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NOTICE AND GROUND OF APPEAL.

Filed October 18, 1921.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Plaintiff-Appellee,* *vs.* THE CITY OF NEWARK, *Defendant-Appellant.*	*Action at Law.* *Notice and Ground of Appeal.*

To Honorable Thomas F. McCran, Attorney-General of the State of New Jersey:

SIR:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in the above-entitled cause on the following ground:

1. That the Court erred in granting plaintiff's motion to strike out the first separate defense interposed by the defendant to each of the five counts of the amended complaint of the plaintiff.

JEROME T. CONGLETON,
Corporation Counsel,
Attorney of Defendant-Appellant.

SUMMONS.

Filed February 15, 1921.

THE STATE OF NEW JERSEY, TO THE CITY OF NEWARK:

(L. S.)

You are summoned to answer the annexed complaint of the State of New Jersey in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the Supreme Court at Trenton, this tenth day of February, A. D. nineteen hundred and twenty-one.

ENOCH L. JOHNSON,
Clerk.

THOMAS F. MCCRAN,
Attorney-General of New Jersey,
Attorney.

COMPLAINT.

Filed February 15, 1921.

(Amended Complaint filed July 27, 1921.)

New Jersey Supreme Court

MERCER COUNTY.

STATE OF NEW JERSEY, *Plaintiff,*	*Action at Law.*
vs.	*Amended Complaint.*
THE CITY OF NEWARK, *Defendant.*	

The plaintiff, the State of New Jersey, says:

FIRST COUNT.

1. That the defendant, during the whole of the year ending June 30, 1915, was and still is a municipality of this State.

2. That during the whole of said year ending, as aforesaid, defendant did divert the waters of a certain stream of this State, to wit, the waters of the Pequannock River, for the purpose of a public water supply for said municipality and has continuously diverted said water for the purpose aforesaid to and including December 31, 1919.

3. That under the provisions of an act of the legislature of this State, entitled "An Act to establish a State Water Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," approved June 17, 1907, being Chapter 252 of the Session Laws of 1907, the defendant was permitted to divert from the Pequannock

River aforesaid an average daily free allowance of water to the amount of 36,241,666 gallons, said last mentioned amount being the amount of water which was being diverted by said municipality on June 17th, aforesaid, the date when the act aforesaid became effective and operative.

4. That the average daily diversion of water by said municipality during the period mentioned in paragraph one was 41,916,666 gallons, said amount so diverted being 5,675,000 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. That by virtue of the provisions of said act said defendant then and there became and was liable to pay to the State Treasurer for the use of the State for the excess so diverted an amount to be fixed by the State Water Supply Commission at the rate of not less than one dollar nor more than ten dollars per million gallons.

6. That by virtue of the provisions of an act entitled "An Act to establish a Department of Conservation and Development, and to consolidate therein the State Water Supply Commission, the Board of Forest Park Reservation Commissioners, the State Geological Survey, the Washington Crossing Commission, the State Museum Commission and the Fort Nonsense Park Commission," approved April 8, 1915, the Board of Conservation and Development on the last mentioned date succeeded to and exercised and still exercises all the rights and powers, and performs all the duties theretofore exercised and performed by or conferred and charged upon the State Water Supply Commission.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1915, the sum of $2,071.37.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters, as aforesaid, to and including June 30, 1915, on the seventh day of February, 1916.

9. The State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1916, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1916, to the Attorney-General the name of said defendant and the amount so due by it, for collection, and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $2,071.37, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1915.

Second Count.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the first count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1917, was 46,300,000 gallons, said amount so diverted being 10,058,334 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole of the year ending December 31, 1917, the sum of $3,671.28.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1917, on the fourteenth day of February, 1918.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1918.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the first day of July, 1918, to the Attorney-General the name of the said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps

to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $3,671.28, the amount due from the defendant to the plaintiff for the whole year ending December 31, 1917.

THIRD COUNT.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the first count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1918, was 49,895,890 gallons, said amount so diverted being 13,654,224 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole of the year ending December 31, 1918, the sum of $4,983.79.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1918, on the thirteenth day of February, 1919.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1919.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the first day of July, 1918, to the Attorney-General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $4,983.79, the amount due from the defendant to the plaintiff for the whole of the year ending December 31, 1918.

Fourth Count.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the first count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1919, was 44,943,009 gallons, said amount so diverted being 8,701,343 gallons in excess of the amount

which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole of the year ending December 31, 1919, the sum of $3,175.99.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1919, on the fourteenth day of February, 1920.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1920.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the first day of July, 1920, to the Attorney-General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $3,175.99, the amount due from the defendant to the plaintiff for the whole of the year ending December 31, 1919.

FIFTH COUNT.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the first count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1920, was 47,721,585 gallons, said amount so diverted being 11,479,918 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole of the year ending December 31, 1920, the sum of $4,201.65.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1920, on the tenth day of February, 1921.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1921.

12. That the State Comptroller, upon the failure of the defendant to make such payment as aforesaid, certified on the first day of July, 1921, to the Attorney-General the name of said defendant and the amount so due by it for collection, and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $4,201.65, the amount due to the plaintiff for the whole year ending December 31, 1920.

The plaintiff demands damages from the defendant on the first count amounting to $2,071.37, together with interest from the first day of July, 1915.

The plaintiff demands damages from the defendant on the second count amounting to $3,671.28, together with interest from the first day of July, 1918.

The plaintiff demands damages from the defendant on the third count amounting to $4,983.79, together with interest from the first day of July, 1919.

The plaintiff demands damages from the defendant on the fourth count amounting to $3,175.99, together with interest from the first day of July, 1920.

The plaintiff demands damages from the defendant on the fifth count amounting to $4,201.65, together with interest from the first day of July, 1921, besides costs of suit.

THOMAS F. McCRAN,
Attorney-General of New Jersey,
Attorney of Plaintiff.

ANSWER.

Filed August 23, 1921.

NEW JERSEY SUPREME COURT.

MERCER COUNTY.

STATE OF NEW JERSEY, *Plaintiff,* vs. THE CITY OF NEWARK, *Defendant.*	*Action at Law.* *Answer.*

The defendant, The City of Newark, a municipal corporation of the State of New Jersey, says that:

Answer to First Count.

1. It admits the first paragraph.
2. It admits the second paragraph.
3. It denies the third paragraph.
4. It denies the fourth paragraph.
5. It denies the fifth paragraph.
6. It admits the sixth paragraph.
7. As to the statement contained in the seventh paragraph, that the said commission fixed the sum of one dollar per million gallons as a license fee to be paid by the defendant for the amount of water so diverted by it, in excess of its allowance, the defendant has not any knowledge or information thereof sufficient to form a belief, and it denies the right of said commission to fix said sum charged against it, and that there is any sum due from the defendant to the plaintiff as alleged in said paragraph.

Answer.

8. As to the statement in the eighth paragraph, defendant has not any knowledge or information sufficient to form a belief, and therefore neither affirms nor denies the same, but leaves the plaintiff to make such proof thereof as it may deem proper.

9. It denies the ninth paragraph.

10. It denies the tenth paragraph.

11. It denies the eleventh paragraph.

12. As to the statement in the twelfth paragraph, defendant has not any knowledge or information thereof sufficient to form a belief, and, therefore, neither affirms nor denies the same, but leaves the plaintiff to make such proof thereof as it may deem proper.

Answer to Second Count.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 2.

Answer to Third Count.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 3.

Answer to Fourth Count.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 4.

Answer to Fifth Count.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to corresponding paragraphs of count 5 of the amended complaint herein.

First Separate Defense to each of the Five Counts of the Amended Complaint.

1. That by virtue of an act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers, passed on the thirty-first day of December, eighteen hundred and twenty-four, as found in the pamphlet laws of that year at page 158, which act was expressly made a public act and required to be judicially referred to by all Judges, Justices and others without being specially pleaded, and the various supplements and amendments thereto, including especially an act passed on the fifth day of March, eighteen hundred and thirty-six, and found in the pamphlet laws of that year at page 262, the State of New Jersey granted unto the Morris Canal and Banking Company, which by said original act was incorporated and given authority to construct an artificial navigation between the Delaware River at or near Easton and the Passaic River at or near Newark, the right and privilege to take and appropriate the waters of the State of New Jersey which should be required by said company, to build, operate and maintain such canal or artificial navigation; that by another act of the New Jersey Legislature passed on the twenty-sixth day of January, eighteen hundred and twenty-eight, entitled "An Act to Authorize the Morris Canal and Banking Company to extend the Morris Canal to the Waters of the Hudson," the said company was given the right to extend the said proposed canal from the Passaic River at the City of Newark to the Hudson River at or near the City of Jersey City to the same effect as if it had originally been authorized by its charter to construct a canal or artificial navigation to connect the waters of the Delaware near Easton with the waters of the Hudson River at or near the City of Jersey City.

2. That by said Act of the New Jersey Legislature of the fifth day of March, eighteen hundred and thirty-six,

it was enacted that on such navigable feeder or feeders, as by virtue of that act, or the act of the original incorporation of the Morris Canal and Banking Company may be constructed by the Canal Company, for the purpose of conducting into the Morris Canal the waters of Long Pond now known as Greenwood Lake or other waters that may be requisite for the supplying of the said canal, the Canal Company was authorized to charge and receive the same rates of toll as were then lawful and chargeable upon the canal, and that in order to enable the Canal Company to procure the requisite lands and premises and construct the several basins, reservoirs and feeders authorized by the act of incorporation of the Canal Company and the amendments thereto, The Morris Canal and Banking Company was authorized to increase its capital stock to an amount not exceeding six hundred thousand dollars ($600,000).

3. That shortly after the passage of said Acts of the New Jersey Legislature, the said The Morris Canal and Banking Company did, at large expense, by the construction of dams and feeders and the diversion of waters from lakes, ponds and streams, take and appropriate, and thereby acquire the right to take and continue to use the waters so appropriated; that included in the waters so taken and appropriated pursuant to the legislative authority before named was the water that is now being used by the City of Newark in the quantities and amount set out in the complaint in this suit, and thereby the said The Morris Canal and Banking Company acquired from the State of New Jersey the right to use the waters so appropriated and diverted as aforesaid; that continuously thereafter the said The Morris Canal and Banking Company, having so acquired from the State of New Jersey the right to use said waters, continued to use and enjoy them in the maintenance and operation of said canal until the month of May, eighteen hundred and seventy-one; that on March fourteenth, eighteen hundred

and seventy-one, the Legislature of New Jersey passed a further supplement to the charter of the Morris Canal and Banking Company known as Chapter CLIII of Pamphlet Laws of that year entitled "A Further Supplement to an Act to Incorporate a Company to Form an Artificial Navigation between Passaic and Delaware Rivers," passed December thirty-first, eighteen hundred and twenty-four, by the second section of which act it was made lawful for the Morris Canal and Banking Company or its lessee or lessees to use the surplus waters of the said canal of said company or any of its feeders, not needed for the purpose of navigation in furnishing and supplying the inhabitants of any city, town or village along the line of said canal or in the vicinity thereof with a sufficient quantity of pure and wholesome water for manufacturing or domestic or other uses, and to make contracts with corporate authorities of any such city, town or village or with individuals for said supply of water for such compensation as it may be mutually agreed upon and to erect said works and make such alterations in said canal as may be necessary or proper to enable said company or its lessee or lessees to furnish such supply of water from the said Canal, and by the same act The Morris Canal and Banking Company was authorized to lease the canal, together with all its boats, property and works, appurtenances and franchises to any person or persons or corporation either perpetually or for such short a time and upon such rates and agreements as may be agreed upon between the contracting parties; that in pursuance to the power contained in said act The Morris Canal and Banking Company on the fourth day of May, eighteen hundred and seventy-one, executed and delivered to the Lehigh Valley Railroad Company a perpetual lease on the entire canal and navigation works of the Canal Company as the same were then laid and constructed from the Delaware River at Phillipsburg to the Hudson River at Jersey City.

Answer—First Separate Defense.

4. That on April 2, 1888, the New Jersey Legislature passed an act entitled "An Act to authorize any of the municipal corporations of this State to contract for a supply or a further or other supply of water therefor," known as Chapter CCL of the Pamphlet Laws of 1888, which authorized any municipal corporation of New Jersey to enter into a contract with any water company or other company for a term of years for obtaining and furnishing of a supply, or a further or other supply of water to such municipal corporation for the purpose of extinguishing fires and for such other lawful uses and purposes as may be deemed necessary or convenient, provided that no such contract shall be made for a period longer than twenty-five years in any one term, and provided further that such contract may contain an option for the acquiring by such municipal corporation of the land, water and water rights for such supply on terms to be fixed in said contract.

5. That pursuant to said Chapter CCL of the State Laws of 1888, The City of Newark being desirous of procuring for the present and future needs of the City of Newark a supply of pure and wholesome water for domestic purposes, the extinguishment of fires, and other lawful uses, entered into a contract in writing with the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, and the East Jersey Water Company, a corporation organized under the general laws of the State of New Jersey, for the purpose of procuring for said The City of Newark such a supply of water for the sum of six millions dollars ($6,000,000).

6. That in aid of said contract and for the purpose of enabling the Lehigh Valley Railroad Company and The East Jersey Water Company to perform their covenants in said contract contained, The Morris Canal and Banking Company united with The Lehigh Valley Railroad Company in the assignment and conveyance to the East Jersey Water Company of such water and water

rights of the Pequannock Watershed, the Wynockie Watershed and the Ramapo Watershed as shall or may become necessary to enable the East Jersey Water Company to perform its part of said contract with The City of Newark.

7. That immediately after the execution of said contract the East Jersey Water Company proceeded to locate, build and construct in one of the watersheds within the State of New Jersey, on a tributary of the Passaic River, known as Pequannock Watershed, embracing lands within Morris, Passaic and Sussex Counties in this State, certain large reservoirs, and also a pipe line to conduct water therefrom to the distributing reservoirs of the City of Newark, and to make and construct works and buildings for this purpose and secure lands, water and water rights therefor.

8. That it was, among other things, agreed by the parties to said contract, that The City of Newark should have the right at any time after the contract had been executed, and until within one year after the date of the final completion of all the works built and constructed to terminate that part of the contract which provided for the purchase of water by the City of Newark from the East Jersey Water Company by the million gallons, by exercising the option therein given and to become the owner absolutely in its own right of the lands, water, water rights, rights of way, dams and reservoirs and works constructed by the East Jersey Water Company for the purpose of said contract with all other appurtenances upon certain terms and conditions therein expressed; that The City of Newark by resolution adopted by its Common Council October 11, 1889, approved by its Mayor October 15, 1889, and adopted by The Newark Aqeduct Board November 6, 1889, exercised this option of purchase.

9. That in and by the fifth paragraph of the said contract, the East Jersey Water Company agreed that

all the works necessary to be constructed, which should be capable of delivering to The City of Newark fifty millions gallons per day for each and every day for all time, should be finished on or before May 1, 1892, on and after which date all the water agreed to be furnished should be ready for delivery by gravity both at high service and low service to The City of Newark.

10. That the East Jersey Water Company on or about May 2, 1892, claiming that it had fully performed its contract and had provided works and buildings required by said contract, and had obtained and secured all the lands, water and water rights required therefor, and alleging its readiness and willingness to make title therefor and to convey and transfer the same to The City of Newark, requested that four million dollars of bonds of the City of Newark be delivered to it, or, if the city should so elect, four million dollars in current money of the United States to be paid to it in accordance with the ninth paragraph of said contract; that said contract also provided that upon making such payment, the East Jersey Water Company should immediately convey to the City of Newark, free and clear of the claims and demands of every person and persons whatsoever, the dams, resorvoirs, reservoir sites, conduit or conduits and all the works of every nature and kind built and constructed by the East Jersey Water Company as required by the terms of the said contract for the purpose of furnishing the supply of water therein contracted to be furnished by the East Jersey Water Company to the city, with all appurtenances, together with water and water rights sufficient to supply fifty million gallons of water daily forever, by good and sufficient conveyance in law, to invest the city with the title thereto absolutely.

11. That at the time such demand was made the water furnished through this new source of water supply, and through the works constructed by the East Jersey Water Company had just been turned into the reservoirs of the

city for use by the said city, but the city alleged that the works provided by the said water company had not been fully completed, and that the capacity of the said works to deliver fifty million gallons per day was in fact inadequate and that the title to the property required for the purpose of the contract by the said water company had not been perfected and the city, therefore, refused to make such payment.

12. That the East Jersey Water Company desired to secure payment to it of part of the money, or the delivery to it of part of the bonds to be delivered to it upon the completion of its contract, and the city desiring to use the water through the works then constructed, entered into a subsequent and supplemental contract on August 1, 1892.

13. That by virtue of the last mentioned contract, the city executed and delivered to the Water Company four millions of dollars of bonds, and deposited the bonds of a like character in the sum of two million dollars with the Fidelity and Title Company of the City of Newark, a trustee selected by the parties, to be held by the said trustee and delivered to the Water Company at the time that the conditions mentioned in the said contract were fully performed on the part of the said Water Company, and that simultaneously with the making of the last mentioned contract and for the purpose of still further securing the city against any default of the performance of its obligations, the Water Company made and executed to the city a bond in the penal sum of five hundred thousand dollars and deposited with the trustee aforesaid five hundred thousand dollars in bonds of the City of Newark, for the purpose of better securing to the city the performance by the Water Company of its obligations to complete and perfect title to the lands, water and water rights to which the city was entitled under the original contract, and the payment of all claims or damages which might be made against the Water Company or

the City of Newark in securing such lands, water and water rights, and that the pipe line or conduit which had been constructed by the Water Company for the purpose of conveying water to the said city should be found, when tested, sufficient to answer the requirements of the said contract.

14. That immediately upon the execution of said supplemental contract and bond the East Jersey Water Company made, executed and delivered to the city a deed of conveyance of the water and water rights for the purpose of enabling it to fulfill and perform its covenants with the city, that said deed is dated as of May 2, 1892, and a true copy of the same as made and executed by the Water Company and delivered to the said city is annexed to this answer and marked "Exhibit A" and made part hereof.

15. That after the payment by the city to the Water Company and the transfer to it of the title to certain water and water rights by the Water Company and prior to May 1, 1896, it became apparent that the pipe line constructed by the Water Company was not of sufficient size to meet the requirements of the said contract, and that it was impossible to convey and deliver by means of the construction then made, at the receiving reservoirs of the City of Newark, fifty million gallons water daily, and that the company would be required in order to comply with the requirements of said contract to enlarge the capacity of the said pipe line for the delivery of the said water, so that on or about May 1, 1896, the City of Newark entered into a further additional and supplemental contract with the Water Company.

16. That soon after the making of the last mentioned contract with the Water Company the Water Company, pursuant therewith, proceeded to construct and lay down a second line of pipe from the Macopin Intake Reservoir located in the Pequannock Watershed, to the receiving reservoir at Belleville.

Answer—First Separate Defense.

17. That at or about this time it became apparent that the capacity of the reservoirs built and constructed in the watershed was insufficient to furnish to the city at all times the daily supply of fifty millions gallons required by the aforesaid original contract, and that it would be necessary to impound therein a larger quantity of water than the reservoirs therein provided would contain. That the Water Company, during the year 1896, proceeded to build and construct within the watershed and upon a branch of the said Pequannock River above the point at which the Oak Ridge Reservoir is located, at or near the village of Canistear, another large reservoir for impounding water, known as the "Canistear Reservoir."

18. That at or about the same time the Water Company obtained additional rights to lands covered by the waters of Echo Lake, and the lands surrounding the same, and constructed a diverting dam, thereby increasing the drainage area contributary to the said lake.

19. That as the city insisted that the capacity of the reservoirs located at Oak Ridge and Clinton, and of Macopin Intake at or near Smith's Mills, mentioned and described in the conveyance to the City of Newark by the Water Company, dated May 2, 1892, was wholly insufficient to regulate the flow of water and make diversion therefrom into the pipe lines in such quantity as to furnish a daily supply of fifty million gallons forever, and that for this purpose it would be necessary for the city to have the control and the title to the Canistear Reservoir and the Echo Lake, the City of Newark, by virtue of the seventeenth paragraph of its original contract with the East Jersey Water Company, invoked the aid and authority of the New Jersey Court of Chancery to enforce the specific performance of the covenants and agreements contained in the said original contract and the deed from the Water Company to the city, dated May 2, 1892.

20. That as a result of said proceedings in the New Jersey Court of Chancery, in which the city was complainant and the East Jersey Water Company, the Morris Canal and Banking Company, and the Lehigh Valley Railroad Company were defendants, it was on September 24, 1900, ordered, adjudged and decreed by the Chancellor of the State of New Jersey, among other things, that the

> "said the Morris Canal and Banking Company and the Lehigh Valley Railroad Company have conveyed to the said The East Jersey Water Company by good and sufficient conveyance in the law, such water and water rights as they or either of them may have had in the said Pequannock Watershed at the date the said original contract was made, or so much thereof as will enable the said the East Jersey Water Company to fulfill and keep and perform the said contract, dated September 24, 1889, hereinabove referred to, and have performed the covenants and conditions in such contract contained."

21. That the East Jersey Water Company, in addition to the deed dated May 2, 1892, executed a conveyance to the City of Newark for a second conduit with the necessary right of way, pursuant to the supplemental contract with the City of Newark entered into May 1, 1896, which deed is dated September 15, 1900, and the East Jersey Water Company, and the West Milford Water Storage Company executed other conveyances to the City of Newark, for the lands covered by the waters and occupied by the dams and works of Canistear and Echo Lake Reservoirs, and in addition thereto lands near to or above the Macopin Intake Dam, to the amount of one thousand acres, which deeds are dated September 21, 1900.

22. That the Beattie Manufacturing Company, by deed dated January 10, 1895, delivered by the Water Company to the city, granted, bargained, sold and conveyed to the

city the right from September 4, 1889, and forever thereafter, to divert and take out and from the Pequannock River at the Macopin Intake or at any other place or point along the line thereof above said Intake, such quantity of water as will enable the city to procure from said watershed for all time a supply not exceeding fifty million gallons of water daily, and that since the date of said deed of January 10, 1895, the Water Company had obtained from the Beattie Manufacturing Company the right as against it to impound, divert and take all the remainder of the waters of the Pequannock River above the Macopin Intake Dam.

