guaranteed as you should desire a guar-

antee, if a sufficient amount would be taken from the purchase price by the complainants, Mr. Hunter and Mr. Simson? A. Yes, as I say— " (p. 116).

"Q. (By the Court) What was the $10,000 to be used for? A. For paying the insurance company, that is, they would have to pay it, and by taking it off, by making it that much less that would be paid.

Q. (By the Court) Paying the insurance company for what? A. For guaranteeing the title or looking up the title so they could get it. In the beginning I understood that I was getting the guarantee of this insurance company for the title, and that satisfied me" (p. 117).

And on page 121, referring to a conference had the day after the fire:

"Q. You then wanted to buy the property for $100,000, didn't you? A. I never made any offer to buy the property at any price, anything like that was simply a matter of suggestion as to what could be done.

Q. Didn't you then ask them to make a new contract, in which the purchase price would be $100,000? A. I didn't ask them to do it, no.

Q. Didn't you suggest it? A. As I say, I suggested it as a way out of the difficulty."

It is also clearly established by the testimony of Mr. Wright heretofore cited that the negotiations with the Title Company for the purpose of removing their exceptions to the title continued up to the time of the fire and that an arrangement had

been completed before Mr. Wright was notified of the fire. Mr. Wright testified to the result of the conference with Mr. Seymour on July 5th, at which time Mr. Seymour agreed to waive all objections except one and Wright says "That left the only important outstanding question of private rights in those streets" (p. 147). And on the same page, he testifies that he went to the Fidelity Trust Company on the following morning, July 6th, "and after arguing with them the whole morning, or practically the whole morning, the Fidelity Trust Company under an agreement I made with them agreed that they would guarantee Mr. Seymour or his client, Mr. Klipstein, against these private rights and eliminate them from their policy."

It is therefore confidently submitted that all technical questions as to the marketability of this title can be eliminated from consideration. Of what concern is it whether all technical rights to the various streets filed more than a half century ago had been completely extinguished if the parties themselves regarded the proposed guarantee of the Fidelity Trust Company a sufficient protection against such doubtful claims as might possibly (although not probably) be at some time presented?

POINT III.

Any question of title, to be available as a defense in this action, must be a reasonable one.

The true rule with respect to this proposition was concisely stated in *Vreeland* vs. *Blauvelt,* 23 N. J. Eq., 483:

> "The doubt to be available as a defense must be a reasonable one and rest upon some debatable ground. The bare possibility of litigation does not render the title doubtful."

And in *Fleming* vs. *Burnham,* 100 N. Y., 1, where in an action for specific performance, the Court said:

> "The purchaser is entitled to a marketable title free from reasonable doubt * * * Objections which are merely captious or mere suggestions of defects such as no reasonable man would consider, although within the range of possibility, or those which are clearly invalid when the law is settled, whatever doubts which may, at a former time, have existed as to the questions raised, are not available to a purchaser and will be disregarded."

And the same Court, in *Cambrelling* vs. *Purton,* 125 N. Y., 610, by O'Brien, J., said:

> "If the existence of the alleged fact which is claimed or supposed to constitute a defect in or cloud upon the title is a mere possibility or the alleged outstanding right is but a very improbable or remote contingency, which according to ordinary experience had no probable basis, the Court may, in the exercise of a sound discretion, compel the purchaser to complete his purchase."

The foregoing are in entire harmony with the decisions throughout the land, where courts of equity have had occasion to consider similar questions and no good purpose will be served by a more extended citation of authorities.

It might be useful, however, to consider the practical question as to the basis for the objections.

From the record it clearly appears that in 1859, a map or plat was filed which is denominated "Bayway map." It embraces within its boundaries nearly 800 acres of land comprising for the most part what is commonly referred to as the salt marshes or meadows abutting upon Staten Island Sound and traversed by the Elizabeth River. A blue print of this map is in evidence and is attached to the record as Exhibit D-5. A similar map attached to the record as Exhibit D-3 shows the particular property in controversy in a more enlarged form than the original map. An examination of Exhibit D-3 discloses the fact that the property owned by the complainants and purchased by the defendant is shown upon this map as bounded by yellow lines. On the southerly side it abuts upon the right-of-way of the Baltimore & New York Railway Company which traverses the plat in a course somewhat deflected to the south from a direct east and west line. On the westerly side, the property is bounded by a right-of-way of the old Perth Amboy & Elizabethport Railway, now known as the Central Railroad of New Jersey, which traverses the plat from southwest to northeast. Crossing the tracks there appear on the ~~part~~ the following streets and avenues: Old Princeton Avenue, crossing the extreme northwesterly corner; Princeton Avenue, crossing the entire tract at a distance somewhat over 200 feet easterly from Old Princeton Avenue; Burlington Avenue, crossing the entire tract in a northeasterly course distant some 400 or 500 feet from Princeton Avenue; Amboy Avenue, crossing the tract in about the same course between 500 or 600 feet southeasterly from Burling-

ton Avenue; Richmond Street crossing the southwesterly portion of the tract in controversy in a southeasterly, northwesterly course; Chelsea Street crossing the property in the same course about 200 feet distant to the northeast from Richmond Street; and Brighton Street abutting upon the northeasterly side of the property. These streets and avenues are variously marked, Amboy Avenue, indicated by a solid line, being the only street actually opened across the property. Dotted lines show streets as laid out on the Bayway map. The broken lines show the streets as indicated on the Commissioners' map, said to have been filed about the year 1867.

The evidence shows that the railroads on the two sides of this tract have been in their present location thirty to forty years. At the extreme southwesterly point of the tract in controversy, nothing but the right of way of the railroad and a narrow strip of ground said to belong to the telephone company lies between the property and Bayway Avenue, a main thoroughfare running through the old plat, and the evidence discloses that it is at this corner of the property that all improvements including the manufacturing plant have been made. The photograph marked Exhibit D-8 is taken from Bayway Avenue looking under the railway crossing of the Baltimore & New York Railroad and the evidence shows that this overhead crossing of the railroad extends not only over Bayway but also across the tracks and right-of-way of the Central Railroad of New Jersey.

In the year 1915, the Board of Public Works of the City of Elizabeth, upon the petition of the complainants-respondents herein, vacated Richmond, Chelsea and Brighton Streets and Burling-

ton and Princeton Avenues as shown on the Commissioners' Map (indicated on Exhibit D-3, broken lines), and all of said streets and avenues except Brighton Street as they appeared on the Bayway Map and also that part of Old Princeton Avenue appearing on the Bayway Map but not shown on the Commissioners' Map. Technical objections were made by the defendant to these vacation proceedings, but as the court below found them to be regular and sufficient, and as it appears that the Fidelity Trust Company was willing to guarantee the title against public and private rights in said streets and avenues, and as no reason is shown in appellant's brief why such vacation proceedings were not in all respects sufficient to accomplish the vacation, we will not take time to discuss the various technical questions which might be suggested. One point, however, is made by defendant's solicitors to which perhaps reference should be made.

It is claimed that that portion of Brighton Street shown on the Bayway Map and not embraced in the street as shown on the Commissioners' Map, was not vacated. This strip of ground lies entirely within the boundaries of the complainants' land. It is shown that it is the narrow strip lying between the broken lines and the dotted lines upon Exhibit D-3 and it is claimed that certain private rights may attach to this strip which would interfere with the free use of the property conveyed.

Counsel for defendant-appellant say at the top of page 79 of their brief:

> "There is no evidence of public acceptance of Brighton Street or of the other streets on the Bayway Map alleged to have been vacated."

It was decided in an early day that:

> "If the owner of a tract of land lays it out in lots and streets by a map publicly exhibited or filed in the proper public office and sells lots laid out on said map by reference thereto, thereby dedicates to the public those streets on said land along which lots have been sold. Such dedication does not make them public streets or highways until the proper municipal authorities have accepted them as such or in some way ratified the dedication."
>
> *Hope* vs. *Town of Union,* 18 N. J. Eq., 282,

and so far as we are advised, this decision has never been criticized or modified. If then as counsel state in their brief there is no evidence of public acceptance of this street, then it is difficult to imagine how public or private rights should have attached nearly sixty years ago, which, never having been used, now constitute a cloud upon this title. But counsel argue that private rights may have arisen by reason of conveyances made referring to the filed map. They concede at the bottom of page 79, that the exact extent of such private rights have not been clearly established in this state, but it is claimed that some rights may have been created on account of a deed made by August Whitlock, et al., in the year 1865. A copy of this deed appears in the record at page 301 (Exhibit D—23). This deed purports to convey the property lying between Brighton Street on the northeasterly side and Bayway on the southwesterly side, Amboy Avenue on the northwesterly

side and South Front Street on the Southeasterly side, and said deed expressly reserves to the grantors "the right of way over Brighton Street as the same is laid out on said map" (p. 303).

It is thus seen that the grantors did not attempt to convey any rights in Brighton Street but reserved them. It is conceded that Brighton Street has never been travelled. It is apparent that for more than fifty years this reserved right in Whitlock has never been made use of. It is equally apparent from the map (Exhibit D—3) that Whitlock if living, can have no interest in the strip of ground embraced within the boundaries of the property in controversy as he can have no property abutting upon this strip. The broken lines indicate that Brighton Street as described in the Bayway Map, is entirely within the boundaries of the property in controversy. It is not shown that any other deed was ever executed which would in any way affect this narrow strip of ground and as the property in controversy extends to the full limit of the tract and abuts upon South Front Street, there can be no intervening right and it is confidently submitted that this objection is not based upon any reasonable or doubtful claim as to this title.

POINT IV.

Title to this property is not affected in any way by the existence of Clifton Street and an unnamed street.

Counsel in their fifteenth point, page 83 of their brief, claim that the title is still encumbered with

Clifton Street and an unnamed street. It is somewhat difficult to understand the theory of this objection. It is true that reference is made to such streets in Section 20 of the title company's exceptions at page 201 of the record, which refer to a survey made by W. W. Luster in 1915. As this survey is not in evidence, we of course, do not understand the reference to it. It is true that these streets appear on the Commissioners' Map (Exhibit D—4), but as neither of them cross the property in controversy, surely there can be no objection based upon their existence in some other part of the plat. It appears from Exhibit D—3, Clifton Street is situated 200 feet to the northeasterly of the tract thereon described, and as there is no evidence that any portion of the premises in controversy extend outside the boundaries shown on Exhibit D—3, it is difficult to see from the record how the existence or nonexistence of Clifton Street would in any way affect this title.

POINT V.

The existence of Amboy Avenue and of the railroads which abut and bound this property do not affect the validity or marketability of the title.

It is conceded that Amboy Avenue is an open street in public use and crosses the property.

It may be conceded at the outset, that the question as to whether the existence of a public highway over and across a tract of land in and of itself constitutes an encumbrance upon the title has not been definitely decided by the courts of New Jersey. The question was discussed in *Beach* vs. *Hudson*

River Land Co., 65 N. J. Eq., 426, 435, where it is said:

> "I am not aware of any case in New Jersey where a considerable tract of land, like the present, has been sold by the acre, that in the absence of a specific provision any deduction has ever been made in the contract price, either on specific performance or on foreclosure of a purchase-money mortgage, on account of the existence of highways within the limits of the survey, where those highways were open and visible to the eye.
>
> I am not aware that it has ever been decided in New Jersey that the existence of a highway upon a tract of land, and included within the metes and bounds thereof, amounts to a breach of covenant against encumbrances. It has been held in Pennsylvania that it does not, and I believe, also, in New York. Rawle Cov. Tit. (2d Ed.) 141, 147 (1854). And, certainly, the sentiment of the profession in this state is to that effect, else there would have been innumerable actions for damages for breach of warranty on account of the existence of highways on or across lands. The simple reason for this is that they are patent encumbrances which cannot be removed, and an action for damages on account of their existence would produce, in ninety-nine cases out of a hundred, no more than nominal damages.
>
> The cases referred to by counsel for the defendant on shortage of acreage have no application here. There is no shortage of acreage nor any defect of title to any part of the premises, except, indeed, that conveyed to the railroad company. Title to the part covered

by the streets is complete, subject, however, only to the encumbrance of the public highway.

The utmost that defendant could claim, under the most favorable aspect that could be taken of the case, would be that it was entitled to a reduction from the purchase-money for the amount which the encumbrance of the highway reduced the land in value. No evidence was produced on that point, but it was well said by the complainant, in his argument, that it is plain that the existence of the highways increases rather than diminishes the value of the property."

This language would seem to be peculiarly applicable to the instant case. It will be remembered that by an examination of the map, Exhibit D-4, it is shown that but a short distance south of the premises in controversy is Staten Island Sound, northerly is the Elizabeth River and it may fairly be assumed that at least one highway extending between these bodies of water would be desirable and of value to the property.

The case last above cited was considered in *McAndrews & Forbes Co.* vs. *Camden Natl. Bank*, 87 N. J. L. 231, 233; where it is said:

"We take up first the question whether the existence of a public highway, actually open, or of a highway in posse by reason of dedication and liability to future acceptance, which liability is turned into actuality by enforcement of the dedication, is a breach of general warranty of the fee. This point has not been decided by this court, nor, as we recall, in the Supreme Court, though it has been dis-

cussed in the Court of Chancery. *Beach* vs. *Hudson River Land Co.,* 65 N. J. Eq. 426. When that case came to this court, we expressly reserved the point; 68 id., 656. In other jurisdictions the decisions are not in accord. 11 Cyc. 1194, and note 91.

It may be conceded for present purposes, though we express no opinion on the point, that where the property conveyed is a farm or other open tract with an existing road running through it, a warranty without mention of the road is not broken by its existence, on the theory that the road is a physical fact of which the buyer is necessarily apprised. *Whitbeck* vs. *Cook,* 15 Johns. 483; *Hymes* vs. *Estey,* 116 N. Y. 501; *Memmert* vs. *McKeen,* 112 Pa. St. 315; *De Long* vs. *Spring Lake,* 72 N. J. L. 125. The situation is essentially different, however, in a case where (as at present) the land is in a crowded city. The road had never been actually laid, and comprised within its lines most of the property conveyed and had been wholly or partly covered with buildings and wholly devoted to private uses as part of a manufacturing plant, and no notice of its legal status given by conditions on the ground (as we shall see presently) by the language of the title deeds."

One of the cases referred to by the Court in considering this question, is the leading case in New York of *Whitbeck* vs. *Cook,* 15 Johns. 483, 491:

"The principal question relative to the supposed breaches of the covenants, that the defendants were lawful owners of the whole tract, including the road, that they were

seized, etc., and had full power to convey, etc.

"It must strike the mind with surprise, that a person who purchases a farm, through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn round on his grantor, and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say, that such an attempt is unjust and inequitable, and contrary to the usual understanding of both vendors and purchasers. If it could succeed, a floodgate of litigation would be opened, and for many years to come, this kind of action would abound. These are serious considerations, and this Court ought, if it can, consistently with law, to check the attempt in the bud."

And in the leading case of *Patterson* vs. *Arthurs*, 9 Watts (Pa.) 152, it is said:

"Although a public highway no doubt is in many instances an injury instead of a benefit to the holder or owner of the land upon which it is located, and therefore tends to lessen its value in the estimation of the purchaser, yet it is fair to presume that every purchaser, before he closes his contract for his purchase of land, has seen it and made himself acquainted with its locality, and the state and condition of it and consequently if there be a public road or highway in use upon it, he must be taken to have seen it, and to have fixed in his

> own mind the price that he was willing to give for the land with a reference to the road * * * The existence of the highway could not be regarded as an incumbrance that came within the meaning of the parties when they used the term 'incumbrance' in their contract; and hence an action of covenant could not be sustained on account of it as a breach of the covenant against incumbrances."

Surely the doctrine of these cases applies to this case where the contract was not to convey a tract of ground specifically described, but "to convey and deliver to the party of the second part all of its real property, consisting of two parcels of land situated at the intersection of the Long Branch division of the Central Railroad of New Jersey, at Bayway Avenue in the section known as Bayway, Elizabeth, New Jersey."

No good purpose can be served by multiplying the authorities on this point. It is believed that the entire tendency of the decisions in New Jersey so far as this question has been discussed at all, is favorable to this contention.

We are not aware that the question as to the effect of a railroad crossing property, upon covenants of title has been determined by the courts of New Jersey. But in Wisconsin, the Supreme Court, in *Smith* vs. *Highes,* 50 Wis. 627, said:

> "In respect to railways and other highways over these lots, or over any portion of them, it is sufficient to say that if they were used as such when the deed of July, 1872, was executed, the appellant must be presumed to have purchased with full notice of them, and they constitute no breach of the covenants of

> the deed. This would be so if the ways were, in law, easements (*Kutz* vs. *McCune,* 22 Wis. 628); and much more if they were less than easements, or unlawful. But in respect to railways, where the right of eminent domain of the government is exercised in conferring a right of way, they cannot constitute breaches of covenants of title in any case. *Rawle on Cov.* 140; *Frost* vs. *Earnest,* 4 Wheat. (Pa.) 86; *Ellis* vs. *Welch,* 6 Mass. 246. Such acts of sovereignty are not presumed to be in the minds of the parties, or embraced within the purview of the warranty."

And in *Webster* vs. *Kings County Trust Co.,* 80 Hun (N. Y.), 420, it is said:

> "We think that in case of street or elevated railroads in actual operation in front of property, it must be assumed that so far as the consent of the property holder is necessary, it has been given, and that the contract of sale is made subject to the open easement of the railroad, as is the rule in the case of a highway."

There is nothing in any of the decisions cited by counsel for appellant that can be said to question the authority of these cases.

POINT VI.

There were no misrepresentations of any material facts affecting the title.

Defendant's counsel have attempted to show in their brief in various places, more particularly

Point XV on page 82 that some misrepresentation had been made by complainants sufficient to prevent relief. The only testimony tending to support such contention and referred to for that purpose is that of Mr. Klipstein (p. 88):

> "Q. Assuming that there are rights of way across this property, was it adaptable for the purposes which were discussed between you and Mr. Hunter? A. No, I never would have considered the purchase of it assuming the rights of way across it.
>
> Q. Was it adaptable to the purposes which were discussed between you and Hunter without the South Front street exit to the public dock, without the South Front street frontage and exit to public docks?"

The answer to this question is quite long; so far as it answers the particular matter involved in the question it reads as follows:

> "I gave Mr. Hunter to understand in the beginning that it was essential to have water front connection, and he gave me to understand that this frontage on that street was practically as good as, almost as good as direct frontage on the land on the Sound."

And again referring to the same subject, at page 83:

> "Q. What was the conversation between you and Mr. Hunter respecting the frontage on South Front street? A. Mr. Hunter gave me to understand that there was a frontage on

> South Front street which permitted egress to the street and in that way an easy access to the dock facilities on Staten Island Sound; he understood—I made him understand plainly that I wanted facilities on Staten Island Sound."

We submit that none of the so-called representations were sufficiently definite to affect the transaction even if false, but when it is remembered that as shown by Exhibit D-3 the property does front on South Front Street, it is difficult to understand in what the alleged misrepresentation is to be found.

POINT VII.

The certificate holders were not necessary parties to this suit.

The argument of counsel for the appellant under Point XX of their brief is predicated upon an assumption that the trustees and the certificate holders of Midvale Chemical Works were partners and all the authorities cited under this point would have some application if this were the true status of the parties, but as has been heretofore shown, the complainants were trustees of an express trust.

Section 267 of the N. J. Practice Act provides:

> "The executor, administrator or trustee of an express trust (including one with whom a contract is made for the benefit of another), may sue or be sued without joining the persons beneficially interested in the suit."

As early as 1828, a doctrine governing such cases was announced in *Bifield* vs. *Taylor,* 1 Moll., 193, where the Lord Chancellor said:

> "When the title to property is held for other persons in trust, you must generally have the trustee and cestui que trust both before the Court. That is the general rule, but there are many cases where property is legally vested in a person who may be called a trustee, to enable the purposes of the contributors to be executed without multiplying parties, if any matter touching that interest should come into litigation. It is the common case of mercantile joint speculation where all who have an interest agree to vest their rights in a few who have complete powers both at law and in equity and yet are bound to distribute the proceeds amongst others.
>
> In such cases it has never been held that every one should be joined for such a rule would counteract the principle upon which such joint adventures are framed which is to avoid difficulty."

And we are not aware of any decision calling in question this doctrine. It is, of course, a general rule as stated that both trustees and cestui que trust should be joined in cases involving the trust, unless the language creating the trust is such as to render the presence of all parties unnecessary. We have examined with care all of the New Jersey decisions where the subject has been under discussion and we find no case in which this principle has been disputed.

In *Tyson* vs. *Applegate,* 40 N. J. Eq., 305, after quoting the general rule, the Court says:

> "These general rules admit of exceptions arising out of the circumstances of particular cases."

