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New Jersey Supreme Court.

SAMUEL S. SHERWOOD, *Prosecutor and Appellant,* v. THE CITY OF PATERSON, AND OTHERS, *Defendants and Respondents.*	*On Certiorari.*

10

Notice of Appeal.

To Edward F. Merrey, attorney of defendants the City of Paterson and Board of Public Works of the City of Paterson, and Griggs & Harding, attorneys of defendant The East Jersey Pipe Company, and the defendants The National Ribbon Company, Michael W. Dippel, Adolph Muller, Verner F. Kuett, and Mary B. Kuett, individually and as guardian of said Verner F. Kuett.

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Take notice, that Samuel S. Sherwood, above named, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment in the New Jersey Supreme Court in this cause affirming the ordinance of the Board of Public Works of the City of Paterson, entitled An Ordinance to Vacate Part of East 35th Street, East 36th Street and East 37th Street, approved by the Mayor of said city on the thirty-first day of December, Nineteen hundred and Fourteen, brought up for review by the writ of certiorari in the Supreme Court.

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GEO. S. HILTON,
Attorney for Appellant.

Filed July 26, 1915.

(Filed February 10, 1915.)

Writ of Certiorari.

(As amended by subsequent orders of the Court.)

New Jersey, ss: The State of New Jersey to The City of Paterson, The Board of Public Works of the City of Paterson, The East Jersey Pipe Company, The National Ribbon Company, Michael W. Dippel, Adolph Muller, Verner F. Kuett, Mary B. Kuett individually and as guardian of said Verner F. Kuett, Greeting: (L. S.)

We being willing for certain reasons, to be certified of a certain pretended ordinance passed by the said Board of Public Works, entitled "An Ordinance to Vacate Part of East 35th Street, East 36th Street and East 37th Street in the City of Paterson, N. J.", approved by the Mayor of said City, on the 31st day of December, 1914, and of all the proceedings touching and concerning the attempted vacation of said parts of said streets as fully and entirely as they remain before the said City of Paterson and the said Board of Public works of the City of Paterson, do hereby command you, that the said ordinance, together with all the proceedings of the said City of Paterson and Board of Public Works in respect to the vacation of said parts of said streets, and all other matters touching and concerning the va-

cation of said parts of said streets, as fully and entirely as they remain as aforesaid, to our Supreme Court of Judicature, at Trenton, the 6th day of February next, you certify and send together with this writ, that therein may be done what of right and according to the laws of the State of New Jersey ought to be done.

Witness, William S. Gummere, Esq., Chief Justice of our said Supreme Court, at Trenton, the 18th day of January, A. D. 1915.

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Geo. S. Hilton,
Attorney.

Wm. C. Gebhart, *Clerk.*

Note.—The time for the return of this writ was extended by a subsequent order of the court to February 10th, 1915.

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Return.

(Filed February 11, 1915.)

NEW JERSEY SUPREME COURT.

SAMUEL S. SHERWOOD, *Prosecutor,* AGAINST THE CITY OF PATERSON *et als.,* *Defendants.*	*On Certiorari.*

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Return.

City of Paterson,
County of Passaic, } ss:
State of New Jersey,

I, T. Simpson Standeven, City Clerk of the City of Paterson, being also Clerk of the Board of Public Works of said city, in obedience to the writ of certiorari hereto annexed, hereby certify and send to the New Jersey Supreme Court, a copy of an ordinance, entitled, "An Ordinance to vacate part of East 35th street, East 36th street and East 37th street, in the City of Paterson, N. J.", together with all the proceedings of the said Board of Public Works and said City of Paterson in respect to the vacation of said parts of said streets, and all other matters touching and concerning the vacation of said parts of said streets, as fully and entirely as they remain before the said Board of Public Works and City of Paterson.

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30

In Witness Whereof, I have hereunto set my hand and the seal of the City of Paterson, New Jersey, this 4th day of February, 1915.

(Seal.) T. SIMPSON STANDEVEN,
City Clerk.

Return.

Proceedings of the Board of Public Works.
Adjourned meeting, November 10, 1914.
President Charles D. Cooke in the chair.

Roll Call.—Members present, J. T. Doremus, Thomas H. Milson, Joseph McCrystal and President Charles D. Cooke (4).

Hearing of Citizens.

Mr. J. A. Nelson, vice president of the East Jersey pipe works, appeared and presented a communication which he asked to be read. The request in the communication was that if the City of Paterson desired the pipe company to rebuild, it would ask that the board of public works abandon East 35th street from 21st avenue south 425 feet, East 36th street from 21st avenue south 425 feet and East 37th street from 21st avenue south 335 feet; also that 21st avenue be electrically lighted from Vreeland avenue to Market street.

Mr. Nelson stated that he could not add anything further to the communication, but would like to be able to go before the board of directors of the company and state that some definite action had been taken and requested that the board consider the matter at this time.

After a general discussion between the members of the board, city engineer and city counsel, the following resolution was unanimously adopted:

By Commissioner Doremus.

Resolved, that it be the expressed opinion of the board of public works that the request of the East Jersey pipe works be granted and that the city counsel be directed to prepare an ordinance closing the streets requested; the closing of said streets being conditional on the East Jersey pipe works ac-

quiring ownership of both sides of streets to be closed, except in the case of East 37th street, one side of which is owned by the National Ribbon company, whose consent for the closing of this street will be obtained.

The following is a copy of the letter above referred to:

New York, November 9th, 1914.

Broad of Public Works, 10

Paterson, N. J.

Gentlemen:

Members of your board, other city officials, and many citizens have expressed to me the earnest desire that our plant which was destroyed by fire on September 8th might be rebuilt in Paterson. It is no secret that the officers of our company have been seriously considering rebuilding nearer to the steel supply. This is a very logical thing to do as the saving in freight to be made in that 20 way totals several thousand dollars per year, and we already own a valuable building site in that location.

We have delayed making final decision regarding this move as we are all very loath to leave Paterson and have felt that possibly such arrangements and concessions might be made by the City of Paterson, the railroads, and others as would enough offset the advantages of moving to enable us to feel justified in rebuilding in Pat- 30 erson.

Informal talks I have had with various officials of the City of Paterson have convinced me that there are certain acts which your board would be willing to pass which would be a help in this direction. I therefore suggest to you the

following and would ask you to act upon them at your earliest convenience.

If we stay in Paterson it will be greatly to our advantage to have certain streets permanently closed so that we can obtain perpetual right to this property now devoted to use as such streets although none of them have ever been graded or opened. The streets referred to are:

East 35th street from 21st avenue south 425 feet,

10 East 36th street from 21st avenue south 425 feet,

East 37th street from 21st avenue south 335 feet.

On December 15th, 1902, 36th street was closed by the city from 21st avenue 275 feet south, but I understand the official record was destroyed by fire and this action should be confirmed for purposes of record.

20 Some time ago we were signers of a petition to your board asking that 21st avenue be electrically lighted from Vreeland avenue to Market street. This should be done for the safety of our employes as well as those of the National Ribbon company and the general public. We would ask that you give this further consideration.

I cannot at the present time make any assurances to you as to our decision being in favor of Paterson but I feel that if I can go before our

30 board of directors armed with a formal resolution passed by your honorable board making the above concessions, the chances of our re-building in Paterson will be greatly enhanced. We would like to decide this matter within the next day or two and therefore respectfully request that you consider the above at your meeting on Tuesday, the

Return.

10th inst. I will be present at this meeting for the purpose of answering any questions that you desire to ask.

I thank you in advance for your careful consideration of these matters, and remain,

Yours very truly,

J. A. Nelson,
Vice President.

On motion, the board adjourned.

T. Simpson Standeven,
Clerk.

Proceedings of the Board of Public Works.

Adjourned meeting, December 8, 1914.

President Charles D. Cooke in the chair.

Roll call.—Commissioners present, Thomas H Milson, J. T. Doremus, Joseph McCrystal and President Charles D. Cooke.

Notice of Intention.

City Street Commissioner Taylor reported that the intention of the board of public works of the City of Paterson to vacate a part of East Thirty-fifth street, southerly from Twenty-first avenue, for a distance of four hundred and twenty-five feet (425); East Thirty-sixth street, south from Twenty-first avenue, for a distance of four hundred and twenty-five feet (425), and East Thirty-seventh street, southerly from Twenty-first avenue, for a distance of three hundred and thirty-five feet (335), as shown on a map on file in the office of the city engineer, had been advertised in accordance with law and objections in writing had been received from Samuel S. Sherwood, Marie Walder and Elizabeth McGee.

Counselor George Hilton appeared in behalf of

S. S. Sherwood and questioned the right of the board to vacate East 37th street as proposed.

Counselor Gustav A. Hunziker appeared in behalf of Marie Walder and Counselor John H. Reynolds appeared in behalf of Mrs. Elizabeth McGee and objected to the proposed vacations.

The following is a copy of the report referred to in above minute:

10 December 8, 1914.

To the Honorable,
Board of Public Works.
Gentlemen:

In accordance with a resolution adopted by the board of public works, November 10th, 1914, l board to vacate East 35th street from 21st avenue have advertised that it is the intention of the south 425 feet and East 36th street from 21st avenue south 425 feet and East 37th street from
20 21st avenue south 335 feet, in the Paterson Daily Press and the Morning Call, for twenty days, and objections have been received from Elizabeth McGee, Samuel S. Sherwood, and Marie Walder, which are hereto annexed.

Respectfully submitted,
J. E. Taylor,
City Street Commissioner.

Objection of Samuel S. Sherwood.

30 To the Board of Public Works of the City of Paterson:

The undersigned, Samuel S. Sherwood, objects to the proposed vacation of a portion of East Thirty-seventh street in said City of Paterson, for the following reasons:

Return.

1. This objector is half owner of a plot of land on the northerly side of and adjoining Twenty-first avenue, extending in front from East Thirty-sixth street to East Thirty-seventh street, and running back 250 feet which, upon the vacation of said section of East Thirty-seventh street as well as the vacation of the sections of East Thirty-fifth and East Thirty-sixth streets proposed to be vacated will have no convenient means of access to Market street, the main thoroughfare in that locality, and will, in consequence, be thereby greatly depreciated in value.

2. The vacation of said section of East Thirty-seventh street will remove or obstruct a much needed means of communication between the lands on each side of Twenty-first avenue in that locality, and thus occasion great public as well as private inconvenience.

3. The vacation of said section of East Thirty seventh street would add two more to the cul de sacs that will be created by the vacation of said sections of East Thirty-fifth and East Thirty sixth streets; and cul de sacs should be avoided as much as possible, lands upon them never being as valuable as lands upon thoroughfares.

4. The vacation of said section of East Thirty seventh street would at the most add only a strip 30 feet wide to the lands of the pipe company, for whose benefit the vacation of said sections of said streets is manifestly proposed to be made, which can weigh little against the inconvenience and damage this objector and the public, as well as other private individuals, would receive from the vacation of said section of East Thirty-seventh street.

Return.

5. The vacation of said section of East Thirty-fifth street and East Thirty-sixth street, is all that should be done, to say the most, for the benefit, in that way of the pipe company.

6. This board can legally exercise their power to vacate streets only when the public good requires it to be done; and the public good, even if the encouragement of this pipe company can be regarded as a public good, would not be promoted by the vacation of said section of East Thirty-seventh street in view of the little advantage it would be to the company and the great detriment it would be to the public as an obstruction to the use of the street.

7. The vacation of said section of East Thirty-seventh street under the circumstances would be such a palpable abuse of the power of the board in the vacation of streets as to render such vacation clearly illegal.

8. This board has no power to vacate a street or section of a street for the benefit of a private corporation or individual except possibly in cases where neither the public or members of the public would not be injured thereby.

9. This objector as the former proprietor of the lands through which East Thirty-seventh street runs from Market street northerly to and beyond his tract to land above mentioned, dedicated that street (with the said other streets) through said land to the public for use as a public street. The City of Paterson holds the lands within such parts of said streets in trust for that purpose: and it has no moral right, even if it has the legal power, which is denied, to abandon that trust as now proposed without the consent of this objector, and against his objections.

Return.

This objector, in making these objections to the vacation of said section of said East Thirty-seventh street does not waive any rights he may have in the lands embraced in said sections of said streets, as the former owner and dedicator of the same for street purposes, in case the same shall cease to be used for those purposes.

Dated December 2nd, 1914.

SAMUEL S. SHERWOOD.

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Objection of Elizabeth McGee

December 1st, 1914.

To the board of public works, of the City of Paterson,

Gentlemen:

I am the owner of two (2) certain lots of land situate on the north side of Market street in the City of Paterson, and known as Nos. 911 and 913 Market street, on the city map. Said lots have a frontage of about fifty-five (55) feet on Market 20 street, and also a frontage of about one hundred and twenty-seven feet (127) on the west side of East 35th street.

There is a request now pending before your honorable board that East 35th street, north of Market street, be closed for the whole distance between said Market street and the line of the New York, Susquehanna and Western railroad.

I do hereby protest against the closing of said street, or any part thereof, for the distance above 30 mentioned, for the reason that my property as above mentioned, will be decreased in value by such action. As these streets are laid out at present I have a property which is situated upon a corner, and the value of said property is increased thereby, and cost more by reason thereof.

If said street is closed all benefit of such situation is lost when E. 35th street is vacated and ceases to be considered as a thoroughfare.

Very respectfully,

ELIZABETH McGEE.

Objection of Marie Walder.

Paterson, N. J., Nov. 19th, 1914.

Board of Public Works,
Office of the Street Commissioner,
Room No. 2, City Hall,
Paterson, New Jersey.

Gentlemen:

This is to notify you that I am an interested party and desire to object to the proposed vacating of that part of East Thirty-fifth street, southerly from Twenty-first avenue, for a distance of four hundred and twenty-five feet (425); East Thirty-sixth street, south from Twenty-first avenue, for a distance of four hundred and twenty-five feet (425); and East Thirty-seventh street, southerly from Twenty-first avenue, for a distance of three hundred and thirty-five feet (335), as shown on a map on file in the office of the city engineer. This is in pursuance of a notice dated November 12, 1914, given pursuant to a resolution of the board of public works of the City of Paterson, &c.

My objections are placed principally upon the fact that I am the owner of lots 555 to 577 inclusive on East 35th street, and I am also the owner of lots 558 to 564 inclusive, 568 to 572 inclusive, and 580 and 582 East 36th street; and also lots 923 to 933 inclusive on Market street, all of said lot numbers being in accordance with the city atlas of the City of Paterson; and if said

East 35th street or any part thereof between Twenty-first avenue and Market street shall be closed all of the said lots on East 35th street would be greatly depreciated in value and some of said lots on Market street would be depreciated in value. Also the said lots on East 36th street would be depreciated in value in view of the fact that I might sell lots running from East 36th street to East 35th street, now being able to give frontage on two streets whereas if East 35th street be closed there would be no such advantage. The same would relate to the closing of said East 36th street or any part thereof.

Yours respectfully,

MARIE WALDER.

The following is a copy of the notices of intention, and affidavits of publication, to vacate parts of East 35th, East 36th and East 37th streets, as advertised in the Paterson Morning Call and the Paterson Press, filed with the city street commissioner's report:

Notice of vacation of parts of East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street.

Board of Public Works,
Office of the City street Commissioner,
Room No. 2 City Hall,
Paterson, N. J., Nov. 12, 1914.

Notice is hereby given that it is the intention of the board of public works of the City of Paterson to vacate a part of East Thirty-fifth street, southerly from Twenty-first avenue, for a distance of four hundred and twenty-five feet (425); East Thirty-sixth street, south from Twenty-first avenue for a distance of four hundred and

twenty-five feet (425); and East Thirty-seventh street, southerly from Twenty-first avenue, for a distance of three hundred and thirty-five feet (335), as shown on a map on file in the office of the city engineer. All persons interested, or who may object to the proposed vacation of parts of said streets are requested to present their objections in writing at the office of the city street commissioner, room No. 2, City Hall, on or before the expiration of twenty (20) days from the date of this notice.

J. E. Taylor,
City Street Commissioner.

Nov. 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 24 25, 26, 27, 28, 30,—Dec. 1, 2, 3, 4, Fees $48.60.

State of New Jersey, }
Passaic County. } ss.:

T. W. Hendershot of full age, being duly sworn on his oath saith that he is the bookkeeper of The Call Printing and Publishing Company, and that the annexed notice was published on November 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26; 27, 28, 30th, 1914. December 1st, 2nd, 3rd, 4th; 1914. In The Morning Call, a newspaper printed and published at Paterson, in this State.

T. W. Hendershot.

Sworn and subscribed before me this fourth day of December 1914.

Garret H. Sturr,
Notary Public of New Jersey.

Notice of vacation of parts of East Thirty-fifth street, East Thirty-sixth street and East Thirty seventh street.

Return.

Board of Public Works,
Office of the City street Commissioner,
Room No. 2, City Hall,
Paterson, N. J., November 11, 1914.

Notice is hereby given that it is the intention of the board of public works of the City of Paterson to vacate a part of East Thirty-fifth street southerly from Twenty-first avenue for a distance of four hundred and twenty-five feet (425); East Thirty-sixth street, south from Twenty-first avenue for a distance of four hundred and twenty-five feet (425), and East Thirty-seventh street, southerly from Twenty-first avenue for a distance of three hundred and thirty-five feet (335), as shown on a map on file in the office of the city engineer All persons interested or who may object to the proposed vacation of parts of said streets are requested to present their objections in writing at the office of the city street commissioner, room No. 2, City Hall, on or before the expiration of twenty (20) days from the date of this notice

J. E. Taylor,
City Street Commissioner.

Fees, $48.60.

State of New Jersey }
County of Passaic, } ss.:

Chas. R. Webster, clerk, being duly sworn, upon his oath says, that the annexed notice was published in The Paterson Press on the 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 24, 25, 27, 28, 30; days

of November 1914 and on the 1, 2, 3, 4, days of December, 1914.

Signed CHAS. R. WEBSTER.

Sworn to and subscribed before me this 4th day of December, 1914.

Richard H. Stalling,

RICHARD H. STALLING,
Notary Public of N. J

10 New Business.

An ordinance entitled, "An ordinance to vacate part of East 35th street, East 36th street and East 37th street, in the City of Paterson, N. J.," was introduced and on motion read for the first time.

On motion of Commissioner McCrystal the ordinance was laid over until the next regular meeting to be taken up on second reading.

On motion, the board adjourned.

20 T. SIMPSON STANDEVEN,
Clerk.

Proceedings of the Board of Public Works.

Regular Meeting. December 15, 1914

President Charles D. Cooke in the chair.

Roll call. Commissioners present, J. T. Doremus, Thomas H. Milson, Joseph McCrystal and President Charles D. Cooke.

Petitions.

30 Petition signed by Richard Carrol, and a long list of others, requesting the board to do all in its power to prevent the East Jersey Pipe Works from leaving the city, was received, considered and ordered placed on file.

Unfinished Business.

The ordinance entitled "An Ordinance to Va-

cate part of East 35th Street, East 36th street and East 37th street in the City of Paterson, N. J.," laid over at the last meeting to be taken up on second reading at this meeting, was taken up at this time, and on motion of Commissioner Milson laid over until the next meeting.

Commissioner Doremus moved that the board adjourn to meet Tuesday, December 29, at 4 P. M.

This motion was adopted. 10

T. Simpson Standeven,
Clerk.

Proceedings of the Board of Public Works.
Adjourned Meeting December 29, 1914.

President Charles D. Cooke in the chair.

Roll call. Members present, J. T. Doremus, Thomas H. Milson, Joseph McCrystal and President Charles D. Cooke.

Communications 20

The following communication from J. A. Nelson, vice president of the East Jersey Pipe Company, was received and ordered placed on file, with the understanding that the subject matter be considered when the ordinance concerning this matter was taken up:

New York, December 28th, 1914.

Board of Public Works,
Paterson, N. J.

Gentlemen:— 30

Our board of directors held today a special meeting at which the matter of the rebuilding of our plant in Paterson was considered. Our decision was much influenced by our desire to accede to the general wish in Paterson to have us

remain and we have made some considerable financial sacrifices largely on that account.

For your information and guidance in acting upon our letter to you of November 9th, 1914, petitioning for the closing of certain portions of East 35th street, East 36th street and East 37th street, we advise you that a resolution was passed by our directors authorizing the rebuilding of our plant in Paterson on a larger and much improved plan provided that your honorable board grants the petition above mentioned.

We have also arranged to manufacture at Paterson other products besides pipe, notably the Reinsch-Wurl Sewage Screen for which we own the American rights and which we had heretofore intended to fabricate in Philadelphia. This in itself we believe will lead to a large business.

Thanking you for your consideration, we remain,

Yours very truly,
The East Jersey Pipe Company,
J. A. Nelson, Vice President.

Unfinished Business.

The ordinance entitled "An ordinance to vacate part of East 35th street, East 36th street and East 37th street in the City of Paterson", laid over at the last meeting to be taken up on second reading at this meeting, was taken up at this time and read for a second time.

After a general discussion between the members of the board taking into consideration the fact that the East Jersey pipe company agreed in a communication presented at this meeting to rebuild in this city if the ordinance now under consideration be passed and adopted, Commis-

sioner McCrystal stated that considering the East Jersey Pipe Company had agreed to rebuild providing these streets were vacated, he would move that the ordinance pass to a third reading. Commissioner Milson seconded the motion. The motion was regularly put and unanimously adopted. The ordinance was then read by title for a third time. Commissioner McCrystal moved that the ordinance be now finally passed and adopted by the board. Commissioner Milson seconded the motion. This motion was regularly put by President Cooke and a roll call vote polled, resulting in the four members voting in the affirmative.

President Cooke declared the motion carried, the ordinance finally passed and adopted by the board and directed the clerk to present it to the mayor for his approval and if approved to have it published in accordance with law.

On motion the board adjourned.

T. Simpson Standeven,
Clerk.

Ordinance approved by the mayor, December 31st, 1914.

The following is a copy of the ordinance as adopted:

An Ordinance to Vacate Part of East 35th Street, East 36th Street and East 37th Street in the City of Paterson, N. J.

Be it ordained by the Board of Public Works of the City of Paterson:

That East 35th street, from 21st avenue as laid out west of East 35th street to a point four hun- and twenty-five feet southerly from 21st avenue, which is the northerly line of 569 and 570 East 35th street:

Return.

East 36th street, from 21st avenue as laid out east of East 35th street to a point four hundred and twenty-five feet southerly from 21st avenue, which is the northerly line of lots 571 and 572 East 36th street;

East 37th street, from 21st avenue as laid out east of East 35th street to a point three hundred and twenty-five feet southerly from 21st avenue, which is the northerly line of lot 565 East 37th street, be vacated.

The above mentioned parts of streets to be vacated are shown on a map entitled "Map showing plan of vacating parts of East 35th street, East 36th street and East 37th street, Paterson, N. J., dated November 11, 1914," and on file in the office of the City Engineer.

Passed, December 29, 1914.

CHAS. D. COOKE,
President Board of Public Works.

Approved, December 31, 1914.

ROBERT H. FORDYCE,
Mayor

Attest, T. SIMPSON STANDEVEN,
City Clerk,

Fees, $7.02.

NEW JERSEY SUPREME COURT.

SAMUEL S. SHERWOOD, *Prosecutor*, vs. THE CITY OF PATERSON, *et als.*, *Defendants*.	*On Certiorari. Depositions.*

10

Depositions and examination of witnesses, taken before me, Thomas W. Randall, a Supreme Court Commissioner of the State of New Jersey, at my office, No. 140 Market street, Paterson, New Jersey, on Thursday, the eighteenth day of February, nineteen hundred and fifteen, by virtue of an order heretofore made in said cause, and upon notice, in the presence of George S. Hilton, Esq., Attorney of Prosecutor, and Edward F. Merrey, Esq., Attorney of the City of Paterson, and John W. Harding, Esq., Attorney for the East Jersey Pipe Company.

20

It is stipulated and agreed by and between counsel for the prosecutor, and counsel for the defendants, that the testimony in the above entitled cause shall be taken stenographically by William N. Berdan, and that when his stenographic notes are reduced to manuscript or typewriting, the same shall constitute the testimony in this case, and that the signatures of the witnesses shall be waived.

30

State of New Jersey, }
County of Passaic. } ss.:

I, William N. Berdan, do solemnly swear that I will well and truly take stenographically, and reproduce in manuscript or typewriting, the testimony to be given in the above entitled cause.

Sworn to and subscribed this 18th day of February, 1915, before me,

10 *Master in Chancery of New Jersey.*

SAMUEL S. SHERWOOD, the prosecutor in the above entitled cause, being first duly sworn, according to law, testified as follows:

Direct Examination by Mr. Hilton.

Q. You are the prosecutor of the writ of certiorari in this case, Mr. Sherwood? A. Yes, sir.

20 Q. Where do you live? A. In the City of Paterson, for the last fifty-four years. I may correct this a little bit; I have lived for fifty-four years in the same house, but a short time in Acquackanonk Township.

Q. Part of the time the house was in Acquackanonk Township? A. Yes.

Q. A part of Acquackanonk Township became a part of the City of Paterson? A. Yes, sir.

Q. What is your business? A. Real estate and

30 insurance.

Q. How long have you been engaged in that business? A. Fifty years; fifty-one years, next month.

Q. In this city? A. Yes, sir.

Q. You were at one time a member of the Board

of Aldermen of the City of Paterson? A. Yes, sir.

Q. For how many years? A. Four.

Q. And when was that? A. From eighteen hundred and seventy-five, until eighteen hundred and seventy-nine.

Q. Since then you were at one time a member of the board of arbitration, were you not? A. Yes, sir.

10

By the Commissioner.

Q. What board of arbitration; there are so many of them? A. State Board.

By Mr. Hilton.

Q. For how long? A. Three years.

Q. From the time the Act was passed until it was repealed? A. No; two years after I gave it up it was repealed; it was in for five years.

20

Q. Were you at one time the owner of the land between East Thirty-fifth street and East Thirty-seventh street, and Twenty-first avenue and Market street? A. Yes, sir.

By the Commissioner.

Q. Where, Mr. Hilton, in what city? A. In this city.

By Mr. Hilton.

30

Q. And considerable more at one time? A. Seventy acres.

Q. And that was part of the seventy acres? A. That was part of the seventy acres.

Q. When was it about—the time you acquired

that property? A. The original fifty odd acres of it was in fifty-nine.

Q. I have reference to the tract embracing in between East Thirty-fifth street and East Thirty-seventh street, and Twenty-first avenue and Market street? A. That was fifty-nine.

Q. Paper is shown witness and he is asked if that embraces any of the land mentioned? A. Yes, sir; that includes the plot at Twenty-first avenue .

10

Q. Does that include the whole tract between East Thirty-fifth street and East Thirty-seventh street, or was there another deed? A. There was a small strip purchased afterwards to straighten the line.

Deed from John P. Kipp and wife, to Samuel S. Sherwood, dated August 1st, 1859, and recorded in the clerk's office of Passaic County, August 3rd, 1859, in Book F-2 of deeds, pages 264, &c., offered in evidence and marked Exhibit S-1 on behalf of the prosecutor.

20

Q. From whom did you acquire the little strip you have mentioned to straighten the line? A. Edo Kip.

Q. Paper is shown witness and he is asked if that is the deed by which he acquired title to that strip? A. Yes, sir.

30

Certified copy of deed from Edo Kip and wife, to Samuel S. Sherwood, dated October 22nd, 1859, and recorded in the office of the clerk of Passaic County, December 9th, 1859, and recorded in

Book F-2 of deeds, page 64, offered in evidence, and the same is marked Exhibit S-2, on behalf of the proseccutor.

Q. Did you have a map of that estate of yours. embracing the lands that you have mentioned, made? A. Yes, sir.

Q. Was it filed in the county clerk's office? A. It was.

Q. Look at that and see if that is it? A. Yes, sir: that is the one. 10

By the Commissioner.

Q. Is that the original, or a copy? A. That is the original; the one on file.

By Mr. Hilton.

The title of the map is "Property of S S. Sherwood, at Dundee Lake, Paterson, N. J., dated, August 5th, 1871", filed in the county clerk's office of the County of Passaic, on December 2nd, 1873, and numbered "141," and the same is offered in evidence and marked Exhibit S-3, on behalf of the prosecutor. 20

Q. I call your attention to what is called the "Robinson Atlas" of the City of Paterson, on plate 9, will you indicate on that atlas, plate 9, the strip of land you purchased from Edo Kip, to straighten lines, as you have mentioned it? A. That strip, as indicated by the blue line, on the bottom of plate 9, in said atlas, running between Market street, to, and beyond Twenty-first ave- 30

nue, indicated on the Robinson Atlas, by letters "A" and "B".

Q. That strip extended westerly from that blue line to and beyond East Thirty-fifth street? A. That is the easterly line of the strip I purchased from Edo Kip.

Atlas offered in evidence, and the same is marked Exhibit S-4, on behalf of the prosecutor.

10

Q. Now, the streets and numbers on your map that was filed, state whether or not they correspond with any other map of the streets at that locality? A. They correspond with the only original authorized map of the city.

By the Commissioner.

Q. You mean the old Goetschius map of 1870?

20 A. 1871.

By Mr. Hilton.

Q. That was the official map? A. I believe that is the only map that was ever adopted, officially.

Q. And have the streets and numbers remained the same in that part of the city, from that time until this time? A. They have.

Q. You sold afterwards, that property, did you?

30 A. Yes, sir.

Q. The property line between East Thirty-fifth street and East Thirty-seventh street, and Market street and Twenty-first avenue? A. Yes, sir.

Q. Who did you sell to? A. Nathaniel Wheeler.

Q. Do you know about the time you sold to him? A. You have the deed there before you.

Q. No; this is the deed from him to you? A. That probably recites it; I don't remember.

Q. You sold the land to Nathaniel Wheeler? A. Yes, sir.

Q. And afterwards Nathaniel Wheeler conveyed it back to you? A. I think to Mrs. Sherwood.

Q. No; look at the deed. A. Yes.

Q. It covered all the land you got from the two Kips? A. Yes; and some I got from Terhune. 10

Q. Paper being shown witness, he is asked what that is? A. That is a deed from Mr. Wheeler, to me, for the same lands.

Deed from Nathaniel Wheeler and wife to Samuel S. Sherwood, dated January 21st, 1869, recorded in the clerk's office of the County of Passaic, on February 10th, 1870, in book U-3 of deeds, pages 512, &c., offered in evidence, and the same is marked Exhibit S-5 on behalf of the prosecutor. 20

Q. Then did you make any sales of the property lying between East Thirty-fifth street and East Thirty-seventh street and Market street and Twenty-first avenue? A. I sold the best part of the block between East Thirty-fifth street and East Thirty-sixth streeet, from Market street to Twenty-first avenue, to Sheppard; commonly known as "Boss" Sheppard. 30

Q. Is that the deed by which you conveyed the property? A. Yes; that is the deed.

Here is a certified copy of a deed from Samuel S. Sherwood and wife, to Alexan-

der R. Sheppard, dated April 25th, 1874, and recorded in the Passaic County clerk's office, in book B-5 of Deeds, on pages 115, &c., and the same is offered in evidence and marked Exhibit S-6, on behalf of the prosecutor.