23. That the East Jersey Water Company and the West Milford Water Storage Company, the Society for the Establishment of Useful Manufactures, and the Dundee Water Power and Land Company, executed a deed to the City of Newark, granting as against them, their successors and assigns, the right and privilege irrevocably forever to the City of Newark to impound, detain, divert, withdraw and use all the waters of the Pequannock River and its tributaries at the Macopin Intake, so called, of the Newark Water Works situated near Smith's Mills, in the County of Passaic, New Jersey, or at any point above said Intake, which last mentioned deed bears date September 21, 1900, and a true copy of the same as made and executed by the aforesaid grantors and delivered to the said city, is annexed to this answer and marked "Exhibit B" and made a part hereof.

24. That previous to the execution of said last mentioned deed, the East Jersey Water Company, through conveyance of the said Society for the Establishment of Useful Manufacturers, George F. Baker, the Dundee Water Power and Land Company, and the West Milford Water Storage Company, had acquired the right to divert the waters of the Pequannock River and its tributaries, at and above the Macopin Intake Dam, and the said several companies joined with the Water

Company in said last mentioned deed, dated September 21, 1900, for the purpose of further assuring and confirming to the city the right to impound, take, divert, withdraw and use all the waters of the Pequannock River and the tributaries above the Macopin Intake Dam.

25. The Water Company, having also executed its grant to the City of Newark of its telephone lines erected along the route of the said pipe line by deed dated September 21, 1900, it was further ordered, adjudged and decreed by the aforesaid final decree, that by the above recited grants and such delivery of grants and possession and the payment by the city in cash and bonds there was a final fulfillment of the contracts between the Water Company and the city and a full discharge of the mutual obligations of the said contract, bond and agreements between the city and the water company, and a full satisfaction of all claims and demands of the city arising out of all contracts and dealings between the parties from the beginning of the world to the date of said final decree, viz, September 24, 1900, with reservations as to certain covenants contained in the deed of May 23, 1892, and the several deeds and grants delivered to the city pending said suit, and the covenants and undertakings of the Water Company with respect to defending the city free from molestation in the enjoyment of its water rights as against The Dundee Water Storage and Land Company, and its assigns, by an instrument dated September 21, 1900.

26. That accordingly the city acquired the title to a supply of water from the Pequannock River and the possession of a completed plant, fully competent and capable of furnishing to the City of Newark fifty millions gallons of water per day forever, which is the same water for the consumption of which this action is brought; all of which was acquired prior to the passage of Chapter 252, Session Laws of 1907, creating the State Water Supply Commission of New Jersey, and therefore before

the passage of said act the city had the right granted by the State of New Jersey to divert, use and take a supply of water from the Pequannock Watershed to the extent of fifty million gallons daily, which is protected, conserved and sustained in Section 2 of Chapter 252 of the Laws of 1907.

Second Separate Defense to each of the Five Counts of the Amended Complaint.

1. The provisions of Chapter 252, Session Laws of 1907, bar the plaintiff from recovery.

JEROME T. CONGLETON,
Corporation Counsel,
Attorney of Defendant.

EXHIBIT "A."

THIS INDENTURE, made this second day of May, in the year eighteen hundred and ninety-two, by and between the EAST JERSEY WATER COMPANY, a corporation organized under the general laws of the State of New Jersey, party of the first part, and the MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK, a municipal corporation of the same State, party of the second part,

WITNESSETH, Whereas a certain contract and agreement was heretofore made and entered into bearing date the twenty-fourth day of September, in the year eighteen hundred and eighty-nine, to which the several parties of this indenture were respectively parties, and having for its object the furnishing to the City of Newark a supply of pure and wholesome water for domestic purposes, the extinguishment of fires and other lawful uses, and the construction by the party thereto of the first part, of dams, reservoirs, conduits and works specially designed and constructed for the said water supply of the said City of Newark; as in and by the said contract

and agreement in more fully specified and set forth, and will, reference being thereunto had, more fully appear;

And Whereas, the entire water supply contracted for in and by the said contract and agreement, both for the high and low service therein and hereby provided for, has been taken from the Pequannock Watershed alone, the said party hereto of the first part has heretofore planned, designed and constructed certain dams, reservoirs, conduits and works with their necessary adjuncts, appliances and appurtenances, specially for the supply of such water to the said City of Newark, in accordance with the terms and provisions of the said contract or agreement;

And Whereas, the party hereto of the second part hath desired, in accordance with the terms and provisions in that regard of the said contract and agreement, to terminate that portion of the said contract or agreement which provides for the purchase of water by it, the said party hereto of the second part, from the said party hereto of the first part, by the million gallons, by exercising the option in such contract or agreement in such case given, and to become the owner absolutely in its own right of the lands, water, water rights, dams, reservoirs and works constructed by the party hereto of the first part for the purpose of that contract, with all their appurtenances, upon the terms and conditions in that regard in the said contract or agreement specified and set forth; and hath manifested such option by a resolution passed by the Newark Aqueduct Board, and approved by the Common Council of the City of Newark, a certified copy of which has been heretofore, and on the..... day of ....., 192.., delivered to the..... ..... of the East Jersey Water Company, the party hereto of the first part;

And Whereas, upon the exercise of such option in the manner aforesaid, in accordance in that regard with the

terms and provisions of the said contract or agreement, and upon the delivery of the said works, lands, water and water rights by the said party of the second part under such option as in and by the said contract or agreement provided, the said party hereto of the second part hath paid to the said party hereto of the first part, in the legally authorized and issued bonds of the said City of Newark, the party hereto of the second part, bearing interest at the rate of four (4) per centum per annum, the sum of four million dollars ($4,000,000).

NOW, THEREFORE, this indenture witnesseth, that upon the making of such payment as last aforesaid, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for and in consideration thereof and of the further and additional but deferred payment of two million dollars ($2,000,000) to be made by the said party hereto of the second part to the said party hereto of the first part, its successors or assigns, on the twenty-fourth day of September, in the year nineteen hundred, on the terms and under the conditions specifically set out in an agreement of even date herewith relating thereto, and of the covenants and stipulations on the part of the party hereto of the second part, to be kept and performed as is hereinafter more particularly mentioned and specified, the party hereto of the first part hath 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 party hereto of the second part, its successors and assigns absolutely and forever:

All and singular the dams, reservoirs, lands and sites, conduit or conduits, and all and singular the works of every kind and nature, designed, built and constructed by the party hereto of the first part, as required by the terms of the said contract or agreement, for the purpose of furnishing the supply of water in the said contract

or agreement contracted to be furnished by the party hereto of the first part, to the party hereto of the second part, with all and singular their appurtenances, adjuncts and appliances of whatever nature, kind or description soever, together with all and every the bridges, tunnels, embankments, stand-pipes, pressure regulators, gate-houses, gate chambers, stop gates and valves, and whatever else has been furnished to ensure a proper and efficient delivery of the water into the reservoirs designated in the said contract or agreement; and all special or other pieces or castings, expansion joints, man-holes, check valves, stop valves, air holes, blow-offs, waste pipes, and all and every other adjuncts and appliances and appurtenances required or furnished to make the said conduits suitable in every respect for the purpose intended;

And also all and every the lands and rights of way over which the said conduit or conduits, pipe line or lines have been laid or constructed, and all and singular the lands and rights of way acquired, owned or possessed by the party hereto of the first part to give access to the said reservoirs or any of them, where the same are located;

Together with and also all and every so much of the water and water rights of the said Pequannock Watershed as shall be sufficient to supply fifty million gallons of said water daily, each and every day forever; with the right to divert through the conduit or conduits so, or hereafter to be constructed, and the works with their adjuncts and appliances so, or hereafter to be built, and to use for the supply of said city with water for the purposes aforesaid up to the maximum quantity of such water in and by the said contract or agreement agreed to be furnished to said party hereto of the second part by the said party hereto of the first part; it being fully understood that the said party hereto of the second part

may supply with said water not only the inhabitants within the present or any future corporate limits of the City of Newark, but also the inhabitants of the Townships of Belleville, South Orange and East Orange and Clinton as now organized and existing.

The intention of this instrument is to convey to and vest in the party hereto of the second part, absolutely all and every the lands and premises with the buildings, erections, structures, works, apparatus, adjuncts, appliances and appurtenances thereon and therein particularly mentioned and described in the schedule thereof hereto appended and made and declared to form and be a part hereof, reference being hereby made thereto for more particular dscriptions of the same by metes and bounds; restricting nevertheless the conveyances hereby made of any of the water or water rights granted and conveyed to the maximum quantity of water to be supplied therefrom and thereby to the said party hereto of the second part mentioned and specified in the said contract and agreement.

Together with and also all and singular the ways, profits, privileges and advantages with the appurtenances to the same, or any thereof belonging or in any wise appertaining.

And also all the estate, right, title and 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 each and every part and parcel thereof.

To have and to hold all and singular, the above described land and premises, water and water rights, with the appurtenances, unto the said party of the second part, its successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever, subject nevertheless to the license and agreement hereinafter particularly mentioned and set forth.

Answer—Exhibit A.

And the said party hereto of the first part doth for itself, its sccessors and assigns, covenant, agree and grant to and with the said party hereto of the second part, its successors and assigns, that it, the said "The East Jersey Water Company," is the true, lawful and right owner of all and singular the above mentioned and described land, premises, water, water rights, buildings, structures, erections, works, apparatus, adjuncts and appliances, and of every part and parcel thereof, with the appurtenances thereto belonging. And that the same, or any part or parcel thereof, at the time of the ensealing and delivery of these presents are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatever, by which the title of the said party hereto of the second part, hereby made, or intended to be made, for the same, can or may be changed, charged, altered or defeated in any manner whatsoever, excepting only the license and agreement hereinafter particularly mentioned and set forth. And also, that the said party of the first part now hath good right, full power and lawful authority to grant, bargain, sell and convey the said lands, premises, water, water rights, buildings, structures, erections, works, apparatus, adjuncts, appliances and appurtenances and every part and parcel thereof; and also that the said "The East Jersey Water Company" shall and will warrant, secure and forever defend the same and every part and parcel thereof, unto the said the "Mayor and Common Council of the City of Newark," their successors and assigns forever, against the lawful claim and demands of all and every person or persons, freely and clearly freed and discharged of and from all and all manner of claims or encumbrances whatsoever, excepting the license aforesaid.

And also, that the said works so built and constructed as hereinbefore said do now conform, or shall be made to conform to the said contract or agreement hereinbefore first mentioned and referred to (but any suit to

enforce performance or for an alleged breach of this last mentioned covenant shall, however, be brought within the time specified in the said last mentioned contract or agreement, and not otherwise).

And the said party hereto of the first part doth for itself, its successors and assigns, further covenant, agree and grant to and with the said party hereto of the second part, its successors and assigns, that the said rights so secured, and the said works so constructed, hereby conveyed and delivered by the party of the first part to the party of the second part, are capable of delivering to the said City of Newark, and shall deliver to the said city pure and wholesome water, of the quantity agreed to be furnished and in the manner, and under the conditions prescribed and set forth in the said contract.

And the said party hereto of the first part doth for itself, its successors and assigns further covenant, agree and grant to and with the said party hereto of the second part, its successors and assigns, that the said pipes, conduits, reservoirs, dams and other works, and each of them have been so constructed properly and in the manner specified in said contract, and are of such strength as shall ensure safety to all property in the City of Newark, through, under or near to which the same are located, and that it, the said party hereto of the first part, shall and will indemnify and save harmless the said city and all individuals owning property therein from loss or damage thereto, and all persons injured while therein by an outbreak of said pipe, conduits, reservoirs, dams or other works, resulting from negligence or breach of contract by the party hereto of the first part, either in constructing or making the same not occasioned by the act of God, or the public enemy, or through contributory negligence of parties aggrieved, the intent hereof being and the same party hereto of the first part hereby declares, that it will be responsible for all loss or damage arising

from the fault of its erection, either in material or construction or in the maintenance thereof, to the same extent and in the same manner as it would or might be in law had it acquired its right of way otherwise than by permission of said City; provided, however, that such liability shall not continue after the twenty fourth day of September, in the year nineteen hundred, when the injury complained of shall arise from the want of proper care or defect in maintenance.

And the party of the first part, doth for itself, its successors and assigns, hereby further covenant and agree to and with the said party of the second part, its successors and assigns, that it, the party of the first part shall and will at any and all times hereafter, upon request, make, execute and deliver to the said party of the second part, its successors and assigns, such other and further conveyance in the law, as may be found necessary for completing and perfecting the title of the said property, and every part and parcel thereof in the said party of the second part, its successors and assigns.

And the said party of the first part doth for itself, its successors and assigns, and also its grantors, the Lehigh Valley Railroad Company, and the Morris Canal and Banking Company, in consideration of the premises, further covenant, agree and grant to and with the said party hereto of the second part, its successors and assigns, that it will not, after the expiration of the period of eleven years, named in section eleven thereof, divert or take any water from the aforesaid watershed above the point of intake established for the said City of Newark, for the use of any other municipality or city, nor authorize any other person or persons or municipality or corporation, so to do.

And whereas, under and in pursuance of the terms and provisions of the said contract and agreement hereinabove first mentioned and referred to, the said party hereto of the second part, hath, upon the execution and de-

livery of this conveyance, become indebted unto the said party of the first part, in the further sum of two million dollars, the payment of which, however, by the agreement of the respective parties hereto, is to be deferred and shall be made as provided for in the collateral agreement relating thereto, hereinabove mentioned:

Now therefore, in consideration of such deferred payment, and of the maintenance of the works by the party hereto of the first part, until said last mentioned date as hereinafter provided and agreed, it is agreed, between the party hereto of the first part and the party hereto of the second part, that the party hereto of the first part, shall during all the period that shall elapse between the execution and delivery of this conveyance and the date specified for the final payment, have the right to divert, use, and for its own benefit, dispose of so much of the water conducted through the conduit or conduits and furnished by the works specially built and designed for the City of Newark, and hereby conveyed as the said City may not, during that time, need for its own use, for domestic purposes, for extinguishment of fires, and its other lawful uses, up to twenty seven million five hundred thousand gallons daily, and shall in any event have the right so to divert and use during all that period, all the water so conducted in excess of twenty seven million five hundred thousand gallons daily, with the right to connect with the pipe line and works so constructed and take the water therefrom as herein provided, at such point or points as the party hereto of the first part may desire; provided that if the said party hereto of the first part shall desire to make any connections with such pipe line within the City of Newark, they shall be made at such point or points as the "Board of Street and Water Commissioners" of said City shall designate, and not otherwise; and shall also have the right to build and construct a pipe line or lines crossing the pipe lines or conduits of the party of the second part, such crossing to be

made in such manner as not to injure or interfere with the works of the party of the second part,

Provided further, that the party hereto of the second part, shall, at all times, during said period have supplied to it for its own use as hereinbefore stated, both at high service and low service, so much water as it may need for its own use, up to a supply in all of twenty seven million five hundred thousand gallons for each and every day.

And it is further covenanted and agreed by and between the respective parties hereto, that during the period above specified, within which the party hereto of the first part, may divert and use for its own benefit the water so to be conducted through the works specially designed and constructed for the supply of the City of Newark, and hereby conveyed as aforesaid, that it shall at its own cost and expense, keep and maintain all the said dams, reservoirs, conduits and works specially designed and constructed for the City of Newark, and hereby conveyed or intended so to be, in good order and repair and shall have such control over the same as may be necessary for any and all of the purposes herein mentioned and set forth, and shall deliver the same at the end of the said period to the party hereto of the second part in good order and repair, upon the payment of the last mentioned sum of two million dollars in the manner provided for in the said agreement relating thereto, and thereupon all the right and interest of the party hereto of the first part, of, in and to the same and every part thereof and all control over the same, shall cease and determine, and the same shall thereafter be kept and maintained by the party hereto of the second part, nor shall said party hereto of the first part, be bound thereafter to preserve the purity of the water, provided, however, that if the party hereto of the first part shall, under the terms of this agreement, lay any pipe or pipes in the streets, avenues, or lands of the said City for the purpose of diverting water during

the period allowed, the same shall at the end of such period become and be the property of said City.

And in consideration of the premises, and of the sum of one dollar and other sufficient value to it in hand paid, at or before the ensealing and delivery of these presents, the full receipt whereof is hereby acknowldged the said party hereto of the second part doth hereby, for itself, its successors and assigns, covenant, grant and agree to and with the said party hereto of the first part, its successors and assigns that the said bonds hereinbefore recited and mentioned as forming the consideration of this conveyance in the sum of four million dollars, have been and are legally authorized and issued, and are and shall be binding and valid obligations to the City of Newark under this conveyance, and that neither it, its successors and assigns, shall or will at any time or times whatsoever, supply any public or private corporation or person with any of the water delivered or furnished to or received by it, or them under or by virtue of this conveyance or purchase, for use outside of the present or any future corporate limits of the City of Newark, or the townships of Belleville, South Orange, East Orange and Clinton as now organized and existing.

In Witness Whereof, the said party of the first part, "The East Jersey Water Company" has caused its corporate seal to be hereto affixed, and these presents to be signed by its Vice President the day and year first above written.

THE EAST JERSEY WATER COMPANY,

(Signed) Henry S. Drinker,
Vice President.

Attest:

D. G. Baird,
Secretary.

Answer—Exhibit A.

Signed, sealed and delivered
in the presence of

(Signed) E. L. PRICE,
J. J. MCDAVITT. (SEAL)

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

Be it remembered, that on the first day of August, eighteen hundred and ninety-two, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared David G. Baird, who being by me duly sworn does depose and make proof to my satisfaction that he is the Secretary of "The East Jersey Water Company" named in the foregoing indenture, that he well knows the corporate seal of the said "The East Jersey Water Company," that the seal thereto affixed is the proper corporate seal of the said company, that the same was so affixed thereto, and said indenture signed and delivered by Henry S. Drinker, who was at the date and execution thereof, the Vice-President of the said company, in the presence of deponent as the voluntary act and deed of the said company and that deponent thereupon signed the same as subscribing and attesting witness.

D. G. BAIRD.

Subscribed and sworn to before me, this
first day of August, A. D. 1892.

JOSEPH COULT,
Master in Chancery of New Jersey.

Answer—Exhibit A.

SCHEDULE.

Oak Ridge Reservoir (by metes and bounds).

Clinton Reservoir (by metes and bounds).

Macopin Intake (by metes and bounds).

Right of Way from Macopin Intake to Belleville Reservoir (by metes and bounds).

Right of Way from Belleville Reservoir to South Orange Avenue Reservoir (by metes and bounds).

The descriptions above given of the lands included in the foregoing deed of conveyance, The Oak Ridge Reservoir, The Clinton Reservoir, The Macopin Intake Reservoir, and the pipe line Right of Way from the last named reservoir to the reservoirs of the City of Newark at Belleville, and on South Orange Avenue, are intended to conform to and describe the same lands and property shown and described upon certain maps of the same lands and property, made by the Engineers of the East Jersey Water Company, numbered from No. 1 to 23 inclusive, delivered herewith, and filed in the Office of the Comptroller of the said City of Newark, to which maps for greater certainty reference is hereby made.

Said descriptions and maps are from the schedule referred to in the foregoing deed of conveyance, and form part thereof.

Signed for identification on behalf of the party of the first part.

JAMES SMITH, Jr.

Signed for identification on behalf of the party of the second part.

Answer—Exhibit B.

EXHIBIT "B."

THIS INDENTURE, made this twenty first day of September, A. D., 1900, between The East Jersey Water Company, a Corporation of New Jersey, The West Milford Water Storage Company, a corporation of said State, The Society for Establishing Useful Manufactures, a corporation of said State, and The Dundee Water Power and Land Company, a corporation of said State, parties of the first part, and the Mayor and Common Council of the City of Newark, a municipal corporation of the said State, party of the second part, WITNESSETH:

That the parties of the first part in consideration of One Dollar and other valuable consideration to them in hand paid, the receipt whereof is hereby acknowledged, have granted, remised, released and quit-claimed, and do hereby grant, remise, release and quit claim unto the party of the second part, their successors and assigns forever, the right and privileges irrevocable forever as against the parties of the first part, their successors and assigns, to impound, take, detain, divert, use and withdraw all the waters of the Pequannock River, and its tributaries at the Macopin Intake, so called, of the Newark Water Works situated near Smith's Mills in the County of Passaic, or at any point above said Intake.

To have and to hold, the same unto the party of the second part, their successors and assigns forever.

IN WITNESS WHEREOF, the parties of the first part have caused their respective common seals to be hereto affixed and duly attested and these presents to be signed by their respective principal executive officers the day and year first above written.

THE EAST JERSEY WATER COMPANY,

By HENRY S. DRINKER,
Vice President.

Answer—Exhibit B.

Attest:

ALBERT P. FISHER,
Secretary.

THE WEST MILFORD WATER
STORAGE COMPANY,

By W. G. SNOW,
President.

Attest:

ALBERT P. FISHER,
Secretary.

THE SOCIETY FOR ESTABLISHING
USEFUL MANUFACTURES,

By WM. BARBOUR,
Governor.

Attest:

RICHARD ROSSITER,
Secretary.

THE DUNDEE WATER POWER AND
LAND COMPANY,

By WM. BARBOUR,
President.

Attest:

EDMUND LE B. GARDINER,
Secretary.

Answer—Exhibit B.

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

On this 22nd day of September, A. D. 1900, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Albert P. Fisher, who, being by me duly sworn, on his oath says: That he is the Secretary and Henry D. Drinker is the Vice President of the East Jersey Water Company, one of the corporations named in and who executed the foregoing Deed; that the seal affixed to said deed is the common seal of said company and was thereto affixed and the said deed was signed and delivered by said Vice President in the presence of deponent and for the voluntary act and deed of said company in presence of deponent, who thereupon subscribed his name thereto as witness.