And in *Stevens* vs. *Bosch,* 54 N. J. Eq., 59, the general rule announced was held not to apply to the particular facts. And in the early case of *Sweet* vs. *Parker,* 22 N. J. Eq., 453, the Court said:

> "Many exceptions exist to the general rule that in equity all must be parties who have an interest in the object of the suit. The reason or principle of such exceptions is stated as follows: in Calvert on Parties, Sec. 2, p. 20: 'If they are required to be parties merely as the owners and protectors of a certain interest, then the proceedings may take place with an equal prospect of justice if that interest receives an effective protection from others."

The same principle was also recognized in *Smith* vs. *Gaines,* 39 N. J. Eq., 545. And in *Newark Savings Inst.* vs. *Jones Exrs.,* 35 N. J. Eq., 406.

This point was fully considered by the Vice-Chancellor at an early stage of the litigation on motion to strike out the defendant's answer filed in lieu of plea. His opinion embracing a full discussion of the point with appropriate references to previous decisions in this state, will be found in the record at pp. 160-170.

IN CONCLUSION.

It is perfectly obvious from an examination of this entire record that the refusal of the defendant to perform his contract to purchase the

property in controversy was not the result of any fear upon his part, based upon any reasonable ground, that he would ever be disturbed in the possession of the property on account of any of the alleged defects in the title.

The whole case presents somewhat of an unusual feature. Immediately upon the execution of the contract, the defendant, the purchaser, went into possession of the entire property. It sufficiently appears that it was a going concern; that the complainants not being familiar with the chemical manufacturing business wished to cease its operation; that the defendant who was engaged in that business in a large way wished to increase his facilities and while he claims to have entered into immediate possession because of his friendship for the complainant Hunter, his testimony in that respect is not satisfying. At any rate, he took possession, continued the operation and brought into the plant raw material, as the record shows, of the value of approximately $10,000. Twenty days later, when the time came for closing title, his counsel objected to the title; that the objections were not seriously considered even by him, as indicated by the fact that he was willing to waive objections if $10,000 was deducted from the price. He admits that the title if guaranteed by the Fidelity Trust Company would have been satisfactory to him. Negotiations continued, he remaining in possession and operating the property until July 6th, when the power plant was destroyed or seriously injured by fire. This happened just at the time when the counsel for the complainants had succeeded in removing all objections to the title. Up to that time numerous discussions had been had and the defendant had

expressed a willingness to accept the title if the price were reduced by $25,000. Even after the fire, when the defendant arbitrarily attempted to import into the contract what was not expressed in terms, that is to say, to make time of its essence, he was yet ready to negotiate for the property, intimating that he would pay $100,000 for it instead of $150.000, the agreed price.

We confidently submit therefore, that the defendant was not in good faith attempting to avoid the contract because of a bad title, but was attempting to take advantage of the necessities of the complainants and drive a better bargain, and that in such efforts, he should not be encouraged by the Court but that the decree should in all things be affirmed.

Respectfully submitted.

GRIGGS & HARDING,
Counsel for Complainants-Respondents.

New Jersey Court of Errors and Appeals

LESLIE N. SIMSON and GEORGE W. HUNTER,
Complainants-Respondents,

against

ERNEST C. KLIPSTEIN,
Defendant-Appellant.

Brief for Appellant.

Statement of Facts.

The action is brought by alleged vendors seeking the specific performance by the defendant, vendee, of a contract for the sale of real and personal property (page 1-5).

On March 15, 1915, the complainants associated themselves together as Trustees to form an associaiton to be known as Midvale Chemical Works, with its principal office at Elizabeth, New Jersey (page 6, line 10).

The business was to be any that an individual might carry on, and the Trustees were to conduct the business (page 6, line 20—page 7, line 10). The Articles contained a provision that the Trustees should be deemed the absolute owners of all property of the association (page 7, lines 12-20).

The Trustees might invite others to join them to whom should be issued certificates of interest of two classes, A and B, preferred and common, which were to be issued only for cash or property (pages 7-14). The preferred certificates were to take eight per cent. (8%) cumulative dividends and fifty per cent. (50%) of the

remaining net profits were to be set aside as a sinking fund for their redemption (page 14, lines 25-40).

The certificate holders were to have power to remove Trustees, to amend the Articles, except that they could not so amend so as to affect the preferential rights of Class A certificates, and could not impose personal liability upon the Trustees (page 16, lines 10-35), and the certificate holders could meet for the consideration of any matter of interest to the Association (page 16, line 37, to page 17, line 10).

The certificates were to be transferable and the transfer was not to dissolve the Association (page 17, line 30, to page 18, line 15).

Every written contract relating to the business or estate of the Association was to contain a reference to the Articles (page 18, lines 13-20).

Neither the Trustees nor the certificate holders were to incur any personal liability (page 18, lines 20-40) (page 20, lines 10-25).

No conveyance or assignment was to be necessary to divest the Trustee of his title to the estate (page 19, line 30). The certificate holders were not to have the right to take any action affecting the Association property, until after notice and idemnity to the Trustees (page 21, lines 16-26).

The trust was to terminate at the expiration of 21 years after the death of the survivor of the Trustees who were parties to the instrument (page 22, lines 1-10).

The Articles are signed by Simson and Hunter as "Trustees of Midvale Chemical Works" (page 22, line 25).

Other parties did join the enterprise to whom certificates were issued (page 134, lines 10-30), and the business of chemical manufacturing was carried on in the name of Midvale Chemical Works until May 29, 1917 (page 1, line 35).

On May 29, 1917, the instrument Exhibit "B" attached to the bill of complaint was signed in duplicate and delivered (pages 23-26) (page 2, line 10, and page 28, line 20) and defendant gave to Midvale Chemical Works a check for Five hundred dollars ($500) (Exhibit D. 20, page 293).

On May 31st pending the investigation of title and without waiving right to perfect title (page 153, line 31) the defendant took possession of the works and continued their operation. At that time, it was a going concern with outstanding contracts for materials and finished product, a labor force employed, and the possession was taken because Mr. Hunter, one of the complainants, wanted to get out of the chemical business which he did not understand and did not want to carry on another day (pages 92, 93, 103 and 107).

It is alleged that shortly after May 29th, both the complainants and the defendant submitted to the Fidelity Trust Company the question of the title, its marketability and its encumbrances, if any, thereon (page 51), but the Court below refused to receive evidence of this submission (page 133, lines 10-20) upon the ground that there was no evidence before the Court from which it could find that the parties had agreed to be bound by the determination of the Fidelity Trust Company (page 154, lines 5-15).

On or about June 4, 1917, the Fidelity Trust Company reported adversely to the title (Exhibit D. 2, pages 196-204) and a copy of their re-

port was furnished to counsel for both parties (page 138, lines 20-30). On June 12th notice was given by the defendant to the complainants of the defects found by the Fidelity Trust Company in the title (page 322, and page 132, line 28). On June 22nd, the objections were put in writing in a letter to defendant from his counsel (Exhibit D. 21, page 293) which was turned over to the complainant Hunter and his counsel, who read the same (page 111, lines 1-15). On June 25th, the objections were again stated in writing by a letter from defendant's counsel to complainants' counsel, and the statement was made therein that the defendant must be free to pass upon the entire matter at the time of the closing of the title, and would not waive defects piece meal (Exhibit D. 29, pages 315-317). On July 3rd, the parties met and went over all the questions again (page 144, lines 1-5) and the title was then rejected upon all the grounds stated in the report of the Fidelity Trust Co. and in the letter from Seymour to Wright under date of June 25th (page 148, line 20; page 122, line 26).

The objections to the title are stated in Exhibits D. 2, D. 21 and D. 29 (pages 196, 293 and 315).

The complainants sought to cure two of the objections—the first, by holding a meeting of the certificate holders at which it was said approval of the contract was given by vote (page 142); and the second, by suggesting that the defendant buy adjoining property (page 108, lines 30-40) by giving a mortgage as security against those rights (page 143, lines 1-20) by procuring releases from adjoining owners (page 128, lines 10-30) and by the deposit of Twenty thousand dollars ($20,000) with

the Fidelity Trust Company as a guaranty (page 149, line 30, to page 150, line 10).

Immediately upon rejecting the title, the defendant offered to surrender possession of the property and complainants promised to send a man to take charge, but failed to do so (page 95, line 30), (page 96, line 20), (page 105, line 20), (page 107, lines 1-30), (page 133, line 25), (page 134, line 1), (page 144, line 25), (Exhibit D. 30, page 317), (Exhibits D. 35, D. 36, D. 37 and D. 38, pages 323 to 327).

The encumbrances are the streets mentioned in complainants' petition and amended petition to the Board of Public Works of Elizabeth (Exhibit D. 3, pages 205-211), and in the Ordinance of the Board (Exhibit D. 42, pages 332-336); also Clifton street and un-named street (Exhibit D. 4); also the reservation of the right of way contained in Exhibit D. 23 (page 303, line 30); also Amboy avenue, a public highway accepted by ordinance (Exhibit D. 10, page 239), introduced in evidence (page 75, line 38); also the conveyance by Bonnett to the Central Railroad of New Jersey (Exhibit D. 11, page 240), introduced in evidence (page 77, line 31); also the encumbrances specified in Exhibit D. 12 (page 246, lines 14-20), and the poles and wires on Amboy avenue (page 70, lines 8-15) and (Exhibit D. 7).

Amboy avenue is included in the 14-22/100 acres of the land to be conveyed (page 270, lines 28-30).

Brighton street, as laid out on the Bayway Map, includes nearly the whole of the frontage of the property on South Front street.

(See map attached to Exhibit D. 3).

Brighton street, as laid out on the Bayway Map, was not closed by the ordinance, Exhibit D. 42 (See page 334, lines 13-19) and could not be closed (page 108, lines 1-10 and 30-35).

The outlet to South Front street was important (page 90, lines 1-20) to give ready access to the public dock on the Sound, nearly opposite this frontage at the foot of Clifton street (page 71, lines 15-30), (page 83, lines 10-20), (page 88, lines 30-40), (page 89, lines 20-25), (page 107, lines 30-36).

The property was bounded on the southerly side by lands of the Telephone Company, next to which was the B. & N. Y. R. R., and on the westerly side by the Central Railroad of New Jersey (See map attached to Exhibit D. 3), Exhibit D. 16, page 269, lines 20-35.

The tracks of the Central Railroad of New Jersey are at grade (page 73, lines 1-20). The tracks of the B. & N. Y. R. R. are raised on a trestle (pages 74 and 75) as shown on Exhibits D. 6, D. 6½ and D. 7.

Dedication of the streets crossing the property is shown by the

Petition, Exhibit D. 3,

Commisioners' Map, Exhibit D. 4,

Bayway Map, Exhibit D. 5,

Map attached to Exhibit D. 11,

Exhibit C. 1, page 192, lines 37-40,

Exhibit D. 9, page 233, lines 26, to page 235, lines 20,

Exhibit D. 10, page 239, lines 13-18,

Exhibit D. 12, page 246, lines 14-20,

Exhibit D. 15, page 266, lines 35-40,

Exhibit D. 19, page 289, lines 18-32,

Exhibit D. 22, page 295, lines 35-40; page 296, lines 9-12, lines 19-25, lines 30-40; page 297,

lines 8-12, lines 20-40; page 298, lines 8-18, lines 28-32; page 299, lines 1-15, lines 22-28; page 300, lines 1-20, lines 30-40,

Exhibit D. 23, page 302, lines 15-20; page 303, lines 28-32.

On July 6th, premises were partially destroyed by fire (page 4, lines 1-10), (page 30, lines 17-23).

The contract was made with reference to the immediate conditions arising out of the European war (page 96 to 98).

Other references will be made in the argument.

Point I.

Introductory.

Midvale Chemical Works—its General Characteristics as Disclosed by its Articles of Association.

These Articles of Association are attached to the bill of complaint and disclose that Midvale Chemical Works is a business association, not a social or charitable organization. The business is any that an individual could conduct (p. 6, line 26). It contemplated the employment of capital (p. 7, line 26), for profit (p. 8, line 10).

Simson and Hunter, the complainants, as Trustees initiated this association. They say "we * * * associate ourselves together as Trustees and hereby form an association," etc. p. 6, line 15). These words are a bit ambiguous, and if they stood alone we might wonder whether they intended to do two things, (1) to associate themselves as Trustees, and (2) to

form an association, or whether they intended to associate themselves as Trustees and as Trustees to form an association.

From other parts of the instrument it appears that the latter was their purpose, and that they intended to keep quite clear of any entanglements such as would follow if, as individuals, they should form such a business concern, under a trade name, and incur liabilities for the effort is thrice made (whatever its legal effect) in Article X, XIV and XVI, to avoid personal liability, both for the contracts and torts of the association. Moreover, Simson and Hunter, as individuals, after associating themselves as trustees are not again referred to in the instrument. The Articles are signed by Simson and Hunter as Trustees and not as individuals (p. 22, line 27). Both from what is contained in and from what is omitted from the Articles, there flows the necessary inference that Simson and Hunter as individuals intended not to be parties to the Articles of association, but did intend in their representative capacity as trustees to form the association.

The Trustees, however, reserved the right to invite others to join them in this business enterprise, to contribute the capital, to share in the profits, to bear the losses, and to exercise functions of ultimate control. (Articles V and VI, pp. 7 to 13.) (Articles X and XI, page 16.) To these other parties were issued certificates of two kinds, Class A and Class B. These certificates are entitled, "Certificate of Interest in Midvale Chemical Works." The A certificates certify that the holder is the owner of the specified number of shares "of Class A interest in the Midvale Chemical Works." The B certificates insert the word 'beneficial" before the

word "interest" (p. 8, line 20; p. 12, line 23). The Class A certificates are preferred for a dividend of eight per cent (8%), for a sinking fund of fifty per cent (50%) of the remaining net profits and for the par value of the certificates on liquidation.

The Class B certificate holders take all the remaining profits and on liquidation all the remaining assets of the association. This is not expressly stated, but is to be inferred from the preference given to the Class A certificates "over any distribution or dividend on Class B certificates of interest," and from the negative form of expression in the body of the Articles (p. 11) and in the form of Class B certificates (p. 13) and from the absence of any other provision, either in the Articles or the certificate governing the distribution of either profits or assets.

These certificates were issued only for contributions of capital, either cash or property (p. 14, lines 15-25), and the capital so contributed was at the hazard of the business.

The certificate holders owned the entire beneficial interest in the association, and neither the Trustees nor the organizers of the association have any beneficial interest, although there is no express provision to this effect; but the conclusion seems to be forced from the general character of the organization, from the negative provisions governing the relative rights of the Class A and Class B certificate holders and from the absence of any provision permitting any other distribution or beneficial interest.

Such certificates were in fact issued, and were outstanding at the time Exhibit "B.", attached to the Complaint, was executed, at the time the suit was commenced, and at the time

of trial (p. 134, lines 20-30). These certificate holders were named in the Answer (p. 43, lines 20-30).

These certificate holders had ultimate control over the policies of the Association and the conduct of its business, for they had the power at a meeting to amend the Articles of Association, and to remove a Trustee or Trustees, except that they could not affect the preference rights of the Class A certificates, and they could not impose personal liabilities upon the Trustees (p. 16, lines 10-30).

A majority could call a meeting of the certificate holders at any time to consider any matter of interest in or to the association (pp. 16 and 17).

The association was actually engaged in manufacturing chemicals, at its plant at Elizabeth, New Jersey (p. 2, line 3), and one of the certificate holders, Stephen S. Krayer, had the active management of the works (p. 135).

In a word it is an association, organized for business and commercial purposes for profit, the whole beneficial interest of which was owned by sundry certificate holders who contributed the entire capital, and were entitled to all the profits. The capital was at the risk of the business. The powers of the association in the ordinary course of the business are to be exercised by the Trustees, who, as such had no beneficial interest, but over whom the certificate holders had powers of supervision, control and removal. The organization was not created under any statutory provision.

No attempt has been made to meet anyone of the several requirements of the act authorizing the formation of Partnership Associations (3 Comp. Stat. 3921-3926) and therefore no con-

sideration of that Act is required. The same may be said of the act to authorize limited partnership (3 Comp. Stat. 3917-3920), and of the Act Concerning Corporations.

The law governing such associations needs no extended consideration.

"Rights & Liabilities—Capacity to Hold Property.

> Except religious and charitable societies, an unincorporated association has no legal existence independently of the members who compose it, is incapable as an organization of the ownership of either real or personal property and the title legal and equitable to any property acquired for the use of such association rests not in the association as such but in the members thereof, in their joint associated capacity."
>
> *(25 Am. & Eng. Enc. 1132.)*

"Legal Status—Commercial Associations.

> If the association is organized for commercial purposes and operated for pecuniary profit, it is no more than a mere partnership, and the rights and liabilities incident to that relation attach to its members."
>
> *(25 Am. & Eng. Enc. 1130.)*

"Liability of Members—To Third Persons.

> An unincorporated association organized for business or profit is a mere partnership and its operations are attended with all the incidents of that relation. Each member is individually liable for all the debts of the association to third persons, although he did not agree to become, and did not hold himself out as, a partner, and although the debt was in fact contracted on the credit of the association."
>
> *(25 Am. & Eng. Enc. 1136.)*

"Officers' Power to Bind.

> An association engaged in commercial enterprises has all the incidents of a partnership and the transactions of its officers are

governed by the law relating to such adventures. Hence as a general rule any contract made by the officers of an association is binding upon it if it is within the scope of the business for the prosecution of which the association was formed."

(25 Am. & Eng. Enc. 1139.)

"Liability of Members.

Each member of an association is liable for the debts thereof incurred during his period of membership, and which have been necessarily contracted for the purpose of carrying out the objects for which the association was formed."

(4 Cyc. 310.)

"Actions by and Against an Association, Being Only a Collection of Individuals.

It could not at common law sue by its own name and an action brought by such an association was necessarily brought in the name of all the individual members."

(4 Cyc. 312.)

"As to the Public.

The stockholders of a joint stock company are personally liable except insofar as such liability may be limited by statute or special agreement for the debts of the company, precisely as general partners are liable for the debts of the firm. The association and all its members are responsible for the acts of its officers within the scope of their authority." * * *

"To entitle members of a limited partnership to protection as such, the statute under which the association is organized and managed must be strictly complied with, otherwise the members are liable as general partners as to the public, although they may be special partners as among themselves."

(23 Cyc. 474.)

"Actions by and Against.

Statutes providing that actions shall be prosecuted in the first instance against an officer of the association are local in their application as they affect the remedy only and in another jurisdiction where no such legislation exists, the individual liability of members may be enforced by an action against them as partners in the first instance."

(23 Cyc. 479.)

It was this association which became the party of the first part and vendor in Exhibit B attached to the bill of complaint.

Point II.

The Contract Exhibit "B," Attached to the Bill of Complaint, Does Not Support the Decree.

There lies at the foundation of this case the question whether complainants Simson and Hunter are the parties to the contract or whether Midvale Chemical Works is the party; and the complainants' position rests upon the allegation that "the complainants as such Trustees and in the name of Midvale Chemical Works entered into a written agreement," etc. (page 2, line 10). This allegation is denied (page 28, line 15). The record is void of any evidence tending to interpret or change the plain meaning of the words employed in the contract. It is nevertheless recited in the final decree and the facts recited are necessary to support the decree:

"That by virtue of a certain agreement in writing, duly made and executed by *and between Leslie N. Simson and George W. Hunter, the complainants, as such Trustees*

> *of said Midvale Chemical Works, and Ernest C. Klipstein,* the defendant, on the 29th day of May, 1917, the defendant, Ernest C. Klipstein, agreed to purchase *of the said complainants* and the said *complainants agreed* to sell to the said defendant all of the real property of said Midvale Chemical Works."
>
> (Page 171, lines 18-25.)

Of this the defendant complains as error (Petition of Appeal, page 180, lines 20-30).

It will be noted that the recital in the decree differs from the allegation of the bill, in that the former, but not the latter, states that the contract was made "in the name of Midvale Chemical Works."

Neither the form nor the substance of the instrument, Exhibit "B.", attached to the Bill, is in controversy. It is made part of the bill and in the form alleged is admitted by the answer to have been signed and delivered (p. 28, lines 15-25). In the instrument Midvale Chemical Works is named as "party of the first part." It is signed "Midvale Chemical Works, by George W. Hunter and Leslie N. Simson, Trustees." Neither of them is named or referred to in the instrument except by this form of signature. Throughout the instrument the vendor is many times designated as "party of the first part," and is so designated whenever any obligation, right or property of the vendor is referred to.