Q. The rest of the land between East Thirty-fifth street and East Thirty-seventh street, and Market street and Twenty-first avenue, you conveyed to Willett Bronson? A. All of the land?

Q. Yes. A. I sold some pieces.

Q. Not between Thirty-fifth street and Thirty-seventh street? A. No.

Q. That was sold to Willett Bronson? A. Yes, sir.

Deed from Samuel S. Sherwood and wife, to Willett Bronson, dated October 19th, 1877, and recorded in the clerk's office of Passaic County, on May 31st, 1878, in book A-6 of deeds, on pages 477, &c., offered in evidence and marked Exhibit S-7, on behalf of the prosecutor.

Q. Have any of those streets on that map filed by you been taken by condemnation proceedings by the City of Paterson? A. Yes; some few years ago, Fifty-sixth street from the railroad to Twenty-first avenue.

Q. You don't understand the question; just read the question. (Question repeated.) A. I don't quite understand.

Q. The city has taken them and paid for them? A. No; I gave them in every instance.

Q. You say you gave the land in every instance;

what do you mean by that? A. All the streets on the map.

Q. Dedicated to the public? A. Dedicated to the public.

By the Commissioner.

Q. Given by you to the public, is that so? A. Yes.

By Mr. Hilton. 10

Q. And you didn't receive any compensation for it? A. No, sir.

Q. Do you own, by yourself alone or with anyone else, any of the land in that locality? A. Yes; I own in person on Twenty-first avenue, between East Thirty-sixth street and East Thirty-seventh street, and running back to the Sunnyside map.

Q. Fronting on what streets? A. The north 20 side of Twenty-first avenue.

Q. Do you own it by yourself, or in conjunction with some one else? A. I own a half interest and the estate of John M. Gould owns the other half.

By Mr. Harding.

Q. An undivided one-half interest? A. An undivided one-half interest.

30

By Mr. Hilton.

Q. That deed that you gave to Bronson, did that include the property of which you now say you own a one-half interest? A. It did.

Q. And Bronson afterwards got into financial

difficulties, and was afterwards sold out by an auditor on attachment? A. Yes, sir.

I offer in evidence a deed by Frank Van Cleve, auditor, to Margaret O. F. Bronson, dated July 15th, 1885, and recorded in the county clerk's office of the County of Passaic, on the 30th day of July, 1885, in book A-8 of deeds, pages 337, &c., and the same is marked Exhibit S-8, on behalf of the prosecutor.

I now offer in evidence a certified copy of a deed from Margaret O. F. Bronson and others, to John M. Gould and Elizabeth Sherwood, wife of Samuel S. Sherwood, dated June 29th, 1889, and recorded in the clerk's office of the County of Passaic, in book P-9 of deeds, on pages 232, and the same is marked Exhibit S-9, on behalf of the prosecutor.

I now offer in evidence a certified copy of the will of Elizabeth M. Sherwood, dated September 30th, 1887, and the same is marked Exhibit S-10, on behalf of the prosecutor.

Q. Do you know, Mr. Sherwood, whether East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street—were they ever called Thirty-fifth street, Thirty-sixth street and Thirty-seventh street, without the use of the word "East"? A. The records show that the word "East" was not used in the beginning, but they had "East" on the map of 1871. There are records to show, but I never heard anybody call them anything without the "East", but I know of one record where the word "East" was not used.

By Mr. Hilton.—I offer in evidence a certified copy of the return of the courses and distances of Thirty-fifth street, in the City of Paterson, in the County of Passaic and State of New Jersey, made by J. H. Goetschius, C. E., and dated February, 1869, and the same is marked Exhibit S-11, on behalf of the prosecutor.

By Mr. Harding.—I object to this upon the ground that there is nothing produced to show by what authority any such return as this is made, and it is immaterial and irrelevant to the issue in this case. 10

By Mr. Hilton.—I offer in evidence a certified copy of the return of the courses and distances of Thirty-sixth street, in the City of Paterson, in the County of Passaic and State of New Jersey, made by J. H. Goetschius, C. E., and dated February, 1869, and the same is marked Exhibit S-12, on behalf of the prosecutor. 20

By Mr. Harding.—I object to this upon the ground that there is nothing produced to show by what authority any such return as this is made, and it is immaterial and irrelevant to the issue in this case.

By Mr. Hilton.—I offer in evidence a certified copy of the return of the courses and distances of Thirty-seventh street, in the City of Paterson, in the County of Passaic and State of New Jersey, made by J. H. Goetschius, C. E., and dated February, 1869, and the same is marked Exhibit S-13, on behalf of the prosecutor. 30

By Mr. Harding.—I object to this upon the ground that there is nothing produced

to show by what authority any such return as this is made, and it is immaterial and irrelevant to the issue in this case.

Q. That land of which you are now the one-half owner, that you have mentioned, is two hundred feet wide, facing on Twenty-first avenue, and about two hundred and fifty feet deep? A. Yes, sir.

10 Q. How does that land stand with reference to the land of the East Jersey pipe company? A. Directly opposite to their original building.

Q. Has that land any particular value, for any particular purpose? A. I consider it very valuable as a factory site, on account of its peculiar location?

Q. What is it? A. It is a large, level piece, right by the station, and on the railroad, and the school house is right close by, and the trolley, and

20 everything beneficial to a factory.

Q. Are mill sites or factory sites on a railroad very plentiful in Paterson? A. No, sir; pretty well used up.

Q. Do you know of any better one in the City of Paterson? A. Not unoccupied; no.

Q. Well, how does the vacation of these streets affect that land? A. Cuts us off from Market street, which is the main street to the town.

Q. Taking Plate 9, in the Robinson Atlas, will

30 you point out, first, the East Jersey pipe company's property? A. It is indicated on the map "East Jersey pipe company," my property is located opposite the East Jersey pipe company, located between East Thirty-sixth street and East Thirty-seventh street, on the north side of Twenty-first avenue.

Q. Some years ago, East Thirty-sixth street, from the south side of Twenty-first avenue, for some distance back, was vacated? A. Yes, sir.

Q. That leaves only for use East Thirty-fifth street and East Thirty-seventh street, in your locality? A. Yes, sir.

Q. What is your damage by this vacation? A. Well, I will have to go a little back. The railroad property is seventy feet wide. I gave it to them, and then I widened the avenue twenty-five feet, so as to give twenty-five feet on each side as a road-way in front of this property, expecting to get out through the streets to the regular roads in to town. Closing off these streets gives us nothing but twenty-five feet, and taking the sidewalks off of that, two wagons could not pass. We could make a one-way street, and that would be very difficult, and then we would have to go down to Market street much farther. It isn't that extra work so much, but people seeing this street blocked off wouldn't buy the property, and it would have to be sold for whatever it would bring.

Q. Wouldn't people pass out East Thirty eighth street? A. They would have to come down to Vreeland avenue, and strike a very ugly place.

Q. What do you mean by a very ugly place? A. There by the railroad track.

Q. But they could pass out through East Thirty-eighth street to Market street? A. Yes; one block here, and then back again.

Q. Now, in reaching the main part of the City of Paterson, which direction do you take on Market street? A. To the west.

Q. And that leads you down to the main part of the City of Paterson? A. Yes, sir; that is the shortest way in.

Q. Have you any idea with regard to the di minution of the value of the property that this property would suffer? A. Money damage?

Q. Yes. A. No; not on the money damage.

Q. On the percentage? A. No; I have calculated on the difficulty of selling it. It virtually takes it out of the market.

Map showing plan of vacating parts of East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street, prepared by H. J. Harder, city engineer, offered in evidence, and the same is marked Exhibit S-14 on behalf of the prosecutor.

Q. Mr. Sherwood, state what effect the creation of these cul-de-sacs shown on this map, upon this proposed vacation, has upon that property? A. Because it acts worse than an alley. Of course, it will be almost impossible to rent a house there, if you build it for renting, unless he works there in the pipe works.

Q. With reference to these blind alleys, what effect does that have on the land? A. That is what I just answered.

Q. Who was city surveyor about the time this map of 1871 was made? A. John H. Goetschius.

Q. How many years had he been city surveyor? A. A good many.

Q. A good many years? A. Yes, sir.

Q. Your wife is dead, I believe? A. Yes, sir.

Q. When did she die? A. Twenty-one years ago.

Q. And she left a will? A. Yes, sir.

Q. Is the land in the rear of the East Jersey pipe company's property, running back to nearly

Market street, vacant or occupied? A. Vacant.

Q. Can you tell us when the railroad, now called the New York, Susquehanna and Western, was built? A. I sent for some papers that I thought would have it in, and it has the description, but not the date.

Q. Can you give us the date? A. I can get it, but I don't remember it now.

Q. Was it before or after the Goetschius map was made? A. No; it was after. 10

Q. You don't know when the road was built? A. No; I couldn't swear; it was after; probably in seventy-two or seventy-three.

Q. You spoke of giving the right of way in that locality to the railroad company? A. Yes, sir.

Q. Do you know when your deed to the company was given? A. In eighty-three.

Q. How long before that was the agreement made? A. I think about ten years; I can't remember it; about seventy-three I think. 20

Q. About the time the road was built, was it? A. About the time the road was built, yes.

Q. Do you remember whether you made any written agreement with the company? A. I must have done, of course.

Q. Have you that agreement, yourself? A. I dont' know; I haven't it here; I don't remember; I had it at the time I put it on record, and I put them away, but I haven't just got them now.

Q. What was the name of the company at that time? A. The Midland was the name under which it was incorporated. 30

Q. The New Jersey Midland? A. Yes, sir.

Q. What was the name of the company when you made the deed for the right of way? A. That I can't remember; I think it was after they failed.

By the Commissioner.

Q. After they went into the hands of a receiver, you mean? A. Yes; Garret A. Hobart was the receiver. The deed was given to The New York, Susquehanna & Western railroad company. I have a copy of the deed itself. The deed is dated October 13th, 1881.

Mr. Mr. Harding.

10

Q. Not eighty-three, then? A. Not eighty three; eighty-one.

By Mr. Hilton.

The record of a deed from Samuel S. Sherwood and wife, and others, to The New York, Susquehanna & Western Railroad company, deed dated October 13th, 1881, recorded in the clerk's office of the County of Passaic, in book Z-6 of deeds, pages 212 etc., offered in evidence, and marked Exhibit S-15, on behalf of the prosecutor; it being understood that a certified copy of the deed is to be produced for the record.

20

Q. Who owned the right of way? A. How?

Q. You owned the right of way? A. Yes, sir.

Q. How did you acquire the title? A. It was a regular farm property.

30

Q. From whom did you acquire that title; the last title before you conveyed to the railroad company? A. I conveyed to the railroad company before I conveyed to Bronson.

Cross Examination by Mr. Harding.

Q. On your direct examination you made a statement which you said you didn't wish to be taken down by the stenographer, with reference to your inability to sell these lands on the north side of Twenty-first avenue, on account of the proximity of these pipe works, what was that? A. For silk business.

Q. Just tell us what you mean by that. A. To sell them for silk business, on account of the smoke; I said I would have to get iron. 10

Q. You have had them in the market for sale for a good many years? A. Yes.

Q. How many years? A. Well, on and off, back and forth, for fifty-four years.

Q. And as I understand you, every one of these lots that you have spoken of are vacant now? A. One parcel of twenty-one lots.

Q. All vacant and unoccupied? A. Yes.

Q. You spoke of East Thirty-sixth street being vacated some years ago, from the southerly line of Twenty-first avenue for some distance south toward Market street; about when was it that the city vacated that? A. I don't remember exactly. 20

Q. The city ordinance shows that this vacation was in the year 1902, is that about the time, as you recall it? A. Yes, sir.

Q. You knew of it at the time? A. I did it for them, and would do it again if they would allow me thirty-five feet to get out. I did it because I owned all around there, and there was nobody to object. 30

Q. I think that is all I wish to ask you now, but we are going to have a hearing later, and Mr. Hil-

ten is going to complete his testimony, and I wish to reserve the privilege to recall you. You will come if we let you know? A. Certainly; any time.

By Mr. Hilton.

I offer in evidence a certified copy of an ordinance to vacate a part of East Thirty-ninth street, passed December 16th, 1902, and the same is marked Exhibit S-16, on behalf of the prosecutor.

10

GEORGE S. HILTON, a witness produced on behalf of the Prosecutor, being first duly sworn according to law, testified as follows:

Some years ago I had occasion to look up the record in the city clerk's office, with reference to the adoption of what is generally known as the official map of the City of Paterson. I mean the Goetschius map of 1870, or 1871. I understand the records were all destroyed in the fire of 1902 My investigation was made before that period. This memorandum, which I made in shorthand, consists, in the first place of proceedings of the board of aldermen in the adoption of the city map, and after that, although it is first on the memorandum, was an ordinance changing the names of streets, making names of new streets correspond to the map names. I have here a typewritten copy of my shorthand notes, made from my dictation.

20

30

Typewritten copy of shorthand notes offered in evidence, and the same is marked Exhibit S-17, on behalf of the prosecutor.

I remember a good many years ago, after I first came to Paterson, of seeing in the county clerk's office, that original Goetschius map; the map which was adopted under the proceedings that my statement relates to. It was kept in a tall tin case. Afterwards I was unable to find that map, and was informed, on inquiry, that it had disappeared from the clerk's office some twenty-five or thirty years ago.

It is admitted, for the purpose of the record, that the East Jersey pipe company is a corporation, organized under the laws of this State.

It isunderstood that Mr. Hilton has closed his case with the exception of offering some exhibits.

At this point an adjournment was taken until Thursday, the twenty-fifth day of February, 1915, at 10 o'clock, a. m.

The taking of testimony in the above entitled cause is resumed on Thursday, the twenty-fifth day of February, nineteen hundred and fifteen, at ten o'clock a. m., as per adjournment.

Present:

Same as heretofore.

SAMUEL S. SHERWOOD, the prosecutor in the above entitled cause, having already been sworn, is re-called and testifies as follows:

Direct Examination by Mr. Hilton.

Q. Will you indicate on Plate 9 of the Robinson atlas, the lines of the strip you acquired from Edo Kip? A. It is between the blue line and the lead pencil line at the bottom of the map.

10 Q. You were asked the other day if you could tell when the railroad, now called the New York, Susquehanna & Western railroad was built; can you answer that quetsion more definitely now, Mr. Sherwood? A. The survey commenced on the twenty-ninth day of January, eighteen hundred and seventy, and the first excursion on the opening of the road took place on the twelfth day of June, eighteen hundred and seventy-two.

Q. By what do you fix the last date? A. By

20 the time table.

Q. By the time table? A. Yes; the paper you have in your hand; it was an invitation to be present, and I was present.

Invitation offered in evidence, and the same is marked Exhibit S-18, on behalf of the prosecutor.

Q. I notice you made this statement in your

30 testimony the other day: "I conveyed to the railroad company before I conveyed to Bronson;" is that correct? A. That should be that I entered into an agreement; I didn't convey until some years after that.

Q. You mean that you agreed to convey before you conveyed to Bronson? A. Yes, sir.

Q. But the actual conveyance wasn't made until afterwards? A. That is so; Mr. Bronson joined in the deed of conveyance.

Q. I also notice that you stated in your testimony the other day, in speaking of the vacation that was made some years ago of the portion of East Thirty-sixth street, you said this according to the stenographer's notes: "I did it then, and I would do it again if they would allow me thirty-five feet to get out," have you any correction to make of that? A. I would do it again for a single street: I will make it this way: I would do it for a single street, or any streets, if they would allow me for a street to get out—a way to get out.

Q. What do you mean; a street to get out; a direct street to get out? A. I mean if East Thirty-sixth street or East Thirty-seventh street was left for me to get out.

Q. I notice that in your testimony the other day, in speaking of the agreement with the railroad company for the right of way, you are reported to have said: "I did it at the time I put it on record;" did you put it on record? A. I didn't put it on record.

Q. You don't know whether the company did or not? A. No.

Q. You made two agreements; one with the company that preceded; the Midland? A. Yes; the New Jersey Western.

Q. Have you that agreement with you? A. Yes, sir; cancelled.

Q. Why was that agreement cancelled? A. The route was changed.

Q. And the name of the company was changed, wasn't it? A. That had nothing to do with it; I don't remember whether this company was in

existence or not; I think it was about four months afterwards.

Q. Do you remember the name of the company with which you made the other agreement; which was it, the Midland or the Western? A. I don't know.

Q. Have you made an effort to find the agreement that you made subsequent to that? A. Yes, sir.

10 Q. Did you succeed in finding it? A. No, sir, I have a big mass of papers and I spent considerable time in looking for it, but I couldn't find it.

Q. You have been over them? A. Yes; two days almost continuously.

Q. Do you know how long after that one the other one was made? A. I think about four months.

I offered in evidence the other day the
20 record of a deed from Samuel S. Sherwood and others, to The New York, Susquehanna and Western railroad company, and promised to produce a certified copy; I now produce the same.

I now offer in evidence the old contract. Old contract marked Exhibit S-19 on behalf of the prosecutor.

I offer in evidence a certified copy of a deed from Samuel S. Sherwood and wife,
30 to Nathaniel Wheeler, dated May 2nd, 1864, and recorded in the Passaic County clerk's office in book R-2 of deeds, pages 219, etc., and the same is marked Exhibit S-20 on behalf of the prosecutor.

I also offer in evidence a copy of the Old Goetschius map that has been men-

tioned, and the same is marked Exhibit S-21 on behalf of the prosecutor.

(The attorney for the prosecutor closes his case.)

CHARLES HEINRICHS, a witness produced on behalf of the defendants, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. Merrey. 10

Q. Mr. Heinrichs, you are a photographer? A Yes, sir.

Q. Did you make some photographs of the property in the vicinity of the East Jersey pipe works? A. Yes, sir.

Q. What day did you make them? A. I have some notes here that I made them February 18th.

Q. Have you got the photographs with you? A. Yes, sir. 20

By the Commissioner.

Q. What year? A. Nineteen hundred and fifteen.

By Mr. Merrey.

Q. Mr. Heinrichs, I show you a picture which you have marked "1" by means of a perforation, and ask you where that was taken from? A. My camera was placed in Trenton avenue, a few feet south of Market street. The picture shows the water tank of the National Ribbon Company, and from that point the camera is on the line of the proposed East Thirty-seventh street. The structure at the left of the picture, which looks 30

like an elevator, is part of the plant of the East Jersey pipe company.

Q. That is the high, dark building? A. Yes, sir.

Q. In the center of the picture I notice a dark colored board fence, right below the water tank; you saw that, did you? A. Yes.

Q. Does the proposed East Thirty-seventh street run along there? A. Yes, sir.

10 Q. Now, what is the nature of the ground to the north of Market street? A. To the north of Market street?

Q. Covered by the picture: is it high or low? A. It is low.

Q. What is the paved street in the foreground? A. That is Market street.

Q. Your camera was then pointed down East Thirty-seventh street? A. Yes, sir.

Q. Or down East Thirty-seventh street, if it was open? A. Yes, sir.

20 Q. It was pointed north along what would be East Thirty-seventh street? A. Yes, sir.

Q. When you were there on the eighteenth of February, nineteen hundred and fifteen, was there any indication of a street there then? A. No.

Q. What is it, a broad grass field? A. Yes.

Picture offered in evidence, and the same is marked Exhibit D-1 on behalf of the defendants.

30

Q. I show you a picture with a perforated number "2" on it, and ask you where that was taken? A. My camera was placed about two hundred feet west from the position from where No. 1 was taken.

Q. Your camera was pointed where? A. North.

Q. Near what street was that? A. Near the place where the proposed East Thirty-sixth street would run.

Q. The paved street in the foreground is Market street? A. Market street.

Q. And the sidewalk which appears there is the sidewalk on Market street? A. Yes, sir.

Q. And the tall building that looks like a grain elevator is what? A. It is the same building that is shown in picture No. 1. 10

Q. And the mills shown on the right is the National Ribbon Company? A. Yes, sir.

Picture No. 2 is offered in evidence, and the same is marked Exhibit D-2 on behalf of the defendants.

Q. I show you a picture with a perforated No. 3 on it, and ask you where that was taken? A. Picture No. 3 was taken just south of Market street, which shows on the foreground, and about where East Thirty-fifth street would run. 20

Q. And the paved street is Market street? A. Market street.

Q. And the buildings in the rear are the buildings of the pipe works? A. Yes, sir.

Q. How is the ground to the north of Market street at this point? A. Low there. 30

Q. Below the street? A. Yes.

Q. How much about? A. It is hard to tell from photographs.

Q. How was it, dry or swampy? A. It looked swampy to me.

Q. There is a peculiar structure to the left, do

you know what that is? A. It is some experimental thing; I think it is an electrical carrier.

Q. This picture was also taken with the camera looking to the north? A. Yes, sir.

Picture No. 3 offered in evidence, and the same is marked Exhibit D-3 on behalf of the defendants.

10 Q. I show you a picture with a perforation mark No. 4 on it, and ask you where that was taken? A. Picture No. 4 was taken from a point a little to the southwest of School No. 20, and a little west of East Thirty-sixth street.

Q. Was the exposure—to which direction? A. That would be south, a little southeast.

Q. Then in picture No. 4 you had crossed the railroad track? A. Yes, sir.

Q. And your camera was pointing directly op-
20 posite to that in Nos. 1, 2 and 3? A. Yes, sir.

Q. I notice marks in this picture like a base ball ground? A. Yes, sir.

Q. And there is a sign; did you notice what the sign was? A. Samuel S. Sherwood's sign.

Q. Offering the property for sale? A. Yes, sir.

Q. You understand from Mr. Sherwood that the land in this suit is the one on which this base ball ground is located? A. I understand that
30 from him.

Q. Now, then, can you point out to us where East Thirty-seventh street would cross the railroad? A. It is between the freight car under the tower and the coal car, and would run along the fence by the ribbon company. It would pass along by the water tank; it would pass to the right hand side of the water tank.

Picture No. 4 is offered in evidence, and the same is marked Exhibit D-4 on behalf of the defendants.

Q. I show you a picture with a perforated number "5" in it, and ask you where that was taken? A. Picture No. 5 was taken on a line above East Twenty-fifth street, and between Twentieth avenue and Twenty-first avenue, and taken north of the railroad. 10

Q. And where was the camera pointed? A. Towards Market street.

Q. How far away is that point from the Susquehanna railroad where you stood? Strike that out. It would show about East Thirty-fifth street in the foreground? A. Looking slightly to the left is Lakeview avenue.

Q. What is the paved street in the background, ascending? A. Lakeview avenue.

Q. How far away is that point from the Susquehanna railroad where you stood? A. I cannot tell. 20

Q. And the buildings seen in the picture are the buildings of the East Jersey pipe company? A. Yes, sir.

Q. And there is a railroad track between your camera and the buildings? A. Yes, sir.

Picture offered in evidence, and the same is marked Exhibit D-5, on behalf of the defendants. 30

Q. I show you a picture with the perforation mark "6" on it, and ask you where that was taken? A. It was taken northwest of Vreeland ave-

nue, at a point where East Thirty-eighth street goes.

Q. And it is looking west, along the Susquehanna railorad? A. Yes; looking west.

Q. And it takes in Mr. Sherwood's property and the ball ground? A. Yes, sir.

Q. And the ball ground is on the right? A. Yes, sir.

Q. And the sign advertising the property for
10 sale is in the center? A. Yes, sir.

Q. And the railroad track is to the left? A. Yes, sir.

Q. The large, dark building on the left that looks like an elevator shaft is the same building that you refer to on the first lot of pictures? A. Yes.

Q. Only it is the opposite side of the building? A. Yes, sir.

20 Picture offered in evidence, and the same is marked Exhibit D-6, on behalf of the defendants.

No Cross Examination.

It is stipulated and agreed by and between counsel that it is admitted that the notice of the intention to vacate these streets was printed and published in "The Morning Call," and "Paterson Press," both of which papers are printed and pub-
30 lished and circulated in Paterson, New Jersey, and that they are both official newspapers of the city of Paterson, and that said notice was printed for such times as is stated in the affidavits annexed to the copies of said notice returned in the return of the certiorari herein.

THOMAS H. MILSON, a witness produced on behalf of the defendants, being first duly sworn according to law, testifies as follows:

Direct Examination by Mr. Merrey.

Q. You are a member of the board of public works of the City of Paterson? A. Yes, sir.

Q. How long have you been a member of that board? A. Five and one-half years.

Q. And you are a retired manufacturer now, aren't you? A. Yes, sir. 10

Q. Were you a member of the board of public works when the question of the vacation of East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street came up before the board? A. Yes, sir.

Q. Are you familiar with the ground occupied by those streets? A. Yes, sir.

Q. How long have you known it? A. Twenty-five years. 20

Q. When the matter first came up your board ordered the city street superintendent to advertise the closing of the streets, did you not? A. Yes, sir.

Q. That was done in open meeting, wasn't it? A. Yes, sir.

Q. That was done at the meeting of November 10th? A. I don't remember the date.

Q. Then you remember other meetings at which the report of the city street superintendent was presented to the board? A. Yes; I think about three meetings. 30

Q. Then there was a meeting upon which citizens were heard, was there not? A. Yes, sir.

Q. Remember anybody appearing making ob-

jections? A. Yes; Mr. Hunziker, I think, for the Walder estate, and Mr. Reynolds appeared, and Mr. Hilton appeared for Mr. Sherwood.

Q. Mr. George S. Hilton appeared for Mr. Samuel S. Sherwood? A. Yes, sir.

Q. Had you seen Mr. Hilton before? A. He came down and asked when the meeting would be held.

Q. Did you tell him? A. Yes, sir.

10 Q. Did he ask you if he could be heard? A. I think he did that twice.

Q. You told him when he could be heard? A. Yes, sir.

Q. Did he appear? A. Yes, sir.

Q. Was he heard? A. Yes, sir.

Q. At any length? A. He made quite a lengthy objection to the closing of East Thirty-seventh street.

Q. Was he heard more than once? A. Two

20 meetings.

Q. Heard at both meetings? A. Yes, sir.

Q. Did the board discuss it with him? A. I think they did, but not at any great length.

Q. Did they ask him any questions? A. Yes, sir.

Q. He was given every opportunity to state his objections, was he not? A. Yes, sir.

Q. Who was the president of the board at that time? A. Mr. Cooke was the president of the

30 board.

Q. Mr. Cooke is not in the city now? A. No; he has rented his house and has left the city.

Q. How long has he been gone? A. Quite a while; I haven't seen him since the first of the year.

Q. Who were the other members of the board? A. Mr. McCrystal and Mr. Doremus.

Q. Was anything said to Mr. Hilton, who represented Mr. Sherwood, with reference to the property here, and asking how the property would be damaged by the closing of the streets? A. He was asked that, because he was on the wrong side of the railroad.

Q. Was anything said about the railroad crossing to him then? A. Yes, sir; he was asked about that. 10

Q. Who asked him about getting across the railroad crossing? A. I think I asked him that.

Q. And you say there was somebody who appeared for Mrs. Walder? A. Yes, sir.

Q. Do they own property along these streets, on the other side of the railroad, on East Thirty-fifth and East Thirty-sixth streets? A. Yes, sir.

Q. Did the board say anything to the pipe company? A. We said they could not close the streets on account of that property. 20

Q. You thought the Walder property would be injured? A. Yes, because they were closing half of that street.

Q. That was on the street that was to be vacated? A. Yes, sir.

Q. Did the board take any consideration of the injury to that property? A. Yes; they told the pipe company they would have to satisfy the property owners. 30

Q. So they would join in the request? A. Yes, sir.

Q. Did the Walder people afterwards come in? A. They came in one meeting and objected, and the next meeting their lawyer came in and withdrew their objection.

Q. What is the nature of the ground there? A. Very swampy.

Q. Has the streets ever been used? A. No, sir.

Q. Is there a brook there? A. There used to be a brook there running down Twenty-sixth street and we had to put a pipe under the shop, and then to the silk mill yard, and finally down to the river.

10 Q. Was there any connection there with Market street? A. No; the railroad is about four feet above grade there.

Q. Has the board adopted a policy with reference to grade crossings?

Mr. Hilton.—I object to that.

A. Yes, sir.

Q. What is that? A. They won't open a street

20 where there is a grade crossing.

Q. Are there any means by which Mr. Sherwood can reach Market street, other than through East Thirty-fifth street, East Thirty-sixth street, or East Thirty-seventh street, if open? A. Yes; he can go out Vreeland avenue or East Thirty-eighth street.

Q. Are those streets open now? A. Yes, sir; opened and macadamized.

Q. They are macadamized? A. Yes, sir.

30 Q. Is Twenty-first avenue open to Market street? A. No; only on one side; the railroad divides it; runs right through the center, and on the southerly side you can get to Market street, but not on the northerly side.

Q. If it was open across the railroad? A. On Twentieth avenue.

Q. Is that as direct a route to the city as going through this avenue? A. More direct.

Q. Is that as direct a route to the city as it is to go down Market street? A. It is not quite so short; there are no roads on Mr. Sherwood's property.

Q. If there were roads? A. It would be quicker for them to go to Twentieth avenue.

Q. That would be more direct than going through these streets to Market street? A. Yes, sir. 10

Q. Did you take into consideration anything about opening these streets and grading them when the board was in session?

Mr. Hilton.—I object to the question.

A. Yes; we always take into consideration streets of that kind; there was only the pipe works and the ribbon company there, and the grading, 20 curbing and guttering is always done at the request of the property owners.

Q. Is that expensive? A. Yes, sir; it would be very expensive here.

Q. Why here? A. Because there would be a lot of filling, and the grounds are of a swampy nature.

Q. Thirty-eighth street is a macadamized street, isn't it? A. Yes, sir.

Q. You listened to all the arguments that was 30 presented there at the two meetings, when you were considering this question? A. Yes, sir.

Q. And you heard Mr. Hilton's argument? A. Yes, sir.

Q. What guided you in your decision? A. His strong point was that he could not reach Market

street, and all he had to do was to go down one block to get to Market street.

Q. In other words you thought Mr. Sherwood was not injured? A. Yes, sir.

Q. Anything else? A. I didn't think it would injure anybody.

Q. Was it an advantage to anybody; the public? A. I thought it would be an advantage to the public to get the plant; the employment of some labor.

10 Q. The citizens themselves? A. The request was made by the company; the people most concerned; the ribbon company didn't object.

Q. That is all.

By Mr. Harding.

Q. I have a few questions on behalf of the defendant, the East Jersey pipe company. I understand, Mr. Milson, that one of the things that brought about the consideration of the vacation

20 of these portions of streets was that petitions were made to your body to have them vacated, is that true? A. Yes; there was a petition made.

Q. The pipe line company wanted it done as one? A. Yes, sir.

Q. Was there a petition from others? A. There was a very lengthy petition from residents.

Q. I show you a paper dated Paterson, December 12th, nineteen hundred and fourteen, addressed to the honorable body of the board of public

30 works of the City of Paterson, and ask you if that was one? A. Yes, sir.

Q. Was there any others? A. I don't recall any others.

Q. This one was before your board? A. Yes, sir; and I think there was another one.

Petition offered in evidence, and the same is marked Exhibit D-7 on behalf of the defendants.

Q. Was the question of the advisability of vacating these streets for the purpose of having the pipe company rebuild their works taken into consideration as a public benefit?