GEORGE T. VICKERS,
Master in Chancery of New Jersey.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } *ss.*

On this 22nd day of September, A. D. 1900, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Albert P. Fisher, who, being by me duly sworn, on his oath says, that he is the secretary, and W. G. Snow is the president of The West Milford Water Storage Company, one of the corporations named in and who executed the foregoing deed; that the seal affixed to said deed is the common seal of said company, and was thereto affixed and the said deed was signed and delivered by said president in the presence of deponent as and for the voluntary act and deed of said company in presence of deponent, who thereupon subscribed his name thereto at witness.

GEORGE T. VICKERS,
Master in Chancery of New Jersey.

Answer—Exhibit B.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.*

On this 22nd day of September, A. D. 1900, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Richard Rossiter, who, being by me duly sworn, on his oath says: that he is the secretary and William Barbour is the governor of The Society for Establishing Useful Manufactures, one of the corporations named in and who executed the foregoing deed; that the seal affixed to said deed is the common seal of said company and was thereto affixed and the said deed was signed and delivered by said governor in the presence of deponent as and for the voluntary act and deed of said company in presence of deponent, who thereupon subscribed his name thereto as witness.

GEORGE T. VICKERS,
Master in Chancery of New Jersey.

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

On this 22nd day of September, A. D. 1900, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Edmund Le B. Gardiner, who, being by me duly sworn, on his oath says, that he is the secretary and William Barbour is the president of the Dundee Water Power and Land Company, one of the corporations named in and who executed the foregoing deed; that the seal affixed to said deed is the common seal of said company and was thereto affixed and said deed was signed and delivered by said president in the presence of deponent as and for the voluntary act and deed of said company in presence of deponent, who thereupon subscribed his name thereto as witness.

GEORGE T. VICKERS,
Master in Chancery of New Jersey.

Answer—Exhibit B.

Deed of Water Right.

The East Jersey Water Company and others
to
The Mayor and Common Council of the City of Newark.
Recorded.

Received in the clerk's office of the County of Passaic on the 25th day of September, A. D. 1900, at 2.10 o'clock in the afternoon and recorded in Book R. 14 of Deeds for said County, on pages 173, &c.

A. D. WINFIELD,
Clerk.

3782.

Received in the Clerk's office of the County of Morris, New Jersey, on the twenty-sixth day of December, 1901, at 10.54 o'clock A. M. and recorded in Book T. 16 of Deeds for said County on pages 594, &c.

DANIEL S. VOORHEES,
Clerk.

4861.

Received in the Clerk's office of the County of Sussex, New Jersey, on the 19th day of December, 1901, at 11 o'clock A. M. and recorded in Book W. 9 of Deeds for said County, on pages 14, &c.

O. C. SIMPSON.
Clerk.

Notice of Motion to Strike Out Defense.

NOTICE OF MOTION.

Filed September 1, 1921.

NEW JERSEY SUPREME COURT.

MERCER COUNTY.

STATE OF NEW JERSEY, *Plaintiff,* *vs.* THE CITY OF NEWARK, *Defendant.*	*Action at Law.* *Notice of Motion.*

To the within-named defendant, or Jerome T. Congleton, its attorney:

Please take notice that on Thursday, the eighth day of September, A. D. nineteen hundred and twenty-one, at the hour of ten-thirty o'clock in the forenoon, daylight saving time, or as soon thereafter as counsel can be heard, before his Honor, Thomas W. Trenchard, Justice of the Supreme Court, at the State House, in the City of Trenton, a motion will be made to determine the question of law raised in the first separate defense to each of the five counts of the amended complaint in the above-entitled action; and at such time and place I shall move to strike out the said first separate defense to each of the five counts of the amended complaint, on the ground that the same does not disclose a legal defense to the complaint, in that Chapter 252 of the Laws of 1907, entitled "An Act to establish a State Water Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," approved June 17, 1907, requires payment for diversion of water in excess of the amount fixed by said

statute, and that the construction of said statute, as contended for by the defendant, would render the same inefficacious.

That the rights of the defendant are not protected, conserved or sustained by Chapter 252 of the Laws of 1907, to divert water in excess of the amount fixed by statute without payment therefor.

That the provisions of Chapter 252 of the Laws of 1907 do not bar the plaintiff from recovery.

Yours respectfully,

THOMAS F. McCRAN,
Attorney General of New Jersey.

WILLIAM NEWCORN,
Assistant Attorney General.

Dated August 23, 1921.

ORDER STRIKING OUT DEFENSES.

Filed September 8, 1921.

NEW JERSEY SUPREME COURT.

MERCER COUNTY.

STATE OF NEW JERSEY, *Plaintiff,* *vs.* THE CITY OF NEWARK, *Defendant.*	*Action at Law.* *Order Striking Out Defenses.*

Application having been made on behalf of the plaintiff, and on due notice to the defendant, to determine the questions of law raised in the answer and the defenses of the defendant, in the above-entitled action, and to strike out the first separate defense, interposed by the defendant to each of the five counts of the amended complaint, as recited in said notice, on the ground that the same did not disclose a legal defense to the complaint, and the Court having heard the argument of counsel for the plaintiff and of counsel for the defendant thereon, and the Court being of the opinion that the first separate defense so interposed, as aforesaid, should be struck out;

It is ordered that the said first separate defense, so interposed, should be struck out.

Let this order be entered in the minutes.

THOMAS W. TRENCHARD,
Justice of the Supreme Court.

Dated September 8th, 1921.
Entered September , 1921.

On motion of
THOMAS F. MCCRAN,
Attorney General, Attorney of Plaintiff.

Stipulation

STIPULATION.

Filed September 8, 1921.

NEW JERSEY SUPREME COURT.

MERCER COUNTY.

STATE OF NEW JERSEY, *Plaintiff,* *vs.* THE CITY OF NEWARK, *Defendant.*	*Action at Law.* *Stipulation.*

It is stipulated and agreed between the parties hereto that the above cause be tried before the Hon. Thomas W. Trenchard, Justice of the Supreme Court, in and for the circuit of Mercer County, without a jury.

THOMAS F. McCRAN,
Attorney General,
Attorney of Plaintiff.

JEROME T. CONGLETON,
Attorney of Defendant.

Dated September 8th, 1921.

Judgment.

JUDGMENT.

Entered September 8, 1921.

NEW JERSEY SUPREME COURT.

MERCER COUNTY.

STATE OF NEW JERSEY, *Plaintiff,* *vs.* THE CITY OF NEWARK, *Defendant.*	*Action at Law.* *Postea.*

This cause was tried before the Hon. Thomas W. Trenchard, Justice of the Supreme Court, by consent of the parties, without a jury, and the Court finds that there is due to the plaintiff from the defendant the sum of eighteen thousand one hundred four dollars and eight cents ($18,104.08), and judgment is rendered in favor of the plaintiff and against the defendant in the aforesaid sum of eighteen thousand one hundred four dollars and eight cents ($18,104.08), besides costs of suit.

THOMAS W. TRENCHARD,
Justice of the Supreme Court.

Entered September 8th, 1921.

ENOCH L. JOHNSON,
Clerk.

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NEW JERSEY
Court of Errors and Appeals

NOTICE OF APPEAL AND GROUNDS THEREFOR.

(Filed July 22, 1921.)

STATE OF NEW JERSEY,
Plaintiff-Appellee,
vs.
CITY OF TRENTON,
Defendant-Appellant.

Action at Law.
Notice and Grounds of Appeal.

To Honorable Thomas F. McCran, Attorney General of the State of New Jersey:

Take notice, that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in the above entitled cause on the following grounds:

1. The Court erred in granting plaintiff's motion to strike out the first separate defense interposed by the defendant.

2. The Court erred in granting plaintiff's motion to strike out the second separate defense interposed by the defendant.

3. The Court erred in granting plaintiff's motion to strike out the third separate defense interposed by the defendant.

4. The Court erred in not permitting the defendant to maintain the first separate defense interposed by it.

5. The Court erred in not permitting the defendant to maintain the second separate defense interposed by it.

6. The Court erred in not permitting the defendant to maintain the third separate defense interposed by it.

CHAS. E. BIRD,
Attorney of Defendant-Appellant.

SUMMONS.

(*Filed February 14, 1921.*)

THE STATE OF NEW JERSEY, to the City of Trenton:

[L.S.] You are summoned to answer the annexed complaint of the State of New Jersey, in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. ffl

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this tenth day of February, A. D. nineteen hundred and twenty-one.

ENOCH L. JOHNSON,
Clerk.

THOMAS F. McCRAN,
Attorney General of New Jersey,
Attorney.

COMPLAINT.

(*Filed February 14, 1921.*)

NEW JERSEY SUPREME COURT.
MERCER COUNTY.

STATE OF NEW JERSEY,
Plaintiff,
vs.
THE CITY OF TRENTON,
Defendant.
} Action at Law. Complaint.

The plaintiff, the State of New Jersey, says:

FIRST COUNT.

1. That the defendant, during the whole of the year ending June 30, 1909, was and still is a municipality of this State.

2. That during the whole of said year ending, as aforesaid, defendant did divert the waters of a certain stream of this State, to wit, the waters of the Delaware River, for the purpose of a public water supply for said municipality and has continuously diverted said water for the purpose aforesaid to and including December 31, 1919.

3. That under the provisions of an act of the legislature of this State entitled "An act to establish a State Water Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," approved June 17, 1907, being Chapter 252 of the Session Laws of 1907, the defendant was permitted to divert from the Delaware River aforesaid, an average daily free allowance of water to the amount of 14,200,000 gallons, said last mentioned amount being the amount of water which was being diverted by said municipality on June 17, aforesaid, the date when the act aforesaid became effective and operative.

4. That the average daily diversion of water by said municipality during the period mentioned in paragraph one was 15,860,000 gallons, said amount so diverted being 1,660,000 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. That by virtue of the provisions of said act said defendant then and there became and was liable to pay to the State Treasurer for the use of the State for the excess so diverted an amount to be fixed by the State Water Supply Commission at the rate of not less than one dollar nor more than ten dollars per million gallons.

6. That by virtue of the provisions of an act entitled "An act to establish a Department of Conservation and

Development, and to consolidate therein the State Water Supply Commission, the Board of Forest Park Reservation Commissioners, the State Geological Survey, the Washington Crossing Commission, the State Museum Commission and the Fort Nonsense Park Commission," approved April 8, 1915, the Board of Conservation and Development on the last mentioned date succeeded to and exercised and still exercises all the rights and powers, and performs all the duties theretofore exercised and performed by or conferred and charged upon the State Water Supply Commission.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1909, the sum of $605.90.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters, as aforesaid, to and including June 30, 1909, on the eighth day of February, 1910.

9. The State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount *so due* or any part thereof to the State Treasurer on or before the first day of July, 1910, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller, upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1910, to the Attorney-General the name of said defendant and the amount so due by it, for collection, and it then and there became

and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $605.90, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1909.

SECOND COUNT.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the first count are here repeated.

4. The average daily diversion of water by said municipality during the whole year ending June 30, 1910, was 17,404,705 gallons, said amount so diverted being 3,204,705 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1910, the sum of $1,169.71.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including June 30, 1910, on the fourteenth day of February, 1911.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1911, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1910, to the Attorney-General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $1,169.71, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1910.

THIRD COUNT.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. That under the provisions of an act of the Legislature of this State entitled "An act to establish a State Water Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," approved June 17, 1907, being Chapter 252 of the Session Laws of 1907, the defendant was permitted to divert from the Delaware River aforesaid, an average daily free allowance of water to the amount of 13,490,000 gallons, said last-mentioned amount of water which was being diverted by said municipality on June 17th, aforesaid, the date when the act aforesaid became effective and operative.

4. The average daily diversion of water by said municipality during the whole year ending June 30, 1911,

was 15,940,812 gallons, said amount so diverted being 2,450,812 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1911, the sum of $894.54.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including June 30, 1911, on the thirteenth day of February, 1912.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1912, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1912, to the Attorney-General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $894.54, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1911.

FOURTH COUNT.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole year ending June 30, 1912, was 17,530,374 gallons, said amount so diverted being 4,040,374 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1912, the sum of $1,474.73.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including June 30, 1912, on the fifteenth day of February, 1913.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1913, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1913, to the Attorney-General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $1,474.73, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1912.

FIFTH COUNT.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole year ending June 30, 1913, was 17,753,010 gallons, said amount so diverted being 4,263,010 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from

said defendant for the whole year ending June 30, 1913, the sum of $1,556.00.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including June 30, 1913, on the fifteenth day of February, 1914.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1914, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1914, to the Attorney-General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $1,556.00, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1913.

SIXTH COUNT.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole year ending June 30, 1914,

was 19,461,287 gallons, said amount so diverted being 5,971,287 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. That said Commission fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1914, the sum of $2,179.52.

8. That said Commission certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including June 30, 1914, on the tenth day of February, 1915.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1915, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1915, to the Attorney-General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $2,179.52, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1914.

SEVENTH COUNT.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole year ending June 30, 1915, was 17,435,833 gallons, said amount so diverted being 3,945,833 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole year ending June 30, 1915, the sum of $1,440.23.

8. That said Board certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including June 30, 1915, on the seventh day of February, 1916.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1916, and still fails and neglects to make such payment as aforesaid.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1916, to the Attorney-General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $1,440.23, the amount due from the defendant to the plaintiff for the whole of the year ending June 30, 1915.

EIGHTH COUNT.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the six months ending December 31, 1915, was 15,636,666 gallons, said amount so diverted being 2,146,666 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from

said defendant for the six months ending December 31, 1915, the sum of $394.99.

8. That said Board certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1915, on the eighth day of February, 1917.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1917.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the second day of July, 1917, to the Attorney-General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $394.99, the amount due from the defendant to the plaintiff for the six months ending December 31, 1915.

NINTH COUNT.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1916, was 15,730,833 gallons, said amount so diverted being 2,240,833 gallons in excess of the amount

which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole of the year ending December 31, 1916, the sum of $820.14.

8. The said Board certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1916, on the eighth day of February, 1917.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1917.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the second day of July, 1917, to the Attorney-General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $820.14, the amount due from the defendant to the plaintiff for the whole of the year ending December 31, 1916.

TENTH COUNT.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1917, was 16,423,000 gallons, said amount so diverted being 2,933,000 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole of the year ending December 31, 1917, the sum of $1,070.54.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1917, on the fourteenth day of February, 1918.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1918.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, cer-

tified on the first day of July, 1918, to the Attorney-General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $1,070.54, the amount due from the defendant to the plaintiff for the whole of the year ending December 31, 1917.

ELEVENTH COUNT.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1918, was 18,444,167 gallons, said amount so diverted being 4,954,167 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole of the year ending December 31, 1918, the sum of $1,808.27.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1918, on the thirteenth day of February, 1919.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness. to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1919.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1919, to the Attorney-General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $1,808.27, the amount due from the defendant to the plaintiff for the whole of the year ending December 31, 1918.

TWELFTH COUNT.

1. The allegations of paragraph one of the first count are here repeated.

2. The allegations of paragraph two of the first count are here repeated.

3. The allegations of paragraph three of the third count are here repeated.

4. The average daily diversion of water by said municipality during the whole of the year ending December 31, 1919, was 15,943,315 gallons, said amount so diverted being 2,453,315 gallons in excess of the amount which said municipality was entitled to divert under the provisions of the act aforesaid.

5. The allegations of paragraph five of the first count are here repeated.

6. The allegations of paragraph six of the first count are here repeated.

7. The said Board fixed the sum of one dollar per million gallons as a license fee to be paid by said defendant for the amount of water so diverted by it in excess of its allowance, making the amount so due from said defendant for the whole of the year ending December 31, 1919, the sum of $895.46.

8. That said Board finally certified the name of the defendant to the State Comptroller and the amount so due by said defendant for the diversion of waters as aforesaid to and including December 31, 1919, on the fourteenth day of February, 1920.

9. That the State Comptroller, as provided by law, thereupon promptly notified the defendant of its said indebtedness to the State.

10. That the sum specified in the notice by the State Comptroller to the defendant, as aforesaid, became and was payable on or before the first day of July then next.

11. That the defendant wholly failed and neglected to pay the amount so due or any part thereof to the State Treasurer on or before the first day of July, 1920.

12. That the State Comptroller upon the failure of the defendant to make such payment, as aforesaid, certified on the first day of July, 1920, to the Attorney-General the name of said defendant and the amount so due by it for collection and it then and there became and was the duty of the Attorney-General to take immediate steps to collect the amount so due by an action in the name of the State.

The plaintiff demands of the defendant the sum of $895.46, the amount due from the defendant to the plaintiff for the whole of the year ending December 31, 1919.

The total sum demanded of the defendant by the plaintiff is $14,310.03.

THOMAS F. MCCRAN,
Attorney-General of New Jersey,
Attorney of Plaintiff.

ANSWER.

(*Filed March 24, 1921.*)

(*Amendments Filed April 23 and May 26, 1921.*)

NEW JERSEY SUPREME COURT.
MERCER COUNTY.

STATE OF NEW JERSEY,
Plaintiff,
vs.
THE CITY OF TRENTON,
Defendant.
} Action at Law. Amended Answer.

The defendant, the City of Trenton, a municipal corporation of the State of New Jersey, says that:

ANSWER TO FIRST COUNT.

1. It admits the first paragraph;
2. It admits the second paragraph;
3. It denies the third paragraph;
4. It denies the fourth paragraph;
5. It denies the fifth paragraph;
6. It admits the sixth paragraph;
7. As to the statement contained in the seventh paragraph, that the said commission fixed the sum of $1 per million gallons as a license fee to be paid by the defendant for water diverted by it, the defendant has not any knowledge or information thereof sufficient to form a belief, and it denies the right of said commission to fix said sum charged against it, and that there is any sum due from the defendant to the plaintiff as alleged in said paragraph;
8. As to the statement in the eighth paragraph, defendant has not any knowledge or information thereof sufficient to form a belief, and therefore neither affirms nor denies the same, but leaves the plaintiff to make such proof thereof as it may deem proper;

9. It denies the ninth paragraph;

10. It denies the tenth paragraph;

11. It denies the eleventh paragraph;

12. As to the statement in the twelfth paragraph, defendant has not any knowledge or information thereof sufficient to form a belief, and therefore neither affirms nor denies the same, but leaves the plaintiff to make such proof thereof as it may deem proper;

ANSWER TO SECOND COUNT.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 2.

ANSWER TO THIRD COUNT.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 3.

ANSWER TO FOURTH COUNT.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 4.

ANSWER TO FIFTH COUNT.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 5.

ANSWER TO SIXTH COUNT.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 6.

ANSWER TO SEVENTH COUNT.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 7.

ANSWER TO EIGHTH COUNT.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 8.

ANSWER TO NINTH COUNT.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 9.

ANSWER TO TENTH COUNT.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 10.

ANSWER TO ELEVENTH COUNT.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 11.

ANSWER TO TWELFTH COUNT.

1. The answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of count 1 are here repeated as the defendant's answers to the corresponding paragraphs of count 12.

FIRST SEPARATE DEFENSE TO EACH OF THE TWELVE COUNTS OF THE COMPLAINT.

1. The defendant required all the water used and taken for its corporate purposes, and had and possessed

the right to use and take all the water from the Delaware River that it required, without limitation as to quantity, and without the payment of any license fee for any part of the water so used and taken during the year or part thereof specified in each of the said twelve several counts of the complaint, which said right was acquired by the "Trenton Water Works" by grant direct from the State of New Jersey, March 24, 1852, and was acquired by the defendant by the duly authorized purchase of such right from the said the "Trenton Water Works," in manner following:

(a) By an Act of the Legislature of the State of New Jersey entitled "An Act to incorporate the proprietors of the Trenton Water Works," passed February 29, 1804, James Ewing, Peter Gordon, Thomas M. Potter, Gershom Craft, Alexander Chambers, and their associates, were created a body politic and corporate by the name, style and title "The President and Directors of the Trenton Water Works," and were constituted and declared to be forever thereafter a body politic and corporate in fact and in name; and (among other things) they and their successors and assigns by the name and style aforesaid, were made capable of holding their capital stock, and of conducting, directing and disposing of the same, from time to time, and of disposing of the use of water, to such as should apply for the same, for such annual rent and under such restrictions as they should think proper, and of purchasing, taking and holding, to them, their successors and assigns for the use of said corporation all such estates, real and personal, necessary or convenient for them, and of selling, disposing and conveying the same at their pleasure, and also to lay and extend their aqueduct through such of the streets of the said city as they should think necessary, and for that purpose to open and dig in such parts of said streets as should be convenient and necessary for the purposes aforesaid, as by reference to a copy of said act hereunto annexed, marked "a", and made a part hereof, will more fully and at large appear;

(b) and by an Act of the Legislature of the State of New Jersey entitled "A supplement to an act entitled 'An Act to incorporate the proprietors of the Trenton Water Works,' passed the 29th day of February, A. D. 1803,' " approved March 24, 1852, the "President and Directors of the Trenton Water Works" were (among other things) authorized and empowered to take the water which they then and thereafter required, without limitation as to quantity, either in whole or in part, from the Delaware River, for their corporate purposes, as by reference to a copy of said act hereunto annexed, marked "b", and made a part hereof, will more fully and at large appear; (c) and by an Act of the Legislature of the State of New Jersey entitled "An Act to authorize and enable the City of Trenton to purchase a part or the whole of the capital stock of the Trenton Water Works Company," approved March 2, 1855, it was (among other things) made lawful for the common council of said City of Trenton, whenever it seemed to them expedient so to do, to purchase, in the name and on behalf of said city, the whole or a majority of the shares of the capital stock of the "President and Directors of the Trenton Water Works," and thereby to become possessed of the same rights and privileges, and be subject to the same liability, as other stockholders, provided, a majority of the electors of said city voting at an election therein specified voted for such purchase, as by reference to a copy of said act hereunto annexed, and marked "c", and made a part hereof, will more fully and at large appear; (d) an election was held on the fourth Monday of March, A. D. 1855, upon the question of making the purchase authorized by said act of March 2, 1855, and the following vote was cast: "For water works," 1,059 votes; "Against water works," 201 votes; majority, 858 votes; (e) at a meeting of the Common Council of said city, held April 2, 1855, the President of that body laid before it the result of said election, as certified by the election officers of each ward of said city, and it was made to appear that a majority

of the electors of said city, voting at such election, had voted for such purchase, and said act thereupon became immediately effective; (f) the City of Trenton purchased the whole of the capital stock of the "President and Directors of the Trenton Water Works" under the authority of said act of March 2, 1855, and became the real owners of said works, and all the corporate rights, powers, franchises and privileges of the said the "President and Directors of the Trenton Water Works" prior to March 1, 1859; (g) and by an Act of the Legislature of the State of New Jersey entitled "An Act to authorize the 'President and Directors of the Trenton Water Works' to convey their works and franchises to the City of Trenton, and to provide for the management of said works,'" approved March 1, 1859, it was (among other things) made lawful for the "President and Directors of the Trenton Water Works," and they were required to convey unto "The Inhabitants of the City of Trenton" all the real estate, works and property and all the corporate rights, powers, franchises and privileges of said company; and upon the due execution of such conveyance, the legal title to said estate, works and property, and all the corporate rights, powers, franchises and privileges of said company passed to and vested in the "Inhabitants of the City of Trenton" by force of the statute, as reference to a copy of said act hereunto annexed, and marked "d", and made a part hereof, will more fully and at large appear; (h) and by a certain indenture made the 7th day of March, 1859, the "President and Directors of the Trenton Water Works," in consideration of the premises therein stated, and under and by virtue of the power and authority conferred upon them by the aforesaid act of the Legislature, granted, bargained, sold, aliened, released, assigned, conveyed and confirmed unto the "Inhabitants of the City of Trenton," their successors and assigns, all the lands, tenements, hereditaments and real estate, works and property, and all the corporate rights, powers, franchises and privileges of the said the "President and Directors of

the Trenton Water Works," together with all and singular the appurtenances to the same belonging or in anywise appertaining; together with all the estate, right, title, interest, use, possession, property, claim and demand of them, of, in and to the same, and also all the corporate rights, powers, franchises and privileges granted unto the "Inhabitants of the City of Trenton," their successors and assigns to the only proper use, benefit and behoof of the said the "Inhabitants of the City of Trenton," their successors and assigns forever, according to the form, force and effect of the aforesaid act of the Legislature, as by reference to a copy of the said indenture hereunto annexed, and marked "e", and made a part hereof, will more fully and at large appear.