In part performance of the terms of the instrument and simultaneously with its execution the five hunderd dollar (500) check, Exhibit 20 (p. 293), being the first payment on account of the purchase price, was made payable to Midvale Chemical Works. This check is endorsed by "Midvale Chemical Works" and by no one

else except the banks in due course. It is Midvale Chemical Works who agrees to convey the property described in the instrument (p. 23, line 32), to whom $50,000 is to be paid on delivery of the deed (page 24, line 16), and to whom the bond and mortgage securing deferred payments, was to be delivered (page 24, line 20). It was the contracts of Midvale Chemical Works for the purchase and sale of raw materials and manufactured products that were to be assigned to and assumed by defendant (page 25, line 5), and it was the contract between Midvale Chemical Works and A. Klipstein & Company that was to be released (page 25, line 15). It is as attorney for Midvale Chemical Works that Harry Wright signs the stipulation adjourning the closing of the title at the foot of the contract (page 26, line 39).

Inasmuch as the instrument as a whole is made part of the Bill of Complaint and is admitted in the answer and is not ambiguous, its construction is not controlled by the allegations of the Bill, but is a pure question of law to be determined by the Court on inspection of the instrument.

Schuler v. *Southern Iron & S. Co.*, 77 N. J. Eq. 60.

There are no extraneous circumstances alleged or proven tending to modify its plain meaning and at this point there is therefore presented no occasion for any discussion of the distinctions between sealed instruments and those not sealed.

There is no claim that complainants have succeeded by assignment or otherwise to the rights of Midvale Chemical Works under the instrument sued upon or that by operation of

law those rights have devolved upon the complainants.

It cannot be claimed that Simson and Hunter are Midvale Chemical Works, for such a claim is disproved by the admitted facts (page 134, lines 10-30), and by the recital of the decree itself, that Simson and Hunter are duly associated together "as Trustees of Midvale Chemical Works." (Page 171, lines 15-18.)

To sustain the position that Simson and Hunter were the contracting parties, the learned Vice-Chancellor refers to *Babcock* v. *Stobbe,* unreported, and annexes a portion of the opinion of Vice-Chancellor Stevenson to his own opinion on the motion to strike out. From the statement of fact (page 167, lines 10-25), it appeared that Moore, under a power of attorney prepared by the complainants' counsel and executed by the defendant, the contents of which were known to all parties, contracted in his own name, but really on behalf of the defendant, to sell the defendant's land, and it was held that the defendant, Stobbe, under the circumstances disclosed, was bound to convey pursuant to that contract of his attorney. The question at bar is quite different and may be stated as follows: Can the agent in his own right recover upon a contract made by the agent in the name of the principal for the sale and conveyance of the principal's land, to which the agent signs the principal's name and obtain a decree that the agent shall convey the land by warranty deed (page 173, line 3), and that the vendee shall pay to the agent sums which he agreed to pay the principal aggregating more than Two Hundred Thousand Dollars ($200,000), (pages 174 and 175). Such a doctrine would seem to be dangerous, and such a judgment would seem not

to be a bar to a second action by the principal upon the same contract.

The opinion in *Babcock* v. *Stobbe* quotes from the opinion of

Vice-Chancellor Van Fleet, 47 N. J. Eq. 48, as follows:

> "That a written contract, whether within the statute of frauds or not, and whether under seal or not, which is free from ambiguity and perfect in itself, and not the product of fraud, or the result of mistake, and which has not been changed by a subsequent contract, cannot be changed, varied, or contradicted by oral evidence, but must be accepted as the only evidence by which the rights and liabilities of the contracting parties shall be measured and determined. This may be accepted as an accurate statement of the law where the contract in question is perfect in itself and where the effort is made by parol evidence to have it 'changed, varied or contradicted.' The vast majority of contracts are not 'perfect in themselves' but relate to things which have to be described and defined—things which the contracting parties knew and had before their eyes, but which the court cannot know unless parol testimony in regard to them is admitted. A contract is not 'changed, varied or contradicted by oral evidence' when it is interpreted by the court after the court has been placed in the position in which the contracting parties stood when they expressed themselves in the language of the contract."

It has not been claimed that there is any ambiguity in this contract upon this point or that it is the product of fraud or the result of a mistake, or that it has been changed by any subsequent contract, or that there is any difficulty in applying the contract to its subject matter. It is perhaps too much to claim that

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the contract is "perfect in itself." It is, however true that it was prepared by the attorney for complainant (page 138, lines 12-15), and in the absence of the elements above noted may be assumed as an expression of their intent. The attorney who drew the contract for complainants was called as a witness in their behalf, but makes no mention of any ambiguity or mistake.

Reference is then made by the learned Vice-Chancellor to 17 Cyc. 675, and others as containing a correct statement of the rule as to when parol evidence may be permissible in the interpretation of a contract, and it is there stated:

> "Such evidence is received, *not* for the purpose of importing into the writing an intention not expressed therein, but simply with the view of elucidating the meaning of the words employed; and in its admission the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument and not of what was intended to be written."

The defendant accepts these quotations as defining the limits of the rule for the interpretation of written instruments.

It is unimportant to determine at this point whether the defendant, when he signed Exhibit "B." attached to the Bill of Complaint, had notice of the relations between the complainants and Midvale Chemical Works, for whether the defendant had such notice or not, it is evident upon the face of the instrument that Simson and Hunter intended to deliver the contract of Midvale Chemical Works; that Midvale Chemical Works had the same intent if Simson and Hun-

ter had power to bind it, and that the defendant intended to take Midvale Chemical Works contract and not the contract of the complainants.

Support of the judgment is further sought upon the theory that the Trustees may maintain the action (page 154, lines 15-25, and page 164, lines 25-40), and in support of this theory are cited:

Smith v. *Gaines,* 39 N. J. Eq. 549.
Stevens v. *Bosch,* 54 N. J. Eq. 63.

It is respectfully submitted that neither of these cases are applicable.

In *Smith* v. *Gaines,* it was held that the Trustees could not maintain the action and this language was used:

> "The general rule as to parties in cases of trust is that, in suits respecting the trust property, brought either by or against the trustees, the *cestui que trust* are necessary parties. Story's Eq. Pl. Sec. 207. Many exceptions have been made to this rule, some for convenience, some for the reason that, by the terms of the trust, or from the nature of the suit, the trustees themselves represented the *cestui que trust.* On this latter ground, it has been laid down that where the only object of the suit is to transfer the trust property into the hands of the trustees, the *cestui que trust* need not be parties; *but if the existence or enjoyment of it is affected by the prayer of the suit, then they should be.* Calvert on Parties 212. Even to the rule in this restricted form, there are numerous exceptions to be found in decided cases, nor does the subject seem capable of exact definition. Courts of Equity exercise a large discretion in the matter, guided sometimes by slight circumstances, and taking care, on the one hand, that justice shall not be defeated through the impracticability of bringing in all persons interested in the issue, and, on the

> other hand, that the righs of individuals shall not be determined when they are neither heard nor represented.''

In *Stevens* v. *Bosch,* the action was by a Trustee appointed by the Orphans' Court simply to recover from the representatives of his deceased predecessor the amount of the trust estate.

It is submitted that the case at bar, based upon a contract which purports to dispose of all the real and personal property of the beneficiary by a lump sale, necessarily terminating a going business, marking the termination of the purpose for which the association was formed involves the existence and enjoyment of the property by the beneficiaries under the trust within the rule above quoted.

For the same reason, the second case is inapplicable.

These cases are far from holding that where the *cestui pue trustent* make the contract in their own name, for the sale of their own property and for payment to themselves, a judgment may be recovered upon that contract for its specific performance by the Trustees.

It is fairly inferable from the fact that the contract was made in the name of Midvale Chemical Works, that all parties intended to put out of the transaction every question as to the powers of the trustees, their right to convey, their right to receive the money and their right to maintain an action upon the contract.

On July 3rd, and ever since, complainants have insisted that their deed conveyed a good title, *first,* because as Trustees they were the absolute owners of both the legal and the equitable title, and by virtue of such absolute ownership could convey a good and marketable title;

second, that if they owned only the legal title they still had the power under the Articles of Association to convey the equitable title. It, therefore, becomes necessary to consider both the title and the power.

Point III.

The Equitable Title to the Lands in Suit Is in the Certificate Holders or Individuals Composing the Association, Midvale Chemical Works.

It will be assumed that the title to the lands described in Exhibit D. 16 is typical.

The evidential documents upon this point with their dates which are of importance are:

March 15th, 1915: Exhibit "A." attached to the Bill, Articles of Association of Midvale Chemical Works.

July 1st, 1915: Exhibit D. 16, Deed Rankin and associate to Simson and Hunter, Trustees of Midvale Chemical Works.

May 29th, 1917: Exhibit "B." attached to the Bill of Complaint. Instrument sued upon.

June 12th, 1917: Exhibit D. 12, Deed offered by complainants to defendant to consumate the transaction.

Discussion will now be limited to the *title* of complainants. Their *powers* will be the subject of the next point.

Complainants assert that at some time both the legal and equitable title to the lands in suit was vested in them. Defendants assert that the equitable title never vested in them.

For immediate purposes it is sufficient to note that on March 15th, 1915, the date of the

Articles of Association and for two and one-half months thereafter, complainants had no title to the lands in suit either as individuals or Trustees and that until July 1st, 1915, Rankin and associates held the fee of said lands. During the interval between these two dates the Articles of Association were utterly inoperative upon the title to these lands. Whatever the legal effect of the Articles may be, it is certain that at the time they were signed by "Leslie N. Simson and George W. Hunter as Trustees of Midvale Chemical Works" (page 22), they did not become a present declaration of trust affecting the title to these lands.

July 1st, 1915, is the date of importance. On that day Exhibit D. 16 was delivered. The parties to that instrument were Rankin and associates, parties of the first part, and Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works, parties of the second part (page 268, line 20). The grant was thereby made to "the said parties of the second part and to their *successors,* heirs and assigns." The Articles of Association are not referred to in the deed.

The title which Simson and Hunter now have of these lands was acquired by the delivery of this deed Exhibit D. 16. If they were in fact acting as Trustees, then the legal title of these lands was conveyed to them, and the equitable title was conveyed to the beneficiaries of the trust, and this would be true whether or not they were designated as Trustees in the deed, and a party dealing with the Trustees who had notice of the trust would be put upon inquiry.

Objection will be made that the words "Trustees of Midvale Chemical Works" are *descripto personae* and import no grant, although the

grant is to the parties of the second part and their *successors,* heirs and assigns (page 269, line 10).

The same objection was presented in *Brown* v. *Combs,* 29 N. J. L. 36.

There the deed ran to "John G. Brown, Trustee of the Lexington & Danville Railroad Company" without the word "successors" and it was held that standing alone these words expressed no grant to the Railroad Company; but it was also held that this deed should be construed with subsequent events and the written instruments evidencing them, which were, a mortgage by the Railroad to complainants together with Brown to indemnify them against loss for endorsements for the benefit of the company and a lease for the culture of a part of the property to Brown signed by him, and upon these facts it was held that the deed to Brown, trustee, etc., was meant to convey the lands to him in trust for the company, and the opinion upon this point is found on page 39 and is as follows:

> "As evidence of a trust, the plaintiffs had the deeds of Stoddart to Brown, trustee, the mortgage executed by the company to the plaintiffs, together with Brown as a mortgagee, and the agreement made by Brown subsequently to the execution of the mortgage, for the culture of parts of the lands, in which he styles himself and signs himself agent; and this I deem sufficient evidence that the deeds of Stoddart to Brown were meant to convey the lands to him in trust for the company, and that it was a mere naked trust."

In the case at bar, there is conclusive evidence independent of the Articles of Association, that the words "Trustees of Midvale Chemical

Works'' used in the Deed Exhibit D. 16 were intended to import a grant in trust.

(a) Midvale Chemical Works was the occupant of the land and personal property thereon on May 29th, 1917.

(b) Exhibit ''B'' attached to the Bill of Complaint the basis of this suit, by its whole tenor and effect assumes the title to be in Midvale Chemical Works. Midvale Chemcial Works is to convey ''its'' property and is to receive the consideration, and Simson and Hunter as Trustees signed the name of Midvale Chemical Works and their own names to this instrument, and it thereupon became an independent declaration of trust within the rule stated in *Brown* v. *Combs, supra,* and interpreted the meaning of the words ''Trustees of Midvale Chemical Works'' employed in the deed Exhibit D. 16.

If the words ''Trustees of Midvale Chemical Works'' had been omitted from Exhibit D. 16, the effect of Exhibit ''B'' attached to the Bill, as a declaration of trust would have been the same.

Aller v. *Crouter,* 64 N. J. Eq. 381.

In that case, land was conveyed by warranty deed, absolute in form; but it was held that a subsequent lease of the same land signed by the grantee as ''Trustee of Mary E. Pake'' was a sufficient declaration of an express trust, and on these facts Chancellor Magie tersely describes the nature of the trust, the title and power of the *cestui que trust* and the power of the Trustee as follows:

> ''Nor can I yield to the defendant's contention that this instrument fails to disclose the terms of the trust. It affords as complete a description of the terms as would

> be afforded by a conveyance of lands to A in trust for B. There could be no doubt that such a conveyance would vest the legal title in A, and B would acquire thereby the complete beneficial interest, which he could convey or devise, and which would descend to his heirs-at-law. Precisely such a trust is acknowledged and proved by this instrument."
>
> (Page 392.)

In speaking of a trust of that character, the learned Chancellor, on page 387, says:

> "Any intending purchaser would have declined to take title to any part of the land from Ackerman (the Trustee) under a deed so framed without a conveyance from the *cestui que trust* (Mrs. Aller) which would have required the concurrence of her husband."

(c) The deed Exhibit D. 12, to which Simson and Hunter as Trustees of Midvale Chemical Works were parties of the first part, signed and acknowledged by them in the same capacity which recited that the lands therein described are the same as those conveyed by Rankin and associates, is another independent declaration of the trust, within the rule stated in *Brown* v. *Combs, supra,* and is notice to the defendant that Midvale Chemical Works is the owner of the equitable title.

Notwithstanding these three positive declarations of trust showing the equitable title to be in Midvale Chemical Works, it is nevertheless contended by complainants that they, themselves, by virtue of the Articles of Association signed only by themselves months before they had any title and unrecorded to the present day, are the absolute owners of both the legal and equitable title to the lands and as such may convey the same.

In Article IV is found this provision:

ARTICLE IV.

"The Trustees shall be deemed the absolute owners of all *property of the Association,* and both the legal and equitable title to all such property shall be vested absolutely in them, their successors and the survivor or the survivors of them, or to their successors, subject only to all applicable terms and conditions of this instrument."

In the certificates of interest, the forms of which are prescribed by the Articles of Association, there appears in each class the following clause:

"The interest represented by this certificate is personal property irrespective of the nature of the estate of the Trustees."

"No certificate holder, or his assigns, heirs or legal representatives, shall at any time have or claim any legal or equitable interest in the property, whether real, personal or mixed, of the Association, and nothing contained herein shall be considered as creating or giving to any certificate holder any interest in or to said property, but such certificate holder shall have an interest only in the net proceeds or profits which may be derived from the said property, or in the proceeds of the said property on liquidation or distribution and only when and as such proceeds may become distributable under the terms of the aforesaid Articles of Association."

"Trustees" are never "absolute owners." "Trustees" cannot have both the legal and the equitable title. Moreover by the very words of this Article it is "all property of the association" that the Trustees thus hold, and again it is "the property whether real, personal or mixed of the association." It is not readily apparent how it could be the "property of the

association'' and yet the entire equitable as well as legal title be in some one else.

If the legal and equitable titles were vested in the same persons, the legal is merged in the equitable and it is idle to call the holder of such a title a trustee, and it is equally idle to call such property the ''property of the association.''

The idea that the ''Trustees'' are vested with both the legal and equitable title is further repugnant, not only to the whole tenor and effect of the Articles of Association, but to sundry specific provisions therein contained.

It will be noted at the outset that this provision for absolute ownership by the express terms of the ast line of Article IV is made subject to ''all applicable terms and conditions of this instrument.''

Therefore, the following provisions of the Articles dominate the construction which is to be placed upon Article IV: above quoted.

Article VII indicates that the entire capital of Midvale Chemical Works is contributed by the certificate holders. While this Article is not so clear as would be desirable upon the fact of there being no other contributions, yet as there is no provision for any other capital or for dividends or distribution of earnings or assets to other capital and as a voluntary contribution by others with no provision for its return cannot be presumed, it is necessary to presume that the certificate holders contributed all the capital and consequently that after the articles were signed and before the conveyance they furnished the entire purchase money for the lands conveyed to Simson and Hunter, as trustees of Mid-

vale Chemical Works, so that if it were not expressed a resulting trust would arise.

Cutler v. *Tuttle,* 4 C. E. Green 549.
Schraupt v. *Wolters,* 63 N. J. Eq. 794.
Ostheimer v. *Single,* 73 N. J. Eq. 542.

Article VIII restrains the Trustees from creating any voluntary lien on the "Association property" which shall be prior to "the interest hereby granted to Class A certificates of interest."

The words "hereby granted" are inartificial for at that time there was no Class A certificate holder, and therefore no grantee; there was no association property and therefore no subject matter of the grant, and there is nothing in the instrument which could be construed as a present grant, express or implied, but the words were no doubt intended to induce the belief on the part of Class A certificate holders, if any such should come in, that if any Association property should be acquired their interest in that very property should be such as might be conveyed to them by grant.

By the same Article 50% of the "net income of the association" for each year is to be set aside for the redemption of Class A certificates, and then becomes a separate special trust, or sinking fund in which the Trustees have no equitable interest.

The words "the interest hereby granted to Class A certificates of interest" are not unlike those used in *Jones* v. *Davis,* 48 N. J. Eq. 493.

In that case lands were bought by Davis and he gave Jones, who had negotiated the sale, and who was to handle the property as agent for Davis, a memorandum in which he stated "that he holds the same subject to the following in-

terest of Jones therein." There was no use of the word "trust" or "trustee." This was held to be a sufficient declaration of an express trust.

The Court said:

> "Here is a distinct recognition of Jones's interest in the property and that Davis holds the title subject to such interest."

And as to profits, the Court further said:

> "As to the amount of Jones's interest, it provides that Davis is to divide equally with him the net profits of the operation * * * Profits do not necessarily imply money to be divided. They may be represented by the unsold portion of the property, which was the subject of this speculation."

So in Article VIII, there is a like express admission of the interest of the beneficiaries in the property itself. As in that case, so in this, the profits are not necessarily represented by money and may be represented by land, equipment, materials or bills receivable, and are made the subject of a special trust in favor of the Class A certificate holders, for the payment of their dividends and the redemption of their shares.

These profits are more frequenty included in what is termed "Book Assets," and they form a part of the subject matter covered by Exhibit B. attached to the bill.

By Article X the certificate holders may remove the Trustees and amend the Articles without limit except that the amount of Class A certificates shall not be increased or their preferential rights affected nor shall the exemption of the Trustees from personal liability be amended. The Trustees may not amend the Articles.

As to removal under this clause, see *March* v. *Romare,* 116 Fed. Rep. 355.

Here the Trustee for bondholders was removed under a like clause. The Circuit Court of Appeals said:

> "We take the law to be that, as the unrestricted power to remove the Trustees and appoint other Trustees was vested in the majority of the bondholders, the power to determine whether there was good and sufficient cause for such removal, was necessarily in them, also, *subject only to the restraining power of a court of equity against the abuse of it.*"
>
> Citing *May* v. *May,* 167 U. S. 310.

By Article XI the certificate holders may hold a meeting at any time to consider any matter of interest to the association.

By Article XV no conveyance shall be required to divest any removed trustee of his title, or to vest the same in his successor.

By Article XIX a certificate holder shall not have the right to take any action affecting the "Association property," or to protect "his interest as a certificate holder therein" until notice and indemnity shall have been given to the Trustees, by clear implication giving to the certificate holder such an interest in "Association property" as would furnish the basis for an action by him after notice and indemnity to the Trustees.

By the terms of the certificates Class A takes 8% dividends and par on redemption or liquidation, and Class B take the balance of earnings and the balance of assets on liquidation.

To summarize—The certificate holders contribute all the capital including the purchase money of the lands in suit. The interest of Class A certificate holders "hereby granted" are superior to any lien which the Trustees can create on the association property and they

take 8% annual dividends and 50% of the remaining profits as a redemption fund and Class B takes the remaining profits and assets—no one else has a share in the earnings or assets. The certificate holders may remove the Trustees, amend the Articles of Association and may meet to consider any matter of interest to the association, and after notice and indemnity may bring action to protect their interest in the association property—in fact they have the whole beneficial interest and the "absolute" title of the Trustees by express limitation is made subject to the foregoing "applicable terms."

On the other hand, Simson and Hunter and the Trustees contribute nothing—have no share in the earnings or in the assets on liquidation, and have no beneficial interest of any kind; are subject to an unlimited power of removal, their title and powers are subject to amendment by the beneficial owners and any title in them will pass on removal to their successors without conveyance.