Mr. Hilton.—I object to the question as leading. 10

A. Yes, sir; it was.

Q. Did you regard the question whether it would be a public benefit or not, to vacate these streets, even though the East Jersey pipe company did not make the request; irrespective of that, did you consider the advisability of vacating them as a matter of public benefit, without regard to the benefit of the East Jersey pipe company? A. No; they were the first people that called our attention to it; I had one of these streets closed in nineteen hundred and two. 20

Q. Did you consider even whether or not the pipe company was there, whether it would be advisable to open these streets? A. We wouldn't do it unless we were asked to; that is to grade them.

Q. I am saying without regard to the public interest at all; would you consider it advisable to have them open if it were not for the East Jersey pipe company? A. No, I wouldn't consider having them opened, because it would be too much of an expense to the city for curbing, grading and guttering. 30

Q. The property that is between the pipe works

and Market street as shown by these photographs, is of what nature? A. It is of a swampy nature and very low.

Q. And absolutely vacant so far as the surface is concerned? A. Yes, sir.

Q. And how long has it been that way to your knowledge? A. Twenty-five years; ever since I have been here.

Q. Take it on the other side, on the south side
10 of Market street,what is the character of all that country? A. It is higher; it is laid out and curbed and guttered.

Q. Is it vacant? A. Most of it is vacant.

Q. It is the vacant part of Paterson? A. Yes, sir.

Q. And do you know whether there is quite a large swamp on the southerly side of Market street? A. Yes; this brook used to turn through that swamp that ran through this property.

20 Q. Since you have been a member of the board of public works, for five years, have you had occasion to vacate portions of streets in the City of Paterson a great many times? A. Quite a number of times, yes, sir.

Q. I will ask you this. During your term of vacating streets, your board has adopted proceedings the same as they did in this case? A. Yes, sir.

Q. You, at one time, were connected with this
30 pipe company; were you not; one of the defendants? A. Yes, sir.

Q. And have you now for a number of years had any connection with them at all? A. No, sir.

Q. You sold out to this company, did you? A Yes, sir.

Q. You formerly were connected with another company that preceded them? A. Yes, sir; I started a company out there.

Q. How long ago was it that you sold out? A. About nine years.

Q. Have you a pecuniary interest in this company—this defendant? A. None at all.

Q. The present defendant pipe company did buy the property which was formerly owned by the company that you were connected with? A. Yes, sir. 10

Q. And I now show you a map which is entitled "Map showing plan of vacating parts of East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street, Paterson, New Jersey, November, 1914, H. J. Harder, city engineer", and ask you if the East Jersey pipe works, the present defendant, are shown on this map? A. Yes, sir.

Q. The property which the company which you were formerly connected with is shown on this map in white? A. Yes, sir. 20

Q. And appears on this map to be south of the New York, Susquehanna and Western railroad, at Twenty-first avenue, running southerly on the portion shown in white, is that right? A. Yes, sir.

Q. That is what you owned? A. Yes, sir.

Q. Now the present—Can you tell me what the present pipe company owns? A. I couldn't tell you that. 30

Q. Did you own the fee in the streets marked East Thirty-sixth street, East Thirty-fifth street, and half, to the middle line of East Thirty-seventh street? A. Yes, sir.

Q. And some years ago, while you were owners, you had East Thirty-sixth street vacated down to the point shown on this map from three hundred and thirty and up to lot No. three hundred and thirty-eight map, is that right? A. Yes, sir.

Q. The white space marked on this map which was formerly owned by your company, and now owned by the East Jersey pipe works, is marked "East Jersey pipe works" in two places? A. Yes, sir.

Q. And do you understand that the East Jersey pipe company, since they purchased from the company with which you were formerly connected, have since purchased and now own all the property southerly down to the line which would be the southerly line of the proposed vacation of East Thirty-sixth street and East Thirty-fifth street, and that they own the fee of the streets that are to be vacated, over the portion that is to be vacated? A. Yes, sir.

Q. And you understand that they own on East Thirty-seventh street, the westerly half of it? A. Yes, sir.

Q. Now, I will ask you this. You finally voted to vacate these streets? A. Yes, sir.

Q. And I will ask you if you heard and carefully considered all the arguments that were made against the vacation of the streets before you finally determined to vacate them? A Yes, sir.

Q. And did you give all of them what you thought was due consideration? A. Yes, sir.

Q. And I will ask you if you thought you were

acting for the benefit of the public in voting the way you did?

By Mr. Hilton.—I object to a direct question like that.

A. Yes, sir.

By Mr. Harding.—I now offer this map in evidence, and the same is marked Exhibit D-8 on behalf of the defendants. 10

Q. That is all.

Cross Examination by Mr. Hilton.

By the Commissioner.—Wait until after recess.

At this point an adjournment was taken until 2 P. M. for recess. 20

(The taking of testimony was resumed at 2 o'clock P. M., as per adjournment.)

Q. I think you said in your direct examination that you didn't deem it advisable to have East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street opened, graded, curbed and guttered from Market street to Twenty-first avenue? A. I don't think so.

Q. Don't think so? A. No. 30

Q. Your principal reason was the cost? A. Yes, and the crossings over the railroad.

Q. I mean Twenty-first avenue? A. There is the railroad there.

Q. My question refers to Market street and Twenty-first avenue? A. I say to raise it over

the railroad it would have to be raised over four feet, in some places.

Q. You don't understand my question; Mr. Stenographer, please repeat the question. (Question repeated)? A. I did.

Q. And the reason you gave was the cost? A. The cost and it was impracticable on account of the grade; I don't know what kind of a grade you could get.

10 Q. The cost wouldn't be borne by the city? A. Yes; if the benefit is too much for the property to carry, it is paid by the city.

Q. The property pays for the benefit up to the extent of the benefit received? A. Yes, sir.

Q. And the excess is borne by the city? A. Yes, sir.

Q. In this case there would be no occasion for taking and paying for the land for the streets, would there? A. No, sir; no occasion for that.

20 Q. Between East Thirty-fifth street and East Thirty-sixth street, beyond the part of East Thirty-sixth street that was vacated some years ago, and lying between the proposed additional vacation are several lots as shown on the map of the proposed as belonging to the Walder estate and one Hinchliffe; I understand you told the pipe company that you would not close it until they bought those lots? A. Told the pipe company that we would not close the street until they

30 owned the property on both sides of the street.

Q. They bought it? A. I don't know that; they came and withdrew their objections. Mr. Nelson asked me once if I thought they would close the streets, and I said I didn't think they would close half of the street; that was the rei-

crence to East Thirty-fifth street; they only owned on one side of the street.

Q. I understand you to say that the reason the company had to buy those lots was because they would be damaged? A. They objected to it.

Q. Why couldn't you close it if they did object? A. We could do it; I suppose, but we don't want to close it if the property holders objected on that side of the railroad.

Q. I understood you to say that the city street commissioner was directed to advertise the intention of the board of public works to close these streets? A. To advertise for objectors. 10

Q. When was that instruction given? A. One of the meetings; I don't remember the date exactly.

Q. How was it given? A. Given by permission of the board.

Q. By a commissioner of the board? A. No; by direction of the board. 20

Q. Was any motion made to that effect, or order given by the board? A. There ought to be a resolution.

Q. And you are sure that there was a resolution to that effect given? A. I am not so sure, but I think there was; we wouldn't have done it without.

Q. Have you a distinct recollection of that being done? A. To the best of my recollection.

Q. To the best of your recollection it was done by resolution of the board? A. Yes, sir. 30

Q. By resolution of the board? A. Yes, sir; that is the regular proceedings for the closing of a street.

Q. Well, why was the direction given to the

street commissioner? A. It is done through the street commissioner.

Q. Does not the law require that all of that kind of things be done by the clerk of the board? A. Not that I know of; it has always been done by the street commissioner.

Q. And you remember when I appeared before the board in opposition to the vacation of East Thirty-seventh street? A. Yes, sir.

10 Q. And you say it was stated to me then, or mentioned to me, about the inability of going over the railroad to Mr. Sherwood's property? A. You were asked, if I am not mistaken, if your lots were not on the other side of the railroad, and how you would get to your property.

Q. Do you recollect who asked that question? A. I think I did, because I was familiar with that property, and had been for quite some time.

Q. You spoke of a petition coming in from a 20 long list of property owners? A. Yes, sir.

Q. At the inception of the proceedings? A. Yes, sir.

Q. Do you recollect the meeting—at which meeting the petition of the pipe company was presented; what meeting was that? A. I don't remember exactly; I think it was early in November.

Q. About the tenth of November? A. November the something.

30 Q. And this petition was dated December 12th? A. Yes, sir.

Q. That was hardly at the inception of the proceedings, was it? A. This matter was in hand; we didn't decide to close the streets until the latter part of December. I think there was another petition. The top of it was typewritten:

I don't know where it is. It must be in the city clerk's hands.

Q. You say the matter of public benefit was considered in this business? A. Yes, sir.

Q. What public benefit was supposed to be derived from the closing of these streets? A. First, it would be a benefit if the company located there and save the city the expense of improving the streets; we didn't think there would be anything there but manufacturers, that is all there is there now. It would never be a benefit to the public, but it would be more of a benefit to have them closed than open. They have been there for twenty-five years and nothing has been done with them.

Q. You say a benefit to the pipe works? A. Yes, sir.

Q. How would that be a benefit to the public? A. Only the employment of labor, and bringing employment to the town.

Q. How many hands do the pipe works employ? A. From two hundred and fifty to three hundred; in busy times more on double shifts.

Q. What kind of pipe do they make there? A. Riveted and lock-bar.

Q. Large pipe or small pipe? A. Large pipe, conduits.

Q. How large are they? A. From thirty inches to twelve feet.

Q. To manufacture those pipe occasions a great deal of noise? A. Not if they are making the new pipe, the lock-bar.

Q. I mean the first kind. A. There is some noise, yes, sir.

Q. And a great deal of smoke is occasioned? A. No, sir.

Q. Not any smoke? A. No, sir; only the smoke they get from the generation of steam.

Q. How about the smell? A. Only the coating of tar, which is not very objectionable; tar and asphalt.

Q. What was there in nature about these streets between Market street and Twenty-first avenue that renders the grading unusually expensive? A. In one case in East Thirty-sixth
10 street there was a brook that ran from East Thirty-sixth street to East Thirty-seventh street, under the pipe works, and then it runs in the trunk sewer.

Q. There is no brook there now? A. Place for a brook.

Q. Anything unusual about that? A. I don't know how you would grade Twenty-first avenue.

Q. I am speaking about East Thirty-fifth street and East Thirty-sixth street. A. They have to
20 meet Twenty-first avenue.

Q. There is sometimes depressions and elevations? A. It is way down in a hole. I don't know who made the grade; I guess they made it themselves.

Q. Do I understand you to say the land back there is swampy? A. Yes, sir.

Q.. It wasn't a swamp? A. It was for twenty-five years.

Q. Haven't you seen corn grow there within
30 the last twenty-five years? A. No, sir; I never saw corn grow in that locality.

Q. Not between Market street and Twenty-first avenue? A. No, sir.

Q. You say the board of public works have adopted the policy of not opening streets across railroads? A. Yes, sir.

Q. When was that policy adopted? A. They have refused to do it right along.

Q. Then the idea is that all streets have to stop at a railroad crossing? A. Not all streets, no, sir; but we do not believe in putting the crossings every two hundred feet.

Q. How far apart then do you put them? A. We haven't put any across since I have been in the board except Twenty-fourth avenue.

Q. You have not passed any ordinance or resolution to that effect? A. No, sir. 10

Q. It is simply the policy of the board for the time being? A. Yes, sir.

Q. How long a term are the members of the board chosen? A. Two years.

Q. So the policy can be changed in two years' time, if they see fit? A. Yes, sir.

Q. I understood you to say that the route going from Mr. Sherwood's property to East Thirty-eighth street, and then up East Thirty-eighth 20 street to Market street, and then down Market street to the city, would be more direct route than through East Thirty-seventh street? A. Not more direct; a little difference.

Q. There would be a difference? A. One block; about two hundred feet.

Q. That is all.

JACOB T. DOREMUS, a witness produced on 30 behalf of the defendants, being first duly sworn according to law, testifies as follows:

Direct Examination by Mr. Merrey.

Q. Mr. Doremus, you are a member of the board of public works of the City of Paterson? A. Yes, sir.

Q. You were appointed in January, nineteen hundred and fourteen? A. Yes, sir.

Q. You were a member of the board when the question of vacating a part of East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street, came up? A. Yes, sir.

Q. In the latter part of nineteen hundred and fourteen? A. Yes, sir.

Q. Were you present at all those meetings? A. All those particular meetings, yes.

Q. Have you a recollection of the request coming in from the pipe works? A. I have a recollection of that.

Q. What did you do then? A. It was considered by the board, and it took its regular course.

Q. What order did you make? A. I don't know as I can just describe it off the reel; what do you mean?

Q. In bringing it before the board? A. It was in the form of a resolution that these streets was vacated.

Q. It was taken up again later, was it not? A. December, yes, sir.

Q. Was there an advertising ordered? A. Yes, sir.

Q. Who did you order to advertise? A. That is ordered through our street superintendent.

Q. He is known as the street commissioner? A. Yes, sir.

Q. Mr. James Taylor? A. Yes, sir.

Q. You say he was ordered to advertise? A. A. He was ordered to, yes, sir.

Q. He attends the meetings? A. Yes, sir.

Q. Do you remember about fixing the days when meetings would be held later—the hearings

on it? A. I remember that they were all on the regular meetings, except the tenth; that was in order to have the old board carry out the old resolution.

Q. You wanted to carry it out before the terms expired? A. That was the idea.

Q. And it was taken into consideration about the twenty days that would elapse? A. That was all taken into consideration.

Q. And the street superintendent reported that objections came in? A. Yes, sir. 10

Q. And the objections were read to the board? A. Yes, sir.

Q. And considered? A. Yes, sir.

Q. Who was chairman of the commission? A. Mr. Charles D. Cooke.

Q. Did any member ask that the objectors be heard in person? A. That is the custom, and that was done.

Q. Who were there? A. Some objections from the Walder estate and from the Sherwood estate. 20

Q. Who appeared for Mr. Sherwood? A. Mr. Hilton.

Q. Was he heard? A. Yes, sir.

Q. Did you ask him questions and discuss the matter? A. Yes, sir; the chairman did.

Q. Was he asked how Mr. Sherwood would be injured by closing these streets? A. That is customary.

Q. Was there anything said about closing the street and Mr. Sherwood crossing the railroad? A. I don't know. 30

Q. Are you familiar with the property? A. Somewhat, yes.

Q. And at the further meeting was there any-

thing further said? A. We asked for objectors at all meetings.

Q. Did Mr. Hilton appear again? A. I think he appeared at all meetings.

Q. And did you take into consideration the matters presented to you and talked over by members of the board? A. Yes, sir.

Q. Can you tell us what actuated you in passing the ordinance? A. I considered it a bene-
10 fit to the City of Paterson in several ways, financially and otherwise.

Q. How would it be a financial benefit to the city? A. It would save the expense of opening the streets, curbing, guttering and grading them, and what is a saving to the city is a saving to the public in general.

Q. Did you make certain that the property owners along the streets were all satisfied? A. They had their hearing.

20 Q. I understand somebody appeared for the Walder property? A. Yes, sir.

Q. I show you Exhibit D-8, and you notice on this map, adjoining East Thirty-sixth street, part of which had been vacated, part of the property of Walder? A. Yes, sir.

Q. You knew that at the time? A. Yes, sir.

Q. Did you say anything to the pipe works about that property? A. I don't remember what we said about that.

30 Q. Did they come afterwards and withdraw their objection? A. They came and withdrew their objections very freely.

Q. Were there some people who came to the board and advocated the vacation, on the ground that it would be a benefit to the city, and filed petitions also? A. There was a petition presented

to the board by people who were in favor of this street being vacated, by a large number of signers; I don't remember just how many now.

Q. You are familiar with the property, are you, Mr. Doremus? A. Why, yes; I am pretty well familiar with the property.

Q. I show you a map called the Robinson atlas, and call your attention to plate 10. This is the same atlas offered in evidence with reference to plate 9. Does this show the City of Paterson in the vicinity of the pipe works? A. That shows it.

Q. And I ask you now, which is the most direct way from the property of Mr. Sherwood to the City of Paterson; whether it would be through the streets that are now vacated, or through the other streets? A. Why, according to my idea of thought, the distance would be trifling either way.

Q. Could it be reached down Twenty-first avenue to Market street, if it were open? A. Yes, sir.

Q. Wouldn't it be a shorter way than going down East Thirty-fifth street, or East Thirty-sixth street, or East Thirty-seventh street to Market street, and then down Market street? A. Yes; that would be a shorter way.

Q. Twenty-first avenue is laid out and shown on this map, plate 10? A. Yes, sir.

Q. It is actually open? A. Yes, sir.

Q. Shown on the photographs we showed this morning? A. Yes, sir.

Q. Twentieth avenue is also open? A. Yes sir.

Q. Crossing the railroad and down to Market street? A. Yes, sir.

Q. And isn't that the shortest way from Mr. Sherwood's property to the center of the city? A. Yes, and more direct.

By Mr. Harding.

Q. Will you come here just a minute, Mr. Doremus? I am now attracting your attention to plate 10 of the Robinson atlas—the Sherwood property which is now in question, is not shown on plate 10, is it? A. No.

10 Q. It is shown, however, on plate 9, is it not? A. Yes, sir.

Q. Now, if you take plate 10, it would join right on plate 9, would it not, and make a complete map? A. Yes, sir.

Q. Taking these two maps considered together, now calling your attention to plate 10, the Sherwood property would be on the north side of the Susquehanna railroad, east of the property on map 9, which is marked as the P. Van Winkle prop 20 erty, would it not? A. Yes, sir.

Q. So then the Sherwood property is not quite shown on plate 10? A. That is right.

Q. Now, East Thirty-eighth street is not shown on plate 10, is it? A. No, sir.

Q. East Thirty-fifth street is the furtherest East street shown on this map? A. Yes, sir.

Q. Now, if you should come out of Mr. Sherwood's property, down East Thirty-fifth street, you would strike Market street at about Twenty- 30 second avenue, would you not, as shown on plate 10; if you should come down from Mr. Sherwood's property through East Thirty-fifth street, you would strike Market street about opposite East Thirty-second street, as shown on this map? A. As shown on this map, yes, sir.

Q. Then you would go northwesterly down Market street to reach the center of the City of Paterson, as shown on this map, is that right? A. Yes, sir.

Q. Instead of going down East Thirty-fifth street and thence on down to the City of Paterson, you could go right straight down Twenty-first avenue, westerly to Market street, and then you would strike Market street at a point between East Thirtieth street and East Thirty-first street as shown on this map, wouldn't you? A. Yes, sir.

Q. Then if you should go down Twenty-first avenue to go down to Paterson, as laid out on this map, and strike Market street you would take only the perpendicular side of the triangle? A. Exactly.

Q. But if you took East Thirty-fifth street, you would have to go down south one side of the triangle and then down Market street to where Twenty-first avenue intercepts Market street? A. Yes, sir.

Q. A greater distance? A. Yes, sir.

Q. Now, if you had to go out East Thirty-fifth street or East Thirty-sixth street, the same conditions would exist, but it would take you still further? A. Still further.

Q. Instead of going down Twenty-first avenue, as laid out on this map, Mr. Sherwood could go down on Twentieth avenue, then go down Twentieth avenue and reach Market street; he would then reach Market street at about the intersection of East Twenty-seventh street? A. Yes, sir.

Q. Would that be shorter than coming out on East Thirty-fifth street, or East Thirty-sixth

street or East Thirty-seventh street? A. It would be much shorter.

Q. Twentieth avenue is now open, and used, is it not, Mr. Doremus? A. Yes, sir.

Q. And it is open across the railroad, is it not? A. Yes, sir.

Q. You are an old inhabitant of the city here? A. Yes, sir.

Q. You have known this property for many
10 years? A. About twenty years.

Q. What is the natural condition of the surface of the land of all this property between the pipe works, the defendant pipe works, and Market street, all the way from say East Thirty-seventh street, on down westerly? A. Low and marshy.

Q. Occupied or unoccupied? A. As I recollect now, ninety per cent. is unoccupied.

Q. Isn't it a fact that all the way from East Thirty-seventh street, up to East Thirty-fifth
20 street, if it was open, that there is only one place occupied, and that is a little white saloon? A. I think that is correct.

Q. As shown by these photographs? A. Yes, sir.

Q. Can you state the surface of the land there as to elevation, as to Market street? A. I should say there was an embankment of four feet at least, from Market street down to this land.

Q. If East Thirty-fifth street and East Thirty-
30 sixth street and East Thirty-seventh street were to be opened and graded, what would you have to do to grade them with Market street? A. It would have to be filled.

Q. Would it be expensive? A. Yes, sir.

Q. Is there any necessity for opening them now? A. No, sir.

Q. Can you see anything for the future that would warrant it, and considering that the pipe company is located there, and the other manufacturers located down there, do you think the public would be warranted to go to the expense of opening these streets, since they have laid there since eighteen hundred and seventy-one? A. No; I would not in my time.

Q. What has been the policy of your board with reference to opening streets and putting them across railroad tracks at grade, where the conditions exist similar to the conditions that exist here? A. The board would not consider such a thing where the general public would be injured in any way.

Q. In the general resolution that was passed, and I will read it to you: "By Commissioner Doremus: Resolved, that it be the expressed opinion of the board of public works that the request of the East Jersey pipe works be granted, and that the city counsel be directed to prepare an ordinance closing the streets requested; the closing of said streets being conditional on the East Jersey pipe works acquiring ownership of both sides of streets to be closed, except in the case of East Thirty-seventh street, one side of which is owned by the National ribbon company, whose consent for the closing of this street will be obtained."

Q. That resolution was offered by you at the first meeting, November tenth, nineteen hundred and fourteen, was it not? A. Yes.

Q. Do you know why that proviso was put in the resolution, that the closing of the street be conditioned upon the pipe company obtaining ownership? A. It was the East Jersey pipe works

that requested that we should grant them that privilege, and they would locate there on those conditions, and that was merely the opening wedge to start things moving.

Q. When you came finally to pass that order of vacation, there was no conditions put in or considered? A. No, sir.

Q. In other words, acting as you thought judicially, did you not think it was beneficial to the City of Paterson to pass the ordinance—to pass it without any qualifications? A. I believe that was the idea of the board.

Q. And that is the way you passed it; without their getting any other land or anything? A. That is the idea exactly.

Q. Did you or not, before you voted on the passage of this ordinance, give due consideration to the objections? A. Due consideration was given to all the objectors.

Q. And I will ask you whether or not in voting to vacate these streets you deemed that you were acting for the public benefit or not? A. Yes, sir; I did.

Q. Did what? A. Acted for the public benefit.

Q. Now, these proceedings were started by the petitions to vacate; I suppose, of course, that is so? A. That is so.

Q. And you did take into consideration, did you, the advantage that might accrue to the city by reason of the pipe works being there?

Mr. Hilton.—I object to that question.
Mr. Harding.—Strike it out.

Q. Did you at all take into consideration the question of whether the retaining of the pipe com-

pany there would be a benefit to the city? A. Certainly took it into consideration that it would be a benefit to the city, and would be a benefit to the public.

Q. If you had considered that the vacation of these three streets in any way would have been a detriment to the public, would you have closed them, irrespective of the benefit to the city of the pipe works remaining there?

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Mr. Hilton.—I object to that question.

A. We would not have closed them if it had been a detriment to the city or public.

Q. Was the benefit with reference to the retaining of the pipe works there merely a secondary consideration?

Mr. Hilton.—I object to that question.

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Q. I will ask you whether it was or not? A. It was secondary.

Mr. Harding.—It is considered that the entire Robinson atlas is in evidence, and I will especially point out plates 9 and 10 in this atlas.

Q. Has your attention as a commissioner, since you have been in office, been called to the Public Utilities law, which requires their consent before a street can be opened on a railroad grade crossing? A. I don't think my attention has been called to that.

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Q. That is all.

Cross Examination by Mr. Hilton.

Q. Those street vacations were made as an inducement for the East Jersey pipe company to remain in Paterson, were they not? A. Not exactly, no; it was one of the inducements, but not all.

Q. And the ordinance was not passed until word had been been received from the East Jersey pipe company that they would remain in Paterson if the streets were vacated? A. That was the final passage.

Q. Do you recollect that when the ordinance was passed to the first reading, that Mr. Nelson, the vice president of the company, was there and stated that he could not state definitely whether the pipe company would stay there or not? A. I remember that at one meeting; yes, sir.

Q. You do remember that? A. Yes, sir.

Q. Do you remember that Mr. Cooke, the president of the board, asked if they passed the ordinance and the streets were closed, and the pipe company moved away, if they would have to open the streets again? A. I don't remember that.

Q. Don't you remember that the city counsel replied that they would have to reopen the streets? A. I don't just recall those remarks now.

Q. At the time the ordinance was finally passed, you recollect that Mr. Lambert stated that arrangements had been made to acquire title to the Walder property? A. Yes; I remember that statement.

Q. And then Mr. Hunziker represented the Walder property? A. Yes, sir.

Q. Do you remember that when the ordinance was passed Mr. Nelson, the vice president of the

company, was present? A. I just don't recall whether Mr. Nelson was present or not.

Q. Do you remember that the president of the board asked Mr. Nelson whether the company had acquired title to that particular property? A. I do remember that question, but whether it was the first meeting or the last meeting, I don't know.

Q. You remember Mr. Nelson saying it had? A. I do.

Q. If that communication had not been received from the pipe company at the time the ordinance was passed, saying they would remain in Paterson, would it have been passed? A. At that particular time, possibly not.

Q. The Susquehanna railroad runs through the center of Twenty-first avenue, all the way from Mr. Sherwood's property to East Thirty-fifth street, does it not—East Thirty-fifth street? A. I believe so; the conditions, according to the map, yes.

Q. So between Mr. Sherwood's property and East Thirty-fifth street there would be only a twenty-five foot street? A. Yes, sir.

Q. On which side of the track? A. On each side of the track.

Q. That is all.

JOSEPH McCRYSTAL, a witness produced on behalf of the defendants, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. Merrey.

Q. You were a member of the board of public works from nineteen hundred and seven, to nineteen hundred and fourteen? A. Yes, sir.

Q. Were you present at the meeting of the board of public works that vacated East Thirty-fifth, East Thirty-sixth and East Thirty-seventh streets, at the end of nineteen hundred and fourteen? A. Yes, sir.

Q. Are you familiar with that property? A. Not so familiar with the northerly side of the track as I am on this side.

Q. That is the southerly side? A. Yes, sir; that is the way I was considering it all through this transaction.

Q. Is there any method of going across the track at East Thirty-fifth street, East Thirty-sixth street or East Thirty-seventh street at this time? A. No; I don't think there is.

Q. It is fenced off, isn't it? A. Yes; I remember at one time there was a request from Mr. Milson, and he wanted to have a portion of East Thirty-sixth street vacated for running a track. and Mr. McKelvey and I went out and looked at it, and looked the ground over, and we reported that it be done and it was done.

Q. You went out there and examined all that property at that time? A. Yes; this side; I must acknowledge the fact that I am not familiar with the other side.

Q. You have been up and down Market street often, and seen the part you vacated? A. Oh, yes.

Q. Do you know whether that was a benefit to the public as a street? A. It never appeared to me that it would be.

Q. When you voted for this ordinance you had considered the question whether it was a benefit to the public generally to vacate the street? A. I thought it was.

Q. What was? A. He said to these people,

"Why don't you go and buy this property and have no trouble about it?"

Q. Buy what property? A. This property they wanted vacated.

Q. The Walder property? A. Yes, sir; I remember that my brother-in-law had a lot in there somewhere; East Thirty-fifth street, I believe it was, and we took the usual course of things whenever there is anything of that kind coming before the board; we generally refer it to the proper committee, and it is worked out. 10

Q. You considered yourself whether it was a benefit to the city to close that street or not? A. I considered that the purpose to be gained was a benefit to the city.

Q. What was the benefit to the city? A. We would get a manufacturing establishment here that the people were hollering for.

Q. And that is what opened the thing up? A. It was. 20

Q. That is the reason, and that had some consideration in opening the thing up; what was the rest of it? A. There was a lot of non-productive property there, and if there was a manufacturing concern; these people had been burned out and there was a lot of sorrow on account of people being thrown out of work, and it would help to build up this particular place.

Q. Any of those streets ever been opened up? A. Never; no. 30

Q. Why didn't you open them up? A. Nobody ever mentioned it.

Q. If it had been mentioned, what would have been done? A. I don't know.

Q. Would it have been an expensive proposition? A. Terrible.

Q. Would the expense of opening it up be justified? A. I don't think it would.

Q. Did you consider the railroad there? A. Yes; that was a factor, and anything on the other side I didn't consider at all.

Q. Did Mr. Hilton say anything about the rail road being there? A. I think it was brought up.

Q. Was he asked how he would cross the railroad? A. I don't think he was asked that.

10 Q. What would be the fact? A. The street would have to be raised up to the grade of the railroad crossing.

Q. Have you opened any streets over a railroad crossing at grade lately? A. No; we have ordered them opened and they have been set aside.

Q. The utility commission set it aside; didn't they? A. No; I think it was the courts, and the utility commission came in on Hazel street, and the County agreed to build a bridge, and that was 20 set aside by the courts, and nothing was done.

Q. You haven't opened any streets across a railroad lately? A. I can't remember of any; there have been petitions up East Side, and we have never opened it.

Q. Have you considered Mr. Sherwood's property, and the character of it, and how it would be affected by the vacation of these streets? A. No; when Mr. Hilton was presenting his case there, I didn't see how his property there could 30 be injured in this vacation.

Q. That is all.

Cross Examination by Mr. Hilton.

Q. You say the railroad is fenced off; do you know how long it has been fenced off? A. That short street down by the mill, I think they asked

permission if they could use that street; that was to protect life.

Q. You don't know how long ago it was? A. No; I can't say.

Q. Do you say there would be a terrible expense in grading these streets, East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street, between Market street and Twenty-first avenue? A. It would be quite an expensive job, because there is a fill there to be made, and the practice of the board for several years back has been to curb and grade and lay side walks, but on account of there being no house there they would have to make a greater fill in order to maintain the sidewalk and curb. There would be a greater expense there. If it was on a general grade the expense wouldn't be so great.

Q.. The expense of filling? A. Yes, sir.

Q. How much filling would there be required? A. I would say there was perhaps that would be four feet or more, five feet perhaps; I remember there was a mule corral there at one time, and they looked to me to be considerably below the grade of Market street, and there would be that fill.

Q. Would it be necessary to fill up to the grade of Market street? A. If you wanted to make a proper grade of things it would be running over to Twenty-first avenue; you would at least have to come to the grade of the railroad.

Q. You think the public is benefited by the pipe works remaining there? A. I do; yes.

Q. That was all the public benefit you see from it? A. That was a general benefit to the community.

Q. The only benefit in having these streets va

cated was having the pipe works remain there? A. As I stated in the beginning, Mr. Cooke asked them why they didn't buy the property; they owned considerable of the property running all the way up to the pipe works, and that was some inducement for people located there.