SECOND SEPARATE DEFENSE TO EACH OF THE TWELVE COUNTS OF THE COMPLAINT.

1. The defendant repeats the statements in the first separate defense and says that Sec. 8 of the act of June 17, 1907, being Chapter 252 of the Laws of 1907 impairs the obligation of a contract and offends against Art. I, Sec. 10, Par. 1 of the Constitution of the United States, and Art. IV, Sec. 7, Par. 3 of the Constitution of the State of New Jersey.

THIRD SEPARATE DEFENSE TO EACH OF THE TWELVE COUNTS OF THE COMPLAINT.

1. The defendant says that Sec. 8 of the act of June 17, 1907, being Chapter 252 of the Laws of 1907, imposes a tax upon property, without regard to uniformity and value, and offends against Art. IV, Sec. 7, Par. 12 of the Constitution of the State of New Jersey.

HENRY M. HARTMANN,
CHAS. E. BIRD,
Attorneys and Counsel with Defendant.

(a)

An Act to Incorporate the Proprietors of the Trenton Water Works.

BE IT ENACTED *by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same:*

1. That James Ewing, Peter Gordon, Thomas M. Potter, Gershom Craft, Alexander Chambers and their present and future associates, proprietors of the Trenton Water Works, pursuant to a certain agreement, entered into by the said proprietors on the eighteenth day of September, one thousand eight hundred and two, their successors and assigns, be and they hereby are created a body politic and corporate by the name, style and title of "The President and Directors of the Trenton Water Works," and they are hereby constituted and declared to be forever hereafter a body politic and corporate in fact and in name; and by that name they and their successors and assigns shall and may have perpetual succession, and shall be persons able and capable in law to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in all courts and places whatsoever; and that they and their successors and assigns may have and use a common seal and may make, change and alter the same at their pleasure; and also that they and their successors and assigns, by the name and style aforesaid, shall be in law capable of holding their capital stock, and the increase and profits thereof, and of conducting, directing and disposing of the same from time to time in such manner and form as they shall think proper, and of disposing of the use of the water, to such as may apply for the same, for such annual rent and under such restrictions as they may think proper, and of purchasing, taking and holding, to them, their successors and assigns, for the use of the said corporation, all such estates, real and personal, as shall be necessary or convenient for them,

and of selling, disposing and conveying of the same at their pleasure, and generally of making all such laws, rules and regulations for the better conducting the affairs of the said company as they may from time to time find necessary or convenient; provided the same be not inconsistent with the constitution or laws of this State or of the United States.

2. *And be it enacted,* That James Ewing, who hath, according to the original agreement aforesaid, been chosen president, and Peter Gordon and Thomas M. Potter, who have, according to the said agreement, been chosen directors of the said company, shall be and continue to be president and directors of the said company until others shall be chosen in their stead, according to the provisions of their said agreement; and that all their legal acts and contracts entered into since and in virtue of their appointment, shall be good and valid as if this act of incorporation had then been in existence; and that it shall and may be lawful for the said president and directors, or for the president and directors for the time being to lay and extend their aqueduct through such of the streets of the said city as they may think necessary, and, for that purpose, to open and dig in such parts of the said streets as may be convenient and necessary for the purposes aforesaid; provided always, that not more than four rods in any of the said streets shall be open at any one time, nor the same be kept open for more than six days; and that the same shall be filled up again at the expense of the company and rendered as good and sufficient as if the same had not been taken up or removed.

Passed February 29, 1804.

(b)

A Supplement to the act entitled "An act to incorporate the proprietors of the Trenton Water Works," passed the twenty-ninth day of February, A. D. one thousand eight hundred and three.

WHEREAS the president and directors of the Trenton Water Works have represented that the increase of population in the city of Trenton has been so great that the springs from which said company have heretofore supplied said city with water are no longer adequate to furnish the necessary quantity—therefore,

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey,* That the said the president and directors of the Trenton Water Works are hereby authorized and empowered to take the water which they may require, either in part or in whole, from the Delaware River, and to that end they are hereby invested with all the powers necessary to enable them to purchase and hold such real estate, and to construct, keep up and maintain such reservoir, aqueducts and apparatus for elevating water, and such erections in the Delaware River not obstructing the navigation thereof, and such other works, establishments and fixtures as may, in their opinion, be required to effectuate the objects of this act, and to lay all pipes under the streets or through private property that may be needed to conduct said water from the river to their reservoirs, and from the reservoirs to such parts of the city and its vicinity as they may deem expedient.

2. *And be it enacted,* That if it shall become necessary, in the opinion of said president and directors, to lay pipes through any private lands in said city, or if any private lands shall be required for erecting reservoirs or other works thereon, and no agreement can be made with the owner or owners thereof, as to the amount of compensation to be paid for laying said pipes through said lands, or the price to be paid for said lands, as the case may be, by reason of the unwillingness of said owners, or any of them, to accept such compensa-

tion or price as said president and directors may deem reasonable, or by reason of the absence or legal incapacity of said owners, or any of them, it shall be the duty of either of the justices of the Supreme Court, upon application in writing of said president and directors, with a map of the lands through which it is deemed necessary to lay said pipes, or a map and description of the lands so needed for said reservoirs or other works, and after ten days' previous notice in writing of such application to the owner or owners of said lands to appoint three disinterested appraisers to determine the compensation to be paid for the laying of said pipes through said lands, or the price to be paid for said lands, as the case may be; and it shall be the duty of said appraisers, after having taken before said justice an oath or affirmation faithfully and impartially to discharge the duties of their appointment, and after having carefully viewed the premises, within twenty days after their appointment to deliver to said president and directors a written appraisement under the hands and seals of them, or a majority of them, of the award they may have made, which map, description and award the said president and directors shall cause to be recorded in the registry of deeds for the county of Mercer, and upon payment or tender by or on behalf of the said president and directors to such owner or owners as aforesaid, or some one of them, of the sum awarded in such appraisement, if any, then the said president and directors shall have the right to lay said pipes through the lands aforesaid, or shall be deemed seized in fee simple of the lands so required for the erection of said reservoirs or other works as aforesaid; and in case any owner or owners of such lands shall be *feme covert*, under age, *non compos mentis*, or out of the State, then and in that case it shall be sufficient for said president and directors to pay the amount of said appraisement into the Court of Chancery, subject to the order of said Court for the use of the party or parties entitled to the same, the cost of all which proceedings shall be taxed

by the said justice of the Supreme Court and paid by said president and directors.

3. *And be it enacted,* That in case the said president and directors, or the owner or owners of the said land, shall be dissatisfied with the award of the appraisers provided for in the preceding section, and shall apply to the Supreme Court, at the next term after filing said award, the court shall have power, upon good cause shown, to set the same aside, and thereupon to direct a proper issue for the trial of the said controversy to be formed between the said parties, and to order a jury to be struck, and a view of the premises to be had, and the said issue to be tried at the next circuit court to be holden in the county of Mercer, upon the like notice and in the same manner as other issues in the said court are tried; and it shall be the duty of the said jury to assess the value of the said land or damages sustained; and if they shall find the same or a greater sum than the said appraisers shall have awarded in favor of the said owner or owners, then judgment therefor, with costs, shall be entered against said company, and execution awarded therefor; but if the said jury shall be applied for by the said owner or owners, and shall find the same or a less sum than the said president and directors may have offered or the said appraisers awarded, than the said costs to be paid by said applicant or applicants, and either deducted out of the said sum found by the said jury, or execution awarded therefor, as the said court shall direct; but such application shall not prevent the company from taking or laying pipes through said lands upon the award of the appraisers, the value or damages being first paid, or upon a refusal to receive the same, upon a tender thereof, or the owner or owners thereof being under any legal disability, the same being first paid into the Court of Chancery.

4. *And be it enacted,* That whenever it shall become necessary to make any repairs or alterations in any

pipes which may have been laid through any private lands, either by virtue of the preceding section or by agreement with the owner or owners thereof, it shall be lawful for said president and directors, with their workmen and agents, and with necessary vehicles, tools, and implements, to enter upon said lands, and make the necessary repairs and alterations, doing no unnecessary damage; but nothing herein shall be so construed as to protect the said president and directors, or their workmen or agents, from any action that may be brought against them, individually, by the owner or owners, occupant or occupants, of said lands, for any damage which they may have wilfully or unnecessarily done.

5. *And be it enacted,* That the rents for the use of the water which said company may supply, shall draw interest from the time they become due.

6. *And be it enacted,* That if any person shall wilfully pollute or adulterate the water in any reservoir belonging to said company, he or she, so offending, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine, not exceeding five hundred dollars, or by imprisonment at hard labor, not exceeding three years, or both, at the discretion of the court before whom such conviction may be had.

7. *And be it enacted,* That the said the president and directors of the Trenton Water Works shall continue to have and possess all the rights, powers, franchises, and privileges which they now have and possess by virtue of the act to which this is a supplement, or the agreement referred to in said act, or the act entitled "An act to authorize Stephen Scales to convey the water from his spring, through the several streets of the City of Trenton," passed the third day of December, A. D. one thousand eight hundred and one; and that said rights, powers, franchises, and privileges shall be deemed to be enlarged, so as to embrace the rights, powers, franchises, and privileges given to said

corporation by this act, to all intents and purposes as if the same had been conferred on said Company at the time it was first established.

8. *And be it enacted,* That the capital stock of said company shall be deemed to be twenty thousand dollars, divided into shares of fifty dollars each, as fixed by the stockholders thereof, at a meeting held on the tenth day of June, A. D. one thousand eight hundred and thirty-nine; and that the stockholders of said company may, from time to time, increase said capital stock to any sum not exceeding one hundred thousand dollars, in order to carry into effect the objects of this act.

Approved March 24, 1852.

(c)

An Act to authorize and enable the city of Trenton to purchase a part or the whole of the capital stock of the Trenton Water Works Company.

WHEREAS, It has been represented to the Legislature that, in order to secure to the City of Trenton a supply of water adequate for the extinguishment of fires and other public purposes, it is expedient that the said city should be the owner of the whole, or a majority, of the stock of the Trenton Water Works—therefore,

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey,* That it shall be lawful for the Common Council of the City of Trenton, whenever it may seem to them expedient so to do, to purchase, in the name and on the behalf of the said city, the whole, or a majority, of the shares of the capital stock of the president and directors of the Trenton Water Works, and thereby to become possessed of the same rights and privileges, and be subject to the same liabilities, as other stockholders; and to the end aforesaid, the said Common Council are hereby

authorized and empowered to contract such debts and to borrow such sums of money, on the credit of the said city, as shall appear to them to be necessary, not exceeding one hundred thousand dollars.

2. *And be it enacted,* That in case the said Common Council shall make the said purchase, they shall have the right to vote on the said shares of stock, or any of them, by proxy, and shall be entitled to appoint as many directors of said water works as the shares held by the city shall be in proportion to the whole number of shares of said water works; provided, that no member of said Common Council shall be appointed such director.

3. *And be it enacted,* That the said Common Council are hereby empowered to set off such parts of the said city, through which the water pipes of the Trenton Water Works now are or hereafter shall be laid, into a district or districts, to be called "the Water District or Districts," and to alter the boundaries thereof, as occasion may require; and to impose an annual tax, in such an amount as to them may seem expedient, on all improved lands comprised in said water district or districts the owners or occupants of which shall not take the water for the use thereof from the said president and directors of the Trenton Water Works, the said tax to be assessed with a view to the value of the property taxed and to its rental, and said assessment to be made and collected in such manner, at such times, and by such person or persons, as the said Common Council shall from time to time, by ordinance, direct; and that said taxes, when imposed in the manner aforesaid, shall have the same force and effect, and be collectable by the same process as other city taxes; and that the money raised by said tax shall be appropriated to defraying the expense of supplying the said city with water for the extinguishment of fires and other public uses.

4. *And be it enacted,* That if the said city shall purchase any of the said stock, it shall be obligatory on the said city to purchase the shares of any stockholder who may offer to sell the same at its par value within one year from the passage of this act, and to receive in payment therefor the bonds of the city, hereinafter mentioned, or cash, at the option of the city; and in case the Common Council shall neglect or refuse to purchase any stock offered to the city on the terms aforesaid, for the space of thirty days after such offer shall be made in writing to the city treasurer, then "the Inhabitants of the City of Trenton" shall be and they are hereby made liable to pay to the person or persons so offering such stock the par value thereof, with interest from the date of such offer, to be recovered in an action on the case, with costs, in any court having jurisdiction of the same; provided, that no execution shall be issued upon the judgment recovered in any such action, until the person or persons obtaining the same shall transfer to the city the stock for the value of which such judgment shall be rendered.

5. *And be it enacted,* That the loan authorized by the first section of this act shall be called the water loan; and to secure the payment thereof the said common council are hereby authorized to issue the bonds of the city for an amount not exceeding in the whole the sum of one hundred thousand dollars, which bonds shall bear interest at the rate of six per cent per annum, payable semi-annually, and shall not be subject or liable to any tax which may be hereafter levied or assessed by order of the common council of said city.

6. *And be it enacted,* That none of said bonds shall be sold or disposed of at less than their par value; and the proceeds thereof shall be applied, exclusively, to the purposes contemplated by this act, and to no other purpose whatever.

7. *And be it enacted,* That the stock purchased shall be transferred to the said city, and the dividends and

revenue derived therefrom shall be appropriated, first, to the payment of the interest of the bonds issued for the purchase of said stock, and the balance thereof shall be set apart as a sinking fund for the payment of the principal of said bonds; and that no part of said dividends or revenue shall be appropriated or used for any other purpose whatever; and no part of said stock shall be sold or transferred until the payment of the principal and interest of said bonds.

8. *And be it enacted,* That an election by ballot shall be held, on the fourth Monday in March next, in each of the wards of said city, at the places of holding the last annual election, at which election the electors of said city shall vote upon the question of making the purchase authorized by this act, those in favor of making said purchase depositing ballots with the words "For Water Works," written or printed thereon, and those opposed thereto depositing ballots with the words "Against Water Works," written or printed thereon; the poll of such election shall be opened at seven o'clock in the forenoon and kept open till seven o'clock in the afternoon; and the said election shall be conducted in the same manner and by the same officers as the annual city election; and in cases of vacancy from any cause, such vacancy shall be filled by the electors of the ward in which the same may arise before the opening of the poll; after counting off the votes polled, the result of said election, in each ward, shall be certified by the election officers of each ward, to the president of the common council, to be by him laid before the common council at their next meeting; and if it shall appear that a majority of the electors of said city, voting at such election, have voted for such purchase, then this act shall take effect immediately; but if otherwise, then this act shall be void.

Approved March 2, 1855.

(d)

An Act to authorize "the President and Directors of the Trenton Water Works" to convey their works and franchises to the city of Trenton, and to provide for the management of said works.

WHEREAS, "The inhabitants of the city of Trenton" have purchased the whole of the capital stock of "The President and Directors of the Trenton Water Works," and have thus become the real owners of said works, but are compelled to manage and conduct the same pursuant to the provisions of the charter of said company, in whom the legal title to said work is still vested; therefore

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey,* That it shall be lawful for "The President and Directors of the Trenton Water Works," and they are hereby required on or before the first day of May next, to convey unto "the inhabitants of the city of Trenton" all the real estate, works and property, and all the corporate rights, powers, franchises and privileges of said company; and that upon the due execution of such conveyance, the legal title to said real estate, works and property, and all the corporate rights, powers, franchises and privileges of said company shall pass to and vest in "the inhabitants of the city of Trenton," in as full and ample a manner as the same now are or heretofore have been held and enjoyed by the said company.

2. *And be it enacted,* That the said water works shall be conducted and managed exclusively by and through a board of commissioners to be appointed as hereinafter directed, and that all the authority, powers and duties relative thereto now exercised and performed by the president and directors of said company shall be exercised and performed by said commissioners, except as is hereinafter provided; and in pursuance of this authority the said commissioners may appoint and employ all proper clerks, officers, agents and assistants necessary or

convenient for the purposes aforesaid at such compensation as they may deem reasonable; provided, that the said commissioners shall have no power or authority to create loans or borrow money, and shall not be entitled to take or receive any compensation for their services.

3. *And be it enacted,* That the real estate, works and property hereby authorized to be conveyed to the inhabitants of the city of Trenton, and the income thereof shall be and remain liable in their hands for the payment of all debts heretofore contracted by the president and directors of the Trenton Water Works; and that for the purpose of paying such debts and to provide for the further extension of said water works, it shall and may be lawful for the common council of said city, upon the written application of said commissioners, to issue the bonds of the city for an amount not exceeding in the whole the sum of fifteen thousand dollars, which bonds shall not be disposed of at less than par value, and shall bear interest at the rate of six per cent. per annum, payable semi-annually, and shall not be subject or liable to any tax which may be levied or assessed by order of the common council of said city; provided, that such bonds shall not be issued in any case except a majority of the whole number of said council shall concur therein.

4. *And be it enacted,* That the said bonds or the proceeds thereof, when sold by the said commissioners, shall be applied first, to the payment of the debts of the president and directors of the Trenton Water Works, and the balance, if any, shall constitute a fund for the future extension of said works, and shall be used exclusively for that purpose, and no other.

5. *And be it enacted,* That the net rents and revenue received from the said water works, after paying all expenses for maintaining the works and extending the pipes, and paying salaries, wages and incidental expenses, shall be appropriated, first to the payment of the interest on the bonds heretofore issued for the purchase of the stock of said company, called the "water loan," and also on the bonds issued pursuant to the provisions

of this act, which shall be deemed part of said loan, and the balance thereof shall be set apart as a sinking fund for the payment of the principal of said bonds; and that no part of said rents and revenue shall be appropriated or used for any other purpose whatever until the whole of said debt is paid and satisfied; provided, that the said commissioners shall not expend out of said water rents in any one year more than five hundred dollars for extending the pipes, and all extensions shall be charged to construction account, and they shall not make any such extension or improvement (necessary repairs excepted), the cost of which shall exceed said amount, in any one year, unless the common council shall have previously authorized the issue of city bonds for the purpose of paying therefor.

6. *And be it enacted,* that the said commissioners shall, on the last Monday of April, and on the last Monday of October in each year, pay over to the treasurer of the city of Trenton so much of the net rents and revenue of said works for the preceding six months as will be sufficient to pay the semi-annual interest on the bonds mentioned in the last preceding section; and shall on the same days pay over the surplus, if any, to the "Commissioners of the Sinking Fund" of said city, to be by him safely invested in the same manner that other city moneys are invested by him, and allowed to accumulate as a sinking fund for the payment of said bonds at maturity.

7. *And be it enacted,* That until such time as the net rents and revenue of said works shall be fully sufficient to pay the interest of said water loan, it shall be the duty of said commissioners in the month of April in each and every year to certify to the common council of said city what in their opinion will be the net revenue of said works for the ensuing year applicable to the payment of said interest; and thereupon the said Common Council may impose, assess and collect such an amount of tax as shall be sufficient, with the estimated net revenue of said works, to pay the interest on said water loan for that

year; and the said Common Council are hereby empowered to add to the amount they now are or hereby may be authorized to raise in the general assessment such sum as shall be necessary for the purpose aforesaid, notwithstanding any limitation or restriction contained in the charter of said city or the supplement thereto.

8. *And be it enacted,* That the city treasurer shall keep a separate account of all moneys received and paid by him on account of the interest of said water loan, particularly specifying therein the amounts received semi-annually from the water commissioners, as also the amount raised by taxation for the purpose of paying said interest, the whole of which shall be credited in said account and applied exclusively to the purpose aforesaid.

9. *And be it enacted,* That a majority of said commissioners shall constitute a quorum for the transaction of business, and they shall keep regular books of account, and books for recording the whole of their official proceedings, and all such books shall be open at all times to the examination of any member of the Common Council of the city of Trenton, and of any person or persons appointed by said Common Council for that purpose; the said commissioners shall also on the first Monday in February of every year make a report to the said Common Council of the condition of the said water works, accompanied by a detailed statement of their receipts and expenditures on account of the same, an abstract of which shall be published with the annual statement of the city treasurer.