Under these conditions, it cannot be said that the Trustees are the absolute owners, vested with both the legal and equitable title, or that those who have the whole beneficial interest have no equitable title. It seems absurd to claim that the Trustees have the equitable as well as the legal title when by the act of the certificate holders the Trustees may be removed in *invitum* and their title to the land vested in their successors without a conveyance.

If other indications of an interest in the property are sought it will be found that the makers of the Articles refer to themselves and their successors as "Trustees" and "Trustee"

ninety-three times and that they refer twenty-eight times to the

"Assets of the Association."
"Business of the Association."
"Property of the Association."
"Profits of the Association."
"Income of the Association."

Having thus emphasized their own trusteeship and the title of the association to the assets, business, property, profits and income there follows the solemn declaration of the last Article as follows:

ARTICLE XXII.

"By subscribing our signatures hereto, we, the undersigned, acknowledge that we *hold all property* which has been or shall be received by us under the title *'Midvale Chemical Works,'* and will administer the same subject to and in accordance with every term and condition of the foregoing Articles of Association, and we declare that all right, title and interest of certificate holders in the Association is defined and governed by these Articles."

Following this declaration are the signatures of Simson and Hunter "as Trustees of Midvale Chemical Works."

It is not easy to reconcile every word of these Articles with every other word, but if there is one purpose that stands out above all others, it is that the certificate holders should understand that there was a trust, that there was property held in trust and that they were the beneficiaries.

"No particular form of words is required to create a trust. But whether one exists or not is to be ascertained from the intention of the parties."

Sawyer v. *Cook,* 188 Mass. 165.

In *Collins* v. *Lewis,* 60 N. J. Eq. 488, the Court of Errors held that a mere undelivered assignment found among the papers of the decedent to secure his wife from loss on account of his having pledged bonds belonging to the wife, containing authority to transfer the same in the books of the corporation, was a sufficient declaration of the trust when supported by the testimony of the subscribing witness as to the declaration of the decedent, indicating that the assignment was to take effect when signed and without delivery.

The trust may be established by informal writings such as letters and even from fiduciary relationship such as being a director of a railroad company for which options were obtained upon terminal property.

Seacoast R. R. Co. v. *Wood,* 65 N. J. Eq. 530 where it is said:

> "The rule is entirely settled that an agent or trustee who in his own name makes a purchase while in the performance of his duties as such holds the property for the benefit of his principal or *cestui que trust.*"

The effect of Exhibit "B." attached to the bill of complaint standing alone is a sufficient declaration of an express trust.

Aller v. *Crouter,* 64 N. J. Eq. 381.

See also *Smith* v. *Howell,* 11 N. J. Eq. 349.

In construing these Articles it is fair to construe them strictly against complainants and in favor of the beneficiaries, for the language is the language of complainants; at the outset they were the only parties to the Articles, the certificate holders had no share in the choice of words, and they had a right to repose confidence in their trustees at least to the extent

that they were in fact trustees as they represented.

Dunn v. *English,* 23 N. J. L. 126.

If there be any doubt, it is as to whether the Trustees had even the legal title.

The certificate holders furnished the purchase money, have all the income, the total assets on liquidation, the power on their own initiative to consider any matter of interest in or to the association, unrestricted power to remove the Trustees and thereby divest them of their title without a conveyance, power to amend the Articles at their pleasure, without permission of the Trustees and without restriction, except that they cannot impair the rights of those of their own number who hold Class A certificates, and cannot impose personal liability upon the Trustees.

Assume for the moment that the certificate holders should assemble under Article XI and should pass the following resolution:

Amend Article II, line 1, by striking out the word "Trustees" and substituting the words "certificate holders."

Amend Article XXI, to read as follows:

"The trust hereby created shall terminate to-day, July 3, 1917, at 12 o'clock noon."

This assumption indicates not what is known to have been done, but what might be done. It suggests the right, title and interest vested in the certificate holders, their dominion over the property, and that right they may exercise without application to a Court of Equity, without the permission of the Trustees and against their opposition.

Under these conditions, it is not easy to define the title, which as matter of right is left in the Trustees.

The proviso in the last half of Article X is really an exception and by excepting two amendments which may not be made, the instrument by clear implication authorizes amendment on all other subjects.

The vesting of the title is not obstructed by the power of sale in Simson and Hunter, if there be one.

Palmer v. *Martindell,* 43 N. J. Eq. 90 (96).

Were it important to determine the extent or quality of the title of the certificate holders, the statute of uses might be invoked.

> "All and every person or persons, to whom the use or uses of any tract or tracts of land within this state have been sold, given, limited, granted, released or conveyed by deed, grant, or any other legal conveyance whatsoever, or that shall hereafter be granted by any deed or conveyance whatsoever, such grantees, their heirs and assigns, shall be deemed, taken and esteemed to be in as full and ample possession of such lands, tenements and hereditaments, to all intents, constructions and purposes, as if such grantees, their heirs and assigns, were possessed thereof by solemn livery of seizin and possession, any usage or custom of the contrary notwithstanding." (P. L. 1898, p. 672.) (2 Comp. Stat. 1536, Sec. 7.)
>
> *Mellick* v. *Pidcock,* 44 N. J. Eq. 525.
>
> *Cornwell* v. *Orton,* 126 Mo. 355.

This argument, however, will not be pursued, as it is the fact of title and not its quality which is important.

If Simson and Hunter, as Trustees, were not the absolute owners of the legal and equitable title, they must necessarily invoke and exercise some power reserved by or conferred upon them by the owners of that title.

Point IV.

No Power to Convey the Lands in Suit Was Conferred Upon Simson and Hunter, as Trustees or Otherwise.

The lands described in Exhibit D. 16 will be assumed again as typical.

On the morning of July 1, 1915, Rankin and associates, the owners of the fee, possessed an unlimited power to convey these lands. During that day, Rankin and associates, by the delivery of Exhibit D. 16, parted with the entire title and exhausted their own power to convey. The equitable title then vested in the certificate holders—the legal title in Simson and Hunter, Trustees.

If Simson and Hunter ever acquired a power to convey the equitable title of these lands, they acquired it when that deed was delivered to them, not before and not after.

Prior to the delivery of that deed, Simson and Hunter had no power to convey the land, for that power resided exclusively in Rankin and associates. On that day, nothing occurred of importance to this discussion, except the mere delivery of the deed and the acceptance of it by Simson and Hunter. The deed is silent on the subject of the power of the Trustees to convey the equitable title, and the legal implication arose that the parties in whom the equitable title vested alone acquired the power to convey the same. Rankin and associates appeared to have been ignorant of the Articles of Association, and there was nothing in the situation which imposed upon them the duty of making inquiry. If they had any intention of conferring the power to convey the equitable title

upon the grantees of merely the legal title, it was carefully concealed.

The Articles of Association were not so referred to in Exhibit D. 16 as to make their provisions or the power to convey, if there be one, a part of the deed. This assertion rests not merely upon the silence of the deed, but is supported by the act of Simson and Hunter, accepting the deed in direct violation of this express provision of their own Articles:

> "In every written contract that the Trustees shall enter into relating to the business of the Association *or estate* or any part thereof, reference shall be made to these Articles."
>
> (Page 18, line 16.)

That Simson and Hunter, who framed this provision, should not comply with it, evidences an intent on their part that the Articles should not be so referred to in the deed as to be incorporated therein or so as to impute any other intent than that expressed in the deed.

The Supreme Court of the United States has stated the rule which may be here applied: *Guerini Stone Co.* v. *Carlin Construction Co.*, 240 U. S. 264 (277).

> "The reference in the sub-contract to the drawings and specifications was evidently for the purpose of indicating what work was to be done, and in what manner done by the sub-contractor. Notwithstanding occasional expressions of a different rule, * * * in our opinion the true rule based upon sound reason and supported by the greater weight of authority is that in the case of sub-contracts *as in other cases of express agreement in writing, a reference by the contracting parties to an extraneous writing* for a particular purpose makes it a part of their agreement only for the purpose specified."

This was said of a contract in which one of the parties was designated "the sub-contractor" and the other was designated "the general contractor" by which work was to be done on government property, according to the specifications attached to the general contract.

The general contract contained a clause permitting the government to suspend the work if it should become inexpedient to carry it on. The specifications mentioned were held pertinent to show the work to be performed, but the reference to the specifications coupled with the designation in the sub-contract of one party as "the general contractor" and the other party as "the sub-contractor" did not serve to incorporate in the sub-contract the provisions respecting the suspension of work by the government.

For the same reasons, the designation "Trustees," etc., applied to the grantee in the Rankin deed will not serve to incorporate into the deed a power of sale if such there be in the Articles of Association.

See also *DeWitt* v. *Berry,* 134 U. S. 306.

The claim cannot be sustained that the certificate holders conferred upon the Trustees power to convey land. Complainants have offered no evidence in support of such claim. What took place between the certificate holders and the Trustees is fairly inferable from the documents in evidence. The certificate holders paid in their money or property and received certificates in the forms found on pages 8-13. They are not signed by the certificate holders, but only by the Chairman who was one of the Trustees (page 17, line 15), and by the Secretary who may have been a stranger. The certificates referred to the Articles of Association. The Arti-

cles are not signed by the certificate holders, but only by Simson and Hunter as Trustees. Nowhere is there found the signature, much less the seal or acknowledgment of any certificate holder to any paper of any kind. The requisites of a power to convey land will be referred to below.

For other reasons Simson and Hunter had not the power to convey.

It was said by the United States Supreme Court in *Clark* v. *Graham,* 6 Wheat. 577 (579).

> "It is a general principle that a power to convey lands must possess the same requisites and observe the same solemnities as are necessary in a deed directly conveying the lands."

This was said of a power to convey land in Ohio by whose laws an acknowledgment was required for a deed. The acknowledgment of the power was defective and it was held that for this reason the donee of the power could not convey.

If Simson and Hunter had possessed the power to convey these lands when they signed the Articles so that they could reserve that power, or if the certificate holders had attempted to confer that power upon the Trustees, then one of the solemnities to observe under the rule stated by the Supreme Court would be the affixing of a seal to the instrument, reserving or conferring the power for a seal is necessary to convey lands.

The Articles were not sealed and were not intended to be sealed as is definitely shown by the first words of Article XXII, by the Attestation Clause and by what purports to be a Certificate of Acknowledgment (page 22). The Certificate Holders did not even sign a paper.

But the requisites of a power to convey land in New Jersey rest not alone upon the rule of the Common Law. Additional requirements prescribed by statute must be observed. The statute is in the following words:

> "All deeds, grants, sales, leases, assurances, or other conveyances whatsoever, heretofore made by virtue of letters of agency, powers of attorney, or *other powers or authorities whatsoever,* that were entered on the public books or records of the province of New Jersey or the public books of records of the eastern or western divisions thereof, prior to July fourth, seventeen hundred and seventy-six, whereby any lands, tenements or hereditaments whatsoever within this state or province were granted, sold, conveyed, assured, released or transferred to any person or persons pursuant to such powers and authorities whatsoever, shall be and are hereby declared, as good, valid, and sufficient title in the law, to all intents, constructions and purposes whatsoever, unto the said grantees, and to their heirs and assigns, as if the constituent or constituents had then and there sold and conveyed the land or lands, and had executed deeds (according to the true intent and meaning of such grants, deeds, or conveyances), which said grants, deeds or conveyances, shall be of force against, conclude and bind all and every the constituents, employers, grantors of such powers and authorities, and their and all and every of their heirs, and all and every other person or persons claiming or to claim estate from or under them, or any of them, severally and respectively; and all lands, tenements or other hereditaments that heretofore have been or for the time to come shall be sold, conveyed, or disposed of by virtue of such powers or authorities as aforesaid, such powers shall have been or shall be *first* acknowledged or proved and certified, and entered upon the public

> records in the books appropriate therefor in the several record offices of this state, after which all grants and conveyances, deeds and instruments made pursuant to the powers thereby granted, shall be deemed, taken and esteemed as good, valid and sufficient titles against all and every the constituents, employers and grantors of such powers and authorities, against all claiming or to claim estate, under them severally and respectively aforesaid, as if the constituent or constituents had then and there sold and conveyed the same land or lands." Section 5, Chapt. 232, Laws of 1898 (2 Compiled Statutes, page 1535).

This statute has been construed by the Court of Errors in *Tyrell* v. *O'Connor,* 56 N. J. Eq. 448 (452).

In that case, there was under consideration a power of attorney made by several tenants in common, residents of Ireland, to one of the cotenants resident here. The power was defectively acknowledged by one of the donors, but it had, nevertheless been recorded. The power of attorney contained the following clause:

> "And also in our name and as our act and deed to sign, seal, execute and deliver such deeds and conveyances * * * as our attorney shall see fit."

The case was made to turn upon the statute above quoted, and it was held, that while on account of the defective acknowledgment, the attorney could not convey, yet he could bind his principals to convey and the Court adopts this language from the opinion of the Chancellor:

> "The scope of this statute is the invalidation of a conveyance made under a power of attorney which shall not first have been proved and recorded. It is the conveyance, not the power of attorney, which is invalidated. The power of attorney remains valid but not effective for the purpose of con-

> veyance until it shall be proved and recorded."

So in the case at bar the defendant is not now merely objecting that Simson and Hunter had not the power to bind their principals or *cestui que trustent* to convey, but they are insisting that Simson and Hunter had not a power which enabled them as trustees to make a valid conveyance.

It will not escape attention that by the express language of the statute, it is made to apply not alone to simple powers of attorney, but to "other powers or authorities whatsoever."

The learned Vice-Chancellor appears to have been of the opinion that if the Articles of Association were made a matter of record in Union County, either at the same time as, or after the record of the proposed deed to defendant, that it would remove any question based upon the lack of power to convey in the Trustees (page 154, line 33).

Such a conclusion seems to be in direct conflict with the last sentence of the conclusions of this Court above quoted, where it is stated that the power is

> "not effective for the purpose of conveyance, until it shall be proved and recorded."

It is also in conflict with a definite expression of the statute that such powers

> "shall have been or shall be *first* acknowledged or proved and certified and entered upon the public records."

But these Articles could not be recorded; they were not so acknowledged as to admit them of record. The notary did not make known the contents of the instrument to the parties; he did not know them or know that they were

the parties named in the instrument; he merely knew that they were the parties who executed it; he does not certify that they sealed the document; his authority to take the acknowledgment does not appear; his certificate is without date, and although his own tenure of office expired on November 16, 1916, it nowhere appears that the acknowledgment, such as it was, occurred before that day. Such an acknowledgment is utterly insufficient.

Longley v. *Sperry,* 72 N. J. Eq. 537 (549).

The omission of a seal is not excused by Chapt. 89 of the Laws of 1904 (2 Compiled Statutes 1540). That statute is in the following words:

> "1. No deed or other instrument mentioned in the twenty-first section of the act to which this is a supplement, heretofore or hereafter made, excepting deeds or instruments made by a corporation, shall be void for lack of a seal; *provided,* the attestation clause and the acknowledgment or proof shall recite that the same was signed and sealed by the makers thereof."

Nor is the omission of the word "sealed" in the notary's certificate of acknowledgment excused by Chapt. 134 of the Laws of 1909 (2 Compiled Statutes 1541).

> "All acknowledgments or proofs of deeds heretofore made or taken, notwithstanding the omission of the word "sealed" in the certificate of acknowledgment or proof, shall be taken and held good and sufficient in law; *provided,* however, that all such deeds have been recorded for a greater period than one year before the adoption of this act."

Certificates of acknowledgments taken without the state affecting titles within the state must conform to all the requirements for acknowledg-

ments within the state. (2 Comp. Stat.—1543, Sec. 23, and 1577, Sec. 124.)

The Articles of Association are not entitled to record as an informal writing under Sec. 65 of Chapt. 232, Laws of 1898 (2 Comp. Stat. 1559, for the obvious reason that they are not referred to in any deed or will and no proof has been made before the Circuit Court of the county in which the real estate is situated. There is no certificate of the presiding judge of such court; no notice of application for such certificate has been published as required by the act.

Such was the power under which Simson and Hunter offered to convey to the defendant the lands in suit. In the deed offered they recited the Articles of Association, and under those Articles claimed the power to convey a marketable title, although the Articles were not sealed, were not intended to be sealed, were not recorded, were not so acknowledged that they could be recorded.

There was no offer to cure these defects, and they could not have been cured if the offer had been made, and for the following reasons, namely:

For this part of the argument, it may be assumed that under *Tyrell v. O'Conner, supra,* Simson and Hunter had power which was effective for the purpose of binding their principals to convey, but that it was not effective to enable them, as trustees, to execute the conveyance. Could that power be validated for the latter purpose on or after July 3rd, 1917, and by whom could it be so validated? On that day Simson and Hunter by the very deed offered to defendant were declaring themselves to be Trustees and by that deed were making reference to the

Articles of Association sufficient to put defendant upon inquiry. Upon examination of the Articles, the power of the professed trustee to convey is found to be ineffective. Could Simson and Hunter by a mere acknowledgment before a magistrate, confer upon themselves a power to convey, which before the acknowledgment they did not have? Could they seal the instrument so as to make it effective to convey lands?

These questions seem to answer themselves, for if the instrument, before the sealing and acknowledgment, did not confer the power to convey, no act of the donee of this power could make it effective for that purpose. Whatever act was required to make that power effective to convey land must be performed by those persons in whom the power resided, and those persons were not the trustees.

The learned Vice-Chancellor in his conclusions makes this statement (page 154, line 28):

> "So far as the point taken that the sale must have the acquiescence of the certificate holders concerned, it is untenable for at a meeting of the certificate holders called for that purpose, assent was in fact given to the conveyance."

The only evidence of such a meeting is in the testimony of Harry Wright, complainants' attorney (pages 141 and 142). He says there was a meeting of the certificate holders on the morning of July 3rd, and that approval was given to the contract.

It will be noted that approval was given to the "contract," meaning Exhibit "B." attached to the Bill of Complaint, but that there was no action conferring upon the Trustees power to convey. But under *Tyrell* v. *O'Connor, supra,* the Trustees might bind the certificate holders

to convey and therefore needed no approval of the contract. What was needed just at this point was something more, namely a conveyance by the certificate holders or a power executed with the solemnities of a conveyance, enabling the Trustees to convey their interest.

These were individuals having and claiming an interest in the land; one could not convey or confer a power to convey the interest of another; and there is one and only one way in which by common law and by statute each could convey or empower others to convey his estate. For reasons best known to themselves, they did not adopt that way, although requested so to do.

Page 202, line 22.
Page 294, line 32.
Page 316, line 12.
Page 148, line 21.
Page 122, line 26.
Page 141, line 34.
Page 138, line 21.

The meeting had none of the elements of a Directors' meeting; there was no corporate or other entity, but only an aggregation of individuals, and while under the Articles they could meet to consider any matter of interest to the Association and as between themselves and their Trustees such action would be binding; yet by the law of the State they could convey lands only by observing the same formalities required by other parties.

It is no answer to say that the Title Company might waive this objection, and issue a policy without exception as to the Trustees power (page 123, line 25). It was a "marketable" title, not a guaranteed one that was called for. If there was a submission to the Title Company

of the question of marketable title (which is denied by complainants and the learned Vice-Chancellor ruled with them on this point), both parties would be bound by the decision which was adverse to complainants, but neither party would be bound by the reasons given for reaching the decision.

Point V.

The Articles of Association Irrespective of the Points Already Raised Do Not Confer Upon or Reserve to the Trustees the Power to Make the Conveyance Required by Exhibit B. Attached to the Bill of Complaint.

The instrument calls for the conveyance by Midvale Chemical Works of all of its real property and all its personal property except cash on hand. It includes all liquid and working assets and accounts receivable and by its general terms and obvious purpose, its good will and trade name. On its face this is presumptively a liquidation proceeding. Moreover Dr. Krayer who was the manager of the factory at Elizabeth and who started the Midvale Chemical Works in connection with Mr. Hunter, testified that on the 31st of May he had a conference with Mr. Hunter and was told that after everything was paid there would be left Fourteen Thousand Dollars of which he would get about Seven Thousand Dollars. It was conceded by counsel on the trial that it was a winding up process and that they were going out of business so far as the business was connected with New Jersey (pp. 135 and 136).

Hunter told Klipstein during the negotiations:

> "That he wanted to get out of the chemical business, said he didn't understand the chemical business and I did understand it, and he didn't want to carry it on another day, in fact, he said he had come on from St. Louis in order to sell this property and he was not going back until he had sold it and got it off his hands."
>
> (Page 93.)

The powers of the Trustees under the Articles do not extend to such a conveyance in liquidation.