Q. The benefit to the people was if the pipe works remained? A. Yes; incidentally it would bring more rateables to the city.

10 Q. Was there any other benefit to the public from the closing of these streets? A. It was a general benefit.

Q. In what way? A. Financially for those who rented property or owned property in that neighborhood, and employed labor, and the pipe works had considerable property there.

Q. Now, suppose, Mr. McCrystal, that the pipe works had concluded to move away from the City of Paterson, and the proposition came up to va-
20 cate these streets, do you think the public good would have required you to do it? A. I will sav this, that if there wasn't some inducement that I would consider a benefit to the city, I certainly would not have voted to vacate those streets. The pipe works was one of the inducements. If they had moved away the property would have been there I don't know how long, but many, many years before anything would have been done.

30 Q. That is all.

T. SIMPSON STANDEVEN, a witness produced on behalf of the defendants, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. Merrey.

Q. Mr. Simpson, you are the city clerk of the City of Paterson? A. Yes, sir.

Q. And the board of public works? A. Yes, sir.

Q. And have been clerk of that board since when? A. Nineteen hundred and seven. 10

Q. Did you have the keeping of the records of the vacation of East Thirty-fifth, East Thirty-sixth, and East Thirty-seventh streets? A. Yes, sir.

Q. When did the board of public works come in existence? A. Nineteen hundred and seven.

Q. But you were clerk to the board of aldermen before that time when they had charge of the streets? A. Yes, sir. 20

Q. When the board of public works came into existence did they yield up their powers? A. They did.

Q. In regard to the streets; the vacating and opening—the entire control of them?

By Mr. Hilton.—I object to the question.

A. Yes, sir.

Q. Have the board of aldermen, since the board of works has been in existence, has the board of aldermen ever attempted to exercise any control over any streets? 30

By Mr. Hilton.—I object to the question.

A. No, sir.

Q. Have they, in fact, exercised any control over the vacation of streets? A. No, sir.

Q. Have the board of works exercised that power?

By Mr. Hilton.—I object to the question.

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A. They have.

Q. Have they actually vacated any streets?

By Mr. Hilton.—I object to that question; the proper proof is the record.

A. Yes, sir.

Q. Mr. Standeven, in the vacating of streets by the board of aldermen, and by the board of pub-

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might compare it with the proceedings in the present case of vacating East Thirty-fifth street, East Thirty-sixth street and East Thirty- seventh street? A. The procedure regular is for the city street commissioner to advertise the vacation of the certain street.

Q. That has been invariably the practice? A. Yes, sir.

Q. And you find the same forms back of your time? A. Yes, sir.

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Q. You are familiar with these things? A. Yes, sir.

Q. What is done after the advertisement of vacation? A. A hearing is held.

Q. Where? A. Board of public works.

Q. And if there are any objectors are they heard? A. Yes, sir.

Q. Do you sometimes receive objections in writing? A. Yes, sir.

Q. Did you receive any in this case? A. Yes, sir.

Q. Were they read before the board? A. They were.

Q. That is all.

Cross Examination by Mr. Hilton.

Q. Mr. Standeven, has it been the custom upon instituting proceedings for any street improvements for the board of aldermen or board of public works to direct that the notices be given? A. It has always been done; sometimes verbally, and sometimes by resolution of the board. 10

Q. Do you recollect any direction having been given in this case for the street commissioner to advertise? A. Yes, sir.

Q. Who gave the direction? A. I just don't recall the commissioner who suggested that it be done. 20

Q. Then what was done; was there any order or resolution passed by the board of public works? A. There was a verbal resolution passed, and the street commissioner, who was present, followed out that verbal resolution.

Q. What do you mean by a verbal resolution? A. A verbal motion that the city street commissioner be directed to advertise.

Q. Were you present? A. Yes, sir. 30

Q. Did you put that motion down in your record? A. I did not.

Q. Why didn't you? A. There is a lot of verbal matter that wasn't taken down by the direction of Mr. Cooke; he said the minutes were

getting too voluminous and for me not to put down the verbal motions.

Q. You said in the first place that one of the commissioners directed it to be done, and then that it was a verbal motion; which is correct? A. Both are correct.

Q. How so? A. There was a motion and then he was directed to advertise.

Q. That is a motion made by the board? A. Yes, sir.

Q. And that motion was put and carried? A. Yes, sir.

Q. And you didn't record it? A. No, sir.

Q. That is all.

JAMES E. TAYLOR, a witness produced on behalf of the defendants, being first duly sworn, according to law, testified as follows:

Direct Examination by Mr. Merrey.

Q. Mr. Taylor, you are the city street commissioner? A. Yes, sir.

Q. And you have full charge of the streets of the city? A. Yes, sir.

Q. And your title is city street commissioner? A. Yes, sir.

Q. Were you present at a meeting of the board of public works— A. Yes, sir.

Q. At which a motion was made for the vacation of East Thirty-fifth, East Thirty-sixth and East Thirty-seventh streets? A. Yes, sir.

Q. Have you a clear recollection of that meeting? A. Yes, sir.

Q. Were you ordered to do anything at that time? A. Yes, sir.

Q. What were you ordered to do? A. I was ordered to advertise that the board of public works were going to close up East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street, for the board of public works.

Q. How was that done? A. By resolution. It was on the tenth and they got up and went to the calendar to see when they could hold the meeting.

Q. Who got up? A. Mr. Milson and I think Mr. Cooke went and picked out the date of December eighth, because that was the earliest date. 10

Q. The earliest date that you could get your advertisement in in time? A. Yes, sir.

Q. Did you advertise? A. On the tenth or the eleventh.

Q. You did advertise? A. Yes, sir.

Q. On the tenth or eleventh? A. Yes, sir.

Q. Did you report to them the advertisement and objections that you heard? A. Reported it back on the eighth of December, yes, sir. 20

Q. You have the list of the streets that are macadamized? A. Yes, sir.

Q. You are constantly going about the streets? A. Yes, sir.

Q. Do you know East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street? A. Yes, sir.

Q. Are they used much? A. There is no street there.

Q. How is the grade? A. There is no street there; it is a swamp. 30

Q. Do you know anything about the expense of doing grading work that would be necessary there? A. No; I couldn't say what it would cost.

Q. Do you know where Mr. Sherwood's property is located across the track? A. Yes, sir.

Q. That is all.

Cross Examination by Mr. Hilton.

Q. You say there was a vote passed to have the intention of the board to make these vacations advertised? A. Yes, sir.

Q. Do you recollect who made the motion? A. I don't; I think it was Commissioner Doremus that offered the resolution for to close the streets.

Q. Who made the motion for the advertisement? A. Some of the board; I was directed by the board to advertise for the intentions of the board of public works to vacate those streets.

Q. The question is: how were you directed? A. By the board at the time.

Q. A vote of the board? A. It must have been, or else I wouldn't have done it.

Q. You say you have a distinct recollection? A. Yes; it was a vote of the board.

Q. You could not say who made the motion? A. No; I was sitting back.

Q. But you are sure that motion was made? A. I am sure I got the orders from the board of pubic works.

Q. In what shape? A. Verbal.

Q. You got the orders by the vote? A. I was ordered to advertise.

Q. They voted that you advertise and you proceeded to advertise? A. I was ordered by the board of public works to advertise their intention to vacate those streets.

Q. I was trying to find out how the order was given; in what shape.

By the Commissioner.

Q. How was it given to you? A. By the board.

Q. Which member of the board? A. I don't remember; maybe Mr. Milson; I remember going to the calendar and I remember that was on the tenth of November and they couldn't have the meeting before the eighth of December—the next regular meeting.

Q. That is all. 10

At this point an adjournment was taken until Friday, the fifth day of March, nineteen hundred and fifteen, at ten o'clock A. M.

Met on Friday, the tenth day of March, nineteen hundred and fifteen, at ten o'clock A. M., as per adjournment.

Present:

George S. Hilton, Esq., Attorney for the Prosecutor. 20

John W. Harding, Esq., Attorney for defendant, The East Jersey pipe works.

ALBERT A. WILCOX, a witness produced on behalf of the defendants, being first duly sworn, according to law, testified as follows:

Direct Examination by Mr. Harding.

Q. You are an attorney-at-law practicing in this city? A. Yes, sir. 30

Q. And were you employed about the time of the proposed vacation of these streets—portions of East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street to procure the title of the owners—of certain property owners for the East Jersey pipe company? A. Yes, sir.

Q. You were employed by them? A. Yes, sir.

Q. And did you procure for the pipe company, title for certain of these lots? A. I procured title for thirty-six lots, I believe.

Q. Have you the deeds with you? A. Yes, sir.

Q. I now show you a deed dated February twenty-sixth, nineteen hundred and fifteen, from Mary E. Walder as executor of the estate of Jacob Walder, deceased, and individually, to H. Seaver Jones; did you attend to the procuring of that deed? A. I did.

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Q. Who is Jones? A. Treasurer of the East Jersey pipe corporation.

Deed offered in evidence, and the same is marked Exhibit D-9, on behalf of the defendants.

Q. I show you a deed dated February twenty-sixth, nineteen hundred and fifteen, from the Richardson company to H. Seaver Jones, and ask you if you attended to the execution of that? A. I attended to the drawing of the deed and getting it in shape, but not the execution.

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Q. I show you a deed from H. Seaver Jones and wife, to the East Jersey pipe corporation, dated March twenty-first, nineteen hundred and fifteen, and ask you if you atttended to the drawing and execution of that deed? A. I did.

Q. Now, Mr. Wilcox, I show you a map which is marked in this case Exhibit D-8 for defendants, which shows The East Jersey pipe company's works, and the streets surrounding it. Now, will you show me on this map—will you point out the lots which were conveyed by these deeds just offered in evidence? Just one minute, I wish to offer this last deed.

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Deed offered in evidence, and the same is marked Exhibit D-10 on behalf of the defendants.

A. The deed from the Richardson company to Jones conveyed from 304 to 310 Twenty-first avenue, both inclusive, and 542 to 576, both inclusive, on East Thirty-fifth street.

By the Commissioner. 10

Q. All in one deed? A. All in one deed.

By Mr. Harding.

Q. How about the Walder deed? A. The Walder deed to H. Seaver Jones includes lots 555 to 567, both inclusive on East Thirty-fifth street, and 558 to 570, both inclusive on East Thirty-sixth street.

Q. That is all. 20

Cross Examination by Mr. Hilton.

Q. How about the lot on the map appearing to be in the name of Hinchliffe? A. We have a deed from Mr. Hinchliffe for that lot, and a confirmatory deed from Mrs. Walder covering that lot; because the title was incomplete.

By Mr. Harding.

Q. That is included in the deed in evidence? A. Yes, sir. 30

The deed to the Hinchliffe lot in question is offered in evidence, dated January twenty-fifth, nineteen hundred and fifteen from James C. Hinchliffe and wife, to H.

Seaver Jones, offered in evidence and the same is marked Exhibit D-11 on behalf of the defendants.

Defendants Rest.

It is stipulated and agreed by and between counsel for the respective parties hereto that the deeds showing the title of the East Jersey pipe company, or certified copies thereof, to the land between East Thirty-fifth street and East Thirty-seventh street, may be put in evidence.

By Mr. Hilton.—I offer in evidence a copy of a deed from Margaret O. F. Bronson and John M. Gould and wife, to The Paterson Ribbon Company, dated the nineteenth day of March, eighteen hundred and eighty nine, and recorded in Book L-9 of Deeds for Passaic County, pages 456 &c. There is a deed prior to that, showing how Gould got his title. If there is no objection, I will reserve the right to get a certified copy of that deed. The above deed being marked Exhibit S-20A on behalf of the prosecutor.

The same premises by the same description were conveyed by deed dated February twenty-eighth, nineteen hundred and three, and recorded in Book T-15 of Deeds, page 538 &c., by The Paterson Ribbon company to George F. Kuett and Michael W. Dippel and Frederick C. Strubberg. Then Frederick C. Strubberg, by deed dated June twenty-second, nineteen hundred and four, conveyed his interest in the premis-

es to George F. Kuett and Michael W. Dippel, and said deed is recorded in Book Q-16 of Deeds, pages 113 &c. Then by deed dated May twenty-first, nineteen hundred and three Kuett and Dippel conveyed an interest in the premises to Adolph (or Adolf) Muller. That put the title to the premises in Kuett, Dipple and Muller. Afterwards Kuett died, intestate, leaving one child named Verner (or Verna) F. Kuett, who is a minor, and also left his widow, Mary B. Kuett, and on July seventeenth, nineteen hundred and nine, Mary B. Kuett was appointed guardian of the said Verner F. Kuett, by the Orphans' Court of the County of Passaic. That left the title in Dippel. Muller and Verner F. Kuett, with the dower right in Mary B. Kuett. The persons last named are the ones made defendants in this suit, on account of those premises. The premises are described in the same way in all these conveyances.

GEORGE S. HILTON, recalled.

Cross Examination by Mr. Harding.

Q. These persons have been served with the certiorari in these proceedings, before the taking of testimony? A. Yes; before the return of the writ.

Q. None of these persons have appeared before any of these hearings? A. No.

Q. Nor have they given you any instructions in any wise to appear on their behalf? A. No.

Q. And as far as you know they have no objections to the vacation of those streets? A. No; Mrs. Kuett, when I served the notice of taking testimony upon her said that they would take no

action in the matter, and when I served some of the papers, I forget which ones now, on the parties, I saw personally Mr. Muller, and he said exactly the same thing; that they would take no action in the matter.

Q. That is all.

JOHN H. REYNOLDS, a witness produced on behalf of the prosecutor, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. Hilton.

Q. You are an attorney and counsellor at law of this State? A. Yes.

Q. Practicing in the City of Paterson? A. Yes.

Q. How long have you been such? A. Since eighteen hundred and seventy-nine; thirty-six years.

Q. Were you present at the meeting of the board of public works of the City of Paterson, at the time the ordinance to vacate portions of East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street was first read? A. Was first read?

Q. Yes. A. I don't remember; I was at two meetings; I was at the meeting when the ordinance was passed. Whether I was there at the first meeting or not, I don't remember.

Q. You were there when the ordinance was passed? A. Yes.

Q. Was anything said then with regard to the lots of lands that would be purchased by The East Jersey pipe company? A. Yes.

Q. Well, do you recollect what was said on that subject? A. My recollection is that the representative of the company stated that arrangements had been made, by which the pipe works was to acquire title on both sides of East Thirty fifth street up to the west line, to which the street was to be closed—no; the south line.

Q. Anything about East Thirty-sixth street and East Thirty-seventh street? A. I don't remember anything about those two streets for the reason that I was interested particularly in East Thirty-fifth street. 10

Q. Don't remember anything about that? A. No.

Q. You have spoken of the representative of the pipe company, who was he? A. Mr. Nelson.

Q. Do you know what office he holds? A. No.

Q. Was anything said by anybody about the vacated portions of East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street? A. I don't remember. 20

Q. Do you remember Mr. Lambert getting up and speaking on the subject? A. I remember that Mr. Lambert was present, and he stated that arrangements had been made for the purchase of Mrs. Walder's property, for the purchase of the lots on East Thirty-fifth street, either by the pipe works or the chamber of commerce, up to the rear line fronting on Market street.

Q. When were those statements made with reference to putting the ordinance in question on its final passage? A. Just before. 30

Q. Were they made in response to the call of anybody? A. There was suggestions made by somebody that the proposition of the pipe company was a one sided one; that is in this particu-

iar; the pipe works said they could not build their works unless they had these streets vacated, and that the pipe works did not bind themselves to build these works if the ordinance did pass.

Q. Did anybody call for remarks that led to the statement with regard to these particular lots? A. Do you mean the chairman?

Q. Yes. A. I believe Mr. Cooke, the chairman. asked if the lots had been purchased.

10 Q. Do you remember whether there was any question put to the representative of the pipe works which led him to the response he made? A. It is my opinion that somebody did ask him and Mr. Nelson did reply that arrangements had been made for the purchase of the property on East Thirty-fifth street.

Q. Do you remember whether, in consequence of the statement made by Mr. Lambert, any objections were withdrawn? A. I believe that Mr.

20 Hunziker remarked that Mrs. Walder withdrew her objection.

Q. That is all.

Cross Examination by Mr. Harding.

Q. Who was Mr. Lambert? A.. He was the President of the Chamber of Commerce.

Q. Was he in favor of, or against the passing of the ordinance vacating these streets? A. I think he was in favor of it.

30 Q. He openly advocated it in this meeting, didn't he? A. Yes.

Q. Did he represent any property there? A. Not that I know of.

Q. Do you remember who represented the estate of Jacob Walder? A. No, sir; I was attend-

ing these meetings with reference to Mrs. McGee.

Q. The estate of Jacob Walder, as it is marked on this map, from Market street, running up to the pipe works, and East Thirty-fifth and East Thirty-sixth streets? A. Yes, sir.

Q. And then the property of the city on East Thirty-sixth to East Thirty-seventh streets? A Yes, sir.

Q. And the city on the east side of East Thirty-seventh street included? A. Yes, sir. 10

Q. You didn't know whether Mr. Lambert owned any property out there or not? A. I don't know whether he did or not.

Q. There were two of these meetings? A. Yes, sir.

Q. Attended by different persons? A. Yes, sir.

Q. Some favoring and some objecting? A. Yes, sir.

Q. You know there were petitions sent in? A. 20 I don't know.

Q. The petitions were read? A. Yes, sir

Q. The meeting was largely attended? A. Yes, sir.

Q. And thoroughly discussed? A. Well, I don't know whether it was thoroughly discussed or not.

Q. No restrictions to anybody? A. No; not at all.

Q. And they were meetings of considerable im- 30 portance—well attended? A. Yes, sir.

Q. There was quite a room full at the first meeting? A. That was the last one.

Q. And it was understood at the first meeting that there would be another meeting? A. It was adjourned.

Q. The newspapers were full of it at the time? A. I don't remember about what was in the newspapers.

Q. That is all.

By Mr. Hilton.

Q. You spoke of petitions that were presented and read at this meeting; how many petitions were presented and read? A. I don't know; I didn't quite understand Mr. Harding's question. My recollection is that the ordinance was read, and then quite some objections read; I don't remember of any petitions being read.

Q. Those meetings were the general meetings of the board of public works? A. Yes, sir.

Q. Some general and some adjourned? A. Yes, sir.

Q. And a great deal of other business was transacted besides the business of vacating these streets? A. Oh, yes; the meeting wasn't for that purpose specifically.

Q. Not called for this business specially? A. No.

Q. That is all.

JOHN A. McKENNA, a witness produced on behalf of the prosecutor, being first duly sworn according to law, testified as follows:

Direct Examination by Mr. Hilton

Q. Where do you reside? A. 349 Summer street, Paterson.

Q. What is your business? A. Assistant Treasurer of the East Jersey pipe company.

Q. Well, you are not the book-keeper? A. Yes, sir; I am the book-keeper.

Q. How long have you been the book-keeper? A. Since the seventh day of July, nineteen hundred and ten; either the sixth or seventh.

Q. The works or buildings of that company were, to a very large extent, destroyed by fire quite recently? A. September eighth, nineteen hundred and fourteen, we had a fire.

Q. How extensive was the destruction wrought by the fire? A. Complete, with the exception of the office, the dipping shed, and part of the boiler house, and old store house, and a pipe storage place. 10

Q. Can you tell how many men were employed by the company at or about the time of that fire? A. All hands I couldn't tell you, but the day after the fire it was intended to put on considerable more men, on account of a large order we had for caisson material for the Flynn-O'Rourke company; there were three of them, and if it had not been for the fire we expected that week commencing September seventh, to have at least anywhere from two hundred to two hundred and fifty men employed? 20

Q. All told? A. All told.

Q. How many were the additional ones to be put on, on account of those contracts? A. Off hand, I cannot answer that, but I can say this with reference to any order in the nature of our work—it depends on what the contract is, and whether both shifts are working, how many men we employ. 30

Q. State as near as you can, the number of men ordinarily employed? A. When one shift or two shifts work?

Q. State them both. A. A large contract in one shop, anywhere from seventy-five to one hundred men, in one shop, and in the other shop from seventy-five to one hundred or one hundred and twenty-five in the other.

Q. About two hundred in both shops? A. No; I didn't say there were two hundred in both shops

Q. What did you say? A. I say from seventy-five to a hundred in one shop, and from seventy-
10 five to one hundred and twenty-five in the other

Q. That would be ordinary? A. Provided the job wasn't a rush job; it depends on circumstances.

Q. That is all.

It is admitted that the property which is marked "City Property" on the map marked Exhibit D-8 for the defendants, is held by the city by a tax title, and it con-
20 sists of lots from 571 to 585 both inclusive, on East Thirty-sixth street; 574 to 590 East Thirty-seventh street, both inclusive, and 559 to 593 both inclusive on East Thirty-fifth street.

Cross Examination by Mr. Harding.

Q. Is it the purpose of your company to increase its plant in case you can use these vacated streets?

30

By Mr. Hilton.—I object to the question.

A. Yes, sir.

Q. Do you expect, by the increase, to employ more hands? A. Considerable more.

By Mr. Hilton.—I object to this as not being proper cross examination, and being irrelevant, incompetent and immaterial.

Q. To what extent? A. Considerable.

Q. How much; can you tell us? A. Not off hand I couldn't; it depends on the nature of our business.

By Mr. Hilton. 10

Q. Where do you get your information? A. On the enlarged plant we are building up there, and what we are figuring on.

Q. You are building a plant, are you? A. Yes, sir.

Q. How long have you been engaged in that? A. Since the twentieth of March.

Q. Since the twentieth of March? A. Before that we started to put in foundations.

Q. How much before? A. I couldn't tell off-hand, without looking up the books. 20

By the Commissioner.

Q. About when? A. I can't tell you that.

By. Mr. Hilton.

Q. Did you commence as early as the first of March? A. Oh, yes.

Q. As early as the fifteenth of February? A. Oh, yes. 30

Q. First of February? A. I wouldn't say that.

Q. That will do.

SAMUEL S. SHERWOOD, the Prosecutor in the above entitled case, having already been sworn, is recalled and testifies as follows:

Direct Examination by Mr. Hilton.

Q. The railroad in Twenty-first avenue, how far does it extend easterly from East Thirty-fifth street? A. To Vreeland avenue.

Q. It extends to East Thirtieth street, does it not? A. You mean west.

Q. So it is. A. Right on to the river.

Q. How far does it go through Twenty-first avenue, where it stops? A. It commences leaving Twenty-first avenue about Vreeland avenue, and gradually gets a little way off of it; it begins to leave at Vreeland avenue.

Q. It commences at East Thirty-fifth street? A. Yes, sir.

Q. How far does it run that way, east, through Twenty-first avenue? A. It runs to Vreeland avenue and then gradually goes north to East Forty-first street, and then it is entirely off the avenue.

Q. For what distance, running east from East Thirty-fifth street, is there a space for a street twenty-five feet wide on that street? A. From Vreeland avenue to East Thirty-fifth street.

Q. Is there a fence at the present time; along the railroad in that section? A. There is a fence on the north side.

By Mr. Harding.

Q. All along the lands in question? A. Yes, sir.

By Mr. Hilton.

Q. How far is the fence along the section of the railroad which was this twenty-five feet on each side—how about the fence along the railroad? A. The fence is on the north side, but there is none on the south side.

Q. None at all? A. I haven't been up all the way; there was one originally on the south side, but they removed it down by the pipe company.

Q. When was that fence put there? A. I cannot tell you.

Q. As near as you can remember? A. Less than a year ago.

Q. Less than a year ago? A. Considerably less than a year; it was particularly on my mind, because when they first put it up they had an accident right after that and killed a man.

Q. Give us, Mr. Sherwood, the general description of the land between Market street and Twenty-first avenue, through which East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street runs? A. The land is level, high and dry, first rate farm land; I farmed it and raised fine crops all through there; it is high except at East Thirty-fifth street, a brook ran right through East Thirty-fifth street, but it had dry banks, and I used that for a pasture lot.

Q. Is there a swamp on the section mentioned? A. No; there is no swamp there; there is a place that looks like a swamp on the south side where water gathers.

Q. Is there a brook there now? A. No brook there now; the brook went into the sewer.

Q. State whether the streets mentioned are at, or near the grade of Market street where they

join Market street? A. Thirty-fifth street at Market street, as it is now graded, is I suppose two and a half to three feet below grade.

Q. Where it joins Market street? A. Yes, where the brook crossed the street, at Thirty-sixth street it is a little below the grade; at Thirty-seventh street it is practically on grade.

Q. East Thirty-eighth street has been graded? A. Yes, sir.

10 Q. When was that graded? A. Some years ago.

Q. Did you know about the work being done, when it was done? A. The grading?

Q. Yes. A. Yes.

Q. Can you tell us what the probable difference of cost would be between the grading of East Thirty-eighth street, and the grading of East Thirty-fifth street, Thirty-sixth or East Thirty-seventh street? A. Nothing, except the differ-
20 ence between the material and labor.

Q. What do you mean by that? A. Why, it would take no more material, but it would cost more for labor now, because everything is so much higher.

Q. When you go down to the railroad where it goes through Twenty-first avenue, state how the railroad stands with regard to the natural lay of the ground? A. "Natural lay" is hardly the right word, because the railroad is about four feet
30 higher than the established grade, but as it stands now it is perfectly level, but the pipe works have been filling there and they have filled it to the extent of their property north.

Q. How do you know the pipe works have been filling in their ground? A. I saw them at it, and

they have done a very good job, too, I will give them credit for that.

Q. How did the railroad stand before the work was done, with regard to the surface of the ground? A. It was not much below, but it was uneven; the ground was not thoroughly level; there has been some years since there was any traffic on there.

Q. On where? A. Twenty-first avenue.

Q. What I mean was coming down say East Thirty-seventh street where you strike the rail road, as it was before the filling was done by the pipe company, how far was the railroad above the natural level of the land? A. I don't suppose it was a foot. 10

Q. Don't suppose it was a foot? A. No; I say it was uneven.

Q. Do you live near this property? A. Yes, sir; I live on the corner of East Thirty-eighth street and Twentieth avenue. 20

Q. Where, with reference to the pipe works? A. One short and one long block.

Q. That is all.

Cross Examination by Mr. Harding.

Q. Mr. Sherwood, the fence that you spoke of, along your property was built by the railroad company, was it not? A. Yes.

Q. That fence extends along the north line of the right of way of the railroad company, does it not? A. Yes. 30

Q. And that fence extends all along the line of your property which is in question in this suit, on the north side of the railroad company? A. It does.

Q. So, at present, you have no access whatever through to the land that would be covered by East Thirty-fifth street, East Thirty-sixth street or East Thirty-seventh street, by reason of the fence? A. It can be removed.

Q. At present? A. Yes, sir.

Q. In other words, the railroad company has put up a fence, which, if it remains there would prevent you from crossing the railroad at East Thirty-fifth, East Thirty-sixth and East Thirty seventh streets? A. Yes.

Q. Now, when it comes to questions of level with respect to the railroad and Market street, and the grade of Market street, I suppose you have given us your opinion, based not upon measurements, but your observation? A. Yes, observation.

Q. There is no doubt, is there, that if you should draw a level from the upper part of the rails on the Susquehanna track to Market street, along the line which is covered by any of these so-called streets that have never been laid out, namely East Thirty-fifth street, East Thirty-sixth street and East Thirty-seventh street, you would have to fill in, wouldn't you? A. More or less fill.

Q. There would be filling in; would there not? A. Of course there would be filling in.

Q. Now, that is so with reference to every street that we have mentioned—all these three streets? A. Of course, you would have to grade every street you touch.

Q. All this land to the south of Twenty-first avenue and Market street is lower than the rails of the railroad company, and Market street? A. Yes; I think there is; Market street is higher.

Q. You don't understand me; the land between

Market street and the railroad is lower? A. The grade of the land at Twenty-first avenue?

Q. Is there any doubt about this? If you should draw a plane from the rails of the railroad, extending south to Market street, with the land itself as it now lies between Twenty-first avenue and Market street, the land there is lower than that plane would be? A. No, sir.

Q. What? A. It is not.

Q. It is not lower? A. It is lower at one end and higher at the other, because the trend of the land is toward the railroad. 10

Q. Do you mean to say that at any point, as you leave East Thirty-seventh street on Market street, until you get to East Thirty-fifth street, that the surface of the land to the north is not lower than the grade of the street? A. I don't think so.

Q. When did you see it last? A. Friday; last Friday.

Q. Are you prepared to swear positively to that fact? A. I am, I believe. 20

Q. Tell me where, and for how great a distance. Now, I am asking you if you rode along Market street, westerly, toward the city, from where what is now called East Thirty-seventh street to East Thirty-fifth street, if you can tell me any place where the land along the north side of the street is not lower than the grade of Market street? A. Yes, sir.

Q. Where? A. At Thirty-sixth street. 30

Q. Is there any place where it is not lower if you were to leave the street? A. Yes, sir.

Q. Where? A. East Thirty-sixth street.

Q. How far does that extend? A. Oh, perhaps one hundred feet.

Q. Is there any other place where it is not low

er? A. There is no other place where it is not lower than Market street as it stands today, except between East Thirty-fifth street and East Thirty-sixth street.

Q. That you say you think is a trifle higher for about one hundred feet? A. Yes.

Q. After you pass along how is it? A. Lower at East Thirty-fifth street, because there is a brook there.

10 Q. Isn't that a wet place generally? A. It is as dry as this floor.

Q. When it rains doesn't the water collect there? A. No reason why it should.

Q. You mean to say the last rain didn't collect and pool there? A. When I was there the other day it was dry.

Q. How much filling would have to be filled in so as to make it a level grade from Market street to the railroad? A. No one could tell without 20 putting instruments on it. If you will allow me to explain one point you will see what I mean. When I purchased that farm there was a brook, and the water runs from Market street to Twenty-first avenue, down to the river, and the way the water runs in the way the grade of the land runs.

Q. That is all.

By Mr. Hilton.

30 Q. Do you know the reason why the railroad company put up that fence? A. No.

Q. You know what they told you? A. Yes.

Q. Who told you? A. I got a letter from one of the representatives—

By Mr. Harding.—I object on the ground that it is hearsay.

Q. What did the representatives of the com pany tell you?

By Mr. Harding.—I object to it on the ground that the witness is attempting to answer a question with a declaration that was not made by any officer of the company who was authorized to make it.

Q. Answer the question? A. I can't remember the conversation; there was several 10

Q. Answer what the impression was you got.

By Mr. Harding.—I object to it.

A. To keep people off the track and avoid accidents.

Q. That is all.

At this point an adjournment was taken until Tuesday, the ninth day of March, nineteen hundred and fifteen, at ten o'clock A. M. 20

The taking of testimony in the above entitled cause was continued on Tuesday, the ninth day of March, nineteen hundred and fifteen, at 10 o'clock A. M., as per adjournment.

Present:

George S. Hilton, Esq., for the Prosecutor.

Edward F. Merrey, Esq., for the City of Paterson. 30

John W. Harding, for The East Jersey pipe company.

By Mr. Harding.—I offer in evidence the following deeds, showing the title of the property now owned by The East Jer-

sey pipe company; the first being a deed from John M. Gould, et al., to Joseph J. McKee and Thomas H. Milson, dated March 1st, 1890, and recorded in the clerk's office of the County of Passaic, in book Y-9 of deeds, pages 262, &c., and the same is marked Exhibit D-12, on behalf of the defendants.