10. *And be it enacted,* That all the contracts and engagements, acts and doings of the said commissioners within the scope of their duty or authority, shall be obligatory upon, and be in law considered as done by the inhabitants of the city of Trenton, and any judgment recovered against the said commissioners in their official capacity, as provided in the next succeeding section, shall have the same force and effect as a judgment against the city, and shall be enforced by the same process and in the same manner as if the same had been

rendered in an action brought against "the inhabitants of the city of Trenton."

11. *And be it enacted,* That the said commissioners may sue and be sued and prosecute or defend any action or process at law or in equity by the name of "the Water Commissioners of the City of Trenton," against any person or persons for money due for the use of the water for the breach of any contract, express or implied touching the execution or management of the works, or the distribution of the water, or of any promise or contract made to or with them, and also for any injury, trespass or nuisance done or suffered to the water, reservoirs, pipes, machinery or any apparatus belonging to or connected with any part of the works or for any improper use or waste of the water; and any vacancy or the filling of any vacancy in the board of commissioners, either before or after any cause of action arises or suit is commenced, shall not change the right of said commissioners as a body to commence, maintain or defend such action or suit, but for such purposes and in such cases they shall be considered from the time of the organization of the board as a body corporate.

12. *And be it enacted,* That all promises and contracts made by or with the president and directors of the Trenton Water Works previous to the execution of the conveyance hereinbefore authorized, shall be binding on the said commissioners and upon the other contracting party in the same manner and to the same extent as if said promise or contract had originally been made by or with the said commissioners; and that all actions, suits and remedies relative thereto shall be brought, prosecuted and enforced in the manner specified in the last preceding section in as full and ample a manner as the same might or could have been prosecuted and enforced by or against the president and directors of the Trenton Water Works in case this act had not been passed.

13. *And be it enacted,* That the board of commissioners for the time being shall have power and author-

ity to regulate the supply and use of the water, to fix the prices for the same and the times of payment, to make and prescribe such rules, regulations, conditions and restrictions as they may deem necessary or expedient with reference to the use and mode of drawing the water, the collection of water rents and the mode of enforcing such collection; and they shall have power to impose such penalties in addition to cutting off the water as they may deem expedient for the violation of such rules, regulations and restrictions.

14. *And be it enacted,* That it shall be the duty of said commissioners to erect and maintain fire plugs in the public streets of said city, through which water pipes shall have been laid in such number and locations as the Common Council may from time to time direct, and to supply the same with water; and such plugs shall be under the control and direction of the Common Council, who are hereby authorized by ordinance to make the necessary rules and regulations respecting the use thereof, and to prescribe penalties for their violation and the mode of collecting such penalties.

15. *And be it enacted,* That the said commissioners shall elect annually one of their number to be president of the board, who shall, under their direction, have their general superintendence of the water works and the business of the board; the president, or in his absence, one of the commissioners appointed by the board for that purpose, shall sign all contracts and all orders on the treasurer for the payment of moneys which may be authorized by the said commissioners.

16. *And be it enacted,* That the said commissioners shall require and take from their treasurer and such officers and agents as they may appoint such bonds and securities for the faithful performance of their duties as they may deem proper.

17. *And be it enacted,* That Charles Moore, Philemon Dickinson, Daniel Lodor, David S. Anderson, Jacob M. Taylor and Albert J. Whitaker shall constitute the first board of water commissioners, and shall at their first

meeting determine, by lot or otherwise, the terms during which they shall hold their offices; and these shall be as follows: two of them shall remain in office one year, two of them two years and two of them three years; all to be computed from the first day of July next.

18. *And be it enacted,* That the Common Council of said city shall in the month of June, at their regular monthly meeting, in the year eighteen hundred and sixty, and in the same month in every year thereafter, elect two commissioners, who shall hold their office for three years, to be computed from the first day of July next ensuing their election; and any vacancy that may occur in said commission by death, resignation or otherwise shall be filled by the Common Council at a regular monthly meeting, but the person appointed to fill such vacancy shall hold his office only for the residue of the term for which he may be appointed; provided, that no member of Common Council shall be appointed a water commissioner, or act as such after his election as a member of said council.

19. *And be it enacted,* That all acts or parts of acts conflicting with this act be and the same are hereby repealed.

20. *And be it enacted,* That this act shall take effect immediately.

Approved March 1, 1859.

(e)

THIS INDENTURE, made this seventh day of March, in the year of our Lord one thousand eight hundred and fifty-nine, between "The President and Directors of the Trenton Water Works," party of the first part, and "The Inhabitants of the City of Trenton," party of the second part: Whereas, in and by an act of the Legislature of the State of New Jersey entitled "An act to authorize the president and directors of the

Trenton Water Works to convey their works and franchises to the City of Trenton, and to provide for the management of said works," after reciting that "Whereas, 'the Inhabitants of the City of Trenton' have purchased the whole of the capital stock of 'The President and Directors of the Trenton Water Works,' and have thus become the real owners of said works, but are compelled to manage and conduct the same pursuant to the provisions of the charter of said company, in whom the legal title to said works is still 'vested,' it was, among other things, enacted as follows, that is to say: 'Be it enacted by the Senate and General Assembly of the State of New Jersey, That it shall be lawful for 'The President and Directors of the Trenton Water Works,' and they are hereby required, on or before the first day of May next, to convey unto 'The Inhabitants of the City of Trenton' all the real estate, works and property, and all the corporate rights, powers, franchises and privileges of said company; and that, upon the due execution of such conveyance, the legal title to said real estate, works and property, and all the corporate rights, powers, franchises and privileges of said company shall pass to and vest in 'The Inhabitants of the City of Trenton,' in as full and ample a manner as the same now are or heretofore have been held and employed by the said company;" as in and by the said act of the Legislature, reference being thereunto had, will more fully and at large appear.

Now this indenture witnesseth, that the said "The President and Directors of the Trenton Water Works," in consideration of the premises, and under and by virtue of the power and authority conferred upon them by the aforesaid act of the Legislature, have granted, bargained, sold, aliened, released, assigned, conveyed and confirmed, and by these presents do give, grant, bargain, sell, assign, alien, release, convey and confirm unto "The Inhabitants of the City of Trenton," their

successors and assigns, all the lands, tenements, hereditaments and real estate, works and property, and all the corporate rights, powers, franchises and privileges of the said "The President and Directors of the Trenton Water Works," together with all and singular the appurtenances to the same belonging or in anywise appertaining; and also all the estate, right, title, interest, use, possession, property, claim and demand of them, the said party of the first part, of, in and to the same; to have and to hold the said lands, tenements, hereditaments and real estate, works and property, and also all the corporate rights, powers, franchises and privileges hereby granted unto the said "The Inhabitants of the City of Trenton," their successors and assigns, to the only proper us, benefit, and behoof of the said "Inhabitants of the City of Trenton," their successors and assigns, forever, according to the form, force and effect of the aforesaid act of the Legislature.

In witness whereof, "The President and Directors of the Trenton Water Works," have, by the hands of Charles Moore, their president, thereunto duly authorized by a resolution of the directors of the said company, hereunto set their common seal, and the said president hath subscribed his name, the day and year first above written.

CHARLES MOORE, (Seal).
President.

The foregoing deed was signed, sealed and delivered, by order of the Board of Directors, on the day of the date thereof, in the presence of J. B. Quigley.

STATE OF NEW JERSEY, *ss.:*

Be it known, that on the seventh day of March, A. D. eighteen hundred and fifty-nine, before me, Caleb S. Green, a Master in Chancery of said State, personally appeared John B. Quigley, who, being duly sworn according to law, did depose and say that he knows the seal of "The President and Directors of the Trenton

Water Works;" that the seal annexed to the foregoing deed is the common seal of "The President and Directors of the Trenton Water Works;" that Charles Moore, the president of the said corporation, did, by their order, sign, seal and deliver the said indenture as the voluntary act and deed of the said corporation, in the presence of said deponent; and that deponent did, at the execution thereof, subscribe his name as a witness thereto.

CALEB S. GREEN, *M. C. C.*

Recorded March 16, 1859.

NOTICE OF MOTION.

NEW JERSEY SUPREME COURT,
MERCER COUNTY.

(*Filed May 26, 1921.*)

STATE OF NEW JERSEY, *Plaintiff,* *vs.* THE CITY OF TRENTON, *Defendant.*	Action at Law. Notice of Motion.

To the within named defendant, or Henry M. Hartmann and Charles E. Bird, its attorneys:

Please take notice that on Thursday, the twenty-sixth day of May, instant, at the hour of ten thirty o'clock in the forenoon, daylight saving time, or as soon thereafter as counsel can be heard, before his Honor, Thomas W. Trenchard, Justice of the Supreme Court, at the State House, in the City of Trenton, a motion will be made to determine the question of law raised in the defenses of the defendant in the above entitled action; and at such time and place I shall move to strike out the separate defense to each of the twelve counts of the com-

plaint, on the ground that the same do not disclose a legal defense to the complaint, in that Chapter 252 of the Laws of 1907, entitled "An act to establish a State Water-Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," approved June 17, 1907, requires payment for diversion of water in excess of the amount fixed by said statute, and that the construction of said statute, as contended for by the defendant, would render the same inefficacious.

That the rights of the defendant are not protected, conserved or sustained by Chapter 252 of the Laws of 1907.

That the provisions of Chapter 252 of the Laws of 1907 do not bar the plaintiff from recovery.

Yours respectfully,

THOMAS F. MCCRAN,
Attorney General of New Jersey.
WILLIAM NEWCORN,
Assistant Attorney General.

Dated May 12, 1921.

ORDER STRIKING OUT DEFENSES.

(Filed June 9, 1921.)

NEW JERSEY SUPREME COURT,
MERCER COUNTY.

STATE OF NEW JERSEY, *Plaintiff,*	Action of Law.
vs.	Order Striking Out
THE CITY OF TRENTON, *Defendant.*	Defenses.

Application having been made on behalf of the plaintiff, and on due notice to the defendant, to determine the questions of law raised in the answer and defenses of

the defendant, in the above entitled action, and to strike out the three separate defenses, interposed by the defendant to each of the twelve counts of the complaint, as recited in said notice, on the ground that the same did not disclose a legal defense to the complaint, and the court having heard the argument of counsel for the plaintiff and of counsel for the defendant thereon, and the court being of the opinion that the three separate defenses so interposed, as aforesaid, should be struck out;

It is ordered that the said three separate defenses, so interposed, should be struck out.

Let this order be entered in the minutes.

THOMAS W. TRENCHARD,
Justice of the Supreme Court.

Dated May 27th, 1921.
Entered June 9, 1921.
On motion of
THOMAS F. McCRAN,
Attorney General, *Attorney of Plaintiff.*

JUDGMENT.

(*Entered June 22, 1921.*)

NEW JERSEY SUPREME COURT,
MERCER COUNTY.

STATE OF NEW JERSEY,
Plaintiff,
vs.
THE CITY OF TRENTON,
Defendant.
} Findings of Fact and Postea.

This case was tried before Judge Frank T. Lloyd, without a jury, by consent of both of the parties thereto,

at the Mercer Circuit, on June fourteenth, one thousand nine hundred and twenty-one.

Counsel for the Defendant, upon the case being moved, consented to the entry of a judgment against the Defendant for the sum of fourteen thousand three hundred ten dollars ($14,310), if any sum is found to be due.

The court finds for the Plaintiff and against the Defendant for the sum of fourteen thousand three hundred ten dollars ($14,310).

FRANK T. LLOYD,
Judge.

Entered June 22, 1921,
ENOCH L. JOHNSON,
Clerk.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals.

STATE OF NEW JERSEY,
Plaintiff-Appellee,
vs.
CITY OF TRENTON,
Defendant-Appellant.

STATE OF NEW JERSEY,
Plaintiff-Appellee,
vs.
CITY OF NEWARK,
Defendant-Appellant.

On Appeal from the Supreme Court.

Brief for the Plaintiff-Appellee.

STATEMENT OF FACTS.

Judgment was entered in the Supreme Court upon the suit instituted by the State of New Jersey against the City of Trenton and the City of Newark, to recover from the appellants the license fees certified by the Board of Conservation and Development to the State Comptroller for the excess use of water by the City of Trenton and the City of Newark, for the various years in the respective complaints mentioned. An answer was filed by each of the municipalities, the City of Trenton interposing three separate defenses, and the separate defense interposed by the City of Newark. Notice was

given by the State to strike out the defenses, and after due hearing, an order made striking out the defenses, and judgment was entered for the total amount claimed by the State against each of the municipalities, and this action of the Justice of the Supreme Court is before this court for review.

The grounds of review are stated to be the error of the court in granting the State's motion to strike out, and the claim of both municipalities is that the defenses interposed by them are proper defenses, because each of the municipalities claims that it had obtained a grant from the State of New Jersey to divert and use all the water necessary for the needs of each municipality, without placing themselves subject to the license tax imposed by Section 8 of an act entitled "An Act to establish a State Water Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted," and known as Chapter 252 of the Laws of 1907.

It is unnecessary in this brief to set out at length the various acts of the Legislature relied upon by each of the municipalities to sustain their position, as the acts are set forth at length in the State of the Case and in their brief. The entire subject-matter, for the purposes of this brief, can be summarized by stating that the City of Trenton, in setting up this grant, bases its contention upon the following acts of the legislature:

(a) "An act to incorporate the proprietors of the Trenton Water Company," passed February 29, 1804.

(b) A supplement to an act entitled "An act to incorporate the proprietors of the Trenton Water Company," passed March 24, 1852.

(c) "An act to authorize and enable the City of Trenton to purchase a part or the whole of the capital stock of the Trenton Water Works Company," approved March 2, 1855.

(d) "An act to authorize the President and Directors of the Trenton Water Works Company to convey their

works and franchises to the City of Trenton, and to provide for the management of said works," approved March 1, 1859.

(e) Articles of Agreement between the President and Directors of the Trenton Water Works and the Inhabitants of the City of Trenton, dated the seventh day of March, 1859, whereby the Water Company sold and the City of Trenton purchased the water works of the Water Company.

The claim of the City of Newark is based upon the rights acquired by it by reason of a contract entered into between the Lehigh Valley Railroad Company and the East Jersey Water Company and the City of Newark, by deed dated May second, 1892, the Morris Canal and Banking Company uniting with the Lehigh Valley Railroad Company in the assignment and conveyance to the East Jersey Water Company of such water and water rights of the Pequannock water shed and others as might be necessary to enable the East Jersey Water Company to perform its part of said contract with the City of Newark, and relies upon the various acts of the Legislature incorporating the Morris Canal and Banking Company, and the supplements to the said act, together with the act of March 14, 1871, known as Chapter 153 of that law, entitled "A further supplement to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers," by the second section of which act it was made lawful for the Morris Canal and Banking Company, or its lessee or lessees, to use the surplus waters of the said canal of said company, or any of its feeders not needed for the purpose of navigation, in furnishing and supplying the inhabitants of any city, town and village, etc., with a sufficient quantity of pure and wholesome water for manufacturing or domestic or other uses, and to make contracts with corporate authorities of any such city, town or village, etc., for said supply of water for such compensation as it may be mutually agreed upon.

Likewise the act of April 2, 1888, known as Chapter 250 of the Pamphlet Laws of 1888, entitled "An act to authorize any of the municipal corporations of this State to contract for a supply or a further or other supply of water therefor."

The contention of both of the appellants is that while the actions as far as their objects and complaints are concerned, are in all respects similar to that considered by this court in the case of *State* v. *The Mayor, etc., of Jersey City,* 94 *N. J. L.* 431, 111 *Atl.* 544, the decision in that case is not binding upon these municipalities, for the reasons set forth in the defenses interposed by them, and for that reason the Supreme Court erred in striking out the separate defenses interposed, and the State should not have recovered the judgment which it obtained against each of the municipalities.

It is conceded upon the part of both municipalities that at the time of the enactment of Chapter 252 of the Laws of 1907, the amounts set forth in the complaint which the respective municipalities were diverting, was correct, and that the assessment for each of the respective years made by the Board of Conservation and Development upon the water diverted by the cities in excess of the number of gallons which could be legally diverted, was assessed at the rate of one dollar per million gallons, and if the State is entitled to recover at all, it is entitled to recover the amount of the judgment which has been assessed against each of the municipalities.

LAW.

In the case of the *State* v. *Mayor and Aldermen of Jersey City,* 94, *N. J. L.* 431, 111 *Atl.* 544, the Supreme Court said:

> "The question before us for determination is whether the Supreme Court, on the record submitted to it, was justified in striking out the answer and directing judgment for the State,

and unless the answer discloses a defense to the State's claim, there was no error in the judicial action."

Therefore, the entire question resolves itself as to whether the defense interposed is a legal defense which would bar the State of New Jersey from recovering the moneys due it, and the further ground that the State cannot be supported in its contention, because if it should prevail, the act would be void as impairing the obligation of a contract, in violation of Article I, Section 10, Paragraph 1, of the Federal Constitution, and Article IV, Section 7, Paragraph 3, of the State Constitution.

It is contended upon the past of the State that the provisions of Chapter 252 of the Laws of 1907, notwithstanding the defenses interposed by both municipalities, are binding upon the municipalities, and subject them to the license fee, and in order to arrive at this conclusion and answer the questions raised by the defenses and the brief of counsel, it might be well to examine the provisions of the act in question.

The suits were brought under the provisions of Chapter 252 of the Laws of 1907, Section 8 of this act, page 637, reading as follows:

> "Every municipality, corporation or private person now diverting the waters of streams or lakes with outlets for the purpose of a public water supply shall make annual payments on the first day of May to the State Treasurer for all such water hereafter diverted in excess of the amount now being legally diverted; provided, however, no payment shall be required until such legal diversion shall exceed a total amount equal to one hundred (100) gallons daily per capita for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. And every municipality, corporation or private person not at present diverting surface waters for said pur-

pose, but who shall hereafter divert such waters, shall make annual payments on the first day of May to the State Treasurer for all waters diverted in excess of a total of one hundred (100) gallons daily for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. Such payment shall be deemed to be a license and its amount shall be fixed by said commission at a rate of not less than one dollar ($1.00) or more than ten dollars ($10.00) per million gallons. If at all times an amount equal to the average daily flow for the driest month, as shown by the existing records, or in lieu thereof one hundred and twenty-five thousand gallons daily for each square mile of unappropriated watershed above the point of diversion, shall be allowed to flow down the stream, the commission shall fix the minimum rate and may increase the rate proportionately as a less amount is allowed to flow down the stream below the point of diversion, due account being taken in fixing said increase both of the duration and amount of said deficiency; provided, however, the aforesaid one hundred and twenty-five thousand gallons daily for each square mile of unappropriated watershed shall be additional to the dry-season flow or any part thereof which may be allowed to flow down from any appropriated watershed or watersheds above said point of diversion. Water diverted within the corporate limits of a municipality for manufacturing and fire purposes only, and returned without pollution to the stream from which it was taken within said corporate limits shall not be reckoned in making up the aggregate amount diverted. Said commission shall certify to the State Comptroller, as soon as practicable after the first day of January, and not later than the

fifteenth day of February of each year, the names of all municipalities, corporations or private persons owing money to the State for the diversion of water during the preceding year, with the amount so due. The State Comptroller shall promptly notify said municipalities, water companies or private persons of their indebtedness to the State, and in case said amounts are not paid the State Treasurer on or before the first day of July of the same year, the State Comptroller shall certify to the Attorney-General for collection the names of such delinquent municipalities, water companies or private persons and the amounts due from each, and it shall be the duty of the Attorney-General to take immediate steps to collect the same in the name of the State. Any party aggrieved by the action of the commission, upon filing written complaint on or before March twentieth, shall be heard and permitted to give evidence of the facts, and the sum fixed may be changed, reduced or canceled, as the facts may warrant. All sums received as above provided shall be credited by the State Treasurer to a special fund, to be used by said commission as the Legislature may direct for the control of the waters and conservation of the water supplies of the State. The provisions herein contained as to payment to the State for water diverted from surface sources shall not apply to water obtained from wells. Nothing in this act shall be construed to confer upon any municipality, corporation or person any franchise not already possessed by said municipality, corporation or person, but the approval of the said commission contained in its decision as above provided shall constitute the assent of the State to the diversion of water as against the State in accordance with the terms of said decision."

The payments required being based on the amount diverted in excess of the amount so fixed and to be deemed a license, the amount of the payment to be fixed by the Commission at the rate prescribed by the act, to wit, a minimum sum of not less than one dollar per million gallons, or not exceeding the sum of ten dollars per million gallons. The statute further provides that the Commission shall certify to the State Comptroller, as soon as practicable after the first day of January and not later than the fifteenth of February of each year, the names of all corporations or persons owing money to the State for the diversion of water during the preceding year, with the amount due; that the State Comptroller shall promptly notify such debtors of the amount of their indebtedness to the State, and if not paid on or before the first day of July of the same year, the default shall be certified by the State Comptroller to the Attorney-General, who shall take steps to collect the same.

Section 2 of the said act provides:

> "No municipal corporation, corporation or person engaged in supplying or proposing to supply the inhabitants of any municipal corporation with water, shall have power to condemn lands or water for any new or additional source of water supply, or to divert water from such new or additional source until such municipal corporation, corporation or person has first submitted descriptions thereof, which may be accompanied by maps and plans, to said commission, and until said commission shall have approved the same; provided, nothing in this section shall be interpreted to restrict any municipality in acquiring, by purchase or condemnation any existing or operating water works supplying said municipality with water; and provided further, that where any such municipal corporation, corporation or person has already acquired lands or water, and has in good faith

> commenced the construction of works for such new or additional water supply, this section shall not apply to construction or lands or water necessary to complete such works, or to put in use such water supply, if maps, plans and descriptions of such lands, works and water supplies shall be filed with the commission within ninety days of the approval of this act. Nothing in this act contained shall be construed to take from any municipality in this State the right to use and take all the water which it has the right to use or appropriate by purchase or condemnation."