For the definition of the powers of the Trustee as distinguished from their title, the following provisions of the Articles are all that are pertinent.

The italics are used not for the purpose of emphasis, but for convenient reference to the limitations upon the powers:

> "The Trustees shall have the power to conduct and *carry on* in the name of and for the Association any business which could be lawfully conducted and carried on by an individual, and, *in the conduct of such business,* may use and invest any funds of the Association, and shall have full general authority and power to buy, sell, pledge, mortgage, grant, convey and exchange property of every description, real, personal or mixed, * * * *and do all things necessary to the conduct of the business* which they may undertake." (Article II.)
>
> "It shall be the duty of the Trustees to *manage and direct all business* of the Association and in the management and direction of such business, the Trustees shall have the power to employ such persons as may be needed in the *conduct of the business of the Association,* and to delegate to such persons, or to either of the Trustees such powers and duties as may be deemed by the

Trustees desirable and expedient *in the conduct* of the business." (Article III.)

"No person *dealing with the Trustees shall be charged* with the duty of making any inquiry as to their authority *to deal* with the property of the Association, nor with the application of the purchase money for any property of the Association which they may purchase from the Trustees, and all such persons shall be entitled to rely on the truthfulness of any certificate of the Trustees purporting to state the facts with reference to any matter connected with the Trustees' *administration* of the estate." (Article XV.)

"Contracts for the conveyance of real estate, deeds, mortgages and other instruments affecting real estate title, shall be sufficiently executed *on behalf of all Trustees* if executed by the Trustees in office at the date of execution, or by duly constituted attorney or attorneys in fact of such Trustees." (Article XVII.)

"The trust herein created shall terminate at the expiration of 21 years after the death of the last survivor of the above named Trustees, unless sooner terminated by the complete liquidation and distribution of the Association property by the Trustees *under the authority of these Articles.*" (Article XXI.)

There is nowhere in the instrument an express power of sale except in Article II and by the language of that Article there is an express limitation to sales in the conduct of the business. As if to emphasize this limitation it is repeated and occurs just before the words conferring the power and again just after those words.

A conveyance in liquidation is not merely one that is not included in the express powers, but it is the opposite and puts an end to the

powers expressly conferred to conduct the business.

These self-appointed trustees reserve to themselves the conduct of "any business" which could be lawfully conducted or carried on by any individual. The word "business" is singular and not plural, and reserves no authority to carry on several enterprises either conjunctively or successively, and this is made clear by the last two lines of Article II, enabling them to do all things necessary to the conduct of "the business which they may undertake."

Having undertaken this business in Elizabeth, New Jersey, it is a fair construction of the words that the Trustees' power of selection of a business to be carried on was exhausted, and that they did not have the power to close this out and start another business.

The power of the Trustees to "conduct the business" is not merely permissive, for by Article III above quoted, it is made their "duty" to manage and direct the business, and to divest themselves of that power by disposing of all working assets is plain violation of this duty.

By Article XV persons "dealing" with the Trustees are excused from any obligation to inquire as to their authority to "deal" with Association property (page 19, line 33).

The validity of this provision might be challenged, but it is obviously not intended by these words "deal" and "dealing" to enlarge the powers expressly conferred upon the Trustees. It is a part of the Article which has to do with amendments, the removal of Trustees and the vesting of the title of a removed Trustee in his successor, and is to be construed with those provisions and as so construed is intended to be a rule of evidence under which the identity of

the Trustees may be established, and under which any question of removal resignation and the amendment of powers may be determined by outsiders.

Moreover the words "to deal" with the property and "administration" of the estate, even if they were by context a part of the grant of powers, would not enlarge the grant, because they give expression to the same underlying thought, and are pregnant with the idea of multiplicity and continuity of action. They exclude the idea of a conglomerate sale of lands, personal property and choses in action as one transaction.

As was said in *Overall* v. *Bezeau,* 37 Mich. 507:

> "Plaintiff owned a quantity of liquors, and he sold them in gross; he had certain property and he sold it in one lot. This did not make him a dealer; a dealer is one who makes successive sales as a business. But this plaintiff by the sale he made was indicating as distinctly as possible his intention not to be a dealer, either by wholesale or retail. The court, we think, committed no error in excluding the showing."

This was said of a defense which claimed that a note was void because given for the price of goods which only a licensed wholesale dealer could sell.

A similar rule was adopted in *Goodwin* v. *Clark,* 65 Me. 280.

This case turned upon the word "dealer" in the statute. The plaintiff had a license to sell tobacco and cigars. Just before the license expired, he was burned out. After the fire, and after the expiration of the license, he sold in one lot the cigars and tobacco saved from the fire. It was held that such a sale was not the

transaction of a dealer and not illegal. In *First Nat. Bk. v. Nat. Exch. Bk.*, 92 U. S. 122, WAITE, *C. J.*, said:

> "Dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank it can hardly be doubted that stocks may be accepted in payment and satisfaction with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks."

The primary significance of the verb involves distribution, as, to traffic to transact business to trade:

> Century Dictionary, 13 Cyc. 285, Am. Eng. Enc., 2nd. Ed.

It is true that the word has acquired a secondary meaning which permits it to predicate a single transaction, but that is not permissible here for even if construed as a part of the grant of power in Article II it must be given the meaning which is in harmony with the multiplicity of action involved in "carrying on," and "conducting" the business.

Article XVII says that deeds shall be sufficiently executed "on behalf of all Trustees" if executed by the Trustees in office. The express limitation "on behalf of all Trustees" excludes the idea that such execution is sufficient on behalf of the *cestui que trust.* If it were intended to include such idea it would have been more nearly accomplished by leaving out the words of limitation. But this Article is not intended as a grant of power, it simply prescribed a method of exercising such powers if any as are elsewhere granted or reserved.

There remains the final words of Article XXI above quoted fixing the termination of the trust at 21 years after the death of the survivor of Simson and Hunter, "unless sooner terminated by the complete liquidation and distribution of the Association property by the Trustees under the authority of the Articles."

There is here no grant of power; the article has reference to the termination of all power. The words "under authority of these Articles" obviously refer to some supposed provision in the Articles intended to cover the subject of liquidation by the Trustees; but the most careful scrutiny will fail to discover any such provision. The most plausible explanation and in view of the other incongruities in the Articles, probably the true explanation is that in the original draft there may have been a provision reserving to the Trustees power to liquidate under conditions which may now be merely surmised and that it was finally decided to strike out that provision and that by inadvertance this clause at the end of Article XXI escaped attention. Certainly the well-known burden upon the Courts reviewing the reorganization plans and freezing-out processes of high finance might well give pause even to Trustees in assuming such hazardous responsibility, and if not the danger of such a provision to the prospective investor would no doubt suggest that for prudential reasons such a provision might better be omitted. It is an exceedingly strained construction which would give these words, either alone or in context with any other provision of the Articles, such a construction as to amount to a grant of power to liquidate, and it would be even a greater strain to make out of these words a power to convey lands in liquidation of the affairs of the concern.

The fact that the Trustees had the legal title counts for nothing in construing a power of sale. It was so held by this Court in

Hattie v. *Gehin,* 76 N. J. Eq. 340,

which affirmed the decision below on the opinion delivered by Vice-Chancellor Howell. His opinion is not officially reported, but is found in 76 Atl. 4, and is as follows:

> "The only question in this case is whether the executors have a present power of sale under the will of T. R. Gue. There is no express power to be found in the will; if any exists, it is a power by implication. I do not find it necessary to decide whether this power by implication exists, because, if it does not exist, in my opinion its exercise is postponed until after the death of the widow of the testator. It is well settled that a power to sell must be strictly executed in regard to time, as well as all other particulars, when express directions are given. Booraem *v.* Wells, 19 N. J. Eq. 87. The clause of the will from which the power is attempted to be deduced is as follows: 'At such time after the death of my wife as my trustees may determine to be in the best interest of my children, but in no event not later than twenty years thereafter, my trustees shall divide all the accumulated surplus of my estate not hereinbefore distributed and realize all out-standing assests, together with all sums that may have fallen into the residue of my estate, except, etc., * * * and shall divide the same into equal parts so that there shall be one equal part for each child of mine, living at that time; and my trustees may in their discretion divide the same in such equal parts that there may, in addition to being an equal share for each child of mine, leaving also a share for the child or children of any child of mine that may have died before said period; and my trustees shall invest and keep invested one equal part for each of my

children and pay the income arising therefrom semi-annually to my children and pay the other equal parts, if in their discretion they have so divided my estate, to and among the child or children of a deceased child,' etc. If it should be held that a power of sale exists under this verbiage, I think it must be equally clear that it cannot be exercised during the lifetime of the widow.

It was argued on behalf of the complainant that an inference was to be drawn, not only in favor of a power of sale, but also in favor of its immediate execution, from the fact that by an earlier clause of the will the title is vested in the executors, and that there is more or less evidence of an intention to mingle the realty with the personalty for purposes of administration and distribution. I do not think, however, that the fact of the vesting of the legal title in the executors and trustees counts for anything, for the reason that they hold title only as Trustees, and under and in accordance with the declaration of the trust as contained in the will. Their powers are conferred by the same instrument by which they get title, and are limited by what we find therein written. In the case of Booraem *v.* Wells, *supra,* the title was in the trustees, but this fact is not alluded to by the Chancellor in stating the reasons for his judgment. It was evidently considered to be unimportant."

In *Booraem* v. *Wells,* 19 N. J. Eq. 87, cited by the Chancellor, it was said:

"Power of sale can only be executed at the time and in the manner prescribed by the testator." (Page 88.)

and again

"It is well settled that a power to sell must be strictly executed in regard to time *as well as all other particulars* when express directions are given." (Page 96.)

It was held in this case that the power to make such other arrangements as the Trustees might deem expedient for the support of the *cestui que trust* on the property did not give a power of sale by implication.

Pratt v. *Worrell,* 66 N. J. Eq. 194, was a case where the testator devised his Westville property to his widow with an independent power of attorney to sell it and appropriate the proceeds to her own use. He devised the residue of his estate including the Westville property to his executor in trust and ordered him on the death of his widow to sell the property if then unsold and to divide the proceeds among his named relatives.

During the life of the widow, the executor attempted to convey the property by deed and the widow quit-claimed. It was held that there was no conveyance for two reasons: (1) that the executor had no power to sell during the life of the widow, and (2) that the purpose of the power conferred upon the executor was to enable him to divide the proceeds of the land among the testator's relatives,—whereas it appeared that he exercised the power for the benefit of the widow.

In the case now under consideration, the purpose of the power to convey was to enable the Trustees to conduct the business, not to wind it up.

Scholle v. *Scholle,* 113 N. Y. 261 (274).

> "The power of sale given by the will was to sell at times or in a manner which the executors should deem for the best interests of the estate. The authority contemplated first a sale, and second the exercise of a judgment as to the best interest of the estate. Here there was, in truth, no sale such as the will contemplated. That was one for

> the purpose of realizing proceeds to be invested as the source of income and interest, and at a time when such values could be realized as would justify a sale instead of further delay for an appreciation of value. Nothing of the kind took place. No proceeds were realized. The land was appropriated to pay a debt chargeable primarily upon the personal property without an order of the surrogate or proof that the personal assets were insufficient to pay the debts. *The authority to sell was given for one distinct and definite purpose,* and not at all to enable a disputed debt to be compromised. *The deed, therefore, passed no interest of the remaindermen,* and the surrogate was powerless to take it away and appropriate it to the payment of debts except in the statutory method."

For the same effect is *Hammond* v. *Cronkright,* 47 N. J. Eq. 447 (458-459).

Stevens v. *Winship,* 1 Pick (Mass.) 318.

Testator devised lands to his wife for her life and gave her, in case she should "stand in need,"

> "full power to sell his whole estate real as well as personal for her comfortable support."

The court held that the burden was upon those taking under this power to show that the specified conditions prevailed when the power was executed.

Wilkinson v. *Buist,* 124 Pa. St. 253.

> "Although the power may be expressed in the most general terms yet if the purpose of its creation appears, and that purpose has ceased there can ordinarily be no further execution of the power."

So in *Williamson* v. *Berry,* 8 How. (U. S.) 535 the execution of a power was successfully challenged because the Chancellor had authorized a

sale for a purpose not specified in a special private act of the legislature upon which the Chancellor's jurisdiction in the proceeding depended.

Not only is there no express power contained in the Articles to make a bulk sale in liquidation but there is no such power arising out of the relations of the parties treating Simson and Hunter as partners in or agents of the Association.

> "It is familiar law that the power of one partner over the property of the partnership is that of an agent, and is confined to the scope of the partnership business. It would be absurd to hold that one partner in the business of keeping a livery stable would have the implied right from the mere fact that he was keeping a livery stable, to sell out the whole plant and give a good title to it without the knowledge and consent of his partner, and the same consideration applies to the mortgaging of it."
>
> *Longley* v. *Sperry*, 72 N. J. Eq. 537 (551).

Point VI.

Upon the Undisputed Facts in This Case a Legal Presumption Arises That the Trust, If Any, Was Surrendered, and That by Such Surrender the Legal as Well as the Equitable Title Became Vested in the Certificate Holders.

This presumption is based upon the established facts showing at least an equitable title in Midvale Chemical Works, the arrival of the time to stop the conduct of the business and to wind it up, and the fact that Midvale Chemical Works with the express written concurrence of complainants contracted to sell its lands (Exhibit B attached to the Bill).

Brown v. *Combs*, 29 N. J. L. 36.

In this case, the lands were conveyed to Brown "Trustee of the Lexington & Danville Railroad Company." The Railroad Company subsequently executed a mortgage of the lands to Brown and another and after the execution of the mortgage, Brown made an agreement for the culture of a part of the lands in which he styled himself and signed as agent. It was *held* that the written lease signed by Brown under the circumstances stated amounted not only to a declaration of express trust, but was sufficient evidence of a surrender of the trust. In passing upon these facts, the Court says:

> "Yet the surrender of a trust or the conveyance of the legal estate may be presumed from circumstances, and that seems to have been the ground of the opinions in Lade *v.* Halford and Armstrong *v.* Pierce and the concurring authorities.
>
> "These cases," said Kent, *J.*, in Jackson *v.* Sisson, 2 Johns. Cases 324, "seem to be based on the principle, that where the beneficial occupation of an estate may possibly suppose a conveyance to the person equitably entitled to it, the jury may be directed to presume one."
>
> "A surrender may be presumed when the object for which the trust was created has been accomplished; and a conveyance may be presumed from lapse of time after the object has been effected. England *v.* Slade, 4 Term. R. 682."

Brown v. *Combs* (*supra*) is cited with approval in *Baxter* v. *Baxter,* 43 N. J. Eq. 86; *Commissioners* v. *Johnson,* 36 N. J. Eq. 213; *Jason* v. *Johnson,* 74 N. J. L. 532.

In the case last mentioned the Court of Errors cited *Brown* v. *Combs,* and stated the rule in the following words:

> "And we have not overlooked the the cases in which it has been held that where it ap-

> pears that the object for which a trust was created has been accomplished, or that the term during which the active duties of a trust were to continue has expired, so that nothing remains to be done by the trustee beyond a conveyance of his naked legal title to the *cestui que trust,* such a conveyance may be presumed from lapse of time or other circumstances, in order to prevent the just title of the beneficial owner from being defeated by a matter of form, and that this presumption will be indulged even in a court of law. Den, *ex. dem.* Obert *v.* Bordine, Spenc. 394; Brown *ads.* Combs, 5 Dutcher 36, and cases therein cited."

These undisputed facts and the presumption of law arising therefrom may be invoked by any future vendee of the lands as a sufficient reason for rejecting the title and the judgment in this case would be no bar to such a claim.

In another supposable case the grantees of the certificate holders could bring ejectment against the grantees of the trustees and under *Brown v. Combs* such complaints would be entitled to submit to the jury Exhibit B attached to the Bill in the case at bar, wherein the *cestui que trustent* propose to convey the legal as well as the equitable title of all "its" property, and to receive the consideration therefor with approval of the trustees by their own signature, together with the other evidence of intended liquidation and upon such proof they would be entitled to the instruction of the Court that there was evidence of a surrender of the trust.

With $200,000 at stake, it cannot be said to be improbable that the effort would be made by someone to acquire these outstanding titles and bring such suit.

In *Schreiver* v. *Schreiver,* 86 N. Y. 575 (584), it was held that in specific performance cases a

title is doubtful unless the evidence is such that the complainant would, in an action at law be entitled to the direction of a verdict, and that the evidence upon which such a direction could be made, must not rest in parole.

It is not an answer to this proposition to point out that the Midvale signature to this instrument is authenticated by Simson and Hunter "as Trustees" and that therefore the presumption of surrender is rebutted by the words of the very instrument by which it is raised. The utmost that can be claimed for the words "as Trustees following the authenticating signatures is that they tend to weaken the presumption of surrender which neecssarily flows from the fact that the purpose of the trust had been accomplished or abandoned, that Midvale is the vendor, is the party of the first part, agrees to convey not the land but all "its" land. That Midvale and not the Trustees was to convey a good and marketable title, received the initial payment of $500 by check to its order, which it endorsed with its own name and deposited; that it was Midvale to whom $50,000 was to have been paid upon the closing of the title and to whom was to be paid the purchase money mortgage, and that it was at Midvale's option that the whole of the mortgage could be called for default in payment of any installment (pp. 23 to 25).

These acts performed and to be performed speak louder than a single word which is only description of the capacity in which a person acts in authenticating the signature of the real party to the instrument by which the surrender is evidenced.

Point VII.

Defendant Was Entitled to a Deed From the Certificate Holders of Midvale Chemical Works, Not Only for the Purpose of Acquiring Their Title, But Also Because He Was Entitled to Their Convenants of Title and Against Encumbrances.

It is conceded at the outset that the power of the Trustees under the Articles of Association to bind the certificate holder to make a conveyance with covenants, does not clearly appear; but inasmuch as complainants now seek specific performance of Exhibit "B" attached to the Bill, they can prevail only by delivering a deed with covenants, if covenants be stipulated, and if stipulated the covenants must be made by the real parties to the contract.

Right here, it is necessary to speak again of Article XIV, which requires reference to be made to the Articles in any written contract relating to the estate of the Association. Such reference was not made in Exhibit "B" attached to the Bill, although the instrument, as already pointed out, was prepared by complainant's counsel. If such reference had been made, the defendant could have seen by the same Article XIV that he was taking an instrument which imposed no personal liability upon any party except himself, and that his remedy, if any, was only against the property comprising the estate which

> "shall primarily and alone stand charged with the burden of paying any money claim or money demand outstanding or existing on account of the operations or business of the Trustees, whether their said claim be founded on contract or sound in tort." (Page 18, lines 35 to 39.)

On the other hand, Mr. Wright, the attorney for the complainant says that a meeting of the certificate holders was held on July 3rd, and approval was given by them to this contract (page 142, line 20).

If this be sufficient to bind Midvale Chemical Works to carry out the contract made in its name by the Trustees, then for the purpose of this point it will be assumed that the defendant also then became bound on his part in such a manner as to make the instrument effectual as a mutual contract between the parties named therein.

If this be so, then Midvale Chemical Works became bound, at least as a condition of enforcing specific performance, to deliver a conveyance with covenants, if it is so stipulated in Exhibit "B" attached to the Bill.

It is further conceded that if ambiguity may be attributed to any part of Exhibit "B" attached to the Bill, it is attributable to the words respecting the covenants. They are:

> "The party of the first part agrees to convey said land and property by a good and marketable title free and clear of all encumbrances, excepting," etc. (Page 23, line 32.)

It is the party of the first part that makes this covenant and that party is Midvale Chemical Works and not the complainants. The land and property referred to is "*its* real property" (page 23, line 22) and "all the personal property *of the party of the first part*" (page 23, line 31).

The phraseology of the covenant quoted is unusual, but it indicates how the land and property shall be conveyed, as well as what shall be conveyed. Although ambiguous, the effect of this clause has never been in doubt between the par-

ties. Exhibit C. 1 (page 193, line 20 *to* page 194 line 13)contains covenants against encumbrances and a warranty of title in Simson and Hunter as Trustees. This is the deed which was first offered by the complainants to defendant and was offered in evidence (page 140).

A new deed was then prepared (Exhibit D. 12) with similar covenants (page 246 and 247).

Again the decree herein adjudges

> "That the said complainants within twenty days from the date of this decree do make, execute and acknowledge in due form of law and deliver to said defendant Ernest C. Klipstein a good and sufficient *warranty deed* of the said premises," etc. (Page 173, lines 3-11.)

Even now respondents do not complain of this adjudication.

Thus, by the acts of the parties and by the decree of the Court, the ambiguity in the covenant contained in Exhibit "B" attached to the bill, has been made plain.