Also a deed from John M. Gould, et als., to Joseph J. McKee and Thomas H. Milson, dated February 12th, 1891, and recorded in the clerk's office of the County of Passaic, in book H-10 of deeds, pages 516, &c., and the same is marked Exhibit D-13 on behalf of the defendants.

Also a deed from Elizabeth Crawford to Joseph J. McKee and Thomas H. Milson, dated February 18, 1895, and recorded in the clerk's office of the County of Passaic, in book X-11 of deeds, pages 338, &c., and the same is marked Exhibit D-14, on behalf of the defendants. Also deed from Joseph J. McKee and Josephine B., his wife, to Thomas H. Milson, dated December 11th, 1895, and recorded in the clerk's office of Passaic County, in book H-12 of deeds, pages 36, &c., and the same is marked Exhibit D-15, on behalf of the defendants.

Also deed from Thomas H. Milson and Angeline J., his wife, to The East Jersey pipe company, dated February 27th, 1897, and recorded in the clerk's office of the County of Passaic, in book P-12 of deeds, pages 415, &c., and the same is marked Exhibit D-16 on behalf of the defendants.

Also deed from Sydney M. Gould, et als., to The East Jersey pipe company, dated May 5th, 1902, and recorded in the Passaic County clerk's office, in book R-15 of deeds, pages 156, &c., and the same is offered in evidence and marked Exhibit D-17 on behalf of the defendants.

THOMAS H. MILSON, a witness produced on behalf of the defendants, having already been sworn, is recalled and testified as follows: 10

Direct Examination by Mr. Harding.

Q. Mr. Milson, from the numerous deeds that have just been offered in evidence, to you and Joseph J. McKee, did you hold the title to the different sections of property therein mentioned? A. Yes, sir.

Q. And did you acquire this property at about the time these deeds are dated? A. Yes, sir. 20

Q. And did you and Mr. McKee hold all of the different properties conveyed by these deeds down to the time you and Mr. McKee conveyed to The East Jersey pipe works? A. Mr. McKee sold out to me, and I sold to the pipe company.

Q. Now, up to the time Mr. McKee sold to you, did you and Mr. McKee hold all of the property? A. Not all of the property.

Q. Some of the properties that was conveyed by the deeds that have been offered were owned by you and Mr. McKee? A. Yes, sir. 30

Q. Now, confining yourself to those properties, Mr. McKee conveyed his interest to you? A. Yes, sir; and I bought some myself.

Q. And in addition you acquired some other properties? A. Yes, sir.

Q. And you conveyed those to The East Jersey pipe company? A. Yes, sir.

Q. Those properties that you and Mr. McKee held together did you hold continued, peaceable and quiet possession of them from the time you got the deed down to the time he conveyed them to you? A. Yes, sir.

10 Q. And did you then hold continued, peaceable and quiet possession of them down to the time you conveyed them to the East Jersey pipe company? A. Yes, sir.

Q. And the property you bought individually, did you have such continued, peaceable and quiet possession of those down to the time you conveyed them to the East Jersey pipe works? A. Yes, sir.

Q. Did you actually possess it and hold it? A.
20 Yes, sir.

Q. Did anybody ever claim it, or make any demand for it at any time? A. No, sir.

Q. Either that or the property held by you individually? A. No, sir.

Q. That is all.

No Cross Examination.

By Mr. Harding.—I was about to produce a witness to show that The East Jersey pipe company has since the date of the
30 deeds to them held continued and peaceable and quiet possession down to the present time.

By Mr. Hilton.—I will admit that.

EUGENE WICKHAM, a witness produced on behalf of the defendants, being first duly sworn, according to law, testified as follows:

Direct Examination by Mr. Merrey.

Q. You are the receiver of taxes of the City of Paterson? A. Yes, sir.

Q. Have you deeds in your possession for the City of Paterson for the following: 565 to 593 East Thirty-seventh street? A. Yes, sir. 10

Q. 574 to 590 East Thirty-seventh street? A. Yes, sir.

Q. 571 to 585 East Thirty-sixth street? A. Yes, sir.

> I now offer in evidence three deeds from the receiver of taxes and assessments of the City of Paterson to the mayor and aldermen of the City of Paterson, all three of which are dated January 20th, 1911, and 20 are recorded in the clerk's office of the County of Passaic, in book 1 of deeds, pages 114, 113 and 102, respectively, and the same is marked Exhibits D-18, D-19 and D-20, respectively.

Q. That is all.

Cross Examination by Mr. Hilton.

Q. What is your office? A. Receiver of taxes. 30

Q. How long have you been in that office? A. Since February, nineteen hundred and thirteen.

Q. Do you know whether or not the premises in the locality mentioned in the deeds are and have been assessed by street numbers or not? A.

Yes, they have been assessed by street numbers

Q. That is all.

By Mr. Hilton.—I have with me a printed book, published in 1867, in this city by Chiswell & Wurts, entitled Charter, Supplement and Ordinances of the City of Paterson. The records in the clerk's office, including the books of ordinances having been destroyed by fire, I offer this old book in evidence, for the purpose of using the ordinances contained on page 107 in said book, and the same is marked Exhibit S-21, on behalf of the prosecutor.

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ALLOWANCE, AMENDMENTS AND SERVICE OF WRIT.

Writ allowed January 18th, 1915, returnable February 6th, 1915. Time for returning same extended by order of the Court to February 11th, 1915. Order for amendment of writ by changing the name of "The Mayor and Aldermen of the City of Paterson", to "City of Paterson", and inserting "The National Ribbon Company" as a defendant made January 30th, 1915. Order for second amendment of writ inserting "Michael W. Dippel, Adolph Muller, Verner F. Kuett and Mary B. Kuett, individually and as guardian of said Verner F. Kuett" as defendants made on February 5th, 1915. Writ as originally issued served on the City of Paterson and the Board of Public Works of said City on January 20th, 1915 Writ served as first amended on the East Jersey Pipe Company and National Ribbon Company on February 3rd, 1915. Writ served as secondly amended on the said Michael W. Dippel and Adolph Muller, on February 8th, 1915, and on said Verner F. Kuett and Mary B. Kuett, individually and as guardian of said Verner F. Kuett on Febuary 8th, 1915.

PROSECUTOR'S EXHIBITS.

S-1. Deed from John P. Kipp and wife to Samuel S. Sherwood, dated August 1st, 1859, and recorded in the Clerk's Office of Passaic County, August 3rd, 1859, in Book F-2 of Deeds, pages 264, &c. Conveys the principal part of the premises in question and other premises.

10 S-2. Certified copy of deed from Edo Kip and wife to Samuel S. Sherwood, dated October 22nd, 1859, and recorded in said Clerk's office on December 9th, 1859, in Book F-2 of Deeds, page 64. Conveys the rest of the premises in question not conveyed by the above mentioned deed, together with other premises.

S-3. Map of "property of Samuel S. Sherweed, at Dundee Lake, Paterson, N. J., dated August 5th, 1871," and filed in said Clerk's Office on
20 December 2nd, 1873, and numbered "141".

S-4. Robinson's Atlas of the City of Paterson.

S-5. Deed from Nathaniel Wheeler to Samuel S. Sherwood, dated January 21st, 1869, recorded in the Clerk's Office of the County of Passaic, on February 10th, 1870, in Book H-3 of Deeds, pages 512, &c. Conveys the premises in question in this case together with other premises.

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S-6. Certified copy of the deed from Samuel S. Sherwood and wife, to Alexander R. Sheppard, dated April 25th, 1874, and recorded in said Clerk's Office, in Book B-5 of Deeds, on pages 115, &c. Conveys by metes and bound lots in the City of Paterson numbers 555 to 557 inclusive on

the east side of East 35th Street, 558 to 582 inclusive, on the west side of East 36th Street and 923 to 937 inclusive on the northerly side of Market Street, as laid down on map mentioned in S-3.

S-7. Deed from Samuel S. Sherwood and wife to Willett Bronson, dated October 19th, 1877, and recorded in said Clerk's Office of Passaic County on May 31st, 1878, in Book A-6 of Deeds, on pages 477, &c. Conveys, among other premises, lots numbers 336 to 350, 21st Avenue, 545 to 585 East 36th Street, 548 to 590 East 37th Street, and 945 to 955 Market Street; also 356 to 370 21st Avenue, 547 to 593 East 37th Street, 550 to 598 East 38th Street, and 967 to 981 Market Street; all of said lots being as laid down on aforesaid map.

S-8. Deed from Frank Van Cleve, auditor, to Margaret O. F. Bronson, dated July 15th, 1885, and recorded in said Clerk's Office on July 30, 1885, in Book A-8 of Deeds, pages 537, &c. Conveys among other premises, lots in the City of Paterson, numbers 316 to 330 21st Avenue, 543 to 553 East 35th Street, 546 to 556 East 36th Street, 336 to 350 21st Avenue, 545 to 585 East 36th Street, 548 to 590 East 37th Street, 945 to 959 Market Street, 356 to 370 21st Avenue, 547 to 593 East 37th Street, 550 to 598 East 38th Street, 967 to 981 Market Street, 335 to 349 21st Avenue, 507 to 517 and part of 505 East 36th Street, 510 to 520 and part of 508 East 37th Street, as laid down on map mentioned in S-3.

S-9. Certificate copy of a deed from Margaret C. F. Bronson and others to John M. Gould and Elizabeth M. Sherwood, wife of Samuel S. Sherwood, dated June 25th, 1889, and recorded in said Clerk's Office in Book P-9 of Deeds, on pages 332, &c. Conveys lots in the City of Paterson numbers 335 to 349 21st Avenue, 507 to 517 and part of 505 East 36th Street and 510 to 520 and part of 508 East 37th Street as laid down on said map.

S-10. Certified copy of will of Elizabeth M. Sherwood, dated September 30th, 1887. Gives and devises all her estate to her husband, Samuel S. Sherwood.

S-11. Certified copy from the Clerk's Office of the County of Passaic of the return of the courses and distances of 35th Street, in the City of Paterson, in said County, made by J. H. Goetschius, C. E., dated February, 1869, and recorded July 30th, 1869.

S-12. Certified copy from said Clerk's Office of the return of the courses and distances of 36th Street in said City of Paterson, made by J. H. Goetschius, C. E., and dated February, 1869, and recorded July 30th, 1869.

S-13. Certified copy from said Clerk's Office of the return of the courses and distances of 37th Street, in said City, made by J. H. Goetschius, C. E., and dated February, 1869, and recorded on July 30th, 1869.

S-14. Map showing plan of vacating parts of East 35th, East 36th and East 37th Streets, prepared by H. J. Harder, City Surveyor.

S-15. Certified copy of deed, dated October 13th, 1881, from Samuel S. Sherwood, and Elizabeth M., his wife, Willett Bronson and Margaret O. F., his wife, and Robert R. Bronson, and Isabella, his wife, to the New York, Susquehanna & Western Railroad Company, recorded in said Clerk's Office on February 24th, 1892, in Book Z-6 of Deeds, pages 212, &c. Conveys right of way through 21st Avenue.

S-16. Certified copy of an ordinance to vacate a part of East 36th Street, passed December 16th, 1902.

S-17. Type-written copy of short hand notes relating to proceedings on February 11th, 1870, of the Board of Aldermen of the City of Paterson, in the adoption of a map of said city and copy of an ordinance of said board changing the names of streets, and naming new streets, passed February 28th, 1870.

S-18. Invitation to Samuel S. Sherwood to attend the first excursion of the New Jersey Midland Railroad Company, on the opening of it's road, dated June 12th, 1872.

S-19. Old contract between Samuel S. Sherwood and the New Jersey Western Railroad Company for right of way, dated January 29th, 1870.

S-20. Certified copy of a deed from Samuel S. Sherwood and wife to Nathaniel Wheeler, dated May 2nd, 1864, and recorded in Passaic Coun-

ty Clerk's Office in Book R-2 of Deeds on pages 219, &c. Conveys the same premises from Sherwood to Wheeler that were subsequently conveyed by Wheeler to Sherwood by deed mentioned in S-5.

S-20-A. Certified copy of a deed from Margaret O. F. Bronson and John M. Gould and wife, to the Paterson Ribbon Company, dated March 19th, 1889, and recorded in Passaic County Clerk's Office in Book L-9 of Deeds on pages 456, &c. Conveys lots in the City of Paterson, numbers 356 to 370 21st Avenue, 550 to 566 East 38th Street and 547 to 563 East 37th Street as laid down on map mentioned in S-3.

S-21. Printed book entitled Charter, Supplement and Ordinances of the City of Paterson, published in 1867, and containing the following ordinance:

"An ordinance to enable the Mayor and Aldermen to prescribe and adopt the locations of streets hereafter to be opened.

"The Mayor and Aldermen of the City of Paterson do ordain as follows:

"Sec. 1. That there be made, pursuant to the provisions of the seventeenth section of the Act of the Legislature, approved April 4th, 1867, entitled 'A further supplement to the Act entitled 'An Act revising and amending the Act to incorporate the city of Paterson, approved March 14th, 1861;' " such surveys, maps and returns as shall be necessary to enable the said Mayor and Aldermen to prescribe and adopt the location, width and grade of streets, in the said city, hereafter to be opened.

"Sec. 2. That to accomplish in part the purpose contemplated by said section of said Act, and by the first section of this ordinance, there shall be employed a suitabe civil and topographical engineer and other proper persons who shall be subject to the direction of the Committee on Streets, or such other committee as said Mayor and Aldermen may appoint for that purpose.

"Sec. 3. This ordinance shall take effect immediately. 10

Passed, June 3d, 1867.

H. A. Williams, *Mayor.*

Attest,

Archie Henderson, *Clerk.*

Copy of official City Map called the Goetschius map, put in evidence on behalf of the prosecutor, but not marked.

Records put in evidence by the prosecutor without objection: 20

No. 1. Deed from Margaret O. F. Bronson and Willett Bronson, her husband, to John M. Gould, dated June 25th, 1889, and recorded in the Office of the Clerk of Passaic County in Book P.-9 of Deeds, on pages 312, &c. Conveys premises described in Exhibit D-17.

No. 2. Deed from same to same, dated same, and recorded in said Office in Book P-9 of Deeds on pages 318, &c. Conveys premises described in Exhibits D-12 (2), and D-13. 30

No. 3. Deed from John M. Gould and wife to Elizabeth M. Sherwood, wife of Samuel S. Sherwood, dated June 25th, 1889, and recorded in said

Clerk's Office in Book P-9 of Deeds on pages 326, &c. Conveys premises described in Exhibit D 17.

No. 4. Deed from same to same, dated same, recorded in said Clerk's Office in Book P-9 of Deeds, on pages 330, &c. Conveys premises described in Exhibits D-12 (2), and D-13.

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DEFENDANTS' EXHIBITS

D-1, D-2, D-3, D-4, D-5, and D-6, photographs made by Charles Heinrichs.

D-7. Petition to the Board of Public Works, from 32 real estate owners in the vicinity of the East Jersey Pipe Works, praying said Board to do all in its power to prevent the East Jersey Pipe Works from leaving the City, dated December 12th, 1914.

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D-8. Map showing plan of vacating parts of East 35th Street, East 36th Street and East 37th Street, by H. J. Harder, City Engineer.

D-9. Deed from Marie A. Walder, individually and as executrix under the last will and testament of Jacob Walder, deceased, to H. Seaver Jones, dated February 26th, 1915, and acknowledged February 27th, 1915, not recorded. Conveys lots in Paterson numbers 555, 557, 559, 561, 563, 565, 567, on the east side of East 35th Street, and 558, 560, 562, 564, 566, 568, and 570, on the west side of East 36th Street, as laid down on the map mentioned in S-3. Also lots 558 and 560 East 36th Street as laid down on the City map. Also 566

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as laid down on the City map "being the same premises heretofore sold by Marie Walder to James C. Hinchliffe, said deed having been made and executed by said Marie Walder as an individual, whereas title was vested in her as executrix, and this lot was included in the description herein that the same may be a confirmatory deed as to said lot."

D-10. Deed from the Richardson Company, a corporation, to H. Seaver Jones, dated February 25th, 1915, proved March 3rd, 1915. Not recorded. Conveys lots in Paterson, numbers 304, 306, 308, 310, 542, 544, 546, 548, 550, 552, 554, 556, 558, 560, 562, 564, 566, 568, 570, 572, 574, 576, as laid down and shown on map entitled "Map of Property of the Estate of Edo Kip, Paterson, N. J., May, 1909." Being in fact the tract shown on the vacation map D-8 as 304 to 310 21st Avenue, and 542 to 576 East 35th Street.

D-11. Deed from H. Seaver Jones and wife to East Jersey Pipe Corporation, a corporation duly organized under the laws of the State of Delaware, dated March 2nd, 1915, not recorded. Conveys the same premises that were conveyed to H. Seaver Jones by the deeds metioned in Exhibits 9 and 10 with the exception of lots numbers 556, 558 and 560 as laid down on the City map conveyed by D-9.

D-12. Deed from James C. Hinchliffe and wife to H. Seaver Jones, dated January 25th, 1915, acknowledged same day. Not recorded.

Another exhibit marked D-12. Deed from John M. Gould and wife, and Elizabeth M. Sherwood and Samuel S. Sherwood, her husband, to Joseph

J. McKee and Thomas H. Milson, dated March 1st, 1890 and recorded in said Clerk's Office in Book Y-9 of Deeds, on pages 262 &c. Conveys lots in Paterson, numbers 336, 338, 340, 342, 344, 346, 348 and 350 21st Avenue, 545, 547, 549, 551, 553, 555, 557, and 559 East 36th Street, and 548, 550, 552, 554, 556, 558, 560 and 562 East 37th Street as laid down on the map mentioned in S-3.

10 D-13. Deed from John M. Gould and wife and Elizabeth M. Sherwood and Samuel S. Sherwood, her husband, to Joseph J. McKee and Thomas H Milson, dated February 12th, 1891, and recorded in said Clerk's Office in Book H-10 of Deeds on pages 516 &c. Conveys lots in Paterson numbers 561, 563, 565, 567 and 569 East 36th Street, and 564, 566, 568, 570 and 572 East 37th Street as laid down on map mentioned in S-3.

20 D-14. Deed from Elizabeth Crawford to Joseph J. McKee and Thomas H. Milson dated February 18th, 1895, and recorded in said Clerk's Office in Book X-11 of Deeds on pages 338 &c. Conveys lots in Paterson 546 and 548 on East 36th Street and 316, 318, 320, 322, 324, 326, 328 and 330 on 21st Avenue, "as said avenue is widened to a width of one hundred and twenty-five feet on map of Samuel S. Sherwood's property, at Dundee Lake, Paterson, N. J., made by A. A.
30 Fonda, Civil Engineer, April 5th, 1871." Also lots 543 and 545 East 35th Street.

D-15. Deed from Joseph J. McKee and wife to Thomas H. Milson, dated December 11th, 1895, and recorded in said Clerk's Office in Book H-12 of Deeds on pages 336 &c. Conveys an undivided one-half part of the premises conveyed to the

said McKee and acknowledged by the next three before mentioned deeds.

D-16. Deed from Thomas Milson and wife to the East Jersey Pipe Company, "a corporation of the City of Paterson, in the County of Passaic and State of New Jersey," dated February 27th, 1897, and recorded in said Clerk's Office in Book O-12 of Deeds on pages 415 &c. Conveys the same premises described in the next before mentioned deed. 10

D-17. Deed from Sidney M. Gould, Philemon D. Gould and Katharine H. Ryle, children and heirs of John M. Gould, deceased, and Samuel S. Sherwood, to the East Jersey Pipe Company, "a body corporate of the State of New Jersey," recorded in said Clerk's Office in Book R-15 of Deeds, on pages 156 &c. Conveys lots in Paterson numbers 547, 549, 551 and 553 East 35th Street, and 550, 552, 554 and 556 East 36th Street, as laid down on the map mentioned in S-3. 20

D-18, D-19 and D-20. Three deeds from Receiver of Taxes and Assessments of the City of Paterson to the Mayor and Aldermen of the City of Paterson, all dated January 20th, 1911, and recorded in the Clerk's Office of the County of Passaic in Book 3 of Deeds, on pages 114, 113 and 102 respectively. 30

(Filed February 12, 1915.)

NEW JERSEY SUPREME COURT.

SAMUEL S. SHERWOOD, *Prosecutor,* v. THE CITY OF PATERSON ET ALS., *Defendants.*	*On Certiorari.*

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Reasons for Reversal.

The said prosecutor, by George S. Hilton, his attorney, comes and prays that the ordinance passed by the Board of Public Works of the city of Paterson, entitled "An ordinance to vacate part of East 35th street, East 36th street, and East 37th street, in the City of Paterson, N. J.," approved by the Mayor of said city on the thirty-first day of December, Nineteen Hundred and Fourteen, may be set aside, reversed, and for nothing holden for the following reasons:

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First. The Board of Public Works, by whom the ordinance in question was passed, has no power to vacate streets.

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Second. The ordinance in question was passed for the express purpose of closing the parts of East 35th street, East 36th street and East 37th street, therein mentioned, for the benefit of the defendant, The East Jersey Pipe Company, contrary to law..

Third. The effect of such vacation would be the giving over, so far as the public is concerned, to the said defendant Pipe Company, the said parts of East 35th and East 36th streets, and the westerly one-half of said part of East 37th street, and the abandonment, so far as the public is concerned, of the easterly one-half of said part of East 37th street to the owners of the land adjacent thereto, namely, the defendants Michael W. Dippell, Adolph Muller, Verner F. Kuett and Mary B. Kuett, contrary to law.

Fourth. The streets in question, having been dedicated by the prosecutor to the public for its use as public highways, and the city having accepted the same as such, said streets, or any part thereof, cannot be given up or devoted by the city to or for any other use or purpose, or abandoned by the city, without the consent of the prosecutor, or, at least, against his objections thereto.

Fifth. The said Board of Public Works decided to grant the request of the Pipe Company to have said parts of said streets vacated without persons interested therein having been heard, or given an opportunity to be heard therein.

Sixth. When persons interested therein were given the opportunity to be heard, the matter had already been pre-judged and pre-determined by said Board in favor of the vacation.

Seventh. The ordinance in question was passed upon certain stipulations and conditions shown in the resolution for the same and otherwise, and was therefore illegal.

Eighth. The notice or advertisement for the presentation of objections to such vacation was not ordered by the Board of Public Works or given or made by the Clerk of said Board, where-

as all notices and advertisements relating to the proceedings of said Board are required by law to be so given or made.

Ninth. The notice or advertisement so given or made did not meet the requirements of the law in cases of vacation of streets. The notice or advertisement should have been served; publication thereof was not sufficient.

Tenth. No notice was given by said Board, or
10 under its direction, when and where persons interested in the matter could be heard before said Board.

Eleventh. Said ordinance was passed and said street vacation attempted without any provision being made for the payment of any damage that might result therefrom, and no such damage has been paid or tendered.

Twelfth. The vacation of the portion of East 37th street so attempted to be vacated is not es-
20 sential to the purposes of said Pipe Company.

Thirteenth. The vacation of the portion of East 37th street so attempted to be vacated could not have had any effect on the decision of said Pipe Company as to whether it should remain in Paterson.

Fourteenth. The vacation of the easterly half of the portion of East 37th street attempted to be vacated would be of no benefit to the said Pipe Company, but, on the contrary, would be an in-
30 jury to said company.

Fifteenth. There does not appear to have been any attempt on the part of the said Board of Public Works to induce said Pipe Company to remain in Paterson without the vacation of said portions of all of said streets.

Sixteenth. Said ordinance was passed upon the supposition on the part of the Board of Public Works that the National Ribbon company was the owner of the land on the easterly side of the part of East 37th street attempted to be thereby vacated, and on the condition that said Ribbon company should consent to such vacation, whereas the said Ribbon company was and is only a lessee of said land, and the owners of said land are Michael W. Dippel, Adolph (or Adolf) Muller, and Verner (or Verna) F. Kuett, with an estate in dower of Mary B. Kuett, as the widow of George F. Kuett, in a portion thereof, which said owners have not assented to such vacation; and it does not appear that even the said company has assented thereto.

Seventeenth. The said Pipe company's rebuilding and remaining in Paterson will not be of any benefit to said city or to any part thereof.

Eighteenth. The said Pipe company's rebuilding and remaining in Paterson, will, on account of the great noise made at it's works, and the smoke and stench emitted from it's works, be a detriment to Paterson, to the prosecutor, and to all other owners of lands in the neighborhood of said works.

Nineteenth. The demand of the said Pipe company that all of said portions of said streets should be vacated in order for it to remain in Paterson was an unreasonable one and should not have been complied with.

Twentieth. The said ordinance in attempting to vacate all of said portions of said streets for the purpose and under the circumstances mentioned, is an unreasonable one.

Twenty-first. If the said Board of Public Works has the power to vacate streets, the exercise of that power in this case was an abuse of such power to such an extent as to render it illegal.

Twenty-second. These attempted street vacations are not promotive of the public good or public welfare in any sense in which those terms are applicable in such a case.

10 Twenty-third. These attempted street vacations would be an injury to the public, to the prosecutor, and to all other land owners in that locality.

Twenty-fourth. These street vacations proceedings are in divers other respects irregular, erroneous and illegal.

Twenty-fifth. These attempted street vacations are in divers other respects illegal.

20 GEORGE S. HILTON,
Attorney of Prosecutor.

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EXHIBITS

hereinbefore mentioned but now printed in full.

ABSTRACT OF EXHIBIT S 15.

SAMUEL S. SHERWOOD AND ELIZABETH M. HIS WIFE, WILLITT BRONSON AND MARGARET O. F HIS WIFE, OLIVER BRONSON AND JULIA F. C., HIS WIFE. ROBERT D. BRONSON AND ISABELLA, HIS WIFE,	*Deed dated October 13th,* 1881; *Recorded in Passaic County Clerk's Office, in Book Z 6 of Deeds, pages* 212 *Etc. Consideration one dollar and other good and valuable considerations.*
TO	
THE NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY.	

Conveys lands and premises in Paterson, N. J., therein particularly described as follows:

First Tract: Beginning at a point in the westerly line of Vreeland Avenue at a point that is distant twenty-seven feet and thirty-three hundredths of a foot (27 33/100) northerly from the southwesterly corner of Vreeland Avenue and 21st Avenue thence (1) north seventy four degrees and fifteen minutes west (N. 74° 15′ W.) parallel with and distant twenty-five feet northerly from the southerly side of 21st Avenue eight hundred and thirty-one feet and fifty-five hundredths of a foot (831 55/100) to the easterly line of East 35th Street if produced northerly thence (2) north fifty-eight degrees and fifty-five minutes west (N. 58° 58′ W.) eighty-seven and forty-

six hundredths of a foot (87 46/100) to the line of lands of Edo Kip thence, (3) north ten degrees and thirty-three minutes east (N. 10° 33′ E.) along the land of Edo Kip seventy feet and twenty-eight hundredths of a foot (70 28/100) thence (4) south fifty-eight degrees and fifty-five minutes east (S. 58° 55′ E.) parallel with the second course ninety-four feet and twenty hundredths of a foot (94 20/100) to a point that is distant twenty-five feet (25) southerly from the northerly line of 21st Avenue thence (5) south seventy-four degrees and fifteen minutes east (S. 74° 15′ E.) parallel with and distant twenty-five feet southerly from the northerly line of 21st Avenue eight hundred and two feet and fifty-five hundredths of a foot (802 55/100) to the westerly line of Vreeland Avenue thence (6) southerly along the westerly line of Vreeland Avenue seventy-six feet and fifty-five hundredths of a foot (76 55/100) to the place of beginning. Said strip being seventy feet wide as laid down on a Map of S. S. Sherwood made by A. A. Fonda, C. E., and on file in the Clerk's office of Passaic County.

Second Tract: Beginning at a point in the centre line of East 43rd Street distant ninety-one feet and seventy-two hundredths of a foot (91 72/100) northerly from the centre line of 21st Avenue, and said point being the centre line of location of the New York, Susquehanna and Western Railroad, thence (1) north seventy-seven degrees and twenty minutes east (N. 70° 20′ E.) along said centre line of said railroad seven hundred and ten feet (710′) to low water mark as it formerly flowed of the Passaic River with the

width of seventy-five feet through the entire length that is to say, thirty-seven feet and five tenths of a foot on each side of the said centre line of said railroad, subject however, to any right which the Dundee Manufacturing Company may have to overflow that part of the said land lying next to the Passaic River.

The above tracts of land are sold and conveyed upon the condition and reservation that the same are to be used for railroad purposes and the Vreeland Avenue station in the City of Paterson to be maintained and continued there as a depot and at least four local passenger trains each way stop at said station daily for passengers either fully or upon signal except on Sundays when all local trains shall so stop.

EXHIBIT S-16.

An Ordinance to Vacate a Part of East Thirty-Sixth Street as a Public Street.

The Board of Aldermen of the City of Paterson do ordain as follows:

Section 1. That that part of East 36th Street, being a public highway in the City of Paterson, beginning at the intersection of the southerly line of Twenty-first Avenue and East 36th Street and extending for a distance of 275 feet southerly from said point, as shown on the City Atlas, be and the same is hereby vacated.

Passed December 15, 1902.

THOS. J. BROGAN,
President of the Board of Aldermen.

Approved December 15, 1902.

JNO. HINCHLIFFE,
Mayor.

Attest:—JOHN KEEGAN,
City Clerk.

City of Paterson

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Office of the City Clerk.

I, T. SIMPSON STANDEVEN, Clerk of the City of Paterson, do hereby certify that the ordinance hereto attached is a true copy of an ordinance, entitled, "An Ordinance to vacate a part of East Thirty-sixth Street as a public street," approved by the Mayor of the City of Paterson on the 15th day of December, 1902, as taken from and compared with the original now on file in my office.

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In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at Paterson, N. J., this 17th day of February, A. D., One thousand nine hundred and fifteen.

(SEAL)

T. SIMPSON STANDEVEN,
City Clerk.

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EXHIBIT S-17.

Ordinance changing the names of streets and naming new streets, Book A of Ord., 587.

"An Ordinance changing the names of streets and naming new streets.

"The Board of Aldermen of the City of Paterson do ordain as follows:

"Sect. 1. That all streets and avenues shall be known by the names designated on the map and atlas prepared by J. H. Goetschius, City Surveyor, and approved by the Board of Aldermen on the eleventh day of February, eighteen hundred and seventy, and shall be so entered on the Assessor's books on all assessments hereafter to be made, and the numbers of which lots as designated on said map and atlas shall be the numbers used by the Assessors to designate all lots or plots within the city limits and for all other purposes.

"Sect. 2. That all ordinances or parts of ordinances inconsistent with this ordinance are hereby repealed.

"Sect. 3. That this ordinance shall take effect immediately

"Passed Monday February 28th, 1870."

From proceedings of Board of Aldermen, Feb. 11, 1870.

"The President stated that the meeting had been called for the purpose of examining the new city map.

"Ald. McKiernan presented the map which was on motion received and referred to the committee of the whole.

"After hearing parties interested in the matter and no objections being made to the adoption of the map the committee recommended that the map be adopted by the Board.