Mr. Justice Bergen, construing the words "now being legally diverted," contained in the eighth section of the act, in the cases of *East Jersey Water Company* v. *Board of Conservation* and *Development, and Acquackanonk Water Company* v. *Board of Conservation and Development,* 91 *N. J. L., p.* 448, wherein the companies claimed that when the original act went into force the companies were under contract to supply certain municipalities with whatever quantities of water they from time to time required, and to pump and filter all the water used by the other water companies which were under contract to furnish and supply the water to certain municipalities, and that the excess water diverted by them was not subject to license fee so long as the diverted water is required to fulfill the contracts, said:

> "This construction will make the statute inefficacious because the growing demands of the different contracting municipalities for water may take the entire flow of the Passaic river, and ought not to be adopted unless required by the statute in plain terms. The statute requires payment 'for all such water hereafter diverted in excess of the amount now being legally diverted,' with the proviso that no payment be required until the legal diversion shall exceed one hundred gallons per day per capita. We are of

> opinion that 'legally diverted' means not a future diversion, but one now being exercised under a legal right, and that under this statute a legal abstractor may take what he was diverting in 1907, and, if that did not reach the statutory maximum of exemption, as much more as is required to make the total diversion one hundred gallons per day per capita for each of the municipalities supplied, without payment of the license fee."

In considering this entire subject it must be borne in mind that this legislation, as expressed in the title of the act, was for the purpose of establishing a State Water Supply Commission (now Department of Conservation and Development), of defining its powers and duties, and the conditions under which waters of this State may be diverted. The act was passed in the interest and for the protection of the public. The charge for excess diversion, upon which the suits are founded, is expressly stated by the statute to be a license, not a denial to use water. The payment of excess charges legalizes the excess diversion. The delegation or grant of power to the State Water Supply Commission, now continued to the Board of Conservation and Development, is a grant of a part of the State's sovereignty, to be exercised by the designated agents in the interest and for the welfare of the whole sovereignty and all its people.

The importance of the subject-matter was well expressed by Justice Pitney, speaking for the Court of Errors and Appeals in *McCarter, Attorney General,* v. *Hudson County Water Company,* 70 *N. J. Eq., p.* 695, in construing the act of 1905, which forbade diversion from the State of the waters of lakes and streams:

> "It must, we think, be sufficiently obvious that the government established in this State by and for the people thereof has complete dominion (subject only to constitutional limitations), over

> all things within the borders of the State, including all lands and waters, and the mode of acquiring and disposing of rights of property therein. The fresh-water lakes, ponds, brooks and rivers, and the waters flowing therein, constitute an important part of the natural advantages of this territory, upon the faith of which its population has multiplied in numbers and increased in material and moral welfare. The regulation of the use and disposal of such waters, therefore, if it be within the powers of the State, is among the most important objects of government."

In the same case, taken by writ of error to the Supreme Court of the United States, Mr. Justice Holmes, speaking for that court, 209 U. S. 349, said:

> "It appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interests of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purposes of turning them to a more perfect use. This public interest is omnipresent wherever there is a State and grows more pressing as population grows."

In the case of *Collingswood* v. *Water Supply Commission*, 84 *N. J. L.* 110, the legislative intent was recognized by this court in construing the legislation pertaining to the subject-matter, wherein it said, after discussing the various acts of the Legislature:

> "It is quire evident, therefore, that the policy of the State is one of determination to conserve, and as we view the matter, to economize to the fullest extent that is reasonable, the water resources of the State for the benefit of all its inhabitants. The growing scarcity of water supply

> is a matter of common knowledge, and a great deal of the fiercest litigation in the courts at the present time arises out of disputes over the ownership of water rights. Consequently, in looking at the acts of 1907 and 1910, this policy should be kept in mind; though indeed this is hardly necessary in view of the language of those very acts, for the act of 1907 in its very first section says that the State Water Supply Commission 'shall be charged with a general supervision over all the sources of potable and public water supply, to the end that the same may be economically and prudently developed for the use of the people of this State.' "

The object of the act of 1907 being the conservation of water, the question arises whether the contention of the cities that by reason of the grants referred to in their separate defenses were exempt from the operation of the provisions of the said act. Blackstone says:

> "Water is a movable, wandering thing, and must, of necessity, continue common by the law of nature; so that I can have only a temporary, transient, usufructuary property therein." 2 Black. Com. 18.

And in *Cobb* v. *Davenport, 32 N. J. L., at page* 378, Justice Depue said:

> "The policy of the common law is to assign to everything capable of ownership a certain and determinate owner. If capable of occupancy and susceptible of private ownership and enjoyment, the common law makes it exclusively the subject of private ownership; but if such private ownership and enjoyment are inconsistent with the nature of the property, the title is in the sovereign, as trustee for the public, holding it for common use and benefit."

The legislative grants under which both cities claim the right to divert water without limit and without the

payment of the tax imposed, was an exercise of the sovereign power of the State, subject to the reserve power of the sovereign to repeal, alter or modify the grant. There is no attempt in the act of 1907 to impair the grant by prohibiting the municipalities from drawing the water that is necessary to supply the inhabitants of the municipalities with an adequate water supply, but in line with the policy of the State to conserve the water and to preserve it for the common good of the entire public of the State, the license imposed is a license upon the limitation fixed by the reserve power of the State after a careful calculation of what would be adequate to supply the inhabitants of the respective municipalities. The limitation fixed by the statute only begins when the legal diversion shall exceed one hundred gallons per day per capita, and it is only upon the excess thereof that the license fee applies. The municipalities are created by the Legislature and are arms of the State to serve the general public. The Legislature that creates has the right to modify, change and impose conditions from time to time upon its creatures, and as was well said in the case of *Collingswood Sewerage Company* v. *Collingswood*, 92 *N. J. L.*, *p.* 511:

> "It would be strange, indeed, if the State, which has power to terminate the existence of the municipalities created by it whenever it may see fit, could not revoke authority granted by it to them, and, in the exercise of its sovereignty, cancel conditions which it had permitted them to impose upon other classes of corporations which had also been created by it."

In the same case, in the opinion of the Supreme Court, Mr. Justice Bergen says, in passing upon the ordinance:

> "The ordinance was the legislative act of the municipality. As a legislative act, it was subject to the control of the Legislature itself, and that body could make changes as long as it did not infringe the rights of the sewerage company, aris-

> ing under the ordinance. It makes little difference whether we say that the ordinance created by way of legislative grant a property right called a franchise, protected by the fourteenth amendment, or a contract protected by the contract clause of the federal constitution and our own State constitution. In either case, the question is whether a municipal corporation, an agency of the State, is protected by either the fourteenth amendment or the contract clause. It is well settled that such protection does not extend to the rights of the municipal corporation against its own creator." Citing *Rader* v. *Southeasterly Road District*, 36 *N. J. L.* 273.

In the latter case Mr. Justice Depue said:

> "The power of the Legislature over corporations created for purposes of local government is supreme. From a grant of this character, no contract arises with the corporators which exempts it from legislative control. The Legislature may alter, modify or repeal the charter at any time in its discretion. The only limitation on the operation of such repeal is as to creditors, that it shall not operate to impair the obligation of existing contracts, or deprive them of any remedy for enforcing such contracts which existed when they were made."

In the case of *New Orleans* v. *New Orleans Water Works*, 142 *U. S.* 79, the United States Supreme Court laid down the following principle:

> "Public corporations such as counties, towns and cities, are not within the principle that renders laws impairing contracts unconstitutional, but the Legislature may modify or destroy them as the public good requires."

The same principle was upheld in the case of *Barnes* v. *District of Columbia*, 91 *U. S.* 540.

The cities of Newark and Trenton are municipal corporations and the creature of the State Legislature, and

do not stand in a position to claim the benefit of the constitutional provision invoked, since their charters can be amended, changed or even abolished at the will of the Legislature.

In the *Dartmouth College Case,* 4 *Wheat* 518, in which the inviolability of private charters was first asserted by the United States Supreme Court, a distinction was drawn in the opinion of Mr. Justice Washington between corporations for public government and those for private charity. There it was held "that the former are to be governed by the law of the land and the corporation may be controlled and its constitution altered and amended by the government in such manner as the public interests might require." Mr. Justice Washington further said, "Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because it is in reality but one party to it. The trustees were governors of the corporation, being merely the trustees for the *cestui que trust* of the foundation." Mr. Justice Story was also of the opinion (p. 694) that "corporations for mere public government, such as townships, cities and counties, may in many respects be subject to legislative control."

In the case of *Laramie County* v. *Albany County,* 92 *U. S.* 307, where it was held that the Legislature had power to diminish or enlarge the area of the county, whenever the public convenience or the necessity required, Mr. Justice Clifford said "institutions of this kind, whether called counties or townships, are the agencies of the State in the important business of municipal rule and cannot have the least pretensions to sustain their privileges or their existences from either right, a contract between them and the Legislature of the State, because there is not, and cannot be, any reciprocity or stipulation, and their objects and duties are utterly incompatible with everything of the nature of contract."

So, in the case of *Williamson* v. *New Jersey*, 130 *U. S.* 189, it was held "that the power of taxation upon the part of a municipal corporation is not private property or a vested right in property in its hand, but the conferring of such power is an exercise by the Legislature of a public and governmental power which cannot be imparted in perpetuity, and is always subject to revocation, modifications and control, and is not the subject of contract." Mr. Justice Blatchford saying: "We are clearly of the opinion that such a grant of the power of taxation by the Legislature of a State does not form such a contract between the State and the township, as is within the protection of the provisions of the Constitution of the United States, which forbids the passage by a State of a law impairing the obligation of contracts."

In the case of *Board* v. *Skinkle*, 140 *U. S.* 334, it was held, the Chief Justice speaking for the court, "That an executive agency created by a State for the purpose of making public highways and empowered to assess the courts of its improvements upon adjoining lands and to purchase such lands as were delinquent in the payment of the assessment, would not by such purchase acquire a contract right in the land so bought which the State could not modify without violating the provision of the Constitution of the United States." This case was taken to the United States Supreme Court under writ of certiorari from the judgment of the Court of Errors and Appeals affirming the judgment of the Court of Errors and Appeals affirming the judgment of the New Jersey Supreme Court supporting the above principle. 47 *N. J. L.* 93; 49 *N. J. L.* 65.

Further citations of authority upon this point would seem unnecessary. They are full and conclusive to the point that the municipality, being a mere agent of the State, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked without the impairment of any constitutional obligation.

In the case of *City of New Orleans* v. *New Orleans Water Works Company, supra,* Mr. Justice Brown, delivering the opinion of the court, said, "in this case the city has no more right to claim an immunity for its contract with the Water Works Company than it would have had if such contract had been made directly with the State, the State having authorized such contract, it might revoke or modify it at its pleasure."

In view of this situation it seems useless to discuss the various legislative acts and grants to the respective municipalities, to determine whether the State at any time parted with any of its rights in the waters to the Proprietors of the Trenton Water Works, or to the Morris and Essex Canal Company, because whatever rights were acquired under legislative authority by the cities of Trenton and Newark would not deprive the State of its control over its agencies, nor the right to regulate the use of water. None of the grantors to the municipalities possessed any greater right to dispose of the water, than was delegated to it by the Legislature, and the right of the East Jersey Water Company to divert water was determined in the case of *Wilson, Attorney-General,* v. *East Jersey Water Company,* 78 *N. J. E.* 329, in the negative. A construction of the surplus Water act of 1871, whereby the Morris and Essex Canal Company were authorized to execute the lease to the Lehigh Valley Railroad Company, and permission was granted to the canal company to dispose of the surplus water of the canal when not needed for navigation for the purpose therein stated, only conveyed a right to the use and sale of such surplus water incidental to its use for canal purposes, and the right to dispose of the same would cease with the non-use of the canal for purposes of navigation, which condition exists at the present time.

In each instance these grants was a limited one to use such water as might be necessary to supply the inhabitants of the various municipalities. This right of user was limited to so much as shall be reasonably necessary

and was qualified by the obligation to leave the streams otherwise undiminished in quantity and unimpaired in quality. The legislative control over this water was never parted with, and it still retains the inherent power to regulate and fix the adequate amount that would be necessary to fulfill the original quantity used and to place a license upon the excessive diversion of the said water.

The power of the Legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety is inherent in the sovereignty of the State and cannot be bartered away or impaired by contract, public or private. *N. Y. & N. E. R. Co.* v. *Bristol,* 151 *U. S.* 556.

A grant of immunity from legislative control is never to be presumed, and unless an exception is clearly established, the Legislature is free to act on all subjects within its general jurisdiction as the public interest may seem to require. 118 *U. S.* 526.

The test of this entire question under the phraseology of Chapter 252 of the Laws of 1917 is not the grant, but the amount that the municipalities were regularly diverting at the time of the enactment of the act. None of the municipalities are deprived of the right of using all the water that may be necessary to supply their inhabitants according to the ratio per capita fixed by the act, but as soon as they begin to exceed the amount which the Legislature has fixed as to the quantity that can be supplied per capita in order to meet the adequate needs of each of the inhabitants, in that event the license fixed by the act attaches to the excess water so diverted. To sustain the contention of the municipalities would be to hold that the State had surrendered *pro tanto* its rights and control over the water belonging to the sovereign power without any consideration.

The cases of the City of Trenton and the City of Newark do not place them in any better position than

that of the City of Jersey City, decided by this court in the case of *State* v. *Mayor and Aldermen of Jersey City*, 94 *N. J. L.* 431, 111 *Atl.* 544, in which the judgment of the Supreme Court was upheld.

Mr. Justice Holmes, in the case of *Hudson County Water Company, Plaintiff in Error,* v. *Robert H. McCarter, Attorney-General of the State of New Jersey,* 209 *U. S.* 349, speaking of the police power of the State, said: "All rights tend to declare themselves absolute to their logical extreme, yet all in fact are limited by the neighborhood by principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line or helping to establish it, are fixed by decisions that this or that concrete case fall on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

It sometimes is difficult to fix boundary stones between the private right of property and the police power, when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the State, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." Further

in the opinion he says, "we are of the opinion further that the constitutional power of the State to insist that its natural advantages which remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of private use or speculations as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an æsthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

The right to conserve confers the right to regulate and to license, and in that respect, as an exercise of the police powers of the State the provisions of Chapter 252 of the Laws of 1907, as amended, apply to both municipalities. Notwithstanding the defenses interposed by both municipalities to the action instituted in the Supreme Court, therefore, the Supreme Court was justified in striking out the separate defenses of both municipalities and entering judgment for the amount sued for.

For the reasons above stated the appeals of the City of Trenton and the City of Newark should be dismissed and the judgments affirmed.

Respectfully submitted,

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NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY,
Plaintiff-Appellee,
v.
CITY OF TRENTON,
Defendant-Appellant.

STATE OF NEW JERSEY,
Plaintiff-Appellee,
v.
CITY OF NEWARK,
Defendant-Appellant.

On Appeal From Supreme Court

BRIEF FOR THE CITIES OF TRENTON AND NEWARK.

These are appeals from judgments entered in the Supreme Court in suits commenced by the State of New Jersey to recover from the cities of Trenton and Newark, respectively, the amount claimed to be due for surplus water used and appropriated by said City of Trenton during the years 1909 to 1919, inclusive, and by the said City of Newark for the years ending June 30, 1915, December 31, 1917, December 31, 1918, December 31, 1919, and December 31, 1920, pursuant to the provisions of Chapter 252 of the Laws of 1907, which authorizes, under certain conditions, the then Water Supply Commission (now the Department of Conservation and Development) to assess the value of water diverted by municipalities in excess of those diverted at the time of the approval of said act of the Legislature; and authorizes, in the

event of the failure of the municipalities to pay such appraised amount, an action to be brought in the name of the State to recover the same for the benefit of the State.

The actions, so far as their base and complaint are concerned are in all respects similar to that considered by this Court in the case of *State* v. *The Mayor, &c., of Jersey City*, 94 N. J. Law 431; 111 Atl. 544.

As shown in the opinion in that case the eighth section of the Act referred to provides that—

> "Every municipality, corporation or private person now diverting the water of streams or lakes with outlets for the purpose of a public water supply shall make annual payments on the first day of May to the State Treasurer for all such water hereafter diverted in excess of the amount now being legally diverted."

The complaint in the cases at bar shows at the time of the enactment of the statute in question the City of Trenton was diverting from the Delaware River, daily, 14,200,000 gallons and the City of Newark was diverting from the Pequannock River, daily 36,241,666 gallons, and concedes that the diversion to the extent stated is permitted by the State without claim for compensation or license fee. The amount of the judgments is the aggregate of the license fees which were sought to be recovered and had been assessed by the Board of Conservation and Development upon the water diverted by the cities from the said rivers in excess of the number of gallons just mentioned, and was at the rate of $1.00 per million gallons. In the case of the City of Newark the diversion at the time of suit for a portion of which a recovery is sought by the plaintiff and permitted by the court below is considerably under 50,000,000 gallons.

There is no dispute as to the amount diverted and the sole question for the determination of this court is whether the defenses set up and relied upon by the cities, respec-

tively, constitute a valid defense to the action or whether the contrary view of the court below is correct.

In each case the defendants set up their respective claims by way of special defenses which were, upon motion, stricken out and judgments entered for the plaintiff in the amounts above mentioned.

THE TRENTON CASE

The first separate defense is found on pp. 22 to 26 (Trenton Case) of the answer, and may be summarized as follows:

The defendant required all the water used and taken for its corporate purposes and had acquired and possessed the right to use and take all the water it required, from the Delaware River without limitation as to quantity and without the payment of any license fee for any part of the water so used and taken during each of the years specified in the complaint; which said right was acquired from the State through the medium of the Trenton Water Works by grant direct from the State in manner following: namely—

(a) By an act of the Legislature entitled "An Act to incorporate the proprietors of the Trenton Water Works" passed February 29th, 1804, certain individuals therein named were constituted a body politic and corporate for the purpose of disposing of the use of water to such as may apply for the same, and of purchasing, taking and holding to themselves, their successors and assigns, all such estates, real and personal as shall be necessary or convenient for them, and of selling, disposing of and conveying the same at their pleasure. A copy of said act of the Legislature is found on page 27 (Trenton Case) of the case and the same is made a part of the first separate defense.

(b) That by a supplement to said Act, approved March 24th, 1852, the said company was authorized and empowered to take the water which they may re-

quire, either in whole or in part, from the Delaware River and to that end they were thereby invested with all the powers necessary to enable them to purchase and hold such real estate and to construct, keep up and maintain such reservoir, aqueducts and apparatus for elevating water, and such erections in the Delaware River not obstructing the navigation thereof and such other works, establishments and fixtures as may in their opinion be required to effectuate the objects of the Act. A copy of this supplement is found on page 29 (Trenton) of the case and the same is made a part thereof.

(c) That by an act approved March 2d, 1855, entitled "An Act to authorize and enable the City of Trenton to purchase a part or the whole of the capital stock of the Trenton Water Works Company" the said corporation was authorized to sell and the City of Trenton was authorized to acquire the whole or any part of the capital stock of said corporation and "thereby to become possessed of the same rights and privileges, and be subject to the same liabilities as other stockholders", provided a majority of the electors of the said City voting at an election therein specified shall vote for such purchase; that an election was duly held on the fourth Monday of March, 1855, upon the question of making the purchase authorized by the said Act, resulting in the casting of the required vote in favor thereof; and that after the certification of the result of said election to the Common Council of the City of Trenton as required by said Act, the City purchased the whole of the capital stock of said company and became the holder of said works and all the corporate rights, franchises, powers and privileges of the said corporation. A copy of this last Act is found on page 33 of the case (Trenton) and is affixed to and made a part of the first separate defense.

(d) That by another Act of the Legislature approved March 1, 1859, and entitled "An Act to authorize the President and Directors of the Trenton Water Works

to convey their works and franchises to the City of Trenton, and to provide for the management of said works" it was made lawful for the said company and its officers were required to convey unto the City all the real estate, works and property, and all the corporate rights, powers, franchises and privileges of said company and upon the due execution of such conveyance the legal title to said estate, works and property and all the corporate rights, powers, franchises and privileges of said company passed to and became vested in the City by force of the statute last mentioned. A copy of this statute is found on page 37 of the record (Trenton) and was affixed to and made a part of the answer.

(e) That by a certain indenture made the 7th day of March, 1859, the corporation, in consideration of the premises therein stated and under and by virtue of the power and authority conferred upon it by the last mentioned Act of the Legislature granted, bargained, sold, aliened, released, assigned, conveyed and confirmed unto the City, their successors and assigns, all the lands, tenements, hereditaments and real estate, works and property, and all the corporate rights, powers, franchises and privileges of the said "the President and Directors of the Trenton Water Works", together with all and singular the appurtenances to the same belonging or in any wise appertaining, together with all the estate, right, title and interest, use and possession, property claim and demand of and to the same, and also all the corporate rights, powers, franchises and privileges granted unto the inhabitants of the City of Trenton, their successors and assigns to the only proper use, benefit and behoof of the said inhabitants of the City of Trenton, their successors and assigns forever. A copy of this indenture of conveyance is found on page 43 of the case (Trenton) and is affixed to and made a part of said answer.

THE NEWARK CASE

The distinctive and separate defense which was overruled by the Supreme Court and resulted in the entry of a judgment against the City of Newark for $18,104.08, besides costs, sets up and avers that by an Act of the Legislature incorporating the Morris Canal and Banking Company, which is a public act passed the 31st day of December, 1824, its amendments and supplements, including especially an act passed on the 5th day of March, 1836, the State of New Jersey granted unto the said Morris Canal and Banking Company, which by said original act was incorporated and given authority to construct an artifical navigation between the Delaware River at or near Easton and the Passaic River at or near Newark, the right or privilege to take and appropriate the waters of the State of New Jersey which should be required by said company to build, operate and maintain such canal or artifical navigation; that by a subsequent act passed January 26th, 1828, and entitled "An Act to authorize the Morris Canal and Banking Company to extend the Morris Canal to the waters of the Hudson" the said company was given the right to extend the said proposed canal from the Passaic River at the City of Newark to the Hudson River at or near the City of Jersey City to the same effect as if it had originally been authorized by its charter to construct a canal or artifical navigation to connect the waters of the Delaware River near Easton with the waters of the Hudson River at or near Jersey City.