It is the defendant's contention that the conveyance should be made by the parties to the contract; that it should contain the stipulated covenants; that those covenants as well as the conveyance should be made by the parties who agreed to make them and that it is a vain and useless thing, amounting to imposition, to offer or decree covenants to be made by parties who, by the Articles under which they now profess to act are not bound personally by the covenant so made; who have no power and do not profess to covenant for the real parties in interest, and who in their representative capacity are liquidating the affairs and distributing the assets and in such representative capacity will forthwith have in their hands no assets of Midvale Chemi-

cal Works from which a recovery could be satisfied. For breach of such covenant the defendant would have recourse only to the land conveyed to him by defective or incumbered title. Such is not the purpose of a warranty of title or a covenant against encumbrances.

In New Jersey the construction of contracts requiring covenants is perhaps more liberal to the vendor than in other states, and it is thought will not be extended beyond present limitations. It is set forth in *Lounsbery* v. *Locander,* 25 N. J. Eq. 554, and in *Sargeant* v. *Realty Traders,* 82 N. J. Eq. 331.

In both of these cases, the action was by the vendee against the vendor for specific performance and in neither of them was there any question of defective title or of encumbrances thereon.

In the first of the cases where the rule originated, the facts were peculiar. There, complainant and another had previously conveyed to the defendant a fifty acre farm without covenants. At the time of such conveyance and as part of the transaction, complainant took from the defendant an option for a five-acre lot, being part of the farm at the same price that he had paid for the whole of the farm. The kind of conveyance complainant was to have in case he exercised the option was not intimated in the option and the Court made this ruling upon these facts:

> "Taking into consideration the fact that the complainant was one of the grantors of the deed to the defendant, the legal effect of the agreement is that of a contract to reconvey *the same title* to the premises as the defendant acquired under his deed, free from any charges or encumbrances to which the same may have been subject while he was owner." (Page 558.)

And after further discussion, the following rule was formulated:

> "A decree for a conveyance by a deed of bargain and sale will give to the complainant all he contracted for, *after the title has been ascertained to be such as was bargained for.* To add thereto covenants not stipulated for, which are not necessary to effect a transfer of the estate, will give him what his agreement calls for, and something beyond." (Page 560.)

In the second case, complainant bid in the property at an auction where nothing was said about title or covenant. The rule is stated in this form:

> "Under a contract to convey equity will not compel the vendor to enter into any covenants for title *where no defect in the title is disclosed* in the absence of any stipulation that the purchaser shall have a conveyance with such covenants." (Pages 334, 335.)

It is submitted that the rule as thus enunciated and applied is not applicable to the facts in this case where there is in the contract of sale a covenant for a conveyance by a good and marketable title free from encumbrances and where defects in and encumbrances upon the title are presented and specified, and that the rule now applicable is stated in *Bryant* v. *Wilson,* 71 Md. 440.

In that case, the contract called for the conveyance of "a good and marketable title, free and clear of encumbrances," and the Court said:

> "If, by the terms of his purchase, he is entitled to a covenant against encumbrances, and he insists upon its incorporation in the deed of conveyance, he may rely upon such covenant instead of insisting upon the removal of the encumbrance as a condition precedent to the acceptance of the title.

> Here, the stipulation against encumbrances rests in the agreement for the sale of the property which is executory simply; and the acceptance of a deed, and the making and delivery of the mortgage, in pursuance of the agreement, would be deemed, *prima facie,* an execution of the contract, and such agreement of purchase and sale would hence become void, and of no further effect." (Page 443.)
>
> "In this case, by the terms of the contract of sale, the vendors were bound to make the conveyance of the property to the vendee within thirty days from the day of sale, and it is not to be supposed that, upon the making of the deed, it was contemplated by the parties that the stipulation against encumbrances should cease to have operation and effect as means of protection to the vendee. The only mode, as we have seen, in a case of a contract like the present, of preserving the full benefit of the stipulation against encumbrances to the vendee, is by incorporating in the deed, made in pursuance of the contract, a covenant against encumbrances." (Page 444.)

It submitted that the use of the word "*by*" in the clause now under consideration gives a more pointed meaning to the whole phrase than can be attributed to the phrase used in *Bryant* v. *Wilson,* and indicates an intent that the covenant is to be perpetuated by the conveyance and that this intent is made certain by the deeds tendered and the decree of the court, and that for this reason as well as others defendant is entitled to a conveyance from the real parties to the contract.

Point VIII.

Complainants Rest Upon an Alleged Perfect Title.

Complainants, vendors, sue defendant, vendee, for the specific performance of a contract (Exhibit B. annexed to the bill) for the sale of two parcels of land, one 14 22/100 acres and the other 2 92/100 acres, "total 17 14/100", together with a going chemical plant thereon and certain personal property referred to in the agreement. The contract is annexed to the bill of complaint and provides that complainants shall convey said "land and property by a good and marketable title *free and clear of all encumbrances*" excepting certain mortgages. Complainants allege in their bill (paragraph 11) that they were and are ready, willing and able to complete said agreement *according to the terms thereof* and tendered defendant their deeds of conveyance for said property, but defendant has been unwilling to perform or accept performance by complainants.

The deed which complainants tendered was a warranty deed which contained the following reservation: "This conveyance is made subject to the public and private rights in streets and avenues crossing or bounding the hereinabove described premises, and also to the right of way of the Central Railroad of New Jersey across a portion of the premises lying between Amboy Avenue and South Front Street," (Ex. D. 12, at p. 246).

The undisputed proof as will hereafter appear is that the property in question is overlapped on the northeasterly side by Brighton Street as laid out on what is referred to in this case as the Bayway map, which street has been dedicated but never opened; that it is crossed by Amboy Avenue a public highway actually opened; that it is

also crossed by the following unopened streets, namely, Richmond, Chelsea, Burlington Avenue, Old Princeton Avenue, Princeton Avenue, Clifton Street, and an unnamed Street; and that it is also crossed by the right of way of a branch of the Central Railroad of New Jersey. (See map annexed to Exh. D. 3, and also part of Ex. A. annexed to answer; also Ex. D. 4, and case, p. 84.)

It is, then, to be observed that complainants contracted to give a good and marketable title to all the land embraced in the agreement, free and clear of all encumbrances, and that they allege in their bill that they were and are ready, willing and able to complete the contract according to the terms thereof. The attention of the court is also called to the fact that at the hearing (p. 112 *et seq.*) inquiry was allowed as to a suggested diminution of purchase price to meet defendant's objections to the title. This was done over defendant's objection, the court saying (112),

> "I don't care whether it is pleaded or not; I am not going to stand on technicalities; counsel ought to know that.
>
> *Mr. Whiting.* "I know, but we are here to meet the case as they have set it forth in their bill; I think it ought to be in the record that we ought not anticipate now making out a case—
>
> *The Court.* "I will deal with that when the proofs are in and I will mould the pleadings to fit the proof, if necessary."

Apparently that never became neecssary, in the mind of the court, for the pleadings have never been moulded and the final decree, after reciting the complainants' readiness and willingness to comply with the stipulations of the agreement specifically, and orders complainants to execute

and deliver to him a "good and sufficient warranty deed to the premises."

The rule to be applied in such case is firmly established and is stated by Professor Pomeroy as follows:

> "If a vendor who contracted to give a good title to all the land embraced in the agreement, alleges in his bill of complaint that he can make out a good title to all, it seems that the least defect or failure of title will be sufficient to prevent him from obtaining a decree, even with compensation to the purchaser."
>
> *Pomeroy on Spec. Perform.*, 2nd Ed., pp. 435-6.

This court in *Doubtney* v. *Lambie* (78 N. J. E. at p. 278) has adopted a like rule, saying:

> "The element of compensation * * * was not in the case, complainant resting in his bill as drawn on a perfect title, going to trial on that issue, and a subsequent amendment for the purpose of bringing it into the case being denied. The question for decision, therefore, was whether the complainant's title was so plainly marketable as to require a court of equity in the exercise of a legal discretion, to decree specific performance."

In the case at bar, then, complainants rest upon an alleged perfect title. The only deed they have ever tendered is given expressly subject to the public and private rights in streets bounding or crossing the same and to the right of way of the Central Railroad across the premises. This deed was tendered for the last time July 3rd, 1917, and rejected by defendant. On July 6th the plant was seriously damaged by fire. No other deed has ever been offered to defendant and the court now orders complainant to give and defendant to accept a warranty deed with no reservation or exception.

Passing the question of the right of defendant under a contract for a marketable title free and clear of all encumbrances to refuse to accept a deed with exceptions as stated; and passing the question whether now, in view of the changed circumstances resulting from the fire, it is equitable to compel defendant to accept a deed such as he should have had in the beginning, namely, one without any exceptions, it is proposed here to consider the exceptions, referred to in the deed as tendered. And first as to Brighton Street, which is the street that in part bounds and overlaps the premises to be conveyed.

Point IX.

Brighton Street Has Been Dedicated.

This street appears on the Bayway map (D. 5) which is filed in the office of the Union County Register (p. 76). This map is referred to in various deeds "from 1860 down" (p. 64). It is referred to in the petition of complainants to the Board of Works of the City of Elizabeth for the vacation of the streets, including Brighton street therein referred to, which proceedings (Ex. D. 3) were begun and ended prior to the date of the contract in suit. Particular attention is respectfully directed to the deed of Whitlock, *et al., to* Richardson, *et al.* (D. 23), dated March 15, 1865, and recorded March 23, 1866. This deed conveys a parcel of land therein expressly referred to as shown and laid out in the Bayway map, which parcel is in said deed described as follows: "Beginning in the centre of said Bayway and at the shore of Staten Island and running thence northwesterly along the centre of said Bayway to the centre of Amboy avenue, thence at right angles to said Bayway

northeasterly along the centre of said Amboy avenue, nine hundred and fifty-five (955) feet to *the easterly side of Brighten street* or to the line of land now or late of James Horner and James Ludlam, thence southeasterly parallel to said Bayway *along the easterly line of Brighton street, etc.*

The portions of Brighton street included in said description are included in the tract in suit. (See map annexed to D. 3.)

That such portions of Brighton street are dedicated to public use is too well settled to admit of question.

Camden v. *McAndrews & Forbes Co.*, 85 N. J. L., 260.

It should be noted here that this deed (D 23) contains the following significant reservation: "Reserving the right of way over Brighton street *as same is laid out on said* (Bayway) *map.*" This reservation and the Brighton street referred to throughout said deed could not have been intended to be the street shown on the commissioner's map hereinafter referred to, for the reason that the commissioner's map was not filed until 1869 (D. 3 at p. 205).

Brighton street has never been opened. It runs along the easterly side of the parcel in suit and is included therein to the extent hereinafter pointed out, and connects the two open and existing highways known as South Front street and Amboy avenue. It is sixty feet wide as shown on both the Bayway map and the commissioners' map but the lines on the two maps do not coincide. On the commissioners' map the westerly line of the street is some twenty-five feet west of the westerly line as laid out on the Bayway map. The result is that the two streets overlap each other in part, as shown on the map annexed

to Exhibit D. 3; and whereas all of Brighton street as laid out on the commissioners' map lies within the property in suit, some thirty-five feet in width of the street as laid out on the Bayway map likewise lies within said property (p. 67).

Point X.

Brighton Street as Laid Out on the Bayway Map Has Not Been Vacated.

Brighton street as laid out on the commissioners' map has been vacated if the proceedings to that end by the Board of Public Works of the City of Elizabeth are valid. For present purposes their validity is assumed. But Brighton street as laid out on the Bayway map has not been vacated. This fact clearly appears from an examination of the vacation proceedings. (Exhibit D. 3.) Such examination shows that on April 7, 1915, Leslie N. Simson and George W. Hunter, Trustees of Midvale Chemical Works (complainants, owners of record and in possession) filed their petition with the Board of Works of Elizabeth, alleging that the fourteen-acre tract (see D. 3 map) in suit is crossed by Richmond, Chelsea and *Brighton* streets, and Burlington and Princeton avenues, "the dotted lines indicating the lines of such streets as they were originally delineated upon a map entitled 'map of building lots in the City of Elizabeth, N. J., on and near Bayway' (Bayway map), and the dash lines indicate the lines of said streets as they appear on a map filed in 1869 by the commissioners appointed to lay out streets, avenues and squares in the City of Elizabeth, N. J. (Commissioners' map). Petitioners prayed for the vacation of Chelsea and Richmond streets as said streets appear on

the "Bayway map," and also as they appear on the "Commissioners' map."

In a separate paragraph they ask for the vacation of Brighton street as laid out on the Commissioners' map. In this paragraph they omit any mention of the Bayway map.

In the following paragraph they ask for the vacation of Old Princeton avenue as delineated on the Bayway map (said street not appearing on the Commissioners' map), and in the next paragraph they ask for the vacation of Princeton avenue as laid out on the Commissioners' map (said street not appearing on the Bayway map). In the last paragraph they ask for the vacation of Burlington avenue as laid out on the Commissioners' map and also on the Bayway map.

Another petition by the same parties was also filed with said Board of Works likewise endorsed April 7, 1915, and alleging that said streets were shown on said two maps and prayed for the vacation of said streets without specifying either map in the prayer. One of these two petitions was the original and the other an "amended" petition.

The record shows that the matter was then taken up by the Board, notice of hearing was given, objections were heard, the original and amended petitions were referred to the Committee on Streets, and thereafter the Board finally adopted (See Exhibit D. 42, also D. 3) the ordinance relied upon as vacating said streets. This ordinance provides that the following streets be vacated and closed: (1) Chelsea and Richmond streets as they appear on the Bayway map "and as they also appear" on the commissioners' map. These streets are grouped in one paragraph. (2) Brighton street as laid out on the

Commissioners' map. This is made a separate paragraph with no mention of the Bayway map. (3) Old Princeton avenue as delineated on the Bayway map, with no mention of the Commissioners' map (said street not appearing on the Commissioners' map). This is a separate paragraph. (4) Princeton avenue as laid out on the Commissioners' map, with no mention of the Bayway map (said street not appearing on the Bayway map). This is a separate paragraph. (5) Burlington avenue as laid down on the Commissioners' map "and on said" Bayway map. This is a separate paragraph.

It thus appears that complainants when they attempted to have these streets vacated well knew that Brighton street was laid out on both maps and that the two streets did not coincide by some twenty-five feet. They knew that the street as shown on the Bayway map encroached on their property by some thirty-five feet. In one petition they asked for the vacation of the street as shown on the Commissioners' map. In the other petition they asked for its vacation without specifying either map. But the Board of Works, with both petitions before them, were careful to vacate Brighton street only as laid out on the Commissioners' map, while at the same time they vacated the other streets which appeared on both maps by specifically referring to both maps.

If further evidence is required to prove that Brighton street as shown on the Bayway map was never vacated and that complainants, or one of them, knew it, the admission of complainant Hunter to defendant is sufficient (pp. 107-9, also p. 119). From that it appears that after the contract was signed and when the closing of title was being discussed, Hunter told defendant this

street could not be closed and suggested that defendant could buy the property on the other side; and defendant told him he did not propose to buy the whole Jersey meadows in order to insure title for complainant (119). This testimony is in no wise denied or impugned. On the contrary, it is corroborated by complainants' witness, Wright, from whom it appears that the Fidelity Trust Company had refused to insure the title to the property in question without making an exception amongst others of outstanding rights in Brighton Street, as laid out on the Bayway map; (see Ex. D. 2), and that Wright had negotiated on July 6th for the Title Company to guarantee against owners lying between the railroad, river and South Front street on condition that he deposit with said company the sum of $20,000. (Note: This negotiation was had on July 6th, or three days after July 3rd, when defendant had finally rejected the title and tendered back possession. The fire at the plant occurred July 6th, or just before Wright told defendant's counsel of his plan with the Fidelity Trust Company (p. 147).

Point XI.

Brighton Street on the Bayway Map is a Cloud on Vendor's Title.

Agens v. *Koch,* 74 N. J. E., 528.
Vogt v. *Mullin,* 82 N. J. E. at p. 454.
McAndrews & Forbes Co. v. *Camden Nat. Bank,* 87 N. J. L. 231.

The court below held that Brighton street has been vacated, but the learned Vice-Chancellor must have been referring to the street as shown on the Commissioners' map. The opinion does not in terms hold that the street has been vacated

as laid out on the Bayway map. If such was the court's conclusion it was in error for the evidence, as above shown, is to the contrary. Moreover complainants themselves long after the termination of the only vacation proceedings in evidence, that is to say when they tendered their deed (D. 12) to defendant, took pains to provide that said conveyance be made "subject to the public and private rights in streets and avenues crossing or *bounding* the herein above described premises."

Point XII.

Defendant's Knowledge of Existence of Brighton Street is no Waiver of the Encumbrance.

The court below points out that defendant examined the property prior to the purchase and saw the maps showing the paper streets, including Brighton street. But the testimony is that there was nothing on the ground to indicate Brighton street physically (p. 73). In such case knowledge of the existence of the encumbrance constitutes no waiver on the part of defendant, who was careful to protect himself by insisting upon a contract providing for a good and marketable title free from all encumbrances, and he was not estopped from insisting upon a clear title.

Propper v. *Colson,* 99 Atl., 385 (Errors and Appeals).

McAndrews & Forbes Co. v. *Camden, supra,* at p. 233.

DeLong v. *Spring Lake,* 72 N. J. L., 125.

Demars v. *Koehler,* 62 N. J. L., 203.

In the case of *Propper* v. *Colson, supra* (reversing the Court of Chancery), a vendee, who

had contracted for a free and clear title *with knowledge of the existence of an outstanding encumbrance,* was relieved of his purchase and his deposit on account thereof was refunded to him. That is exactly the relief sought by defendant in the case at bar, and he asks it for exactly the same reasons, among others, that were successfully urged in the case cited.

Point XIII.

Private Rights in Brighton Street Still Subsist, Notwithstanding Alleged Vacation of the Street.

But even though it can be held, as the court below seems to do, on some theory not disclosed by the evidence, that Brighton street on the Bayway map has been vacated by the public authorities, there still remain the questions of private rights in the street.

The court below dealt with such private rights as follows:

> "There is no claim that there was any private rights over any of these streets except such as may have arisen by reason of conveyances made referring to the filed maps, except with respect to Brighton street. There is shown that by deed made in 1865 (D. 23) there was reserved a private right of way. There is no evidence that such right of way has ever been exercised. While as a matter of law upon dedication to public use the private right might not have been merged, yet it seems to me that where the streets were dedicated, and accepted by the City and never used by the public or by those who are said to have private rights in the public vacated streets, the rights, both private and public expired." (Pp. 158-9.)

The statement quoted to the effect that the streets in question were "accepted by the City" is hardly warranted. There is no evidence of public acceptance of Brighton street, or of the other streets on the Bayway map alleged to have been vacated.

As for the private rights in Brighton street which "may have arisen by reason of conveyances made referring to the filed maps," it is respectfully submitted that the court below was in error in holding that upon the vacation of such streets "the rights both private and public expired." Our Supreme Court has held, as recently as *Borough of Verona* v. *Essex Freeholders,* 88 N. J. L. 55 (affirmed here on the opinion below, see 89 N. J. L. 373), that "it is settled that the vacation of a street does not impair private rights." See also, *Bozarth* v. *Egg Harbor City,* 103 Atl. 405.

Any possible doubt as to this proposition is cleared by the proviso at the close of section one of Chapter 286, P. L. 1911, p. 614, as follows: "Such action (extinguishment of public right in dedicated streets) by said Common Council or other board or body shall not impair or affect any private right-of-way or access which any person may have acquired in or over said land."

The exact extent of private rights in streets like Brighton street, dedicated by the filing of a map and the sale of parcels of land with reference thereto, is perhaps not yet clearly delimited in New Jersey.

See *Atty. General* v. *M. & E. R. R.,* 19 N. J. E. 386, 393, 394 (reversed on other grounds).

Clark v. *Elizabeth,* 40 N. J. L. 172.

Dodge v. *P. R. R.,* 43 N. J. E. 351.

Stevens v. *Headley,* 69 N. J. E. 533.

Newark v. *Hatt,* 79 N. J. L. 548.

In re Vacation of Peat Street, 36 N. J. L. J. 365.

In the case at bar, Brighton street, as already pointed out, connects the open and existing public highways of Amboy avenue and South Front street. Brighton street as laid out on the Bayway map is recognized by complainants predecessors in title, Augustus Whitlock, *et al.,* and in their deed (D. 23) they convey the parcel extending from Amboy avenue to South Front street, describing the easterly boundary of the piece conveyed as "the easterly line of Brighton street." Finally, it is to be noted that in this same deed the grantors specially reserve "the right of way over Brighton street as the same is laid out on said map." (Bayway map.) (See D. 23, at p. 303 of case.) In view of the foregoing it seems difficult to conceive how a clearer case of the existence of private rights in a dedicated street alleged to have been vacated can be presented. If the limitations of such private rights are not clearly defined under our decisions then the least that can be said of them in this case is that they present doubtful questions of law which should not be determined in a suit by vendors against vendee on specific performance.