"On motion that the report of the committee be

adopted the ayes and nays were called and carried unanimously.

"By Ald. McKiernan, Resolved that the City Surveyor be directed to prepare returns and file the map this day adopted by the Board of Aldermen in the County Clerk's office of the County of Passaic and that the committee complete the atlas and register in accordance with said map. On motion the ayes and nays were called and carried unanimously."

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Book C of Minutes, page 548.

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Opinion.

(Filed June 7, 1915.)

NEW JERSEY SUPREME COURT.

February Term, 1915.

SAMUEL S. SHERWOOD,

vs.

THE CITY OF PATERSON, AND OTHERS.

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Opinion.

Submitted February term, 1915; Decided June, 1915.

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1. Under the act of 1911 (P. L. 179), the Board of Public Works of Paterson has power to vacate streets.

2. One of the inducements to the passage of an ordinance vacating streets, was the desire to retain a private manufacturing company in the city; *held* that under the facts of the case, the ordinance was not thereby vitiated.

3. The dedicator of streets does not have a right to thwart the vacation thereof if the city authorities deem that course a public benefit.

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Certiorari.

George S. Hilton, for prosecutor.

Edward F. Merrey and Griggs and Harding,

for defendants. Before Justices Swayze, Parker and Kalisch.

The opinion of the court was delivered by Swayze, J.

The question raised is as to the validity of an ordinance vacating certain streets in the City of Paterson. The ordinance was passed by the Board of Public Works. Its powers are defined by the act of 1911, P. L. 179. The vacation of streets is not specifically mentioned. If that power is conferred, it is by implication. The statute first gives the board all the powers and duties formerly vested in or exercised by any board of aldermen, common council or committee thereof, relating to and in respect of the management, control, maintenance and operations of the roads, streets, alleys and sewers, and of the laying out and construction of roads, streets, alleys and sewers within the city. If the Legislature had stopped there, it might well be doubted whether the power to vacate had been conferred. It did not stop; but after mentioning other powers, added these words: "it being the intention of this act to entirely supersede the common council, board of aldermen or other governing bodies of such cities, or their power or authority thereunder in the several departments of streets, sewers and water works, and to place the same under the power, authority and control of the board of public works as herein provided for in the same manner and with like power and authority as the same are now vested in or under the authority or control of any such common council, board of alder-

men, or other governing body of such city, or their power or authority therein, and this act shall be so construed." We think this language broad enough to vest in the board of public works the powers formerly vested in the board of aldermen in the department of streets. An examination of the city charter, P. L. 1871, 846, shows that the department of streets was charged with the execution of the powers of the board of aldermen to lay out, open, vacate, straighten, widen or alter any street. This power obviously suffices. We think the board of public works has the power to vacate streets.

One of the inducements to the passage of the ordinance seems to have been the desire to free a large piece of land from the encumbrance of these streets which existed only on paper, so as to retain a private manufacturing company in Paterson. It is urged that this motive vitiates the ordinance. Without going to far as to say that the union of such a motive with other more public considerations might never be enough to vitiate the ordinance, we think we are safe in holding that the facts of the present case bring it within the rule of Kean v. Elizabeth, 54 N. J. L. 462, affirmed 55 N. J. L. 337.

We think an opportunity to be heard was afforded the prosecutor before the ordinance was passed. Indeed, that is not disputed; the point made is that the matter had already been decided, and the subsequent hearing was a mere farce. We think, however, that the resolution, although it was the expression of a favorable opinion, was

only preliminary to the necessary legal proceedings, and we see no objection to a resolution directing the city counsel to prepare an ordinance We cannot assume, in the absence of proof, that members of the board would not approach the subsequent hearings with open minds.

The requirement of the consent of abutting owners, and to that end the acquisition by the East Jersey Pipe Company of some of the abutting land, seem to us reasonable requirements for the purpose of avoiding injury to private owners and possible expense to the city.

We do not think that dedicated streets are subject to any different rule with reference to the right of the city to vacate than other streets. The dedicator does not retain a right to thwart the vacation if the city authorities deem that course a public benefit. To so hold would often prevent the city from relieving the public treasury of the unnecessary burden of caring for useless streets.

The other objections call for no special notice

The ordinance is affirmed with costs.

NEW JERSEY SUPREME COURT.

SAMUEL S. SHERWOOD, *Prosecutor,* vs. CITY OF PATERSON, ET AL., *Defendants.*	*On Certiorari.*

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Rule for Judgment.

The court having inspected an ordinance passed by the Board of Public Works of the City of Paterson entitled "An ordinance to vacate part of East 35th Street, East 36th Street and East 37th Street, in the City of Paterson, N. J.," approved by the Mayor of the said city on the thirty-first day of December, nineteen hundred and fourteen, and the proceedings touching and concerning the same, returned with the certiorari in this cause, the depositions taken by the parties to the cause, the reasons for setting aside the said ordinance, and having heard the argument of counsel therein, and having duly considered the same, do order that the said ordinance be in all things affirmed, with costs.

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Entered June 24, 1915.

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On motion of EDWARD F. MERREY,
Attorney of defendants, City of Paterson and Board of Public Works of the City of Paterson.

A true copy,

WM. C. GEBHARDT, *Clerk.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

SAMUEL S. SHERWOOD, *Prosecutor and Appellant,* vs. THE CITY OF PATERSON, AND OTHERS, *Defendants and Respondents.*	*Grounds of Appeal.*

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Grounds of Appeal.

Filed August 14th, 1915.

The appellant states the following grounds of appeal.

1. Said Supreme Court adjudged and decided that the Board of Public Works of the City of Paterson, by whom the ordinance in question was passed, has power to vacate streets.

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2. Said Supreme Court did not adjudge and decide, as contended by the appellant, that said Board of Public Works has no power to vacate streets.

3. Said Supreme Court did not, as it should have done, adjudge and decide said ordinance to be illegal, and reverse and set aside the same, for the following reasons urged by the appellant:

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(a) Said ordinance was passed for the express and sole purpose of closing the parts of streets thereby attempted to be vacated, for the benefit of the defendant, the East Jersey Pipe Company, contrary to law.

(b) Said Board of Public Works decided to grant the request of said Pipe Company to have said parts of said streets closed without persons interested therein having been heard, or given an opportunity to be heard thereon.

(c) Said ordinance was passed upon certain stipulations and conditions shown in the resolution for the same and otherwise, which render it illegal.

(d) Said ordinance in attempting to vacate all of said parts of said streets for the purpose and under the circumstances is an unreasonable one.

(e) If said Board of Public Works has power to vacate streets, the exercise of that power in this case was an abuse of such power to such an extent as to render it illegal.

(f) Said attempted street vacations are not promotive of the public good or public welfare in any sense in which those terms are applicable in such a case.

(g) Said attempted street vacations would be an injury to the public, to the appellant, and to all other land owners in that vicinity.

4. Said Supreme Court in affirming said ordinance relied upon what it called "the rule in Kean v. Elizabeth," whereas the facts in the two cases are too dissimilar to make any rule of law based on the facts in that case applicable to this case and the rules of law applicable to such cases stated in that case or deducible therefrom (of which there appear to be two) are, at least without material modifications or qualifications thereof favorable to the appellant, incorrect.

5. Said Supreme Court adjudged and decided that dedicated streets are not subject to any dif-

ferent rule with reference to the right of the City to vacate streets than other streets are.

6. Said Supreme Court in divers other matters apparent in the record adjudged and decided erroneously.

GEO. S. HILTON,
Attorney of Appellant.

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New Jersey Court of Errors and Appeals

SAMUEL S. SHERWOOD, Prosecutor and Appellant, vs. THE CITY OF PATERSON *et als.*, Defendants and Respondents.	On Appeal from Supreme Court.

APPELLANT'S BRIEF.

The writ of certiorari in this case brought up an ordinance of the Board of Public Works of the City of Paterson, approved by the Mayor of said City on December 31st, 1914, to vacate parts of East 35th, East 36th and East 37th Streets in said City. See ordinance on page 19 of Case.

On East 35th Street the vacation extends back 450 feet from 21st Avenue, on East 36th Street it extends back 425 feet from 21st Avenue, and on East 37th Street it extends back 325 feet from 21st Avenue.

In fact, however, the vacation of East 35th Street and of East 36th Street runs back to the same point, the difference in the figures denoting such vacations resulting from the fact that 21st Avenue is 25 feet wider at the foot of East 35th Street than it is at the foot of East 36th Street. See the vacation map, Exhibit S-14.

It turns out that a part of East 36th Street, extending back 275 feet from 21st Avenue, was vacated in 1902. Exhibit S-16, printed in full on page 133 of Case. So the ordinance of 1914, in question, actually vacates only 150 feet back of the part formerly so vacated.

So much of these streets and of said avenue as lies in that locality, together with parts thereof extending further north, south and west, and a number of other streets and avenues in the City, were dedicated to the public for street purposes by the appellant, Samuel S. Sherwood, more than forty years ago. Exhibit S-3, Case, p. 116.

History of the Streets.

The history of these streets is as follows:

Maps and returns of 35th, 36th and 37th Streets, made by J. H. Goetschius, C.E., dated 1869, were recorded in the Clerk's Office of the County of Passaic in February of that year. Exhibits S-11, S-12 and S-13, Case, p. 118.

For authority for the same I refer to Section 74 of the City Charter of 1861 (Laws of 1861, p. 354), Section 17 of a supplement thereto, passed in 1867 (Laws of 1867, p. 653), and an ordinance of said City passed on June 3rd, 1867, shown on page 107 of a printed book containing charter and ordinances of said City published in 1867. Exhibit S-21, Case, p. 120.

The records in the office of the Clerk of said City were destroyed by the great fire of 1902, so that reference cannot now be made to those records. The fact that Mr. Goetschius, who made those returns, signs as "C.E.," instead of "City Surveyor," which he was at that time, indicates that he was the engineer employed under that ordinance. Case, p. 34, ll. 26 &c.

A memorandum I made from the City records several years before that fire, when looking up the facts relating to an official map, being the only official City map that was ever adopted, shows that such map was adopted by the Board of Aldermen on February 11th, 1870, and that on February 28th of the same year, an ordinance was passed by said Board ordaining that the streets and avenues in the City should be known by the names designated on that map. See Exhibit S-17, Case, p. 38 &c.

It was manifestly in this way that the names of the streets in question became changed from 35th, 36th and 37th Streets, to East 35th, East 36th and East 37th Streets.

The appellant became the owner of a large tract of land, which included the land on which these streets lie, in 1859. Exhibits S-1 and S-2. In 1864 the appellant conveyed said lands to Nathaniel Wheeler (Exhibit S-14), and in 1869 said Wheeler conveyed said lands back to the appellant. Exhibit S-5, Case, pp. 21-27.

In the first deed to the appellant, and the deed from the appellant to Wheeler, and the deed from Wheeler back to the appellant, the lands conveyed appear to have been farm lands, there being no streets or avenues running through them. In 1871 the appellant caused a map of this land and of other lands owned by him to be made, and filed the same in the office of the Clerk of the County of Passaic. This map was dated August 5th, 1871, and was so filed on December 3rd, 1873, and bears in said office the number 141. It is marked Exhibit S-3, Case, p. 25. The streets and numbers on that map accord with the streets and numbers on said official map, and have remained the same in the part of the City here concerned ever since. Case, p. 26. Of the part of this land formerly of the appellant which has 21st Avenue on the north, Mar-

ket Street on the south, East 37th Street on the east, and East 35th Street on the west, including those streets and the lands adjoining the same on the other side thereof, the appellant conveyed a portion to Alexander R. Sheppard in 1874, and the rest to Willett Bronson in 1877. Exhibits S-6 and S-7, Case, pp. 27 and 28. In the deeds of conveyance in both cases, the lands conveyed are described as bounding on said streets, and lot numbers are given according to the appellant's said map. See statements of these exhibits on pages 116 and 117 of Case.

All this, no doubt, constituted a dedication of these streets to the public for street purposes. The appellant so considered it. Case, bottom of p. 28 and top of p. 29. That the City considered them as public streets is clear. In the ordinance of 1902, vacating a part of East 36th Street, that street is expressly stated to be a "public highway." Case, p. 133. If that street was a public highway at that time, the other two streets must also have been public highways. In fact, these ordinances to vacate are admissions in themselves that the streets, portions of which are so vacated, are actually streets; streets to be vacated must be actual streets. If actual streets, they became so by such dedication; they were never appropriated as streets under condemnation proceedings. Case, bottom of p. 28 and top of p. 29. The acceptance of such dedication by the City must therefore be regarded as established.

The Appellant's Interest Herein.

The interest of the appellant in this matter arises from the fact that he is half owner of a tract of land fronting on the north side of 21st Avenue, running thereon from East 36th Street to East 37th Street, and extending back a distance of about 250

feet. Case, pp. 29 and 30. I will now proceed to a consideration of the grounds of appeal.

FIRST.

The decision of the Supreme Court that the Board of Public Works, by whom the ordinance in question was passed, has power to vacate streets, is erroneous.

The last charter of the City of Paterson was passed in 1871, being entitled "An act to provide for a more efficient government of the City of Paterson," Laws of 1871, pp. 808 &c. Section 21 of that act declares "That the legislative power of said corporation shall continue to be vested in a Board of Aldermen" (p. 816), and Section 92 confers upon that Board power "to lay out, open, vacate, straighten, widen or alter any street, avenue, road, highway or alley within said City, and to take such lands and real estate as may be necessary therefor, upon making compensation in the manner hereinafter provided" (p. 846). I do not find anything further in the charter upon the subject of street vacations.

The Board of Public Works of said City came into existence under an act concerning the government of certain cities, &c., passed in 1907. Laws of 1907, p. 114. The legislative powers of the Board are specified in Section 2 of that act. A supplement to that act, passed in 1908, confers some additional powers upon that Board, which, however, do not affect this case. Laws of 1908, p. 106. By an act passed in 1910, the second section of that act was amended (Laws of 1910, p. 532); and by an act passed in 1911, the same section thereof was again amended. Laws of 1911, p. 179. It is therefore the second section of the act as last amended that we must search for the power of the Board in respect to the matter in hand.

Before proceeding to an examination of this statutory provision, let us see what is required by law to give the power to vacate streets.

Dillon in his work on Municipal Corporations, speaking on this subject, says: "The power must be *expressly conferred* by legislative enactment, or must be necessary to the exercise of some power expressly conferred." 5th Ed., Vol. 3, Sec. 1160. The italics are the author's.

In case of *Morris & Essex R. R. Co.* v. *Newark*, 2 *Stock.*, 352, Court said: "That authority must be *expressly* given; or if it be conferred by *implication*, it must be a *necessary* implication, such as will necessarily and naturally flow out of the law from whence it is derived," p. 363.

See also 2 Smith on Mun. Corp., 1283; *Warren Railroad Co. ads. State*, 5 *Dutch.*, 353, 354; *Greenwich Township* v. *Easton, &c., R. R. Co.*, 9 *C. E. Gr.*, 217, 224; *Jersey City* v. *Central R. R. Co.*, 13 *Stew. Eq.*, 417, 420; *Newark* v. *D., L. & W. R. R. Co.*, 15 *Stew. Eq.*, 196, 198; and *Burlington* v. *Penn. R. R. Co.*, 11 *Dick. Ch.*, 259, 261.

In the last cited case, which appears to be the last judicial deliverance upon the subject in this State, the Court said: "The legislative authority, however, must appear either in express terms or must flow as a necessary implication from the powers expressly conferred."

"If the words are ambiguous, the construction ought to be in favor of the common right of highway, not against it." *Warren Railroad Co. ads. State, supra; Greenwich Township* v. *Easton, &c., R. R. Co., supra; Jersey City* v. *Central R. R. Co., supra;* and *Newark* v. *D., L. & W. R. R. Co., supra.*

The Supreme Court in speaking in its opinion upon this subject and referring to the statute in question, says:

"The vacation of streets is not specifically mentioned. If that power is conferred, it is by implication. The Statute first gives the board all the powers and duties formerly vested in or exercised by any board of aldermen, common council or committee thereof, relating to or in respect of the management, control, maintenance and operations of the roads, streets, alleys and sewers, and of the laying out and construction of roads, streets, alleys and sewers within the City. If the Legislature had stopped there, it might well be doubted whether the power to vacate had been conferred. It did not stop; but after mentioning other powers, added these words: 'It being the intention of this act to entirely supersede the common council, board of aldermen or other governing bodies of such cities, or their power or authority thereunder in the several departments of streets, sewers and water works, and to place the same under the power, authority and control of the board of public works as herein provided for in the same manner and with like power and authority as the same are now vested in or under the authority or control of any such common council, board of aldermen or other governing body of such city, or their power or authority therein, and this act shall be so construed.' We think this language broad enough to vest in the board of public works the powers formerly vested in the board of aldermen in the department of streets."

It will be observed that the Court admits that if the statute had stopped at a certain point mentioned, "it might well be doubted whether the power to vacate had been conferred." And that down to

that point the power had not been conferred is clear from the case of *Burlington* v. *Penn. R. R. Co., supra,* p. 261. If, therefore, the power is not conferred after that point in the statute, either expressly or by implication, it does not exist. It will also be observed that the Court, after having declared that, "if the power is conferred, it is by implication," proceeds to deduce the power, not from implication, but from words of the statute claimed to confer it. It will also be noticed that it would naturally be inferred from the language of the Court that the added words quoted by the Court followed immediately "after mentioning other powers"; the Court did not say the added words followed immediately after, but such would be the natural inference. Now the fact is that they did not; and this fact is a very material point in the construction of the statute with reference to this power. Between that "mentioning other powers" and those added words comes a part of the statute, beginning with an entirely new paragraph, which provides that any notice required in the proceedings of the Board shall be given by the Clerk of the Board, and that all advertisements required in such proceedings shall be made by the Board, and that all applications and petitions therein shall be made to the Board; and then come those added words, *after a comma,* which shows the close connection of these words with what immediately precedes. And then it will be noticed that the powers and authorities mentioned in those added words expressly relate to matters "as herein provided for." It seems perfectly clear that the only office of these added words is to make it more certain that all the powers and authorities thereinbefore conferred are, especially in respect to formalities, completely vested in the Board, and that there was no intention to thereby

confer any additional powers. And the rest of the clause, down to where it speaks of additional powers, performs substantially the same office.

There is no power expressly conferred by the statute that is of such an important, extraordinary and dangerous character as that of the vacation of streets. In this case the streets proposed to be vacated are on vacant lands; but the same power could be exercised on streets in the populous parts of the City. In the case of *Laurel* v. *Lowell,* 84 *Miss.,* 435, the Court said:

> "The closing of the street is a taking of the easement for the public use in the purview of our statute. If this be not true, three out of five of a municipal board, as in this case, may work ruin at will upon property owners."

It may be that in this State the closing of a street is not a taking of an easement for the public use; but the fact that three out of four of the Board of Public Works may, in the language of that Court, "work ruin at will upon property owners" in this way, should be borne conspicuously in mind in the consideration of whether or not the power is conferred in a case like this. The power given by the City Charter leaves the matter at "loose ends." There is no provision for a petition or application therefor, or for any notice thereof; or for the allowance of any damages occasioned thereby, how great soever they may be. There is great particularity in the specification in the act of the powers thereby conferred; and the fact that this power is not among those so specified should be taken as conclusive against it. There is no implication, necessary or otherwise, of the power in the act;

and the statutory provision relied upon by the Court is at least ambiguous, and should therefore, according to the authorities cited, be construed "in favor of the common right of highway, and not against it."

Then it seems clear that the Supreme Court misconstrued the Paterson Charter. The last words quoted above from its opinion are as follows: "we think this language broad enough to vest in the Board of Public Works the powers formerly vested in the Board of Aldermen in the Department of Streets." The Court then continues thus: "An examination of the City Charter, P. L. 1871, 846, shows that the Department of Streets are charged with the execution of the powers of the Board of Aldermen to lay out, open, vacate, straighten, widen or alter any street. This power obviously suffices." Now there is no such thing as "powers formerly vested in the Board of Aldermen in the Department of Streets" in Paterson. All legislative powers were vested in the Board of Aldermen, and all the power the Department of Streets had over streets was merely executive power; it had no legislative power in respect thereto. That the power of the Street Department in this respect was as here set forth appears from the above quoted statement of the Supreme Court, where it says: "The Department of Streets was charged with the execution of the powers of the Board of Aldermen" in the matter of streets. It is clear that a department merely charged with the execution of powers cannot exercise those powers; they are exercised by the legislative body, by the passage of the requisite ordinances, &c., and then the ordinances, &c., are executed by the Department of Streets. A brief review of the City Charter in relation to this matter will show that the view here presented is the correct one.

By Section 21 of the Charter the legislative power of the City is vested in a Board of Aldermen. P. L. 1871, p. 816. By the 28th section the executive power is vested in the Mayor, and in the departments and City officers thereinafter named (p. 821). And according to the 31st section, the Department of Streets and Sewers is composed of the Street Committee (p. 822). And the part of the Charter upon which the Court relies, being Section 92, reads as follows:

> "That the department of streets and sewers shall be charged with the execution of the following powers of the board of aldermen of said city, which powers are hereby conferred on said board, namely: 1. To lay out, open, vacate, straighten, widen or alter any street, avenue, road, highway or alley within the city, and to take such lands and real estate as may be necessary therefor, upon making compensation in the manner herein prescribed" (p. 846).

It is clear from all this that these powers are by the Charter vested solely in the Board of Aldermen, and that the Department of Streets and Sewers is charged only with the execution of them after they have been exercised by the Board of Aldermen. That is to say, after the exercise of one of these powers by the Board of Aldermen by the passage of an ordinance or resolution or other proper legislative act, then the Department of Streets and Sewers is charged with carrying such ordinance, resolution or other act into execution. The construction placed on this statutory provision by the Supreme Court involves the absurdity of the Street Committee having been vested with the exercise of these powers. No one will contend that the Street Committee had power, for instance, to vacate streets.

SECOND.

Said ordinance was passed for the express and sole purpose of closing the parts of streets thereby attempted to be vacated, for the benefit of the defendant, the East Jersey Pipe Company, contrary to law.

That such is the case appears from the proceedings of the Board of Public Works in relation thereto. The only application for it was made by one J. A. Nelson, signing himself "Vice-President," which means, no doubt, vice-president of the East Jersey Pipe Company, in whose behalf the vacation was made. Case, pp. 5, 6 & 7. That application asked for these vacations in order to have the streets permanently closed so that the company could obtain perpetual right thereto. Of course this perpetual right meant absolute title to the portions of the parts of streets to be vacated, to which the company held the fee as adjacent owners, subject to the rights of the public therein as public streets. This application was dated on November 9th, 1914, and was presented to the Board at the meeting thereof held the next day. Mr. Nelson was present at the meeting, presented the application in person, and asked to have it read. After it was read, he made some remarks in which he said he would like to be able to go to the board of directors of the company and state that some definite action had been taken, and requested that the Board consider the matter at that time. Case, p. 4. The record says that "after a general discussion between the members of the board, city engineer and city counsel," a resolution was adopted, the first part of which read as follows: "Resolved, that it be the expressed opinion of the board of public works that the request of the East Jersey Pipe Works be granted, and that the city counsel be directed to prepare an ordinance closing the streets

requested." Case, p. 4. At an adjourned meeting of the Board held on December 8th, 1914, the ordinance in question was introduced, read the first time and laid over until the next regular meeting. Case, pp. 7 & 16. At the next regular meeting, held on December 15th, 1914, the ordinance was laid over until the next meeting, and the Board then adjourned to the 29th of the month. At that meeting a communication from this Pipe Company, dated the day before, was received and read. That communication, among other things, said:

> "For your information and guidance in acting upon our letter of November 9th, 1914, petitioning for the closing of certain portions of East 35th Street, East 36th Street and East 37th Street, we advise you that a resolution was passed by our directors authorizing the rebuilding of our plant in Paterson on a larger and more improved plan provided that your Honorable Body granted the petition above mentioned."

The ordinance was then taken up and read the second time. And then, the record says:

> "after a general discussion between the members of the board, taking into consideration the fact that the East Jersey Pipe Company agreed in a communication presented at this meeting to rebuild in this city, if the ordinance now under consideration be passed and adopted. Mr. McCrystal stated that, considering the East Jersey Pipe Company had agreed to rebuild providing these streets were vacated, he would move that the ordinance pass to a third reading."

The ordinance was then read the third time, and passed. Case, pp. 18 & 19. It is clear from this

that the purpose of the ordinance was to give this Pipe Company just what was asked for it in the application mentioned, that is to say, to vest in it the absolute title to the parts of these streets in which it before had only the fee, subject to the public right. It is true the company did not then own several of the lots fronting on the to be vacated portions of these streets, but the closing of the streets was conditional upon the company acquiring the ownership of those lots, with the exception of some on East 37th Street, supposed to be owned by The National Ribbon Company, "whose consent for the closing of this street will be obtained." Case, pp. 4 & 5. But this cannot affect the general purpose of the vacation.

There can be no doubt that these proceedings, without any good and lawful motive therefor available in such a case, were absolutely illegal. *Deland* v. *Dixon Power Co.,* 225 *Ill.,* 212; *Corcoran* v. *Chicago, &c., R. R. Co.,* 149 *Ill.,* 291; *Marietta Chair Co.* v. *Henderson,* 121 *Ga.,* 399; *Townsend* v. *Epstein,* 93 *Mo.,* 555; *Leonard* v. *Lowell,* 84 *Miss.,* 435; *Kansas City* v. *Hyde,* 196 *Mo.,* 498.

And I suppose there is no doubt that the only good and lawful motive available in such a case is the promotion of the public good. It is clear that the only public good that was had in view by the Board of Public Works in these vacations was such good to the public as might result from the retention of the business of the Pipe Company in Paterson. It is true a feeble attempt was made by the defendants in the testimony to make it appear that the Board was actuated in this matter, at least to a certain degree, by a desire to save the City from the expense of the grading of the streets some time in the future, which, it was claimed, would be very expensive on account of the amount of filling that would be required. This attempt was such a fail-

ure that it is hardly worth while to waste time upon it. I will, however, call attention to three points relating thereto. (1) Any testimony of that kind flatly contradicts the record. (2) East 38th Street, further away from the principal part of the City than these streets are, has been graded and is extensively built upon, as appears from the leaf from the Robinson Atlas (Exhibit S-4), and the only difference between the cost of the grading of that street and of either of these streets would be no more than the greater cost now of materials and labor (Case, p. 104, ll. 8 &c.); and (3), while the witnesses were talking of the great cost of the grading of these streets, the Pipe Company itself was engaged in doing the grading. Case, p. 104, ll. 30 &c. We must, therefore, in this matter, confine ourselves to the record and exhibits in the case, and according to them, the only public good the Board had in view in this matter was that above mentioned, namely, such as would result from retaining the business of the Pipe Company in Paterson. And here the question arises, whether such a public good is the kind of a public good that can justify the vacation of a street? I have made a careful search for some authority to the effect that it is, but have been unable to find any. And so far as I can learn, the law upon the subject is as follows:

The streets and avenues in the City of Paterson do not belong to the City, but to the State. The entire State, therefore, has an interest in them. The State has conferred upon the City certain authority over the streets and avenues therein as trustees for the public, and that authority can be lawfully exercised by the City as such trustee only for the promotion of the interest of the public in such streets and avenues as streets and avenues. *Trustees of M. E. Church of Hoboken* v. *Council of*

Hoboken, 4 *Vr.,* 13, 19; *Hoboken Land, &c., Co.* v. *Hoboken,* 7 *Vr.,* 540, 549; *Beecher* v. *Newark,* 35 *Vr.,* 475, 479 & 480; *Burlington* v. *Penn. R. R. Co.,* 11 *Dick. Ch.,* 259, 261. The City, therefore, under a mere general power to vacate streets, can lawfully vacate a street or section of a street only when the interest of the public therein as a street or section of a street, as the case may be, requires that it should be vacated. And the good to the public that will result from such a vacation, that is, a vacation made because the interest of the public in the street as a street requires it to be vacated, is the only public good that can justify a vacation. Consequently, no street or section of a street can be vacated, under such general power, for the mere purpose of turning it over to or for the private use and benefit of an individual or corporation, no matter what benefit may accrue to the public from the use such individual or corporation may make of it; and no street can be lawfully vacated, under such general power, so long as it is needed, or may be needed in the future, in a reasonable sense, for the accommodation or convenience of the public as a street. It follows that the vacation of the sections of streets in question in this case is a perversion and abuse of the City's authority over streets, and a violation of the trust under which it holds such streets. See cases just above cited; and also the following cases, hereinbefore cited: *Deland* v. *Dixon Power Company, Corcoran* v. *Chicago, &c., R. R. Co., Marietta Chair Co.* v. *Henderson, Townsend* v. *Epstein, Laurel* v. *Lowell,* and *Kansas City* v. *Hyde.*

If it should be held that the benefit a city may receive from the use or retention of a manufactory by means of the vacation of streets for its private use and benefit can ever be considered as such a public good as can justify such vacation, it can be

so considered only in cases where neither public nor private injury in respect to the street so vacated will result therefrom. That this is not such a case will be shown under another head.

I will add, before proceeding further, that it is clear that the vacation of these streets was not necessary in order to secure even that "public good." East 36th Street having been previously vacated to the distance of 275 feet back from 21st Avenue (Exhibit S-16, on p. 133 of Case), the company already had a frontage on that avenue of 460 feet. Then, by purchasing lots Nos. 558 to 570 East 36th Street, and 555 to 567 East 35th Street, which it was to purchase as a condition of the vacation of the streets (Case, bottom of p. 4 and top of p. 5), and which, of course, it could have purchased just as well without as with such vacation, its land would extend back from 21st Avenue 425 feet, with the exception of 150 feet of the previously unvacated part of East 36th Street. That the company considered that it could get along with this land appears from the following facts: The company commenced rebuilding its plant on this land about the 15th of last February (Case, p. 110, ll. 11 &c.), although the writ in this case was served upon it on the 3rd of that month. Case, p. 115. And as already shown, while the testimony in this case was being taken, the company filled in the low ground around its lands, about which lowness of land the defendants' witnesses had so much to say. These facts seem to justify the conclusion that the rebuilding by the company of its plant in Paterson was not dependent upon these vacations.

I return now to the opinion of the Supreme Court in this case. The Court says:

> "One of the inducements to the passage of the ordinance seems to have been the desire

> to free a large piece of land from the encumbrance of these streets which existed only on paper, so as to retain a private manufacturing company in Paterson." Case, p. 139.

The particular language here used does not affect the substance of the matter, which is that the inducement or motive so appearing was to retain the Pipe Company in Paterson. The Court does not specify any other motive, and no other appears in the records or evidence.

The Court proceeds: "It is urged that this motive vitiates the ordinance." It was so urged because it was not in itself a good and lawful motive, and no good and lawful motive, or, indeed, any other motive at all, appeared.

The Court continues:

> "Without going so far as to say that the union of such a motive with other more public considerations might never be enough to vitiate the ordinance, we think we are safe in holding that the facts of the present case bring it within the rule of *Kean* v. *Elizabeth*, 54 *N. J. L.*, 462; affirmed, 55 *N. J. L.*, 337."