That by said act of the Legislature dated the 5th of March, 1836, it was enacted that on such navigable feeder or feeders, as, by virtue of that act, or the act of the original incorporation of the Morris Canal and Banking Company, may be constructed by the Canal Company for the purpose of conducting into the waters of the Morris Canal the waters of Long Pond (now

known as Greenwood Lake) or other waters that may be required for the supplying of the said Canal, the said Canal Company was authorized to charge and receive the same rates of toll as were then lawful and chargeable upon the canal, and that in order to enable the Canal Company to procure the requisite lands and premises and construct the several basins, reservoirs and feeders authorized by the original act of incorporation and the amendments thereof, the said company was authorized to increase its capital stock to an amount not exceeding $600,000.

That shortly thereafter the said company did, at large expense, by the construction of dams and feeders and the diversion of waters from lakes, ponds and streams, take and appropriate, and thereby acquire the right to take and continue to use the waters so appropriated, included in which, pursuant to legislative authority as aforesaid, was the water that is now being used by the City of Newark in the quantities and amount set out in the complaint in this suit and thereby the Morris Canal and Banking Company acquired from the State of New Jersey the right to use the waters so appropriated and diverted; that continuously thereafter the said company, having so acquired from the State the right to use the said waters, continued so to use them in the maintenance and operation of the said canal until the month of May, 1871; and that on the 14th day of March of that year the legislature passed a further supplement to the charter of the said company, known as Chapter CLIII of the Pamphlet Laws of that year, entitled "A further supplement to an Act to incorporate a company to form an artifical navigation between the Passaic and Delaware Rivers" passed December 31st, 1824; that by the second section of this last act it was made lawful for the said company or its lessee or lessees to use the surplus waters of the said canal of said company or any of its feeders not needed for the purpose of navigation, in furnishing and supplying the inhabitants of any city,

town or village along the line of said canal or in the vicinity thereof with a sufficient quantity of pure and wholesome water for manufacturing or domestic or other uses; and to make contracts with corporate authorities of any such city, town or village, or with individuals, for said supply of water, for such compensation as may be mutually agreed upon and to erect such works and make such alterations in the canal as may be necessary or proper to enable the company or its lessee or lessees to furnish such supply of water from the said canal, and by the same act the said company was authorized to lease the canal, together with all its boats, property and works, appurtenances and franchises to any person or persons or corporation either perpetually or for such short a time and upon such rates and agreements as may be agreed upon; that in pursuance of the power contained in said act the said company on the 4th day of May, 1871, executed and delivered to the Lehigh Valley Railroad Company a perpetual lease of the entire canal and navigation works of the Canal Company as the same were then laid and constructed from the Delaware River at Phillipsburg to the Hudson River at Jersey City.

That on April 2d, 1888, the Legislature of this State passed an act entitled "An Act to authorize any of the municipal corporations of this State to contract for a supply or a further or other supply of water therefor," being known as Chapter CCL of the Laws of 1888, which last mentioned act authorized any municipal corporation of the State to enter into a contract with any water company or other company for a term of years for obtaining and furnishing a supply or a further or other supply of water to such municipal corporation for the purpose of extinguishing fires and for such other lawful uses and purposes as may be deemed necessary or convenient, provided that such contract may contain an option for the acquiring by such municipal corporation of the land, water and water rights for such supply on terms to be fixed in said contract.

That pursuant to the said act last mentioned the City of Newark, defendant herein, being desirous of procuring for the present and future needs of the City a supply of pure and wholesome water for domestic purposes, the extinguishment of fires and other lawful uses, entered into a contract in writing with the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania and the lessee above named, and the East Jersey Water Company, a corporation organized under the general laws of the State of New Jersey, for the purpose of procuring for said city such a supply of water for the sum of $6,000,000.

That in aid of said contract and for the purpose of enabling the said Railroad Company and the said East Jersey Water Company to perform their covenants therein, the Morris Canal and Banking Company united with the Lehigh Valley Railroad Company in the assignment and conveyance to the East Jersey Water Company of such water and water rights of the Pequannock Watershed, the Wynockie Watershed and the Ramapo Watershed as shall become necessary to enable the East Jersey Water Company to perform its part of said contract with the City of Newark.

That immediately thereafter the East Jersey Water Company proceeded to locate, build and construct in one of the watersheds, within the State of New Jersey, on a tributary of the Passaic River, known as Pequannock Watershed, embracing lands within Morris, Passaic and Sussex Counties in this State, certain large reservoirs and a pipe line to conduct water therefrom to the distributing reservoir of the City of Newark and to make and construct works and buildings for this purpose and secure the necessary property for that purpose.

That it was, among other things, agreed by the parties to said contract that the City of Newark should have the right at any time after the execution thereof and until within a year after the date of the final completion of all the works built and constructed, to terminate that

part of the contract which provided for the purchase of water by the City of Newark from the East Jersey Water Company by the million gallons, by the City's exercising the option therein given and thereby becoming the owner absolutely in its own right of the lands, water, water rights, rights of way, dams and reservoirs, and works constructed by the said East Jersey Water Company for the purpose of said contract with all other rights and appurtenances upon certain terms and conditions therein expressed; that the said City of Newark, by resolution duly passed by the proper municipal bodies, approved of the exercise by and on behalf of the said city of the said option of purchase.

That there being some dispute as to whether or not, within the time limited by said original contract between the City of Newark and the East Jersey Water Company, the said last named company was able to deliver the quanity of water in said contract provided for to the said City of Newark in accordance with the terms of the said contract, a subsequent contract dated the first day of August, 1892, was entered into between the said City and the said Company by virtue whereof the said city executed and delivered to the water company its corporate bonds aggregating in amount $4,000,000 and deposited bonds of a like character in the sum of $2,000,000 with the Fidelity Title and Deposit Company (now the Fidelity Union Trust Company) a trustee selected by the parties to said supplemental agreement, to be held by it and delivered to the water company when the conditions mentioned in the said contract were in fact fully performed on the part of the said water company, and that for the purpose of further securing the city against any default in the performance of said company's obligation, the said water company simultaneously made and executed to the said city a bond in the penal sum of $500,000 and deposited with the trustee aforesaid $500,000 in bonds of the City of Newark for the better securing to the city of the per-

formance by the water company of its obligation to complete and perfect title to the lands, water and water rights to which the city was entitled under the said contract and for the performance of such other covenants therein contained as upon inspection thereof will appear, including the fact that the pipe line or conduit which had been constructed by the water company for the purpose of conveying water to the said city should be found sufficient, when tested, to answer the requirements of the said contract.

Immediately upon the execution of said supplemental contract and bond the said company executed and delivered to the City of Newark a deed of conveyance of the water and water rights for the purpose of enabling it to fulfill and perform its covenants with the city. Said deed was dated May 2d, 1892, and atrue copy thereof is annexed to and made a part of the answer as Exhibit "A".

That after the payment of said city of Newark to the water company of the said bonds and the transfer to it of the title to certain water and water rights by the water company, it became apparent, prior to May 1st, 1896, that the pipe line constructed by the water company was not of sufficient size to meet the requirements of said contract and that it was impossible for said company to convey and deliver, by means of the pipe then laid, at the receiving reservoirs in the City of Newark 50,000,000 gallons of water daily, and that the said company would, in order to comply with the requirements of said contract, be required to enlarge the capacity of the said pipe line for the delivery of said water. Whereupon, on or about the first day of May, 1896, the said City of Newark entered into a further and additional supplemental contract with said water company, pursuant to the terms of which the said water company proceeded to construct and lay down a second line of pipe from the Macopin Intake reservoir located in the Pequannock Watershed to the receiving reservoir of the said

City of Newark located at Belleville in the County of Essex.

That at or about this time it became apparent that the capacity of the reservoirs built and constructed in the watershed was insufficient to furnish to the city at all times the daily supply of 50,000,000 gallons required by the aforesaid original contract and that it would be necessary to impound a larger quantity of water than the reservoirs at that time would contain. Whereupon the said water company, during the year 1896 built and constructed within the said watershed and upon a branch of the said Pequannock River, above the point at which the Oak Ridge reservoir is located, at or near the village of Canistear another large reservoir for impounding water, known as the Canistear Reservoir.

That as the City of Newark insisted that the reservoirs located at Oak Ridge and Clinton and at the Macopin Intake, described in the conveyance to the city of Newark by the water company dated May 2d, 1892, were insufficient to regulate the flow of water and make diversion therefrom into the said pipe lines in such quantity as to furnish a daily supply of 50,000,000 gallons forever, the said city, by virtue of the seventeenth paragraph of its original contract with said East Jersey Water Company invoked the aid and authority of the Court of Chancery of New Jersey to enforce the specific performance of the covenants and agreements contained in the said original contract and the said deed from the water company to the city dated May 2d, 1892, and that such proceedings were had in the Court of Chancery in the said suit so commenced, that on or about the 24th day of September, 1900, it was ordered, adjudged and decreed by the Chancellor (said City of Newark being the complainant and said East Jersey Water Company, the said Morris Canal and Banking Company and the said Lehigh Valley Railroad Company being the defendants) that

> "said the Morris Canal and Banking Company and the Lehigh Valley Railroad Company have

conveyed to the said The East Jersey Water Company by good and sufficient conveyance in the law, such water and water rights as they or either of them may have had in the said Pequannock Watershed at the date the said original contract was made, or so much thereof as will enable the said the East Jersey Water Company to fulfill and keep and perform the said contract, dated September 24th, 1889, hereinabove referre to, and have performed the covenants and conditions in such contract contained".

That certain other corporations in said answer particularly named, which had acquired the right to divert the waters of the Pequannock River and its tributaries at and above the Macopin Intake Dam, joined in a further deed with the said the East Jersey Water Company dated September 21st, 1900, for the purpose of further assuring and confirming to the said City of Newark the right to impound, take, divert, withdraw and use all the waters of the Pequannock River and its tributaries above the Macopin Intake Dam, by virtue whereof there was a final fulfillment of the contracts between the said water company and the said city, and a full discharge of the mutual obligations thereof; and that, accordingly, the said City of Newark acquired the title to a supply of water from the Pequannock River and the possession of a completed plant fully competent and capable of furnishing to the said city 50,000,000 gallons of water per day forever, which is the same water for the consumption of which this action is brought; all of which was acquired prior to the passage of Chapter 252 of the Laws of 1907 creating the State Water Supply Commission, and therefore the defendant claims that before the passage of said last mentioned act the city had, in manner aforesaid, acquired the right granted by the State of New Jersey to divert, use and take the supply of water from the Pequannock Watershed to the extent of 50,000,000 gallons daily.

The said answer further claims that, therefore, the said City of Newark is protected by the provisions of Chapter 252 of the Laws of 1907 in the enjoyment of its rights to at least 50,000,000 gallons of water and that this action by the State cannot be sustained.

The foregoing recital evinces the fact that each of the cities, Trenton and Newark, claimed that by virtue of the acts of the Legislature of this State and of the conveyances and other documents referred to in the respective answers, the cities derived, long before the enactment of Chapter 252 of the Laws of 1907, a right to divert and use, in the case of Trenton, an unlimited amount, certainly all that its ligitimate municipal purposes required, of the waters of the Delaware River, and in the case of Newark at least fifty millon gallons of water of the Pequannock River.

Section 2 of Chapter 252 of the Laws of 1907 expressly provides "nothing in this act contained shall be construed to take from any municipality of this State the right to use and take all the water which it has the right to use and appropriate by purchase or condemnation."

The mere recital of these facts and of this important provision in the Act of 1907 which forms the basis of the State's right to recover in this action would seem to justify the cities' contention and to invalidate the conclusion of the Supreme Court in this case.

In a word, in this case, the cities not only make the contention that was made in the case of *State* v. *The Mayor and Aldermen of Jersey City*, supra, but present the elements which CHIEF JUSTICE GUMMERE, expressing the unanimous opinion of this court, showed were lacking in that case. He says (p. 545):

> "The arguments both of the Attorney General and of counsel for the municipality rest largely upon the theory that the case presents for consideration and determination the question whether, by virtue of the provision of section 2 of the act of 1907 above recited the City of Jersey City is

entitled to abstract from the Rockaway River water to the amount of 50,000,000 gallons daily, without being subjected to the license fees which have been imposed upon it, notwithstanding the fact that at the time of the enactment of the statute the amount of water abstracted by it was very much less. But this question we think is not ripe for determination. The section applies only to those municipalities of the State which, at the time of the enactment, had the right to use and take water from the running streams, lakes, and ponds within the borders of the State; and, as the control of such waters rests in the state in its sovereign capacity as representative of and for the benefit of the people in common (*McCarter* v. *Hudson County Water Co.* 70 N. J. Eq. 695, 65 Atl. 489, 14 L. R. A. (N. S.) 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116), the only way in which a municipality can acquire the right to use and take such water is by a grant directly from the State itself, or by the duly authorized purchase or condemnation of such right from a third person, either corporate or individual, to whom it has already been granted by the State. There is nothing in the answer of the municipality which shows a grant by the State to the East Jersey Water Company of the right to abstract from the waters of the Rockaway River 50,000,000 gallons daily, or any other amount; and, of course, unless that corporation had, prior to the making of the contract set out in the answer, acquired from the State of New Jersey the right to abstract that water, it could not, by contract, or in any other way, confer such right upon the City of Jersey City."

The intention of the Legislature in passing Chapter 252 of the Laws of 1907 and providing for the payment of a license fee by water companies or municipalities for

water used or diverted by them in excess of the amount diverted at the time of the passage of the act, was not in any way to require the payment of license fees from cities for the use of water that they had previously acquired from the State, although at the time of the passage of the act they were not actually diverting all the water they had, by such grant, the right to divert.

The Supreme in *Collingswood* v. *The Water Supply Commission*, 84 N. J. Law 104, 110, speaking of this act, said

> "It is quite evident, therefore, that the policy of the State is one of determination to conserve, and as we view the matter, to economize to the fullest extent that is reasonable, the water resourses of the State for the benefit of all its inhabitants. The growing scarcity of water-supply is a matter of common knowledge, and a great deal of fiercest litigation in the courts at the present time arises out of disputes over the ownership of water rights. Consequently, in looking at the acts of 1907 and 1910, this policy should be kept in mind; though indeed this is hardly necessary in view of the language of those very acts, for the act of 1907 in its very first section says that the State Water Supply Commission shall be charged with a general supervision over all the sources of potable and public water supply, to the end that the same may be economically and prudently developed for the use of the people of this State."

The opinion then refers to the act of 1910 which applies to sub-surface waters and continues:

> "The general effect of this Legislation is to invest the commission as a state agency with the fullest control over prospective drafts by municipalities, corporations, or private persons upon either surface or sub-surface supplies of water within the jurisdiction and boundries of the State;

to charge it as such agency with the duty of prudently and economically dealing with the supply so as best to subserve the interests of the people of the State at large and not the interests of any particular locality; and to vest in the commission a judicial discretion with regard to permitting municipalities to draw upon that water-supply, such discretion to be exercised within the limits laid down by the statute and subject to review by the courts "for reasonableness, legality and form."

This court in affirming the judgment of the Supreme Court in the case just referred to, 85 N. J. Law 673, 674, said, concerning the act in question:

"It is common knowledge that prior to the statute, to which reference will be made hereafter, municipalities, private corporations and individuals in different parts of this State were acquiring and diverting to their uses, a considerable portion of the public water-supply, some under laws which delegated such power to local governments established by the Legislature, but in many cases by those whose right to do so was, perhaps, of doubtful authority, and the potable waters of the State were being rapidly gathered into the hands of a few, a condition which, in view of the rapid increase of population, became a cause of great anxiety, if not of alarm, to such inhabitants of the State as were not benefited by such ever growing segregation for the use of particular localities.

The question became so momentous that in 1907 the Legislature undertook to deal with it, and in that year (Pamph. L., p. 633), a statute was enacted which provided for the appointment of five persons to constitute a commission to be known as the State Water Supply Commission, 'charged with a general supervision over all the

sources of potable and public water supply to the end that the same may be economically and prudently developed for the use of the people of the State'. Section 2 of this act declares that no municipal corporation engaged in supplying, or proposing to supply its inhabitants with water 'shall have power to condemn lands or water, or any new or additional source of water supply, or to divert water from such new or additional source until such municipal corporation, corporation or person has first submitted descriptions thereof, which shall be accompanied by maps and plans, to said commission, and until said commission shall have approved the same', Section 3 authorizes municipal corporations to make application to the commission for the approval of its plans for obtaining a new or additional source of water supply, and provides for a public hearing upon due notice at which all persons affected by the proposed plans may be heard for or against the granting of the application. It further provides that after due hearing 'the commission shall decide whether the plans proposed are justified by public necessity, or reasonably anticipated public use, and whether such plans interfere unduly with the opportunity of other municipalities to obtain a water supply by the taking of waters necessary for their use, or whether the reduction of the dry season flow of any stream will be caused to an amount likely to produce unsanitary conditions, or otherwise unduly injure public or private interests.' And it was also declared that the approval of the commission shall constitute the State's assent to the diversion of water and the construction and operation of water works."

This court and the Supreme Court of the United States had just recently reld in the case of *McCarter* v.

Hudson County Water Company, 70 N. J. Eq. 695-209 U. S. 349, that the State had a sovereign interest in and control over its public waters, and the obvious design of the act was to create a body which should thereafter require some system in the appropriation of the State waters by municipalities or water companies, which body would rave in mind, as well, the interests of other localities as that of the particular municipality or company seeking the right to divert, before granting the desired permission.

It is important to study the act. The first section provides for the appointment of the Commission and charges them "with a general supervision over all the sources of potable and public water supply to the end that the same may be economically and prudently diverted for the use of the people of this State". Evidently the supervision there provided for is of the undeveloped sources of supply.

The second section provides that a municipal corporation, corporation or person engaged in supplying or proposing to supply the inhabitants of any municipal corporation with water shall have no power to condemn lands or water for any new or additional source of supply, or to divert such new or additional source until they shall have first submitted their plans to, and received the approval of the Commission. Two provisos follow making the section inapplicable to a case where a municipality proposes to acquire an existing or operating water works already supplying such municipality, and also making it inapplicable to a case where a municipal corporation had already commenced the construction of works, if the maps and plans therefor are filed within a short time. Then follows the important provision "nothing in this act contained shall be construed to take from any municipality in this State the right to use and take all the water which it has the right to use and appropriate by purchase or condemnation."

The third section provides for an application to the

Board by any municipal corporation, corporation or person for the approval of its plans for obtaining such new or additional source of water supply. The applicant is required to give notice "of a public hearing at which all persons or municipalities affected by the proposed plans may be heard for or against the granting of the application." A hearing is then provided for and a written decision which, if favorable, "shall constitute the State's assent to the diversion of water and the construction and operation of the water works in accordance with the terms of the decision and the plans filed."

The fourth section supplies the legal machinery for an effective hearing before the Board.

The fifth section provides for annual reports by all municipal corporations, corporations or persons diverting water for supply purposes as to the amount of water diverted by them, the communities supplied, etc.

The sixth section provides for the *personnel* of the Commission and their salaries, officers and expenses.

The seventh section provides for an annual report by the Board.

The eighth section (being the one under which suits like the present are brought) provides that every municipal corporation or private person now diverting the waters of streams or lakes for the purpose of a public water supply shall make annual payments on the first day of May to the State Treasurer for all such water hereafter diverted in excess of the amount now being legally diverted "*Provided*,

> "however, no payment shall ge required until such legal diversion shall exceed a total amount equal to one hundred (100) gallons daily, per capita for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. And every municipality, corporation or private person not at present diverting surface waters for said purpose but who shall hereafter divert such

> waters shall make annual payment on the first day of May to the State Treasurer for all waters diverted in excess of a total of one hundred (100) gallons daily for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. Such payment shall be deemed to be a license and its amount shall be fixed by said commission at a rate of not less than one dollar ($1.00) or more than ten dollars ($10.00) per million gallons."

The same section provides the legal machinery for the recovery of the amounts assessed and declared to be due, and appropriates the receipts to a special fund for the control of the waters and the diversion of the water supply of the State. It is careful, however, to provide "Nothing in this act shall be construed to confer upon any municipality, corporation or person any franchise not already possessed by said municipality, corporation or person, but the approval of the said commission contained in its decision as above provided shall constitute the assent of the State to the diversion of water as against the State, in accordance with the terms of that decision."

The remaining two sections of the act are unimportant so far as this controversy is concerned.

It will be noticed that the act really has a three-fold purpose: (1) the creation of the supervisory board; (2) the prevention of further diversion of State waters than already exists without the permission of this Board; and (3) an obligation on the part of those who shall divert to pay a certain sum to the State for State purposes for all waters in excess of a certain amount over and above that being legally diverted. Both the body of the act and its title plainly indicate that the Legislative concern was to prevent the acquisition of new diverting rights in any manner without the consent of the Commission. The title is "An act to establish a State water supply commission and to define its powers and duties and the

conditions under which waters of this State may be diverted."

The obvious design was to prevent a continuance of the theretofore frequent practice of municipalities and water companies indiscriminately diverting water without the State's consent; to require a careful consideration after hearing of the proposition so to divert, and to finally bestow the right, which right, thus bestowed, shall constitute the State's assent to the proposed diversion. It is ridiculous to suppose that there was any effort—could such an effort be constitutionally effected—to have the State bestow its assent to the diversion upon a municipality when, previous to the enactment of the act, such assent had already been given.

Neither the second section, which provides for the Board's assent nor the eighth section, which provides for the fees to be paid, pretends to apply to or to interfere with rights previously obtained. The second section is confined wholly to persons or corporations proposing to acquire a new or additional water supply and the eighth section only requires the payment of fees "for all such water hereafter diverted in excess of the amount now being legally diverted." There is not the slightest ground for the contention that the Legislature intended to interfere with the rights of any municipality or corporation that had theretofore acquired from the State the right to divert waters. As if to make assurance doubly sure upon this point the last sentence of the second section is added "nothing in this act contained shall be construed to take from any municipality in this State the right to use and take all of the water which it has the right to use or appropriate by purchase or condemnation."