Kohlrepp v. *Ram,* 79 N. J. E. at p. 390.

Sheehan v. *Humphreys,* 81 N. J. E. at p. 418.

Van Riper v. *Wickersham,* 77 N. J. E. at p. 232.

As for the specific reservation of the private right of way in the Whitlock deed (D. 23), the Court, as already shown, merely states "there is no evidence that such right of way has ever been exercised" (p. 158). Taking that to be so it is also true that there is no evidence that it has not

been exercised. Neither does it follow as a matter of law that because of such mere non-user there has been an abandonment. As this court has stated in *Raritan Water Power Co.* v. *Veghte,* 21 N. J. E., at page 480. "To accomplish an abandonment, the facts or circumstances must clearly indicate such intention. Abandonment is a question of intention. Non-user is a fact in determining it, but is not even for twenty years conclusive evidence in itself of abandonment." The easement in that case was a right to divert water, but the same rule applies in the case of a right of way. *Mason* v. *Ross,* 75 N. J. E., 136, reversed on other grounds. 77 N. J. E., 527. Moreover the parties who might be entitled to use Brighton street are not in court and it is improper to decide their rights in their absence, "and it is certainly improper in a specific performance case."

Kohlrapp v. *Ram,* 79 N. J. E. at p. 391.

Complainant should have determined the claims of private rights in Brighton street and set these doubts at rest by filing a bill to quiet the title.

Paulmier v. *Howland,* 49 N. J. E., at p. 373.

Instead of doing so he stands upon a claim of perfect title and asks a court of equity to assist him in forcing upon an unwilling vendee who contracted for a marketable title, free from all encumbrances, a property that will expose such vendee to the hazard of litigation in regard to it. In such a case the court will not decree specific performance.

Tillotson v. *Gesner,* 33 N. J. E. at p. 327.

Cornell v. *Andrews,* 35 N. J. E. at p. 16.

Zelman v. *Kaufher,* 76 N. J. E. at p. 53.

Point XIV.

Complainants' Misrepresentation Sufficient to Prevent Relief.

Before leaving the subject of Brighton street the attention of the Court is directed to the further fact that complainants gave defendant to understand that the dedicated streets had been vacated (p. 86). Complainants attempt no denial of this. The fact is, however, that they knew from their own vacation proceedings and negotiations that Brighton street as shown on the Bayway map had not been vacated, and later on, when the contract had been signed and they were trying to persuade defendant to take the title which they had, they told him Brighton street "could not be closed on account of some property that lay back of it" (p. 108). This, too, is not denied. The result is that a clear misrepresentation was made by complainants which itself is sufficient to disentitle them to a decree of specific performance.

When a contract has been procured with any sort of fraud or falsehood the court will refuse its discretionary aid of specific performance.

Plummer v. *Keppler,* 26 N. J. E., 481.

An intentional misrepresentation of a fact materially affecting the value or use of the property, will deprive the party making it of all right to a remedy in equity.

Plummer v. *Keppler, supra,* at p. 482.

Point XV.

Complainant's Title in Still Encumbered With Clifton Street and an Unnamed Street.

Leaving Brighton street and the fourteen-acre tract for the moment and coming to the 2 92/100 acres piece which adjoins it (p. 84) at Brighton street and Burlington avenue and extends to the Elizabeth river, it appears that this part of the property in suit is crossed by streets which it has never even been suggested have been vacated. The streets referred to are Clifton street and an unnamed street northeast of and parallel to Clifton street. (See Ex. D. 2, Sec. 20.) These streets are shown on the Commissioners' Map (D. 4) and the legislature has made them and the map upon which they are laid out, final and conclusive, unless vacated by the City. (P. L. 1869, Chap. 392, Sec. 1.) They were included within the exceptions to the title to the second tract raised by the Fidelity Trust Company. They were not mentioned in the alleged vacation proceedings (D. 3), and for the very good reason that this second tract was not owned by complainants at the time they applied for the vacation of the streets mentioned in their petition and which affected the 14 22/100 acres tract. (Referred to in the petition D. 3 as "fifteen acres," p. 205.)

Point XVI.

The Existence of Amboy Avenue Renders Title Unmarketable.

This is an existing public highway, actually open across the property in suit. (Shown on D. 3 map.) The question as to whether the existence of such a highway constitutes a breach of

warranty is not settled in New Jersey. This court has twice expressly so held.

McAndrews & Forbes Co. v. *Camden, supra.*

Beach v. *Hudson River Land Co.*, 68 N. J. E., 656.

The title in suit is therefore not marketable for it is affected by a doubtful question of law.

Kohlrepp v. *Ram, supra.*

Van Riper v. *Wickersham, supra.*

It is true that the road is a physical fact of which the buyer was necessarily apprised; but the seller was likewise so apprised, and yet he contracted to give a marketable title free from all encumbrances. If the vendee was careless so was the vendor. Had there been no contract for a free and clear title the parties might perhaps be said to have waived the doubtful encumbrance. The court below has found, however, and the evidence justifies the conclusion, that there is no evidence in the case that will permit the court "to find that the defendant has waived his right to have a good and marketable title." (P. 153.)

Now in *DeLong* v. *Spring Lake, supra,* and in *McAndrews & Forbes Co.* v. *Camden, supra,* there are dicta which might indicate that there is a distinction to be drawn between encumbrances which are physical facts and those which merely affect the title. (See especially the *McAndrews & Forbes Co.* case at p. 234.) But in *Demar* v. *Koehler, supra,* and *Propper* v. *Colson, supra,* which cases have made the law in this state on the question of the effect of knowledge of encumbrances where there is an agreement to give a free and clear title, this court neither by inference nor the logic of its opinions suggests any such distinction. At least it may be said that

the question is still debatable and therefore specific performance is not the kind of case in which to settle it. Defendant had to pass upon this doubtful question when title was tendered. If the court's opinion is requisite to determine the question finally, complainants are literally selling defendant a law suit.

The learned Vice-Chancellor decided with respect to Amboy avenue as follows: "I do not have to pass upon the question whether the existence of a public street over land to be conveyed would make a title such as this unmarketable because I find as a fact that the contract contemplated only that the real estate *actually* owned by the complainants should be conveyed, and did not contemplate the conveyance of the land within the boundaries of Amboy avenue." (P. 159.)

The written contract contains no such suggestion. Conceding that there has been sufficient performance in the case at bar to take the contract out of the statute of frauds and to permit of the admission of parol evidence, it is respectfully urged that there is no evidence, parol or written, of any modification of the written contract. The court below itself found, as above pointed out, that "there is no evidence before me that will permit me to find that the defendant has waived his right to have a good and marketable title." There is certainly no evidence that Amboy avenue was to be excluded from the tract sold. On the contrary, an examination of the contract in suit, the maps in evidence, the deed into the complainants (D. 16) and the deed prepared and tendered by complainants themselves to defendant (D. 12) proves that the clear intention was to include Amboy avenue in the conveyance.

The contract describes one parcel as comprising "14 22-100 acres" (p. 23). The map annexed to D. 3 shows Amboy avenue to be included in that tract. The deed into complainants (D. 16), given by William H. Rankin, et als, after describing the 14 22-100 acres, continues as follows (p. 270): "Including in said premises twenty-eight hundredths (28-100) of an acre which comprises *that part of Amboy avenue* crossing said premises, subject to the rights of the public in said street." The deed tendered by complainants and rejected by defendant recites that the 14 22-100 acres is "the same premises conveyed to the parties of the first part (complainants) by deed from William H. Rankin, et als, recorded in Book 671 of Deeds for Union County, on page 57." This deed is D. 16.

The court appears to be laboring under a misapprehension as to the land included in Amboy avenue and to decide that it was not actually owned by complainants. Of course it is established by abundant authority that the fee to lands on which highways have been laid is in the abutting owner. *Rogers* v. *Warrington,* 101 Atl. 183, and cases cited. No evidence whatever is to be found in the record in the case at bar to rebut this legal presumption. On the contrary it is clear as above set forth, that Amboy avenue was required to make up the 14 22-100 acres and was included in the premises described in the deed tendered to defendant.

Point XVII.

Railroad Right of Way is an Encumbrance.

A branch of the Central Railroad of New Jersey crosses the property in suit. The right of way is for an indefinite time. (D. 11.) Defendant saw the railroad and knew it was there before he signed the contract. (P. 86.) All that has been said with respect to Amboy avenue applies to the railroad, with this difference, namely, that the railroad is an encumbrance without any doubt. An apt summary of the law in several states is given by Professor Washburn: "In Pennsylvania the court held a highway across the granted premises, which had existed thirty years, not to constitute an encumbrance within the meaning of the covenants in a deed. But a private way would be an encumbrance. *A right of way for a railroad is an encumbrance for which a covenantee may recover, although cognizant of its existence when he took the deed.* But whether this applies to public highways" the courts in the various states are not agreed. (Washburn on Real Property, Vol. III, pp. 492-3, 5th Ed.) (Note that deed tendered by complainants was drawn subject to this right of way.)

See also 11 Cyc, 1116 and 8 A. & E. Enc. Law, 2d Ed. p. 125.

Point XVIII.

The Encumbrances Are Not Deminimis.

The portion of Brighton street as laid out on the Bayway map which has not been vacated and which encroaches on the premises in question is thirty-five feet wide and over one thousand feet long. (See map an-

nexed to D. 3 drawn to scale.) The area of Amboy avenue within the 14 22-100 acres tract is over a quarter of an acre (28-100 of an acre. See D. 16) and cuts straight through the property. The right of way of the C. R. R. is thirty-three feet by about eighty-five feet and crosses the property only about eighty-five feet from South Front street. This corner of the property was of vital importance to defendant. It abutted on South Front street near the public docks. Had it been unencumbered it would have afforded egress from the premises and enabled defendant to erect a building there. As a matter of fact the encumbrance of the unvacated portion of Brighton street, and of the C. R. R. right of way, take up practically the entire frontage on South Front street and the approach thereto from the rest of the tract. If the defendant had known of these encumbrances he would not have purchased the property (pp. 88-90).

Point XIX.

Possession by Defendant No Waiver.

Reference in the pleadings, testimony and conclusions of the court below is made to the fact that pending the closing of title defendant entered into possession of the premises and worked the plant down to the time of the fire. The reasons for this are fully explained by defendant and not in anywise denied (pp. 105-107). He took possession at complainants' urgent request. He ran the plant down to the time of the fire because it was a going concern and could not be stopped without great loss to one party or the other. Abandonment of the property by defendant would in fact, as stated by the court,

"have been ruinous" (p. 107). Title was finally rejected on the adjourned day for closing namely, July 3d, and defendant told complainants he wanted to give up possession immediately (p. 95).

> "*By the Court.* Was this after the fire? A That was before the fire.
>
> Q What did he say? A I understood him to say that he would take possession next day, send somebody, a representative, to take the place of the representatives I had there.
>
> Q Well, did he do so? A No."

The result was defendant remained in possession until an arrangement without prejudice was made by the parties to put a keeper in charge. In the meanwhile, on July 6th, the fire occurred, and the plant has never since been worked.

The point might have significance if this were a suit on an alleged parol contract, or an alleged modification by parol of the contract as written. Defendant's possession, as already conceded, is amply sufficient to take the case out of the statute of frauds or to permit the introduction of parol evidence. But as already shown, complainants sue upon the specific written contract and not upon any variation thereof, and the court below found it unnecessary to "mould the pleadings to fit the proof."

The important point in reference to the subject of possession by defendant is, as the court below has found that "There is no evidence before me that will permit me to find that the defendant had waived his right to have a good and marketable title. There is no doubt but that on July 3rd, 1917, the defendant formally tendered to the complainants possession of the

property, and that the complainants declined to receive it." (Conclusions p. 153.)

> "Where, either by the terms of the original contract or by a subsequent arrangement, it is agreed that the purchaser shall take possession and shall be entitled to a good title, no waiver is worked by the possession, or by any acts which do not go beyond the acts of a person entrusted with the possession and bound to take care of the estate."
>
> *Fry's Spec. Perform.* 5th Ed. Sec. 1347, p. 656.

Point XX.

The Burden of Proof Was on Complainants.

At the opening of the final hearing the court below stated that the burden of proof was on defendant (p. 61). Defendant's counsel cited *Cornell* v. *Andrus,* 36 N. J. E. 321, to the contrary, and submitted the reported decision for the inspection of the court. After inspecting the report the court still ruled that the burden was on defendant. The result is that complainants have never made any proof of their title. The point may possibly now have lost some of its importance, but we respectfully insist that it was well taken by defendant.

> "The burden of proof is on the vendor to show good title, where that is denied in the vendee's answer."
>
> 36 Cyc. 695.

Paragraph 3 of the Bill, so far as it alleges the acquisition of title by complainants, is denied by Paragraph 3 of the Answer.

Paragraph 4 of the Bill, so far as it alleges a contract between the parties to the suit, is denied by Paragraph 4 of the Answer.

Paragraph 9 of the Bill, so far as it alleges tender by complainants of sufficient deed, is denied by Paragraph 9 of the Answer.

Paragraph 10, so far as it alleges notification by complainants to the insurance companies of the loss by fire and the taking of necessary steps to protect the interests of the defendant, was denied by Paragraph 10 of the Answer.

Paragraph 11 of the Bill, so far as it alleges that the complainants were able to perform, is denied by Paragraph 11 of the Answer.

Proof of each of these allegations is necessary to support the Bill.

As the case now stands, it is barren of proof that complainants ever acquired the equitable title to the land in suit; that there was ever a contract to which the complainants were a party; that the complainants offered to perform or had the power to perform under Exhibit "B" attached to the Bill, or that they discharged their admitted duty to the defendant to protect his alleged interests in the property under the Fire Insurance Policies.

This is not a mere question of the order of proof, but goes to the legal effect of the pleadings.

Unless the defendant has supplied the proof upon these points, the defendant is entitled to judgment upon the pleadings.

It is respectfully submitted that such proof has not been supplied.

Point XXI.

The Public Rights in the Streets and Avenues Crossing the Property Were Not Extinguished by the Ordinance, Exhibit D. 3.

The proceedings, on which this ordinance was based, are:

April 15th—Petition received and referred to Committee on Streets (page 216, line 21).

April 29th—Amended Petition received and referred to Committee on Streets (page 217, line 1).

April 29th—Street Commissioner was directed to publish notice of intention to vacate (page 217, line 5).

May 6th—Amended petition again referred to Committee on Streets (page 219, line 20).

May 6th—Resolution of April 29th reconsidered and laid on table (page 219, line 25).

May 6th—The Street Commissioner was directed to publish a new notice of intention to vacate (pages 219-221).

May 18th—Two objections were received (page 212).

May 20th—Street Commissioner reported notice of intention to vacate had been published (page 222).

July 1st—Ordinance read and adopted on first and second reading (page 223, line 18).

July 3rd, 10th, 17th—Notice of a public hearing upon proposed ordinance for vacating streets and releasing the lands from dedication (page 215, line 40).

July 22nd—Chairman of the Street Committee having under consideration the petition reported that a public hearing had been held on July 20th on the ordinance vacating said

streets and recommended the adoption of the ordinance on third reading (page 228, line 20).

July 22nd—Ordinance adopted on third reading (pages 224-227).

This is the complete record and nothing was done which is not recorded (page 62, line 35 and page 78, line 32).

Two separate and distinct things were attempted by this ordinance:

(1) To vacate and close the streets laid out by the Commissioners under the Act of 1867, crossing the lands in suit except Clifton street, a part of Burlington avenue and an unnamed street, and

(2) To release and extinguish the public rights arising from dedication by the Bayway map, in streets crossing the larger tract except Brighton street.

The streets laid out by the Commissioners are not identical with those over which public rights were acquired by dedication (page 66, line 25 to page 67, line 25, and map attached to petition, Exhibit D. 3).

A. The Commissioners' Streets.

The power to vacate by resolution any street established by the Commissioners was conferred upon the City Council by Sec. 8 of Chapt. 146 of the Laws of 1875, amending the City Charter. For present purposes it will be assumed that the Board of Public Works succeeded to this power. After the Commissioners' maps were filed, the Legislature by direct enactment made the streets and maps, final and conclusive, unless vacated by the City Council by resolution. (Chapter 392, Laws of 1869, Sec. 1.)

The Board of Public Works did not vacate "any street", as authorized by statute, but they attempted to blot out a group of streets within a certain zone and they attempted to do it by ordinance and not by resolution.

The notices directed to be published by the Street Commissioner (pages 217-221) may be disregarded, as they were evidently published in error under Sec. 93 of the act amending the City Charter, Chapter 82 of the Laws of 1863, which is not applicable to a proceeding to vacate streets laid out by the Commissioners and made permanent by the Legislature in 1869.

B. The Bayway Dedication.

The Legislature, by Chapter 205 of the Laws of 1904, delegated power to the governing body of any city to vacate and extinguish the public rights in land dedicated to public use, and again by Chapter 286 of the Laws of 1911, delegated the power to release and extinguish public rights acquired by dedication.

These are independent enactments. They prescribe alternative procedure. The first is initiated by the consent of the owners and is finished by a referendum to the voters of the city. The second is taken upon the initiative of the governing body; requires no consent of the owners and no referendum. If support can be found for the ordinance in question, it must be under the later act, for no referendum was provided for or invoked.

The power conferred by the Act of 1911 was "to release and extinguish" the public right arising from said dedication. This, the Board did not do. The ordinance purports to ordain that "the following named streets and avenues" (naming them) "be vacated and closed."

These words are appropriate to carry out what the Board was authorized to do in vacating the Commissioners' streets taken and laid out and made permanent by statute and constructively occupied, but are not equivalent to a release of unaccepted rights under which no possession had been taken either actual or constructive. Neither a release nor rights are made the subject of the ordinance—the subject is streets vacated, and there is nothing in the words or in the context to indicate that the ordinance was intended to be operative in any other sense than a physical vacating of existing streets. The mention of the Bayway map is not sufficient for in the ordinance the streets on that map are treated as being of the same character as those on the Commissioners' map.

The word "vacate" is not used in the ordinance in the sense of making void the public rights as it is used in the Statute of 1904, but is used in the same sense in which the Legislature used it in authorizing the municipality to vacate streets which had been appropriated and at least constructively occupied by the municipality. A dedication is equivalent to a grant, and it would hardly be said that when one vacates land he makes void the grant. The Legislature has construed its use of the words employed in the ordinance, for they were deemed insufficient to accomplish the release or extinguishment of dedicated rights. Otherwise, the two Acts of 1904 and 1911 would have been useless legislation, for prior legislation had made ample provision for vacating streets. Again the Legislature has given construction in one act both to the words "vacate streets" and to the words "release and extinguish the public right arising from dedication," in Chapter 152 of the Laws of 1917, Article

XXII, Section 1, Subdivision (b), and Article XXII, Section 4, where provision is again specifically and separately made for an ordinance on each subject, and the last words of Section 4 clearly point out that the two powers were present in the legislative mind, and were not deemed equivalent. In granting power to release and extinguish public rights acquired by dedication they add the proviso

> "provided, however, that notice of the intention of the governing body to consider any such ordinance and a hearing thereon shall be given as is herein provided, concerning ordinances for the *vacation of streets.*"

This act is subsequent to the ordinance now in question and does not govern the procedure in adopting it, but is useful to indicate the uniform construction of the meaning of the words employed by the Legislature in the series of acts relating to the two subjects.

The omission was not mere inadventance on the part of the Board, for in the notice of the public hearing, they specify "the releasing of the lands within such portions from any dedication thereof" (page 214, line 11). The ordinance, however, contains no such provision, and it must be assumed that it was intentionally omitted. It would be a strain upon the imagination to assume that the ordinance was passed upon final reading without looking at the notice, the publication of which was jurisdictional. Thus the release from dedication as a thing different from vacating streets was actually as well as presumptively present to the mind of the Board when the ordinance was passed, in the same sense as was mentioned in

American Heating Co. v. *The Board, etc.,*
81 N. J. L. 424.

Statutes releasing public rights are strictly construed.

Legislation is the sole basis of the authority of the Board of Public Works to vacate streets taken for public use and to release and extinguish public rights acquired by dedication, and, therefore the repeated construction and interpretation of its own language by the Legislature is almost controlling.

It has been suggested that the ordinance might be sustained under

Newark v. *Penn R. R. Co.*, 86 N. J. L., 575.