In this case there was no "union of such a motive with other and more public considerations"; for no such "other and more public considerations" appear. This motive stands alone. And if the union of such a motive with such other considerations might be enough to vitiate the ordinance notwithstanding such other considerations, then surely, such a motive standing alone must vitiate the ordinance.

There is no similarity between the facts in this case and the facts in the case of *Kean* v. *Elizabeth*. In that case all that the interested party did was

to petition for the vacation; there was nothing in the proceedings to show that the vacation was made for the benefit of that party; which is very different from this case, as already shown; in that case the Court considered that a benefit to a part of the City was probably the principal inducement for the vacation; in this case a supposed benefit to the City was the only apparent inducement; in that case there may have been other "public considerations" for the vacation, whereas there were none in this case; in that case the vacated portion of the street ran through salt meadows and unbridged creek, and there was not a house or building along the line of it, 54 *N. J. L.*, 466, 467. The street was doubtless a useless one, presently and prospectively, the vacation of which in itself was a public benefit. The streets in question here are not of any such character. The lands through which they pass, although they were somewhat low at or near the railroad crossing before filled in by the Pipe Company as hereinbefore mentioned, are well adapted to building purposes. Case, pp. 103-105. It is true they are in a part of the City that is not yet fully built up. But the greater part of the City was in the same situation not many years ago. And there can be no doubt that the laying out of the City into streets, &c., so many years ago, as already shown, has been of great benefit to it. None of the streets, &c., so laid out can be regarded as useless ones simply because they have not yet been built upon. They can be so regarded only when it is clear that they will not be needed for streets in the future. And when they shall be needed, being dedicated streets, it will cost nothing to open them. And in the meantime it costs nothing to maintain them. Plate 9 of the Robinson Atlas, Exhibit S-4, shows the part of the City in which these streets are located. It will be seen by reference thereto

that the part of the City there shown is dotted all about with buildings. Even East 38th Street, already mentioned, east of East 37th Street, having been put in proper condition, is all built up in that locality. Then there is a railroad station near by on the Susquehanna Railroad, a school-house in the neighborhood, and a trolley line crossing 21st Avenue within a stone's throw of East 37th Street. These things show not only that the population of the City is reaching out there, but that there are more than ordinary inducements for it to go there. There is, therefore, no comparison whatever between these streets and the one involved in *Kean* v. *Elizabeth*. Then it will be observed that apparently only a part, and most likely a very small part, of that street ran through the land represented by the petitioners, so that the vacation of the rest of it was doubtless actuated by other "public considerations." If in this case the vacations were actuated by such considerations, they would have included at least the whole block between 21st Avenue and Market Street. Instead of that, they take in only a part of the block—the part the vacation of which was beneficial to the Pipe Company, leaving an undesirable *cul de sac* next to Market Street in each of them. I respectfully submit that the facts in that case and in this case are so dissimilar that any rule of law applicable in that case would not necessarily be, and most likely would not be, applicable in this case.

I have had considerable doubt as to what the rule in that case referred to by the Supreme Court is. I find that the syllabus to the case, in referring to the portion of the street vacated in that case, says: "The fact that one of the reasons for vacating that portion of the street was to accommodate a person over whose lands the vacated portion runs does not invalidate the ordinance." This is speak-

ing of that particular case, which, as I have shown, is unlike this case. Any such rule for general application would require these modifications: (1) That if the fact be that the only reason for vacation is to accommodate a person over whose lands the vacation runs, the ordinance is invalid; and (2) that if there are any other reasons, or is any other reason, such reasons or reason must be in themselves or itself sufficient to validate the ordinance.

I have been somewhat uncertain whether or not the rule in *Kean* v. *Elizabeth* referred to by the Court was not the rule or doctrine thus stated in the opinion:

> "If the Courts can enter into the motives of the municipal legislature in respect to acts of this kind in any case, it must be one in which public interests have been glaringly sacrificed to subserve private ends." 54 *L.*, 466.

But any rule or doctrine precluding the entering into such motives in such cases does not apply when the motives appear upon the face of the proceedings, so that no investigation is required to see what they are. In such cases the Courts are bound to take cognizance of such motives. *Deland* v. *Dixon Water Power Company,* 225 *Ill.*, 212; *Laurel* v. *Lowell,* 84 *Miss.*, 435. In this case, however, the "public interests have been glaringly sacrificed to subserve private ends." That such interests have been sacrificed will be shown under another head. Glaring is defined as "clear, notorious, open and bold, bare faced." And surely nothing could be clearer, or more notorious, open and bold and bare faced than the purpose for which these vacations were made. No investigation or even inquiry is required to discover them. Clearly, therefore, the

public interests so sacrificed were *glaringly* sacrificed.

But this case of *Kean* v. *Elizabeth* has no binding force upon this Court. It is true that, as stated by the Supreme Court in its opinion in this case, that case was affirmed by this Court, but it was not affirmed upon the opinion of the Court below; and the points here mentioned were not considered by this Court at all; the only question that was considered therein being the power of the City of Elizabeth to pass the ordinance in question. 54 *N. J. L.*, 338.

THIRD.

Said Board of Public Works decided to grant the request to have said parts of said streets closed without persons interested therein having been heard or given an opportunity to be heard therein.

That decision was made in and by the resolution adopted by the Board upon such request being presented, and Mr. Nelson, the vice-president of the company, having said that he would like to be able to go to the board of directors of the company and state that some definite action had been taken, and requested that the Board consider the matter at that time. The request that definite action be taken at that time was acceded to by the Board by that resolution, which began as follows:

> "Resolved, that it be the expressed opinion of the Board of Public Works that the request of the East Jersey Pipe Works be granted and that the city counsel be directed to prepare an ordinance closing the streets requested." Case, p. 4.

That was clearly a decision by the Board to grant the request. It is conclusive proof that the mem-

bers of the Board had made up their minds upon the subject. The Board was manifestly ready to pass the requisite ordinance as soon as it could be prepared. But it being considered necessary that a notice of the proposed vacation should be given, such a notice was given, not by the Board or by the Clerk thereof, as required by the law under which the Board acted (P. L. 179, bottom), but by the City Street Commissioner. Case, p. 13, bottom. But a notice and hearing under such circumstances was a mere matter of form. The Board having already decided the matter, and embodied its decision in a formal resolution entered upon its minutes, and the Pipe Company having, no doubt, proceeded to consider the subject of its remaining in the City, if it intended to leave the same, there is no probability that anything could be said or presented to change such decision. This matter should, therefore, in my judgment, be treated just the same as if the ordinance had been prepared and adopted without notice given or parties interested heard. The view of the Supreme Court upon the subject appears on bottom of page 139 and top of page 140 of the case. The view taken of this subject by anyone depends, of course, upon his judgment and knowledge of human nature. And there I leave it.

Fourth.

Said ordinance was passed upon certain stipulations and conditions shown in the resolution for the same and otherwise, which render it illegal.

Those stipulations and conditions were as follows: (1) That the East Jersey Pipe Company, for whose use and benefit the vacation was to be made, should remain in Paterson; (2) that said company should acquire the ownership of both sides of the streets to be closed, meaning, of course,

so much thereof as they did not already own; excepting in the case of one side of East 37th Street (meaning easterly side, opposite Pipe Company's property), erroneously stated to be owned by the National Ribbon Company; and (3) that the consent of the National Ribbon Company, the supposed owner of the east side of East 37th Street, for the closing of that street be obtained.

This ground of appeal is not now pressed. I had grave doubts, when the case was before the Supreme Court, of the propriety of such conditions and stipulations. But I do not see, after a fuller consideration of the matter, as they have any other bearing on the case than to show very clearly that the public good, otherwise than from the retention of the business of the company in the City, was not considered as requiring the vacations to be made; and if the public good, otherwise than from such retention, was considered as requiring such vacations, they doubtless would have been made without such conditions and stipulations.

FIFTH.

Said ordinance in attempting to vacate all of said streets for the purpose and under the circumstances, is an unreasonable one.

I confine myself here to East 37th Street, that being the only street the vacation of which the appellant protested against. Case, p. 8, ll. 30, &c. He did not protest against the closing of the other two streets for the reason that all he personally wanted was a way to "get out," as he put it, through East 36th or East 37th Street. Case, p. 37, ll. 26, &c., p. 41, ll. 4, &c. East 36th Street having been closed several years ago (see ordinance on p. 133 of Case; Exhibit S-16), East 37th Street was the only one of the two that was left him. The vaca-

tion of the portion of the last mentioned street that was vacated was not essential to the purposes of the Pipe Company, and could not have had any effect upon its decision as to whether it would remain in Paterson. This street does not run through that company's property, but along the easterly side of it, separating it from lands occupied by the National Ribbon Company; all the Pipe Company gains by such vacation, therefore, is a strip of land in said street adjoining its property 30 feet in width and 325 feet in length. No one looking at the vacation map can believe that the Pipe Company's remaining in Paterson could have been contingent upon its getting that strip of land. But the vacation was not confined to this strip of land; it took in the entire width of the street. It thus took in the opposite half of the street also, which could not be of any benefit to the Pipe Company. The only parties benefited by the closing of that half of the street are the owners of the adjoining land, who would thereby acquire a strip of land 30x325 feet along the entire length of their land (see vacation map) without asking for it or its costing them anything; and it does not appear that the City would receive any benefit whatever from that donation. But it would have been of advantage to the appellant as well as to other land owners in that locality and the public at large to have confined the vacation to the westerly half of the street, for in that case there would have been a 30-foot street left, which would have been much better than no street at all. It does not appear that any effort was made to persuade the Pipe Company to "let up" in the vacation of the other half of this street. That the vacation of this part of East 37th Street, and especially of the easterly half of it, which could have been of no benefit to the Pipe Company, was unreasonable, seems very clear.

SIXTH.

If said Board of Public Works has power to vacate streets, the exercise of that power in this case was an abuse of such power to such an extent as to render it illegal.

That such is the case I think clearly appears. In the case of *Marietta Chair Co.* v. *Henderson,* 121 *Ga.,* 399, the Court said:

> "If the public interest is not the motive which prompts the vacation of a street, whether partial or entire, the act of vacation is an abuse of power, and especially would it be a gross abuse of power if it is authorized without reference to the rights of the public and merely that the convenience of a private individual might be subserved."

It appears from the context that the "public interest" there mentioned is the interest of the public in the street as a street. And in the case of *Laurel* v. *Lowell,* 84 *Miss.,* 436, the Court said:

> "we think this record shows that the closing of Post Street is in order to put appellant corporation in possession of it, and this is *ultra vires* and intolerable."

SEVENTH.

These attempted vacations are not promotive of the public good or public welfare in any sense in which these terms are applicable in such a case.

I do not think I need say anything more than I have already said upon this point.

EIGHTH.

Said attempted vacations would be an injury to the public, to the appellant, and to all other land owners in that vicinity.

The public would be injured by the closing of East 35th and East 37th Streets at 21st Avenue, and converting the other parts of that section of these streets from thoroughfares into *cul de sacs.* In this way two of the means of passage from Market Street, the principal thoroughfare in that locality, to 21st Avenue, will be destroyed. As the matter now stands, without the vacations the blocks on 21st Avenue in that locality are as follows: 200 feet from East 34th Street to East 35th Street, 460 feet from East 35th Street to East 37th Street (East 36th Street having been closed there before, as already shown), and 200 feet from East 37th Street to East 38th Street. After these vacations there will be only one entire block from East 34th to East 38th Street, a distance of 980 feet.

It is true that this is in a vacant part of the City, but it will not always, or even very long, remain vacant, as the City is, upon the whole, increasing in population very rapidly. The City was very wisely, as long ago as 1871, as already shown, laid out into blocks and lots, with streets and avenues thereon, to insure regularity and uniformity in the building up of the City. Only a few years ago parts of the City that are now built up were as vacant at least as the part now in question. East 38th Street, further away from the business part of the City than these streets are, having been fully improved, is now built up, as already shown. Improve East 35th Street and East 37th Street in the same way and the same result will no doubt follow. It is therefore no argument against public injury that these streets are not yet improved. The public

will be injured by their being rendered unavailable for their future use, for which they are intended.

The appellant will be injured in this way: The land of which he is the half owner is highly adapted for business purposes, as, for instance, manufacturing establishments. Case, p. 32. It is not likely that it will be used for private residences, especially if the Pipe Works, which are directly opposite his land (Case, p. 32, l. 10), remain there. It is too near the railroad and would be too near the Pipe Works for that purpose. If East 37th Street is left, appellant will have a direct access through that street to Market Street. If closed, his best means of access to the same point in Market Street will be through a 25-foot street (the fence along the railroad then no doubt remaining), 200 feet to East 38th Street, then through that street, which is about 25 feet longer in that section than East 37th Street is, to Market Street, and then down Market Street, a distance of about 225 feet, to East 37th Street. But, as the appellant said, the objection is not so much to this distance and inconvenience of travel as with the situation of the property, which would have only a 25-foot street before it, there being in that case no crossing over the railroad, and a solid street on the other side of the road. Case, p. 33. The inconvenience of such a situation for business property can be readily seen. The ~~prosecutor~~ appellant says that such a situation would put the property out of the market. Case, p. 34, l. 8. Then the injuries to the public already mentioned would also constitute injuries to the ~~prosecutor~~ appellant to a greater or less extent.

But it is said by the defendants' witnesses that the appellant could go through 21st Avenue to Market Street, and that in that way the distance to the business part of the City would be shorter than the East 37th Street route would be. In going

that way one has to pass along the railroad through a 25-foot street for the distance of 200 feet, and the distance would be about twice as far to Market Street than it would be by the East 37th Street route. Some other routes were mentioned by the defendants' witnesses by which the distance to the business part of the City would be shorter than through East 37th Street, but it is hardly worth while to notice them here. For the important thing in such a matter is, not the shortest route to the business part of the City, but the shortest route to the main thoroughfare in the locality; and in this case that thoroughfare is Market Street. Case, p. 32, l. 27. And the shortest route from the appellant's property to Market Street is through East 37th Street. See the vacation map. Then the shorter routes to the business part of the City do not remove the injury resulting from the local situation above mentioned.

That other lands in the same locality would be injured by these vacations is clear; some as much and others not quite as much perhaps, as those of the appellant.

NINTH.

The last ground of appeal stated is that the Supreme Court adjudged and decided that dedicated streets are not subject to any different rule with reference to the right of the City to vacate streets than other streets are.

On this point the Supreme Court said:

> "We do not think that dedicated streets are subject to any different rule with reference to the right of the city to vacate than other streets. The dedicator does not retain a right to thwart the vacation if the city

> authorities deem that course a public benefit. To so hold would often prevent the city from relieving the public treasury of the unnecessary burden of caring for useless streets." Case, p. 140.

I must say I do not see the connection between the proposition contained in the first sentence of this statement and the reasons therefor given in the other two sentences. We have not claimed that the appellant retains any more "right to thwart the vacation if the city authorities deem that course a public benefit" than other persons have; all we have claimed in behalf of the appellant as such dedicator is that, having dedicated the streets, he has a peculair right to be heard and considered when he thinks an attempt is being made to unlawfully vacate the same. Nor have we denied the right of the City to relieve the public treasury of the unnecessary burden of caring for useless dedicated streets, whenever such power is conferred by the Legislature. Nor do we see the necessity of a uniform rule upon the subject; that is to say, why one rule should not be applied to dedicated streets and another and different one to streets not dedicated. As to the rule itself referred to, there is nothing to show what it is. If it is as I have stated it, namely, that a city under a mere general power to vacate streets can lawfully vacate a street or section of a street only when the interest of the public therein as a street or section of a street, as the case may be, requires that it should be vacated, there does not seem to be much objection to it.

But it is exceedingly doubtful whether under a mere general power to vacate streets a dedicated street can be vacated at all. Such a vacation would seem to require special statutory provisions to be

observed for the protection of parties interested. But, however that may be, it is certain that a dedicated street cannot, at least without express statutory authority, be turned over to the use of a private individual or corporation. *Hoboken Land, &c., Co.* v. *Hoboken,* 7 *Vr.,* 540, 549. It cannot make any difference whether that is done by a conveyance or leasing of the fee, when the fee is vested in the municipality, or by releasing the public right by means of a vacation, when the fee is in the adjacent land owners. In the case of a mere vacation the question is, what is its purpose? What the end accomplished?

I will add that, if the "rule" mentioned by the Supreme Court would permit what has been done in this case to be done if the streets were not dedicated streets, then the rule does not apply to dedicated streets. *Trustees of M. E. Church* v. *Council of Hoboken,* 4 *Vr.,* 13, 19; *Hoboken Land, &c., Co.* v. *Hoboken, supra; Belcher, &c., Co.* v. *St. Louis &c., Co.,* 82 *Mo.,* 121, 125.

Note 1.

It should be observed in reference to the rule in *Kean* v. *Elizabeth,* 54 *L.,* 462, whatever that may have been, referred to by the Supreme Court, that the street in question in that case was not a dedicated street.

Note 2.

The statutory provision upon which the Supreme Court relied in sustaining the power of the Board of Public Works to vacate streets has received an exactly contrary legislative construction. An act approved April 9th, 1913, P. L. 657, provides for a municipal board of public works in all cities of the second class that should adopt the act. The

provisions of that act upon this subject are substantially the same as those of the act in question in this case; and the part of the latter act relied upon by the Supreme Court is precisely the same as in the former act. And yet the Legislature, by an act approved April 14th, 1914, P. L. 562, enacted that the board of public works provided for in the Act of 1913, "shall, *in addition* to the powers conferred by the said act, have the power to open, grade, pave, curb, *vacate,* alter or change the lines of roads, streets or alleys," &c. The italics are mine.

I respectfully submit that the judgment of the Supreme Court in this matter should be reversed, and the ordinance in question set aside.

GEORGE S. HILTON,
Attorney for Appellant.

New Jersey Court of Errors and Appeals

SAMUEL S. SHERWOOD, Prosecutor and Appellant, vs. THE CITY OF PATERSON *et als.*, Defendants and Respondents.	On Appeal from the Supreme Court.

RESPONDENTS' BRIEF.

The streets, of which parts were vacated by the ordinance under review, were streets dedicated about forty-four years ago, by map filed by the owner. They have never been opened, nothing whatever has been done physically upon the ground, but the same lies just as it has since the map was filed. The streets exist merely on maps and in deeds wherein they are referred to.

This case is submitted on brief; and in this brief we shall confine our argument to answering the points raised in Appellant's brief, in reliance upon the rule, that this Court will not consider any points other than those mentioned in the Appellant's brief, as laid down in *Lavin* v. *Public Service Ry. Co.*, 48 *Vr.*, 217, 220, and *Marten* v. *Brown*, 52 *Vr.*, 599, 600.

In answer to the Appellant's points, we submit the following:

FIRST.

Section 92 of the Paterson City Charter conferred the power to vacate streets upon the Board of Aldermen (P. L. 1871, p. 846) and this power was transferred from the Board of Aldermen to the Board of Public Works, by the acts herein next referred to.

The power is conferred upon the Board of Public Works by the Act of April 13th, 1907, P. L. 1907, p. 114, and the amendments of that Act of April 12, 1910, P. L. 1910, p. 524, and of April 6th, 1911, P. L. 1911, p. 179. Under these acts, which apply to the City of Paterson, the Paterson Board of Public Works was created.

Section 2 of this act and Section 2 of each of the amendments provides as follows:

> "The said board of public works shall be in the place of and be substituted for and shall be invested with all the powers and duties now vested in or exercised by any board of aldermen, common council or committee thereof, relating to and in respect of the management, control, maintenance and operations of the roads, streets, alleys and sewers, and of the laying out and construction of roads, streets, alleys and sewers within such city."

Then after enumerating other powers and matters Section 2 immediately continues as follows:

> "It being the intention of this act to *entirely* supersede the common council, board of aldermen or other governing bodies of such cities, or *their power or authority thereunder in the several departments of streets,* sewers and water works, and to place the same under the power, authority and control of the board of public works as herein provided for in the same manner and with *like* power and authority as the same are now vested in or under the authority or control of any

> such common council, board of aldermen or other governing body of such city, or their power or authority therein, *and this act shall be so construed.*"

Counsel for Appellant argues that, under the Paterson Charter, the Department of Streets as therein defined consists of a committee, who are charged with the execution of the powers of the Board of Aldermen, among which powers is that of vacating streets, but counsel for Appellant further argues that the power of vacating streets resides in the Board of Aldermen and not in the Department of Streets as defined in the Charter.

Counsel's argument then assumes, as we understand it, that the Legislature, by the provision transferring the powers of the Board of Aldermen to the Board of Public Works, intended that the only power so transferred to the Board of Public Works with reference to streets was this executive power of the committee constituting the Department of Streets as defined in the Paterson Charter.

To this we reply:

1. There is no expression in the act to indicate that the Legislature intended to transfer to the Board of Public Works only the limited power of the committee to merely execute the power of the Aldermen over streets as defined by the Paterson Charter. If such had been the legislative purpose, naturally by apt language, it would have referred to the power transferred as limited to the executive power of the committee or the Department of Streets *as defined in the Charter.*

But, on the contrary, the act expressly states "that it is the intention of the act to entirely supersede the *Board* of Aldermen * * * or their power or authority * * * in the several departments of streets," etc.

The power of the Board of Aldermen thereby referred to as superseded is not limited to the powers of a committee constituting the Department of Streets as *defined by the Paterson Charter,* or to the executive powers of such committee

or department *as defined by the Charter,* but the term "department of streets" is used generally in its common and accepted meaning, as referring to the whole power of the Board of Aldermen respecting the department, meaning the *subject* of streets, irrespective of what the Paterson Charter had defined as the Department of Streets.

This general use of the word "department," irrespective of what the term "department of streets" was under the Paterson Charter, as meaning merely one of the subjects or divisions of the powers of the Board of Aldermen, is its common use just as the word is used when we refer to the "treasury department," "war department," applied to government or "medical department" or "department of physics" applied to universities (Webster's Dictionary).

2. There is not merely an absence in the act of any such expression, but the provision in question clearly shows by its express terms that the entire power of the Board of Aldermen over streets is superseded, and not merely the limited powers of a committee, such as counsel for Appellant contends constitutes the Department of Streets as defined by the Charter.

We call attention to that language of the act which provides that it is the intention of the act to supersede the *Board* of Aldermen or their power or authority *"in* the several departments of streets, sewers and water-works."

The "department of streets" which is here superseded is here referred to as something *in* which the *Board* of Aldermen (that is, the whole Board as distinguished from a committee) has power and authority. Now, if the "department of streets," as defined in the Paterson Charter, consists only of a committee with powers merely to execute the powers of the Board, the Legislature, when it expressly transferred the entire power of the *"Board of Aldermen"* (*i. e.,* the whole Board) *in* the "Department of Streets," could not have intended that this entire power of the whole *Board of Aldermen* so transferred referred to the *committee* or executive power of the Department of Streets as defined in the Paterson Char-

ter, *in* which the Board of Aldermen had no power. The language is not merely inapt, but it is absolutely in conflict with such purpose.

In this connection we observe that counsel for Appellant, at page 10 of his brief, says, "Now there is no such thing as powers formerly vested in the *Board of Aldermen* in the department of streets." Counsel then proceeds to show that he means to say that the *Board of Aldermen* had no such power in the Department of Streets as defined by the Paterson Charter, because such Department of Streets consisted only of a committee charged only to execute the power of the Board of Aldermen.

If, as counsel argues, the *Board of Aldermen* had no power in the *Department of Streets* as defined in the Paterson Charter, what power of the Board of Aldermen must the Legislature have meant to supersede when it *expressly* says that the "intention of this act is to entirely supersede * * * the *Board* of Aldermen * * * or their power or authority thereunder, in the several departments of streets"; and when it further says that the power so superseded should be placed under the Board of Public Works in the same manner and with like power "as the same are now *vested* in or under the control of the *Board* of Aldermen"?

Certainly some power of the *Board of Aldermen* in the *Department of Streets* is here expressly conveyed, and if the Board of Aldermen had no power in the Department of Streets, as defined in the Paterson Charter, then clearly the power of the *Board of Aldermen* which is referred to in the act as being *"in the department of streets"* must relate to such power as the *Board* had over streets, irrespective of how the committee called the "department of streets" was defined by the Paterson Charter. In fine, the Legislature, in referring to the power of the *"Board of Aldermen in the department of streets,"* merely meant by the use of the term "department" to refer to the *subject* of streets as a division of their powers, and used the term generally as it is usually understood, without any regard to the meaning of the term as defined in the Paterson Charter.

3. We contend that the provision of the act already quoted *expressly* transfers the power to vacate streets from the Board of Aldermen to the Board of Public Works.

While the act does not *specify* "vacation" of streets, it does *expressly* transfer, by the general terms used, all powers of the Board of Aldermen over streets, expressly given by Section 92 of the Paterson Charter, which section expressly includes vacation of streets (P. L. 1871, p. 846). If the general terms used in the Act of 1907 are apt and sufficient, under the usual rules of construction, to include the special power to vacate streets, it cannot accurately or properly be said that the power is transferred by implication. In such case it is transferred *expressly* but by *general* terms which properly construed include "vacation of streets," although such vacation is not *specially* named. This method of transferring such powers by general terms, instead of enumerating every particular power or detail, was necessary from the nature of the legislation, as will appear from the following considerations:

The act applies to any city *"now or hereafter"* having the given population.

Manifestly, it was impossible for the Legislature to *specify* each and every *particular* power, not only of the city or cities then being within the class, but also of such cities as might thereafter come within the class to which the act would apply. Evidently, many *particular* powers would be given to cities that would come within the class after the law was passed which could not be *specified* when the act was passed. From the nature of the legislation, therefore, the different powers to be superseded could not be *specified* in detail, but it was necessary to express them in *general* terms.

And so Section 2 of the act does not attempt to specify in detail the particular powers so superseded as they had been subdivided or defined in existing charters of the city or cities to which the act then applied or to which it would thereafter apply.

That each of such powers could not have been so specified is obvious. For instance, the Legislature, in referring to the

transfer of the power of the Board of Aldermen in the Department of Streets, which was to apply to all cities having a certain population, whether then existing or afterwards coming into the class, could not confine the term "department of streets" to what the *Paterson Charter had alone defined it,* since the power of the governing bodies in the Department of Streets, as defined in other cities to which the act would then or thereafter apply, might be entirely different from that defined by the Paterson Charter. Evidently, the Legislature, in using such general terms for *different* cities to which the act then and afterwards would apply, must have used them without regard to the use of such terms by any *particular city.*

That the term "department" was not meant to refer to "department" as defined in the Paterson Charter also appears from the fact that the act also couples the "department of water-works" with that of the Department of Streets and Sewers. There is no Department of *Water Works* defined in the Paterson Charter, from which it would appear that the Legislature did not intend to place such restricted meaning upon the terms, as defined by the Paterson Charter in the "departments," either of streets, sewers or water-works, referred to in the act.

4. Apart from the provision of the act already referred to, it is unreasonable to suppose that the Legislature intended to create a Board of Public Works, the principal power of which related to streets, and to transfer from existing governing bodies the *entire* power over streets, except that of vacating, and to leave the power of vacating with the Board of Aldermen. What conceivable purpose could the Legislature have in taking from the Aldermen and giving to this newly created Board, designed primarily to act in relation to streets, every power respecting streets except the power of vacating a street? Why give the power of laying out, managing and improving streets to the Board of Public Works and leave with the Aldermen the kindred power of vacation? It is not conceivable why the Legislature should leave such cog-

nate powers in two different bodies, particularly when we consider that the very purpose of the act was to create a body whose peculiar duties related to streets.

The unreasonableness of supposing such an intention of the Legislature to make such an incomplete law would raise, in itself, an implication against such construction, even if the intent were not shown by the general provision referred to. As an example of such construction, *Reed* v. *Camden,* 24 *Vr.,* 322, is pertinent.

There the Charter of Camden in one section expressly conferred the power to "vacate" streets in connection with the power to "lay out, open, alter and widen" and in the subsequent section providing for notice, etc., expressly used only the words "altering, laying out or widening." The Court, however, held that, "reading the whole together," it appeared that the word "altering" must be held to relate to the other changes contemplated in streets not included in the words "laying out and widening," and would include the term "vacated" in the first part of the section "to make the power complete in its operation."

While not disputing the general rule laid down in the cases cited by counsel for Appellant, that a municipal body's power over streets must be conferred expressly, or by what is termed necessary implication, we contend that the transfer of the power to vacate streets to the Board of Public Works would be given in that act by "necessary implication," within the meaning of that term as defined and explained by the decisions, even if the intent were not shown as we claim it is shown by the provision of the act referred to.

What "necessary implication" means in such case clearly appears in *Reed* v. *Camden, supra.* In that case implication had to be as rigidly necessary as in the case *sub judice.* In that case a result could *possibly* have been reached contrary to that reached by the Court, but the Court construed the act according to its spirit and reasonableness and did not adopt a rule that was unreasonable, although possible. Upon this question, in addition to *Reed* v. *Camden, supra,* the following authorities are cited:

In 26 *Am. & Eng. Enc. of Law,* 2nd Ed., pages 613 and 614, citing *Gilbert* v. *Craddock* (*Kan.* 1903), 72 *Pacific Rep.,* 869, the meaning of the term is laid down as follows:

> "When the intention of the Legislature as gathered from all legitimate sources is taken into consideration, terms and provisions not expressly declared, may be introduced into a statute by necessary or plain implication from what is directly or expressly declared.
>
> By 'necessary implication' is not meant an implication that points to a result so as to leave no possible escape and to exclude every other imaginable conclusion, but one that leads to such a conclusion as under the circumstances, a *reasonable* view compels the court to take, the contrary of which would be improbable or absurd."

26 *Am. & Eng. Ency. of Law,* 2nd Ed., pages 613, 614.
Gilbert v. *Craddock* (Kan. 1903), 72 *Pac. Rep.,* 869.

In *Gilbert* v. *Craddock, supra,* it is said:

> " 'Necessary implication' does not mean to shut out every other possible or imaginary conclusion, and from which there is no possible escape, but means one leading to such a conclusion as, under the circumstances, a reasonable view impels us to take, the contrary of which would be improbable and absurd. Speaking on the matter of implication in the consideration of the statutes, *Black, Interp. Laws,* par. 33, says: 'This doctrine does not empower the courts to go to the length of supplying things that were intentionally omitted from the act, but it authorizes them to draw inferences from the general meaning and purpose of the Legislature, and from the necessity of making the act operative and effectual as to those minor or more specific things which are included in the more broad or general terms of the law, or as to those consequences

of the enactment which the Legislature must be understood to have foreseen and intended.' "

5 *Words and Phrases Judicially Defined,* p. 4718.

In *McCoury's Ex'rs.* v. *Leek,* 14 *N. J. Eq.,* 70, at pages 72 and 73, Chancellor Green defines the meaning of the term as applied to the construction of wills as follows:

" 'In construing a will, conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed.' *Coryton* v. *Helyar,* 2 *Cox,* 340; *Wilkinson* v. *Adam,* 1 *Ves. & B.,* 466; 2 *Bla. Com.,* 381; *Roper on Legacies,* 84, 724.