Unlike the provisos preceding it the languag here used is "nothing in this *act* contained." This last sentence, therefore, unlike the provisos in section 2, must be read as if it was placed at the end of the act and the provisions of Section 8 must be read in connection therewith.

The claims of the cities, as hereinabove outlined, to

the waters arise from are founded upon grants from the State which are complete in themselves. These grants have been acted upon; in the case of Trenton by the purchase by that city from the Trenton Water Works, for a large consideration, and the expensive erection of works adapted to enjoy the privilege; in the case of Newark by the payment of several millions of dollars by the City of Newark and the erection of costly works in express reliance thereon. In such a case the grants by the State are irrevocable. *McCarter* v. *Hudson County Water Company*, supra; *Pearsall* v. *Great Northern Ry.* 161 U. S. 646; *Galveston* &c. v. *Texas*, 170 U. S. 226.

Section 8, in speaking of the payment that is required to be made by the diverting municipality or company, says "such payment shall be deemed to be a license". The Supreme Court, through MR. JUSTICE DEPUE, in NORTH HUDSON COUNTY RY. v. HOBOKEN, 12 Vr. 71 (a leading case, among other things, for the clear way it distinguishes between a tax and a license) says:

> "The legal definition of a licenss is a right given by some competent authority to do an act which, without such authority, would be illegal. Bouvier Law. Dic. Tit. 'license' ".

Were it not for the act of 1907 attempting, as the plaintiff claims, to impose license fees for the diversion of water theretofore granted by the State, there would be no answer to our contention that the cities, already possessing authority to divert up to the amount herein claimed, need no license to do a thing they already possessed the right to do. Hence it is necessary in construing the act, in order to give to the word license as found in the eighth Section its proper legal definition, to conclude that the payment which is made the equivalent of a license shall only be required for such diversion as is permitted and authorized by Section 2 of the act. Neither of the cities has acquired any right to divert the water in question by virtue of or under the second section

of the act and hence, under the above definition of a license, they would be paying a license fee for something they already possessed if the judgment below should stand.

In Cooley on Taxation, p. 406, it is said:

> "A license is a privilege granted by the State, usually on payment of a valuable consideration, though this is not essential. To constitute a privilege the grant must confer authority to do something which without the grant would be illegal; for if what is to be done under the license is open to everyone without it the grant would be merely idle and nugatory, conferring no privilege whatever. But the thing to be done may be something lawful in itself and only prohibited for the purpose of the license; that is to say, prohibited in order to compel the taking out of a license."

See also 25 Cyc., p. 598, where, among other things, it is stated—"The object of a license is to confer a right which does not exist without a license", citing numerous authorities. From every point of view, therefore, it seems plain that this act, in order to be consistent and to have its license comply with the ordinary canons of construction and to reconcile the second and eight sections with each other, must receive the construction that we claim.

There is nothing in the language of either of the grants which limits the rights acquired as against the State to any particular amount, and Newark's acquisition, for a large consideration, was the right to take fifty million gallons, whereas, Trenton's rights are only limited by the reasonable necessities of its population.

If in the face of these previous grants and the rights acquired thereunder, the State of New Jersey has any reserve power enabling it to exact as against the assignees of its previous grants, a license fee for using the very thing it had previously granted, it must be because of

some reserved or sovereign power in the State. This court, however, in the elaborate opinion of MR. JUSTICE PITNEY in the case so often referred to of *McCarter* v. *Hudson County Water Co.*, *supra*, after showing that the rights of the State to control its public waters would not be implied to have been surrendered by a charter filed under the general corporation act, as was the case with the Hudson County Water Company, was careful to add—

> "As we have just pointed out, it is, and long has been, the legislative policy of this State, while recognizing fully the common-law right of diversion on the part of riparian owners, to allrw no statutory extension of this right, nor to authorize water diversion for other than riparian uses, saving for a limited class of purposes beneficial to the people of this State, such as the establishment of water powers for manufacturing purposes, the construction of artifical channels for navigation, *and the supply of our own inhabitants with water through aqueducts.*"

It was not questioned in that case that such Legislative grants, so far as they went, were a complete abandonment of the State's interest in the waters thus granted, and that no reserve power remained in the State as sovereign thereafter to exact fees for the use of that which had theretofore been granted by it.

In this connection the case of *Wilson, Attorney General* v. *East Jersey Water Company*, 8 Buch. 329, is of moment. There Vice-Chancellor Stevens in a most enlightening opinion held that a grant by the State of its rights in water may be express or by implication. In that case the Attorney General sought, by information, to attack the right of the East Jersey Water Company to take and by contract sell to municipalities the waters of the State. As the municipalities to be affected were not parties the Vice Chancellor, although fully discussing the question and showing that there may be grants from

the State of water rights which the State cannot thereafter question, deferred his final decision until the cities were made parties. This was later done and the question was again presented in *Wilson* v. *East Jersey Water Company*, 83 N. J. Eq. 42. He there asked the questions (1)

> "Has the Legislature, by necessary implication from its various acts giving to municipalities a right to obtain a water-supply, granted to them the State's right in so much water to be taken from the streams of the State as they may need for their lawful purposes?"

and (2)

> "If such consent has been given, does the East Jersey Water Company stand in the position of acting as the lawful agents of the defendant municipalities in obtaining the supply? This second question has been somewhat modified by what has occurred during the progress of the suit."

As to the first question (with which alone we are concerned) he answered:

> "As to the first question, there can be no doubt. The authorities cited in my former opinion, lead inevitably to the conclusion that when the Legisalture has authorized a municipality to procure a water-supply, it has, by necessary implication, granted the State's right in so much of the water of the stream, from which the supply is to be taken, as the municipality may need. There never has been a direct grant of such right to any municipality and if the grant be not implied, every municipality is now appropriating the State's right in the water unlawfully. The uniform course of decision is in favor of the implication."

There can be no question as to the right of the State, through its Legislative agency to bestow upon cities

certain rights in its waters which the courts will recognize. *Marcus Sayre* v. *Mayor and Council of Newark*, 60 N. J. Eq. 361.

It is difficult to comprehend how, in view of the foregoing cases, it can be claimed that the State has not, to the extent here claimed by the cities of Trenton and Newark, denuded itself of any right in or dominion over the waters which are the subject matter of these suits. This being so, of course, any diminution of the right conveyed is a taking thereof in derrogation of the grant which cannot be tolerated, and to that extent the act of 1907, even assuming that any other construction than that we attribute to it were tenable, would be and is unconstitutional. It was said by Justice Depue in *Baldwin* v. *Flagg*, 43 N. J. Law 495:

> "It is perfectly clear that any law which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it, and the manner or degree in which this change is effected can in no respect influence the conclusion. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are part of the contract, however minute or apparently immaterial in their effect upon it, impairs its obligation."

Of course the courts will construe the Legislative acts in a way to make them constitutional and if possible, not to impair vested rights. *Colwell* v. *Mays Landing Water Power Co.*, 19 N. J. Eq. 245. In this case it was said:

> "Where the words of an act admit of two meanings one of which would make the act unconstitutional and the other not, it will be held that the Legislature intended to use them in the

sense which would be in accordance with the constitution."

While the Legislature has a broad, sweeping control over the charters of municipal corporations, nevertheless such control does not go to the extent of depriving them of their property acquired in their proprietary capacity particularly where, as here, there is no attempt to deprive the cities of their governmental functions. Judge Cooley, in his work on Constitutional Limitations, at p. 391, after discussing the general legislative power of control of property acquired by the ordinary exercise of of the ordinary powers of government says:

> "Those charters of incorporation however, which are granted, not as a part of the machinery of government, but for the private benefit or purposes of the corporators, stand upon a different footing, and are held to be contracts between the Legislature and the corporators, having for their consideration the liabilities and duties which the corporators assume by accepting them; and the grant of the franchise can no more be resumed by the Legislature, or its benefits diminished or impaired without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself."

again, at page 345, he states:

> "If the State grants property to the corporation the grant is an executed contract which cannot be revoked. The rights acquired either by such grants or by any other ligitimate mode by which such a corporation can acquire property are vested rights and cannot be taken away."

and at page 384, he observes:

> "A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right."

This court, in the leading case of *Millburn* v. *South Orange*, 58 N. J. Law 665, was careful to refrain from affirming the views of Judge Van Syckle, speaking for the Supreme Court in the same case (55 N. J. Law 254). There the Supreme Court had taken a very liberal view of the power of the Legislature over property of a municipality. See also 1 Dillon Mun. Corp. 5th ed. §111, p. 187.

The most enthusiastic supporters of the view that the Legislature is untrammeled in this connection would not, we believe, undertake to apply their views to help out the plaintiff in this case; and this leads us to our second point which needs no further elaboration than its statement, namely:

II.

The contention of the plaintiff cannot be supported because, if it should prevail, the act of 1907 *is void as impairing the obligation of a contract and offends against Article, I,* §10, *Par.* 1, *of the Federal Constitution, and Article IV*, §7, *Par.* 3, *of the State Constitution.*

III.

The sixth section of the General Corporation Act of 1846 (P. L. 1846, p. 16) has no application to the grant made to the "Trenton Water Works" in and by the act of 1852.

The seventh section of the act of 1852 (Trenton Case, p. 32) provides:

> "That the said the president and directors of the Trenton Water Works shall continue to have and possess all the rights, powers, franchises, and privileges which they now have and possess by virtue of the act to which this is a supplement, or the agreement referred to in said act, or the act entitled 'An Act to authorize Stephen Scales

to convey the water from his spring, through the several streets of the City of Trenton', passed the third day of December, A. D. one thousand eight hundred and one; and that said rights, powers, franchises, and privileges shall be deemed to be enlarged, so as to embrace the rights, powers, franchises, and privileges given to said corporation by this act, *to all intents and purposes as if the same had been conferred on said company at the time it was first established.*"

The company (Trenton Water Works) was established, as already shown, by an act of the Legislature passed February 29, 1804 (Case Trenton, p. 27).

The conclusive character of the grant to the "Trenton Water Works" precludes any valid contention upon the part of the State that the sixth section of the act of 1846 should be read into the act of 1852.

That it was competent for the Legislature to make a grant of such character is entirely settled. (*Singer Mfg. Co.* vs. *Heppenheimer*, 58 N. J. L. 633-636, citing *New Jersey* vs. *Yard*, 95 U. S. 104.)

It is clear that both the State and the Trenton Water Works understood and intended that the sixth section of the act of 1846 was not to apply to the grant contained in the act of 1852, and that the purpose of the seventh section of the latter act is to manifest in express words that understanding and intention.

It is respectfully and confidently urged that the judgments should be reversed.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,
Plaintiff-Appellee,
v.
CITY OF TRENTON,
Defendant-Appellant.

On Appeal From Supreme Court

STATE OF NEW JERSEY,
Plaintiff-Appellee,
v.
CITY OF NEWARK,
Defendant-Appellant.

REPLY BRIEF FOR THE CITIES OF TRENTON AND NEWARK.

The brief for the State recognizes no distinction between political and governmental matters in which municipalities are the representatives of the sovereignty of the State, and auxiliary to it, and other matters relating to property rights in which they have the attributes and distinctive legal rights of private corporations.

The distinction is very clearly recognized, however, in many of the cases cited on the brief for the State. A

merely summary examination of those cases discloses no case at variance with the legal principles relied upon by the cities of Trenton and Newark to sustain the position taken by them.

The case of Essex County Road Board *v.* Sinkle, 140 U. S. 334, was considered by the Supreme Court of this State in 47 N. J. L. 93, and by this Court in 49 Id. 641. Judge VanSyckle, speaking for the Supreme Court in that case, said:

> "The cases draw a distinction as to property rights of a strictly private character vested in municipal corporations."

And again—

> "There is another class of cases recognizing in public corporations a vested right in their city halls, markets, water-works, ferries and other like property, as to which it is affirmed that they stand on the same ground of exemption from legislative control and interference as a private corporation. Atkyn *v.* Town of Randolph, 31 Vt. 226; Grogan *v.* San Francisco, 18 Cal. 590; Benson *v.* New York, 10 Barb. 245."

Mr. Justice Parker, speaking for this Court (49 N. J. Law at 671 and 672), takes pains to distinguish between the particular facts of the case and the general rule, saying:

> "The land did not become the property of the Board, but its name was used for the sake of convenience as the channel through which the public would pass title to anyone who would subsequently purchase. The land was held in the corporate name of the Board as the property of the public, subject to the right of redemption during fifty years, and subject also to the control of the Legislature. Such corporations do not hold prop-

erty thus entrusted to them *as their property under contract*, but by virture of legislation, *subject to all changes which the Legislature may make*. To constitute a contract there must be two contracting parties. In this case the government (acting through the Legislature) and the road board were one and the same party. They did not and could not contract with themselves. * * * The road board alone complains and that body has no vested right or interest in the premises, no right which is not subordinate to the action of the government through the Legislature. * * * The authorities cited on behalf of the plaintiff in error on the question of the constitutionality of the act concede the general doctrine that the Legislature may alter and even abolish laws incorporating municipal corporations, but maintain that in so doing property rights cannot be violated. Those authorities, so far as they refer to property rights, do not apply to this case, because the road board did not have the right of property in the land in reference to which the arbitrators were called to act. They refer to cases where counties, cities or townships, having, by their charters, full power to acquire by purchase and to hold property, have exercised such power, usually in furnishing public buildings for government use. No case can be found which applies to the facts now before the Court, where not a dollar has been paid for the land by or for the road board, but where the land in question was assessed for benefits, and because of non-payment thereof was transferred nominally to the agent for the use of the government."

The same distinction appears in the opinion of Chief Justice Fuller, which appears in the Supreme Court of the

United States, 140 U. S. 334. At the top of page 342 he says:

> "Undoubtedly the distinction exists, as counsel urges, between regulation and appropriation, and under the Constitution of New Jersey, as under those of the other States, the legislative power is not so transcendent that it may at its will do that which amounts to an arbitrary divestiture of the private property of a municipal corporation. * * * There is no contract with or grant to the public road board which the State could not resume, and in no aspect can the board be regarded as acting in a private capacity, or as having acquired a private interest in real estate struck off to it for want of purchasers."

The distinction made in our principal brief between the legislative control over the governmental functions of municipalities and property held by them for government purposes, on the one hand, and property like water-works held in a priprietary character, is expressly recognized in Hunter *v.* Pittsburgh, 207 U. S. 161-179, in the following language:

> "It will be observed that in describing the absolute power of the State over the property of municipal corporations we have not extended it beyond the property held and used for *governmental purposes.* Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the State courts (1 Dillon, Municipal

> Corporations, 4th ed., sections 66 to 66a, inclusive, and cases cited in note to 48 L. R. A. 465), and it has been held that as to the latter class of property the Legislature is not omnipotent. If the distinction is recognized, it suggests the question whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation. Mr. Dillon says truly that the question has never arisen directly for adjudication in this Court. But it and the distinction upon which it is based has several times been noticed. (Citing cases)."

This case is referred to approvingly by Mr. Justice Swayze in Collingswood Sewerage Co. *v.* Collingswood, 91, N. J. Law 20-27, as defining the limits of legislative control over muncipal corporations and there is nothing in the opinion in this Court in the same case, 92 N. J. Law 509, that in any way militates against this distinction or intimates that property acquired by a municipality for water-works is subject to the complete legislative domination.

The cases of Collingswood Sewerage Co. *v.* Collingswood, 91 N. J. L. 20, and Atl. Coast Elec. Ry Co. *v.* Board of Utility Commissioners, 92 N. J. L. 168, deal althogether with the power of a municipality to deprive by contract, the state of its sovereign power over rates. In the Atl. Coast Elec. Ry. Co. case, Mr. Justice Swayze, speaker for the court, makes this plain. He said:

> "To avoid possible misunderstanding, we add what is probably plain enough that our view does not affect contracts made by the Legislature itself or by any individual or corporation which has power to make them."

Williamson *v.* New Jersey, 130 U. S. 189, was considered by our Supreme Court under the title of New Brunswick *v.* Williamson, reported in 44 N. J. L. 165. At page 168 Mr. Justice Dixon said:

> "A distinction has been sometimes drawn between what are called the governmental or public character of these corporations and their proprietary or private character; and it has been claimed that in the latter aspect they are to be regarded as private bodies, so far as relates to the protection of their property."

In Rader *v.* Southeasterly Road District, 36 N. J. L. 273, the court deals with the general power of the Legislature over corporations created for purposes of "local government" and the power of the Legislature to change the remedy of a creditor.

And in New Orleans *v.* New Orleans Water Works, 142 U. S. 79 (cited on brief for State) the U. S. Supreme Court found:

1. The contract was altogether ultra viries.
2. The city repudiated the contract.

It goes without saying, of course, that there can be no impairment of a contract that has no legal existence.

In that case, however, the court declared:

> "A municipal corporation stands in its governmental or public character, in no contract relation with its sovereign; *but such corporation in respect to its private or proprietary rights and interests, may be entitled to constitutional protection.*"

In the celebrated Dartmouth College case, (referred to by the Attorney General on the brief for the State) Justice Story, in delivering his opinion in the case, said:

> "It may also be admitted that corporations for mere public government such as towns, cities

and counties, may in many respects be subject to legislative control, but it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendant that it may, at its will, take away the private property of the corporation, or change the uses of its private funds acquired under the public faith. * * * From the very nature of our governments, the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction, and abrogation. This court has already had occasion, in other causes, to express their opinion on this subject; and there is not the slighest inclination to retract it."

In People ex rel Rodgers *v.* Coler, 166 N. Y. 1, 52 L. R. A. 814, Mr. Justice O'Brien, speaking for the Court of Appeals, declared:

"The city is a corporation possessing all the the powers of corporations generally, and cannot be deprived of its property without its consent or due process of law any more than a private corporation can; * * * ."

In People *v.* Ingersoll, 58 N. Y. 1, the court said:

"In political and governmental matters the municipalities are the representatives of the sovereignity of the State, and auxiliary to it; in other matters, relating to property rights and pecuniary obligations, they have the attributes and the distinctive legal rights of private corporations and may acquire property, create debts, and sue and be sued as other corporations; and in the borrowing of money and incurring pecuniary obligations in any form, as well as in the buying and selling of property within the limits

of the corporate powers conferred, they neither represent nor bind the State.

"The relation of principal and agent does not and cannot exist, for obvious reasons, between the State and the various municipal corporations created with power to contract debts, in respect to the exercise of the corporate functions. Debts contracted by the municipalities, by authority of the Legislature, are contracted by them as principals and not as agents of the State."

What is said by the Court in this case applies with peculiar propriety and force to the cases at bar.

In People *v.* Hurlburt, 24 Mich. 44, Mr. Justice Cooley, in the course of the great judgment delivered by him in that case, said:

"Conceding to the State the authority to shape the municipal organizations at its will, it would follow that a similar power of control might be exercised by the State as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it. There are cases which assert such power, but they are opposed to what seem to me the best authorities as well as the soundest reason. The municipality, as an agent of government, is one thing; the corporation, as an owner of property, is in some particulars to be regarded in a very different light. The Supreme Court of the United States held at an early day the grants of property to public corporations could not be resumed by the sovereignty. Terrett *v.* Taylor, 9 Cranch, 43; Town of Pawlet *v.* Clark, Ibid. 292; and see Dartmouth College *v.* Woodward, 4 Wheat. 694-698. When the State deals with a municipal corporation on the

footing of contract, it is said by Trumbull, J., in Richland *v.* Lawrence, 12 Ill. 8, the municipality is to be regarded as a private company. In Detroit *v.* Corey, 9 Mich. 165, Manning, J., bases his opinion that the city was liable for an injury to an individual, occasioned by falling into an excavation for a sewer, carelessly left open, upon the fact that the sewers were the private property of the city, in which the outside public or people of the State at large had no concern. In Warren *v.* Lyons, 22 Ia. 351, it was held incompetent for the Legislature to devote to other public uses land which had been dedicated for a public square. In State *v.* Haben, 22 Wis. 660, an act appropriating moneys collected for a primary school to the erection of a State Normal School building in the same city was held void. Other cases might be cited, but it seems not to be needful. They rest upon the well understood fact that these corporations are of twofold character; the one public as regards the State at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens; and that as to the acquisitions they make in the latter capacity as mere corporations, it is neither just, nor is it competent, for the Legislature to take them away, or to deprive the local community of the benefit thereof. There may come a time when from necessity the State must interpose. The State may change municipal boundaries; and then a division of the corporate property may be needful. The State may take away the corporate powers, and then the property must come to the

State as trustee for the parties concerned. In either of these cases, undoubtedly, State action becomes essential; and the property may be disposed of according to the Legislative judgment and sense of justice; but even then the appropriation must have regard, so far as the circumstances of the case will admit, to the purposes for which the property was acquired, and the interest of those who were corporators when the necessity for State intervention arose."

Numerous other cases, wherein the dual character of municipal corporations is clearly recognized, could be cited, but it is deemed unnecessary to specifically refer to them.

In conclusion, assuming the amplitude of the legislative power claimed for the State, it by no means follows that the State exercised its power in the enactment of 1907 in such manner as to take from the municipalities of the State the rights they had acquired by grant directly from the State itself, or by purchase of such rights from third persons to whom they had already been granted by the State, rights which when in possession of the original grantees were protected by provisions of the Federal and State Constitutions, and were therefore, beyond the reach of the Legislature.

There is nothing in the act of 1907 which manifests a legislative intention to deprive the municipalities of the State of the full and complete benefits accruing to them from such grants; while the introduction of the "general exception" into section 2 of the act would seem to indicate the legislative intention and purpose to be quite to the contrary.

It is the established rule that statutes are not to be so construed as to interfere with vested rights, if their terms admit of any other reasonable construction. End. Stats. Sec. 273.

And in Citizens' Gas Light Co. *v.* Alden, 44 N. J. L. 648-653, Mr. Justice Knapp, speaking for the Court, said that statutes "Are not usually designed to alter or effect the quality or legal relations of past acts and concluded transactions."

Only the most clear and indubitable expression of the legislative design as precludes any other reasonable interpretation of the words used will support the construction urged by the State.

Respectfully submitted,

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