In that case, lands were dedicated in 1833. In 1849, the Legislature empowered the Common Council to make surveys of dedicated streets, which that body thought proper to recognize as public. Such survey was made and approved and did not include the lands in question. In 1856 a subsequent survey was made, the validity of which was questioned by the Court of Errors. This second survey did include the lands in question. These lands have been continuously occupied by the defendant and its grantor since 1837. In 1901, by legislative authority (P. L. 1874, p. 45) Newark made a contract with the Railroad, which was strictly performed to the letter to elevate its station at these lands. The act provided:

> "Such contracts made by any railroad company or companies as aforesaid with said cities or either of them are hereby fully ratified and confirmed,"

and it also provided:

> "Said cities respectively, and for that purpose shall have power to vacate, alter the lines, and change the grades of any streets."

It was held:

> "By that contract it (the City) recognized the right of the present defendant to the exclusive possession of the tract free from any user of public travel thereover. Such action on its part was either an acknowledgment of the invalidity of its acceptance of the dedication of 1856 or a repudiation and abandonment of that acceptance if it was valid."

If counsel have apprehended the grounds of the decision in the Newark case, it is not a controlling authority here.

(a) The second survey under which the city claimed was of doubtful valadity.

(b) The contract evidenced an acknowledgment of the invalidity of the second survey or a repudiation thereof.

(c) The land in question had been occupied continuously and adversely by the R. R. Co. and its grantor for station purposes for more than 50 years.

(d) The act which authorized the contract, by express words ratified and confirmed the contract and the contract was inconsistent with any claim of public right to the *locus in quo*.

(e) The act which authorized the contract also delegated to the city for the purpose of the contract power to vacate streets:

C. No Public Hearing Upon the Ordinance Was Afforded.

The Act of 1911, Section 2, prohibits the adoption of any such ordinance until after a public hearing shall have been granted with respect thereto.

On July 22nd, just before the passage of the ordinance on its third and final reading, the "Committee on Streets, having under considera-

tion the petition of Midvale Chemical Company,'' etc., reported that a public hearing was held on July 20th (page 228, line 20).

The report of the Committee is to the effect that no objectors appeared before the Committee. This would be expected as the notice imported a hearing before the Board and not before the Committee (pages 214, 215).

The Board delegated no power to the Committee to hold a hearing and there was no notice to appear before the Committee; nevertheless, the Committee assumed the power not only to hold the hearing but to exercise other judicial functions in passing upon the propriety of the ordinance and upon the jurisdictional facts and to recommend the adoption of the ordinance. There was no hearing before the Board. The action of the Committee was not ministerial or administrative in character.

D. The Board has no power to delegate to a Committee authority to hold this hearing.

Foster v. *Cape May,* 60 N. J. L. 78.

This case involved a lighting contract. The statute conferred upon the Common Council the power to make such contract. The Council purported to delegate to a Committee the power to make the contract with no prescription as to terms, except that the contract should provide for a sufficient number of lights at thirty-five cents per light per night for five years.

The Court pointed out the distinction between purely ministerial and administrative acts on the one hand and judicial action on the other and the contract was held not valid.

In *State* v. *Patterson,* 34 N. J. L. 163, the delegation of discretionary powers to a commission was held void.

(See also *Harcourt* v. *Asbury Park,* 62 N. J. L. 158; *Miner* v. *Larney,* 87 N. J. L. 40.)

The case last cited involved a liquor license and the matter was referred by the Council to a Committee. The Court says (page 42):

> "Apparently the Council considered its duty to have been performed by the session of the Committee and that no further public hearing was called for. The action of the Council in delegating its authority to a Committee cannot be supported by the express language of the Charter; the power and the responsibility are theirs and theirs alone."

The Court of Errors, in *Amer. Heating Co.* v. *Board of Education,* 81 N. J. L. 423, having under consideration a resolution of the Council adopting the heating system of the plaintiff, directing the city architect to incorporate the system in his plans and delegating power to make the contract to the president and clerk, held that the resolution was void and would not support the contract so executed.

The ordinance is based upon judicial action of the Board of Public Works and not upon legislative or ministerial action within the distinctions drawn by the Court of Errors in *Sears* v. *Atlantic City,* 73 N. J. L. 712 (Court of Errors).

> "A legislative (ministerial) act is one which prescribes a general rule of conduct, while a judicial act is one which imposes burdens or *confers privileges* in specific cases according to the *discretionary judgment* of some person or board as to the propriety of imposing the burden or *granting the privilege* in the specific case."

E. The jurisdictional facts upon which this ordinance could be passed, were not made to appear.

It is conceded that under late authorities a recital of power is not ordinarily needed in an ordinance where municipal action is by statute made dependent upon the determination of public benefit or public interest, and that such determination may be inferred from the mere passage of the ordinance.

There are exceptions to this rule, and one of them is where such a determination is the authority only for alternative action.

> *Northern Iron R. R. Co.* v. *Englewood,* 62 N. J. L. 191, where the Court said:
>
> "We think that where such a determination is authority only for alternative action, the determination must affirmatively appear. Any other rule would leave it impossible to know whether the action was based upon such a determination or upon a mistake of fact as to the existence of the normal conditions authorizing it, and would in effect work a repeal of those conditions."
>
> See also *Lehigh Valley R. R. Co.* v. *Jersey City,* 81 N. J. L. 395.

The case at bar comes within this exception. The Board had the alternative to proceed under the Act of 1904, which required the consent of the owner of the fee, and the submission of the ordinance to a referendum, or the Board might proceed under the Act of 1911 of its own initiative and without submitting the ordinance to a referendum, and under the later act, jurisdiction was acquired, if at all, by the determination

> "that such proposed street or highway or some part thereof will not be of public benefit or that the public interest will be better served by releasing said lands or any part thereof from such dedication."

It is submitted also that the rule does not extend to a case where public benefit and public interest are the sole jurisdictional facts to be determined; where no petition or consent of owners is required, and where the empowering statute contemplates that action shall be taken by the Board of its own initiative, but only in cases where the public interest is made to appear.

By reference to the ordinance and the map attached to the petitions in Exhibit D. 3, it will be observed that the action of the Board, so far from indicating any consideration of the public interest or benefit, almost certainly shows consideration merely of the private interest of Midvale Chemical Works. The parts of the streets vacated lie wholly within the boundaries of their lands. Five of the six streets and avenues vacated are left with beveled ends, coincident with the boundaries of the property. Nothing is vacated outside of the property. Streets and avenues appropriated by legislative enactment come up to this property from every side and stop with pointed and irregular ends. They become mere *cul de sacs*. While Midvale Chemical Works may go and come by the named streets, other owners of property on the same streets on all sides cannot pass from one unvacated part to another. There is discernable no consideration of public convenience or of any treatment of the subject as one involving streets or thoroughfares. If it were permissible to refer to the petition which was filed without authority of law, it would be found that there is nothing in it to indicate that the public interest or benefit received consideration. The petition is not verified and is supported by no proof. It is presented by these two non-resident gentlemen from Missouri, Trustees of Midvale Chemical Works, who had

agreed between themselves that neither they nor the certificate holders who should join them, should be personally liable, either on contract or for tort (page 18, line 30). They say that they purchased the property described, although their deed, Exhibit D. 16, is dated two months after their petition was received and referred to the "Committee on Streets." They described the paper streets. If there is anything that may be construed as a reference to public benefit or public interest, it lies in the statement that:

> "*In the opinion of your petitioners* the vacation of said streets, as hereinafter prayed, will be detrimental to the interests of no person, and will enable your petitioners to bring to the City of Elizabeth not only property of large value, but employment of many of its citizens" (page 207, line 2).

The opinion of the petitioners is not of special importance and is not a relevant fact. Even if the phrase about property and labor should be most liberally construed, it is used by persons who profess over their own signature to assume no personal responsibility of any kind for the truth of their unverified statement. By the words "Trustees of Midvale Chemical Works," the Board was put upon inquiry as to the nature of this fiduciary relationship. The whole assumed benefit to the public in return for blocking a net work of streets, was predicated upon opinion and upon the mere anticipation that property would be brought to Elizabeth and labor would be employed. There was nothing shown to indicate that either the opinion or the anticipations had any basis. The financial resources, the credit, the business experience, the technical force for the technical business proposed, the stability of the business, the number of laborers

to be employed, the amount of property to be brought into Elizabeth,—none of these things nor anything else that would enable the Board to reach an opinion of its own was made to appear at any stage of the proceeding. The importance of the streets as public highways, their connections with other streets, and their relation to navigable tide waters in Staten Island Sound and Elizabeth River, is not mentioned. The entire treatment of the subject, both by the Board and by the petitioners may fairly be said to relate to private rather than public interests, and there does not appear anywhere in the proceedings a real fact, bearing upon the public interest or benefit. The whole burden of the petition is summed up in the eighth paragraph, as follows:

> "Your petitioners further show it will be impossible for them to use the lands above mentioned and purchased by them for the purpose aforesaid, unless the paper streets or parts thereof, to be hereinafter designated are vacated."

The event has developed what should have been anticipated from the showing, namely that the works are closed, no labor is employed, and if petitioner's purpose has been accomplished the streets are closed with no benefit to the public.

The public interest is a jurisdictional requirement, and must be made to appear, and is not presumed. It is not a mere matter of regularity.

App v. *Stockton,* 61 N. J. L. 520 (523).
Perrine v. *Farr,* 22 N. J. L. 356 (366).

In the case last cited, the learned Chief Justice said:

> "No principle is better settled, than that an officer exercising special statutory au-

thority, or a tribunal of limited jurisdiction, must show its authority. If the case is not shown to be within the jurisdiction it is presumed to be without it."

(See also *State* v. *Lewis,* 22 N. J. L. 565.)

F. The Statutory Notice of the Pubilc Hearing was not given.

Section 2 of the Act of 1911 provides that:

"No ordinance shall be passed as above provided, until after a public hearing shall have been granted with respect thereto, notice of which hearing shall be advertised at least once a week for two weeks prior thereto, etc."

The ordinance in question was passed on its first and second reading on July 1st and ordered published two weeks (page 223).

Unless a contrary intent appears, the passage of an act or ordinance refers generally to the date on which it takes effect. If, however, a different intent appears from the whole tenor of the act, its passage may be regarded as having taken place at some other time, such as the date of approval by the executive or the passage of it by the legislative body.

Scales v. *Marshal,* 96 Texas, 140, where the authorities are collated.

In the case at bar, it is certain that in referring to the passage of the ordinance some other time was indicated than that at which it should take effect, and there are two possible solutions

(1) "No ordinance shall be passed until" etc.

(2) "No ordinance shall be" finally (?) "passed" etc.

Before injecting a word of limitation not used by the Legislature, into a general prohibition, the legislative purpose, if apparent on the face

of the act, may be sought. The obvious purpose is to give the fullest possible notice, not only to the public but to persons having a private interest in the subject matter and to negative the power to act judicially until a hearing shall have been given. The full purpose of the hearing can be realized only if held before the judicial mind shall have acquired a leaning, either for or against, even by a *pro forma* passage of the ordinance. The omission of the word "final" cannot be assumed to have been inadvertant.

Again Chapter 152 of the Laws 1917, Article XXII, Section 1, Subdivision (b) may be invoked as indicating the legislative interpretation, for it is there provided that the notice shall be given before the introduction of the ordinance, and this provision is made applicable to ordinances extinguishing dedicated rights by Section 4 of the same Article.

This act being more in the nature of a codification of existing law than of new enactment, serves rather to make plain the prior legislative intent than to indicate a change in the law.

Point XXII.

All Partners Are Necessary Parties Plaintiff or Defendant in an Action Based Upon a Contract of the Co-Partnership Unless Statutory Authority Be Found for Some Other Procedure.

It is a familiar rule at common law that however numerous a partnership or an unincorporated association may be, or however widespread its business, it can claim recognition in the courts as a complainant only when all the partners are made parties, as the common law recog-

nized only two forms of legal entity,—that of the natural person, and that of the artificial person or corporation, and the rule rests upon the theory that there is no legal entity before the Court and not upon the theory that there is a defect of parties plaintiff or a want of capacity to sue.

30 Cyc. 26, 27 and 29 and cases cited.

Mayor v. *Journeymen S. C. Asso.*, 47 N. J. Eq. 519.

Davison v. *Holden*, 55 Conn. 103 (3 Am. St. Rep. 40).

The Statutes of New Jersey do not permit the complainants to sue upon a partnership contract.

The enactments upon this subject are:

(1) Chapter 204 of the Laws of 1880 (3 Comp. Stat. 3921) providing for the formation of partnership associations, upon recording with the register of deeds in the proper county a statement containing full names of the partners, the amount of capital subscribed by each, the character of subscription, the total amount of capital, when and how to be paid, the character of the business, the location of the same, the name of the association which shall include the word "Limited" and its duration not exceeding 20 years, and the names of the officers.

An association so organized may sue and be sued in the association name. This is not such an association and the suit is not in the association name. There are two supplements to this Act, neither of which are pertinent to this point, —namely Chapter 141 of the Laws of 1883; Chapter 109 of the Laws of 1917.

(2) Page 121 of the Laws of 1837 (3 Comp. Stat. 3917), authorizing the formation of limited

partnerships, permits suits by and against the general partners, as if there were no special partners; but this is not such a partnership and the suit is not in the name of the general partners.

(3) Chapter 182 of the Laws of 1899 (3 Comp. State 3924), authorizing winding up proceedings by service of process upon the Trustees, but makes no provision of suits by the copartnership.

(4) Chapter 50 of the Laws of 1898, Section 11 (4 Comp. Stat. 5647) permits an unincorporated association to bring an action in the association name or in the name of the President or Secretary or Treasurer of such association for any violation of the "*Trade-mark Act,*" but does not permit any other suit in that form.

(5) Chapter 247 of the Laws of 1903, Section 40, (3 Comp. Stat. 4064) permits suits at law against unincorporated associations in the association name, but makes no provision for suits *by* such association.

These provisions exhibit a well defined legislalative scheme based upon public policy regulating the whole subject matter of organizations of a character similar to that of Midvale Chemical Works, and there is in them a studied determination to exclude associations like Midvale Chemical Works from suing in any other name or by any other parties than all the partners in the association. This case exemplifies the evils which the Legislature had in mind in the development of the scheme, for it would be an injustice which the Legislature could not be presumed to contemplate with favor to permit these non-resident trustees, disclaiming any liability

by contract or in tort both for themselves and their *cestui que trustent* to come into the State under an assumed name, incur obligations, bring suits, and enjoy all the privileges and protection afforded by the laws of the State in the conduct of business without disclosing the identity of the real parties in interest, or presenting an organization which had a legal entity and could be made to answer for its obligations, or the costs of the suit instituted by them.

The omission of authority for suits like the pending one, in this series of seven enactments, in five of which the subject of parties to suits by and against partnership associations was the subject of specific legislation, is equivalent to a prohibition of suits not permitted by the statutes.

The authorities involving suits by or against joint stock companies, organized under statutes, are not applicable. Cases of this sort are:

> *Saunders* v. *Adams Express Co.,* 71 N. J. L. 520; *Edgeworth* v. *Wood,* 58 N. J. L. 463; *Camden, &c. R. R. Co.* v. *The Guarantors of Pa.,* 59 N. J. L. 329; *Fargo* v. *Powers,* 220 Fed. Rep. 707; *in re Carthage Lodge,* 230 Fed. Rep. 699.

These cases all involved either the fact that the party so far partakes of the character of a corporation as to be suable as such, or that it may be sued in its assumed name under the New Jersey Statutes above referred to, or that by comity the organization should be recognized as such in view of the fact that it was created under the statutory law of another State, and none of them involves a partnership agreement without statutory support.

Reliance is also had upon the following clause of the Articles of Association:

> "No certificate holder shall as such be a necessary or proper party complainant or defendant in any suit or other judicial proceeding relative to or affecting the property or assets of the association."
> (Page 18, line 10.)

Passing by the proposition that parties may by a provision in a contract enact rules of procedure for the Court of Chancery, and that third parties are to be bound thereby, it is by no means clear that the quoted provision covers this case. It might cover such a case as *Stevens* v. *Bosch, supra,* where the sole question was the recovery of property or assets of the association, but it will not cover an action against a third party for the specific performance of a contract made by the beneficiaries in their own name for the conveyance of their own property, and for the payment to them and not to the trustees of the purchase price.

Point XXIII.

Fidelity Trust Company.

It is respectfully submitted that the learned Vice-Chancellor erred in excluding the application of complainants' attorney to the Fidelity Trust Company for an examination and insurance of the title in question, and the like application by the defendant's attorney (page 133, lines 10-20).

This was the first step in the defendant's effort to prove the facts set out in paragraphs 56-61 of the Answer (pages 51 and 52), which are claimed to amount to an equitable estoppel, precluding the complainants from insisting in an

action for specific performance that the objection raised by the Fidelity Trust Company, affecting the marketability of the title, was either unfounded or unsubstantial.

The evidence was rejected because the plaintiff had not laid a proper foundation (page 133, lines 21 and 22).

The foundation to which the learned Vice-Chancellor referred was that before the submission could be offered in evidence, there must be proved an agreement to abide by the decision (page 154, lines 3-15).

This was the very fact which the application of both parties established.

Smith v. *Morse,* 76 U. S. 76.

In that case, the submission contained no agreement to abide by the result and was signed by defendant's agent.

Justice Field says:

> "So the agreement to submit the matter to arbitrators and to an umpire if needful, carried with it the further agreement to abide the award which they might render or in case of their disagreement, which he might render. *The law implies an agreement to abide the result of an arbitration from the fact of submission.*"

The authority of the Fidelity Trust Company to act in this matter is found in Chapter 132 of the Laws of 1875 (p. 117, Private Acts).

Point XXIV.

Doubtful Title.

Summary of questions which may be raised by parties not before the Court.

(1) The vendor is Midvale Chemical Works and this action is not a bar to any other action by the Certificate Holders for specific performance.

(2) The equitable title is in the Certificate Holders.

(a) By the deed Exhibit D. 16.
(b) By the Articles.
(c) By declarations in Contract *in* Suit *and by* Exhibit D. 12.

(3) Both the legal and equitable title are in the Certificate Holders and the Statute of Uses executes the trust.

(4) The Trustees have no power to convey.

(a) Not reserved by anyone having the power.
(b) Not conferred by anyone having the power.
(c) Articles not so executed as to confer power to convey under the common law.
(d) Ditto by Statute.

(5) Purpose of power as expressed in Articles does not extend to a sale in liquidation.

(6) There is competent evidence that the trust has been surrendered.

(7) Streets and Avenues crossing the land

(a) Were dedicated to public use (Bayway Map).
(b) Appropriated to public use (Commissioners' Map). (Ch. 392, Laws 1869.)
(c) Private rights have been acquired.

(8) Private right over Brighton street was reserved by grantor in Exhibit D. 23.

(9) Amboy avenue an opened and used public street.

(10) Jersey Central tracks cross the land.

(11) The ordinance Exhibit D. 3 is invalid.
(a) Does not "release" the public right.
(b) No public hearing was afforded.
(c) Delegation of power to committee void.
(d) Jurisdictional facts did not appear.
(e) Statutory notice not given.

(12) The ordinance does not purport to vacate Clifton street or an unnamed street crossing the second tract.

These questions may hereafter be raised,
All of them by the Certificate Holders.
All but No. 1 by future vendees.
Nos. 11 and 12 by the City of Elizabeth.
Nos. 7 and 8 by owners of private rights.
Nos. 9 and 10 are conceded incumbrances.

The least that may be said of any of these subjects is that it rests upon disputed questions of fact, doubtful questions of law and that the parties entitled to litigate them are not before the court.

Such a title is doubtful and will not sustain a specific performance suit.

Kohlrepp v. *Ramm,* 79 N. J. Eq. 390;
Sheehan v. *Humphrey,* 81 N. J. Eq. 418;
Van Riper v. *Wiekersham,* 77 N. J. Eq. 232;
Flemming v. *Barnham,* 100 N. Y. 10;
Kilpatrick v. *Barron,* 125 N. Y. 751.
Schreiver v. *Schreiver,* 86 N. Y. 575 (584).

Defendant's Failure to File Briefs Below.

Counsel for defendant regret their misunderstanding of the attitude of the learned Vice-Chancellor as to the submission of briefs. They urge in extenuation that they took the oral conclusions delivered at the close of the trial for a final disposition of the case, but that by way of courtesy briefs would be received if counsel should desire. The case had been fully argued, the authorities had been presented and read at length and it seemed to counsel an imposition upon the time of the court to further prolong the argument. Moreover there was thought to be a general understanding that it was desirable to expedite the disposition of the case so that if possible it might be presented to the Court of Errors at the March term. This unfortunately proved impossible. Counsel were far from entertaining any idea of hampering the court or withholding aid in the due disposition of the case. The oral conclusions were not written out, revised or ready for delivery to counsel until long after the entry of final judgment and the perfection of the appeal.

Respectfully submitted,

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