"The whole will, taken together, must produce the conviction that the testator's intention was to create the estate raised by implication. *Bootle* v. *Blundell,* 1 *Mer.,* 219; *Brummell* v. *Prother,* 3 *Ves.,* 113; *Rathbone* v. *Dyckman,* 3 *Paige,* 9.

"In passing on the question whether a will created a gift by necessary implication, it was said that the term 'necessary implication' is thus defined by Lord ELDON in *Wilkinson* v. *Adam,* 1 *Ves. & B.,* 456: 'It does not mean natural necessity, but so strong a probability of intention that an intention contrary to it which is imputed to a testator cannot be presumed.' In *Mitchell* v. *Mitchell,* 5 *Mad.,* 69, the court says: 'The expression "a necessary implication" is frequently applied to cases between a devisee and an heir at law, and yet there is hardly a case decided against an heir at law where the implication on which it was so decided was of absolute necessity. It is but a loose way of defining this expression to say that the intention must be so probable that the judge cannot suppose to the contrary' " (5 *Words and Phrases Judicially Defined,* p. 4719).

The term "necessary" has been defined by this Court in *State, N. J. R. R. & Trans. Co., pros.,* v. *Hancock,* 6 *Vr.,* 537, by Chief Justice BEASLEY, at pages 545 and 546, as follows:

> "In the case of *The State* v. *The Commissioners of Mansfield,* already mentioned, this term, 'necessary,' is put in sharp contrast to the word 'convenient.' But this, I think, is clearly a mistake; and it is a mistake which has introduced confusion. The word necessary, in this use, is so far from being contra-distinguished from the word convenient, that the former term comprehends much that, in strictness, is embraced in the latter term. Power necessary to a corporation does not mean simply power which is *indispensable.* Such phraseology has never been interpreted in so narrow a sense. There are few powers which are, in the strict sense, absolutely necessary to those artificial persons, and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass their operations. Such, in similar cases, has never been the legal acceptation of this term. A power which is obviously appropriate and convenient to carry into effect the franchise granted, has always been deemed a necessary one. For example, in the case of *The State* v. *The Commissioners of Mansfield,* it is said: 'Power to construct a railroad, and establish transportation lines upon it, necessarily includes the essential appendages required to complete and maintain such a work, and carry on such a business, as the power to erect and maintain suitable depots, car-houses, water-tanks, shops for repairing engines, &c., coal or wood yards for fuel for the use of their locomotives,' &c. Now it will be observed that these appendages thus enumerated, are nothing more than conveniences, which, in the rigorous meaning of terms, are not necessary; yet no one will doubt that they plainly fall within the legal signification of that term. *And it is to be further observed, that is the only force which in law is usually given to this word.* Such

was the limited meaning ascribed to it in the great case of *McCulloch* v. *State of Maryland,* 4 *Wheat.* 414. The constitution of the United States empowers congress to pass such laws as are 'necessary and proper' for carrying into execution the powers granted, and it was insisted that, by this authority, such laws only could be passed as were indispensable. Referring to the term 'necessary,' Chief Justice MARSHALL says: 'Does it always import an absolute physical necessity so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.' "

Since "necessary implication," according to the foregoing cases, does not mean to shut out every conclusion, but means only such a conclusion "as under the circumstances a *reasonable* view impels us to take, the contrary of which would be improbable," we submit that the power to vacate streets would pass in this case by necessary implication within the meaning of that term from the improbability and unreasonableness of supposing that the Legislature would create a Board of Public Works for the express purpose of transferring to such new Board all existing powers of the Board of Aldermen over streets, except the kindred power of vacating, and leave that power alone with the Board of Aldermen.

5. The purpose of the provision is too plain to be governed by mere forms of punctuation. "Very little reliance is to be placed on it" (punctuation) said HORNBLOWER, *C. J.,* in *Den Berdan* v. *Van Riper,* 16 *N. J. L.,* 7, at page 14. The conten-

tion of counsel that, because the provision in question follows a comma, the office of the provision is merely to make more certain the conferred powers thereinbefore specifically enumerated, would give no force to the provision, but would render it idle and purposeless. Moreover, the language of the provision cannot possibly be meant to relate merely to the things previously enumerated, because the provision expressly uses general terms sufficiently comprehensive to include all powers with reference to streets which might not be included in the things specially enumerated. The purpose of this comprehensive provision evidently is to comprehend by more general terms all powers relating to streets which may not have been specifically enumerated.

Nor is such plain purpose and intent of the act affected by the fact that the Legislature may by subsequent similar legislation have seen fit to specifically provide for the vacation of streets. The Legislature customarily makes such legislation to remove all kinds of doubts and questions of construction, however captious they may be. Such subsequent legislation is of small consequence on a question of construction where, as in this case, the intention of the act is apparent according to the usual principles of construction.

SECOND.

The Board of Public Works created by the act has been the de facto body exercising the power of vacating streets whereby its act in vacating the streets in question is valid.

Long v. *Bayonne,* 74 *N. J. L.,* 455.
Harrison v. *Madison,* 81 *N. J. L.,* 21.
Dugan v. *Farrier,* 47 *N. J. L.,* 383.

The Board of Aldermen has construed the Act of 1907 and its amendments as transferring the power to vacate streets to the Board of Public Works, and during the eight years since the creation of the Board of Public Works the Board

of Aldermen has never claimed or exercised the power to vacate, while the Board of Public Works on numerous occasions have exercised the power (Case, pp. 83, 84).

THIRD.

The object and effect of the ordinance did not render it illegal.

Counsel for Appellant states in his brief that its object was to confer a private benefit upon the East Jersey Pipe Company with no other public good in view than such as might result from the retention of the company with its business in Paterson. To this we answer:

1st. If such were the sole object of the vacation, it would not be illegal on that account.

In *Kean* v. *Elizabeth,* 25 *Vroom,* 462, affirmed by this Court, 55 *N. J. L.,* 337, a similar question arose.

In that case this Court justified the action, in the opinion written by Mr. Justice Reed, at pages 466 and 467, as follows:

> "Nor do I find any substance in the point that the vacation was made to subserve a private interest.
>
> It is true that the proceedings for vacation were taken immediately after a petition for such vacation had been presented by the trustees of the Trumbull estate.
>
> The vacated portion of the street had been laid over the Trumbull lands. There appears to have been an opportunity to sell a tract of said land to a company which would locate extensive works upon it, and so increase the prosperity of that portion of the city.
>
> The required piece of land could not have been obtained without a vacation of this part of York street. This was probably the *principal inducement* to the ac-

tion of common council. But the motives which induce municipal proceedings of this kind are always of a mixed character.

Regard for private interests are necessarily intertwined with public interests. The size of lots for building purposes is a proper factor to be taken into consideration in the vacation, as well as in laying out or altering streets.

If the motive of a common council in exercising the power conferred upon it by the legislature can ever be questioned is doubtful.

If the courts can enter into the motives of the municipal legislature in respect to acts of this kind in any case, it must be one in which the public interests have been *glaringly* sacrificed to subserve private ends.

Nothing of this sort appears in this case. The vacated portion of the street runs through salt meadows and crosses an unbridged creek, and there is not a house or building along the line of it.

Between the property of the prosecutrix and the vacated part of the street York street is crossed by Schiller street, which is open and built upon.

Under all the circumstances the action of common council is not properly the subject of a suspicion of being influenced by any considerations other than to conserve the best interests of the city."

2nd. While the vacation in the case of *Kean* v. *Elizabeth, supra,* was justified, the facts in that case afforded a ground for more serious objections than exist in this case, as will appear from the following considerations:

In that case the street vacated was an opened and used street, for the expense of opening which the prosecutor had paid benefits some years before. The land of the vacated street was required for the purpose of causing a company to locate works upon it and so increase the prosperity of that part of the city. In the opinion, at page 466, it is said:

"This was probably the *principal* inducement to the action of the common council."

In the case *sub judice,* however, while the petition of the East Jersey Pipe Company brought the proceedings before the consideration of the Board of Public Works, and while the public benefit of maintaining the works in the City was duly considered, such benefit was not the sole or even the principal cause that induced the Board to vacate the streets.

The principal cause that induced the Board to vacate was, that it was probable from all the circumstances that the portions of the streets vacated would never be needed by the public for streets, and that the public authorities would never be justified in going to the expense of opening and maintaining them, and that conclusion results from the following facts: In the first place, the streets had been dedicated by the owner in 1871, forty-four years ago, and during this whole period of forty-four years, the City has never done anything whatever towards opening or using them. The land lies just as it did when the streets were dedicated, so that the streets exist only on maps. The Pipe Company owns the whole property from and including East Thirty-fifth Street to and including the westerly half of East Thirty-seventh Street and from Twenty-first Avenue south toward Market Street a distance to and beyond the parts vacated as shown on the map marked Exhibit D-8, and the National Ribbon Company owns the large tract along Twenty-first Avenue as shown on map marked Exhibit D-8.

Since these companies occupy all the land through which these vacated portions of the streets go, there can be no other houses or buildings on the vacated portions for the use of which a street may be needed.

The ground is low compared with the grade of the railroad and Market Street, so that the cost of opening and grading in order to use them would be large. There is only one building on the whole tract between Twenty-first Avenue and Market Street and East Thirty-fifth Street and East Thirty-seventh Street other than the pipe works. There is a large

acreage of unoccupied land all around this locality, so that there is no need of many streets, while East Thirty-eighth Street is a wide macadamized street amply sufficient to permit all kinds of traffic from Vreeland Avenue to Market Street.

Moreover, Twenty-first Avenue is dedicated and opened from the railroad to Market Street (Case, pp. 69 and 53), so that it would be more feasible for the City to open and improve the rest of Twenty-first Avenue from the railroad along Appellant's land to Vreeland Avenue, rather than to open these portions of East Thirty-fifth, East Thirty-sixth and East Thirty-seventh Streets now occupied by the defendant and the Ribbon Company; and if Twenty-first Avenue were opened, then the occupants of the Appellant's lots on Twenty-first Avenue would have a much more direct way to Market Street and nearer to the heart of the City than they would have by going the way over the vacated portions of East Thirty-fifth, East Thirty-sixth or East Thirty-seventh Streets. In other words, the course from the Appellant's lots to the City by way of Twenty-first Avenue would be more direct and shorter than by East Thirty-fifth Street, East Thirty-sixth Street or East Thirty-seventh Streets, if they were opened. (See testimony of Doremus and map, Case, pp. 69-70.)

Again, Twentieth Avenue is now actually open and it is a shorter distance by way of Twentieth Avenue to the City than by way of East Thirty-fifth Street, East Thirty-sixth or East Thirty-seventh Street if they were actually opened. But the serious objection to the opening of either of these streets is that they would have to cross the Susquehanna Railroad track at grade. The grade of the track is considerably higher than the grade of the surface of these dedicated streets, so that not only the danger of crossing at grade, but also great expense, had to be considered.

Furthermore, the Board of Public Works have no power to open the streets and cross the railroads at grade without obtaining the consent of the Board of Public Utility Commissioners pursuant to the provisions of the 21st Section of the Act of April 21st, 1911.

Paterson & Ramapo R. R. Co. v. *Paterson,* 81 *N. J. Eq.,* 124, 126.

All of these things were taken into consideration by the Board of Public Works in its action in vacating these streets, and it cannot be said, in view of these facts, that their action was not in accord with public interests.

On this subject we repeat the language of Judge REED, in *Kean* v. *Elizabeth, supra,* wherein, at page 466, he says:

> "If the motive of a common council in exercising the power conferred upon it by the Legislature *can ever be questioned is doubtful.* If the courts can enter into the motives of the municipal legislature in respect to acts of this kind in any case, it must be one in which the public interests have been glaringly sacrificed to subserve private ends."

These words, we repeat, were applied in the case of *Kean* v. *Elizabeth, supra,* where the "*principal* inducement to the action of the common council" was to give the vacated streets to the defendant company to locate its works upon it and so increase the prosperity of that part of the City, and the street there vacated was an opened street for the expense of which the prosecutrix had previously paid for benefits. From this, the futility of such objection is apparent in the present case, where the vacation is of merely mapped streets, while the public interest would probably never justify their use at the place vacated, irrespective of the public benefit to be derived by retaining the defendant in Paterson.

The object of the Board in vacating the streets is evident, both from the undisputed testimony of the members who were sworn as to their object and from admitted facts. They considered that it was for the public benefit to vacate the streets; not only because of the advantages to be derived from having defendant's works at Paterson, but they vacated them because they did not think that the portion vacated would be needed for public streets; and if they had thought that they

would be needed for public use they would not have vacated them (Case, pp. 55-68-72-78).

The fact that all of the streets between Twenty-first Avenue and Market Street was not vacated is not inconsistent with our contention. The portion vacated was owned and occupied by the defendant and the Ribbon Company, so that there could not be any future use of that portion for dwellings so as to need a street, but the portion not vacated was open and might in the future be occupied by buildings and so need the streets for such purpose. Moreover, the serious objection to opening the streets over the railroad at grade applied to the portion vacated, but not to the portion not vacated. In other words, the conditions as to the two localities with respect to the need of a street in the future, were considered by the Board as entirely different. But according to the decision in *Kean* v. *Elizabeth, supra,* it matters not whether the principal inducement for vacating was the public benefit to be derived from the works, as was the case in that case, or that the public did not need the street in any event. The principle decided in that case is that it is doubtful whether the motive of the Board in exercising the power can ever be questioned by the courts, and if the Court can question them, it must be one in which the public interests have been glaringly sacrificed to subserve private ends.

Moreover, since the decision in *Kean* v. *Elizabeth, supra,* the Court of Errors in *Moore* v. *Haddonfield,* 33 *Vr.,* 386, has denied the power of the courts to question the motives of municipal bodies in the exercise of their powers, wherein, at page 391, Mr. Justice GARRISON says:

> "It remains to say a word upon that view of the case which assumes that it is within the judicial province to protect constituencies from the 'recreancy' of their representatives by undoing legislation that evinces 'bad faith.' To which the answer is—first, that the power so to intervene has wisely been withheld from the judiciary; secondly, that if the power existed, its exercise would be most mischievous, and lastly,

> that the redress of the betrayed constituent is in his own hands, to be sought at the polls and not in the courts."

See also 28 *"Cyc,"* pages 375, 376, and numerous cases cited on this point, particularly those showing the distinction between the power of the Court to review ordinances like the present and municipal contracts.

FOURTH.

The Board had power to vacate dedicated streets.

In *Hoboken Land & Improvement Co.* v. *Hoboken,* 7 *Vr.,* 540, cited in Appellant's brief, the right of the public authorities to vacate a *dedicated* street was considered. Mr. Justice DEPUE, speaking for the Court of Errors, at page 549, says:

> "But they (the public authorities) cannot release or discharge the public right, *unless* authorized to *do so by legislative authority,"*

thereby clearly implying that such vacation of a dedicated street as well as any other street may be made, where there is legislative authority, and, as we have shown in this case, legislative authority is clearly and expressly given to vacate streets by Section 92 of the Charter, which power was transferred to the Board of Works by the Act of 1907 and its amendments.

That our courts have made no limitation as to the power of the municipality to vacate streets, by reason of special circumstances connected with them, when power to vacate streets exists, appears in the case of *Kean* v. *Elizabeth,* 25 *Vr.,* 462 (affirmed 26 *Vr.,* 337).

In that case Mr. Justice REED, at pages 464 and 465, says:

> "It is assumed by counsel for prosecutrix, that because the prosecutrix was assessed for a benefit result-

ing from the opening of this street peculiar to herself, that she got a vested right in the continued existence of the street, of which she could not be stripped without compensation.

But this, I think, is more plausible than substantial. While the right she got may have been of peculiar benefit to her property, yet it was a right which she shared with the public.

The privilege of using the street was shared by each member of the community.

It may not have been of the same value to each member of the community, but the right to use the street was in each citizen the same. It was exclusively a public right put under the control of the representatives of the public. It was subject to alteration or abolition when in the judgment of those to whom the public interests were confided those interests demanded such action."

The language which recognizes that each person shares streets equally with the public, so that no person had any right over other persons to keep the street open on account of assessments for benefits paid by that person alone, applies equally to the case of a dedicated street. After it is dedicated and accepted, the person dedicating has no more interest in the *public* use of the street than any other member of the public, and has no more right than any other person to object to the vacation which is a mere relinquishment of the *public* interest.

In 27 *Am. & Eng. Enc. of Law,* 2nd Ed., at pages 113 and 114, the law upon that subject is stated as follows:

"As has been generally done, the legislature may expressly authorize municipalities to abandon the public use of a street and exonerate themselves from the obligation to keep it in repair and otherwise suitable for public use, and it is immaterial whether the street was established in the first instance by dedication or

by condemnation under powers of eminent domain, or that special assessments were levied to pay the expenses of originally establishing the street."

In the foot note is cited:

Glasgow v. *St. Louis,* 107 *Mo.,* 198.
See also *Reed* v. *Camden,* 24 *Vr.,* 347.
United N. J. R. &c. Co. v. *Natl. Docks &c. Co.,* 57 *N. J. L.,* 523.

FIFTH.

The action of the Board was taken only after legal notice and hearings.

The objection in this respect stated by counsel for the Appellant in his brief is, that the decision of the Board was actually made by the resolution adopted at the first meeting, when the question was originally presented. This conclusion of counsel, in our view, is entirely erroneous upon the conceded facts. The final action, of course, was the ordinance, and the terms of the resolution is of no importance if the ordinance was legally passed.

However, the resolution did not express and did not purport to express any determination of the Board other than to initiate the usual course of procedure for vacating the streets.

The minutes in the return show that Mr. Nelson on behalf of the defendant requested merely that *some* definite action be taken and that the Board should *consider* the matter. It was nothing more than a request that the Board should take up and consider the matter in the usual and legal course of procedure, and the statement in the resolution that the request be granted was merely a statement that the matter would be considered in its usual and orderly course. That the *resolution* does not purport to do more than take the first step in the procedure appears from the next provision

of the resolution that the City counsel be directed to prepare the ordinance, which would express their final determination. But apart from the resolution, the facts proved show that the *ordinance* was passed only after unusual hearings and discussions before the Board. The important question is what was done before the passage of the *ordinance,* not the *resolution.* At the first meeting on November 10th, 1914, the City Street Commissioner, who is also called Superintendent of Streets, was expressly instructed by the Board to cause the notice to be printed for objections to be filed pursuant to Section 98 of the City Charter.

1st. This notice was printed in two newspapers in the City on November 11th, the day following this meeting, and continued for twenty days successively in each paper (Case, pp. 48-13-14). The notice, according to the requirements of Section 98 of the Charter, described the proposed vacation and notified and requested all persons who might be interested or who might object to the proposed vacation to present their objections at the office of the Street Commissioner within twenty days from the date of the notice. Section 98 of the Charter (P. L. 1871, p. 848) provides for the procedure for vacating under the term "alter" according to the construction of a similar Charter in *Reed* v. *Camden,* 24 *Vr.,* 322.

2nd. Thereupon the Appellant and others actually filed objections, pursuant to the notice.

3rd. After these objections were filed, *two* different meetings of the Board were fixed for hearing the objections of the Appellant and all others.

These meetings for hearings were fixed by the Board after consultation and agreement as to the time thereof with counsel for the Appellant and all other objectors (Case, pp. 50-88).

4th. At two different meetings the counsel for the Appellant and other objectors appeared before the Board and were

fully heard on these two occasions before the Board decided to pass the ordinance (Case, p. 50).

The members of the Board who voted for the resolution testify that they voted for the ordinance only after giving due consideration to all the objectors and believing it to be for the public benefit (Case, pp. 58, 59, 74, 78, 79).

In face of these facts, counsel for Appellant, in his brief, says:

> "That (the resolution) was clearly a decision by the Board to grant the request. It is conclusive proof that the members of the Board had made up their minds upon the subject. * * * But it being considered necessary that a notice of the proposed vacation should be given, such notice was given. * * * But a notice and hearing under such circumstances was a mere matter of form. The Board having already decided the matter, and embodied its decision in a formal resolution entered upon its minutes, * * * there is no probability that anything could so be said or presented to change the decision."

To this it is perhaps sufficient to say that this is an imputation by counsel that public officers refused to give consideration to an important matter that the duty of their office plainly required, that such imputation is against the presumption of good faith and honesty that is attributed to all men in the absence of proof to the contrary, and that, in this case, there is not merely an absence of evidence to justify such imputation, but the evidence is, as we have shown, that the Board did carefully consider all objections and considered that they were acting for the public benefit in passing the ordinance.

But if there was evidence of recreancy or bad faith in this respect, the Appellant's remedy is not in the Courts, as is shown by the language of the Court of Errors already referred to in the case of *Moore* v. *Haddonfield, supra,* which is as follows:

> "It remains to say a word upon that view of the case which assumes that it is within the judicial province to protect constituencies from the 'recreancy' of their representatives by undoing legislation that evinces 'bad faith.' To which the answer is—first, that the power so to intervene has wisely been withheld from the judiciary; secondly, that if the power existed, its exercise would be most mischievous, and lastly, that the redress of the betrayed constituent is in his own hands, to be sought at the polls and not in the courts."

See also 28 *"Cyc,"* pages 375, 376, citing numerous cases.

It will be observed that counsel for the Appellant does not in his brief deny that the notice and hearings were in any wise insufficient, except for the fact that the Board had prejudged the matter and really decided it before the notices were given and the meetings held. No objections can be made on account of insufficiency of notice and hearing, because not only were the notices given according to the statute constituting the Charter, but two meetings for the very purpose of hearing all objections were fixed and agreed upon between the Board and counsel for the Appellant and other objectors before the meetings were held, and then, pursuant thereto, the counsel for Appellant and others actually appeared at two different meetings, and at length were fully heard, before the ordinance was passed.

Even if no notice had been given, and if the law required it to be given, the actual appearance and hearing of the objectors before the Board would have done away with the necessity of notice, since, if it is shown that the parties appeared and were heard, the object of notice has been attained.

> *State, Forbes* v. *Elizabeth,* 13 *Vr.,* 56, at pages 58 and 59.

Thus in this case notice and hearing were given, such as would meet all lawful requirements if the action of the Board were judicial and not ministerial or legislative.

But we contend that the particular action of the Board in vacating these particular streets was not judicial, but administrative and legislative, and that no notice or hearing is necessary except such as may be required by statute.

In making this contention, we admit, at the outset, that in the ordinary vacation of an open and used street, where it appears that an abutting owner on a portion of the street not vacated has in fact suffered special damage other than that suffered by the public at large, the act of vacating, so far as the private interests of owners so specially affected is concerned, is judicial; but we contend:

1st. Where the character of the vacation does not in fact so specially affect owners, the action is ministerial and may be done by the Board without giving notice of hearing. The rule is laid down in *State, Vanatta, pros.,* v. *Morristown,* 5 *Vr.,* 445, at pages 451 and 452, as follows:

> "Ordinances directing the mere repairing and repaving of streets or re-construction of sewers, which are enjoined upon municipal corporations as matters of duty, are purely ministerial; but ordinances directing new streets to be opened or altered, new sewers to be constructed, or other similar public improvements to be made, by which the property of individuals is taken or affected, are, in their nature, judicial. *City of Camden* v. *Mulford,* 2 *Dutcher,* 57, per Ch. J. GREEN. An ordinance laying out new streets or directing a sewer to be built, is judicial. *Parks* v. *Boston,* 8 *Pick.,* 218; *The Rochester, &c., Co.* v. *City of Rochester,* 3 *Comst.,* 464. The distinction is between those ordinances which adopt a general system of policy affecting all the inhabitants of the city or town, or all the property situate within corporate limits, directing the execution of mere public duties, the burden of which is borne by all equally, and those which provide for the making of a particular improvement affecting property in one locality, the cost of which is to be defrayed by certain specified individuals. The passing

of ordinances of the first class is within the ordinary legislative functions with which the common council is entrusted as the representatives of the people, which they may exercise in their discretion. Those of the latter class are the execution of certain statutory powers over individuals, to affect their property, which have been specially conferred upon the common council by the act of incorporation. With respect to this latter class of ordinances, the adoption of an ordinance directing the improvement to be made is a judicial act, affecting those individuals, and they are entitled to be heard before the ordinance is passed which adjudges the necessity or expediency of the proposed improvement and directs it to be made."

In *Kennelly* v. *Jersey City,* 28 *Vr.,* 292, Mr. Justice DIXON, speaking for this Court, at pages 295 and 296, says:

"It is impossible to frame a universal rule for determining when individuals are absolutely entitled to notice of the proceedings of public agencies. Like 'due process of law,' it seems to be a mixed question of abstract justice and established usage. Sometimes it is said that such notice is requisite in all judicial proceedings, but not in those which are legislative or ministerial. With regard, however, to the acts of corporate bodies invested with governmental powers, these terms are often very shadowy, and sometimes appear to be applied to such acts merely on a hypothesis that notice to private persons is or is not deemed essential. Generally, I think, it may be said that when private rights are involved, notice must be given to the parties interested. Yet not always; for the question whether the power of eminent domain shall be exerted over the property of A or of B is conclusively decided without notice to either, although that certainly involves private rights. The counterpart of the general rule above suggested is, I believe, of universal applica-

tion, that, when private rights are not involved, notice to private persons is not essential.

The matters dealt with in the ordinance now under review, and of which complaint is made, the adoption of the trolley system and the laying of double tracks in the street, do not involve private rights.

It may be that the legitimate use of the street by the abutting owners will interrupt the passage of cars upon double tracks more frequently than it would if there were only a single track, but, as we have seen, the private right will not, on that account, be diminished; the public using the tracks must put up with the interruption.

Rafferty v. *Central Traction Co.*, 147 *Pa. St.*, 579. If this ordinance defined the position of the poles, and thus determined whether the possible inconvenience which they might occasion should be borne by one abutting owner rather than another, then perhaps, as is intimated in the equity cases before mentioned, private rights would be so concerned as to require notice; but the ordinance attempts no such location."

In *Moore* v. *Haddonfield*, 33 *Vr.*, 386, the Court of Errors adopts the rule already quoted.

In all these cases, whether the act is judicial or administrative depends upon the single criterion, viz, the presence or absence of such *special* interest.

Thus it is said, in *State, Vanatta* v. *Morristown, supra:*

"Ordinances directing the mere repairing and repaving of streets, * * * are purely ministerial; but ordinances directing new streets to be opened or altered *by which property of individuals* is taken or affected, are in their nature judicial * * *.

The distinction is between those ordinances which adopt a general system of policy affecting all the inhabitants or all the property situate within cor-

porate limits, *the burden of which is borne by all equally,* and those which provide for the making of a particular improvement affecting property in one locality, *the cost of* which is to be defrayed by certain specified individuals."

Likewise, in *Moore* v. *Haddonfield, supra,* Mr. Justice GARRISON says:

> "As to *public* rights in the street, the municipal action was clearly legislative. It became *judicial* only *in case it imposed an additional burden upon the land of the abutting owners.*"

It is apparent that when a street is opened or altered and special expense is put upon abutting owners, not shared by the taxpayers generally, such expense upon the owners gives them a special interest, so that, as to them, the action is judicial within the rule. Such is the example given in *State, Vanatta* v. *Morristown, supra,* constituting judicial action. It is based upon the special expenses incurred by the owner.

But, manifestly, such special expense which exists in opening or altering a street does not exist in the present vacations. The authorities by their action simply determine to relinquish any public right, and there is no expense whatever to any owner by such action, whereby such owner can be specially affected, as he is in case of an opening or altering where he is required to pay special expense.

Unless, therefore, the owner is specially affected in some other way than by special expense, the action of the Board is not judicial, but ministerial.

Within the rule thus laid down, in order to determine whether or no the action of the Board was judicial, or what amounts to the same thing, whether or no owners are specially affected other than the public generally; that question can be determined only by the character of the particular action in question, since there is no universal rule for determining the same. As was said by Mr. Justice DIXON, in *Kennelly* v. *Jersey City, supra:*

> "It is impossible to frame a universal rule for determining when individuals are absolutely entitled to notice of the proceeding of public agencies."

Or, in other words, to determine whether owners are specially affected so as to make the action judicial, and this question is one of fact depending on all the circumstances of the case.

Mr. Justice DIXON, in *Beecher* v. *Newark,* 35 *Vr.,* 475, in referring to the question of such special interest, at page 477, says:

> "On this footing, the question whether the requisite interest or injury appears when alteration of a highway is intended, seems to be one of fact, to be answered on consideration of *all the circumstances,* of *each* case as commissioners or a jury, selected to award damages for carrying out the municipal plan, might answer it."

Applying the rule laid down in the cases already mentioned, that the action is not judicial unless owners are specially affected, to this particular case, we claim that the lands of the Appellant are not specially affected by the vacation of these streets, as will appear from the following considerations:

1st. In all the cases which we are able to find where a portion of a street is vacated, and owners abutting on the portion not vacated have been held to be specially affected by such vacation, the street vacated has been one that has been previously opened and used in some way as a public street. Where a street has been in fact opened and used, so that the owner of land thereon in fact had the right to use it, under certain circumstances, such as existed in the case of *Beecher* v. *Newark, supra,* and similar cases, it is perceived that the owner may suffer special injury. In such cases the owner has in fact a clear, certain, *existing* right to use the

street, the vacation of which may specially affect him, but, in such case, the right so affected, however insignificant, is fixed, certain and existent in the sense that it is based on an existing thing and not merely speculative and contingent.

But in the vacation of the streets here in question, the Appellant had no such right. The so-called streets, a portion of which were vacated, were nothing more than map or paper streets. They were merely dedicated about forty-four years ago, and not a thing has ever been done by the City or anyone else to open or in any wise improve them. Indeed, nothing whatever has been done upon these mapped streets, but the ground lies just as it did when they were dedicated forty-four years ago. Moreover, the portions vacated were already occupied by manufacturing companies, so that there was no prospect that they would ever be used for dwellings on the parts vacated.

The streets would never be needed for public traffic since East Thirty-eighth Street is ample for that purpose in this locality, which is on outskirts of the City, where the land is sparsely settled, not only at the place of the vacation, but for a great distance surrounding. But, in order to open and grade the streets, so as to give the Appellant access thereto from his land, the streets would have to be opened and graded across the steam railroad, which could only be done at great expense of grading due to the low character of the land, and could only be done by consent of the Public Utilities Commission.

Under these circumstances, the evidence is that there was no probability that these streets would ever be opened; indeed, the greater part of East Thirty-sixth Street vacated by the ordinance in question had already been vacated by the City in 1902, and the Appellant was chiefly instrumental in obtaining this vacation. The Appellant had the same interest in his lands then as he has now, and the same proceedings were taken then as were taken in the present vacations (Case, p. 37).

An ordinance like the ordinance in question that merely relinquished the right of the public to use merely mapped

streets which have lain for forty-four years without any improvement or use, and without any probability that they will be used, has practically the same effect upon the Appellant and all others as it would be if the streets had been merely dedicated and never accepted, and the Board's refusal to accept them were challenged, instead of its action in vacating.

In such case, there can be no special injury done to the Appellant.

2nd. The only suggestion made by the Appellant of special damage to Appellant's lots by the vacation is that, if the streets should *possibly* be opened in the future there would in that event be a somewhat nearer approach from the lots to Market Street on the way west to the centre of Paterson. But an examination of the maps and testimony shows clearly that no special damage can so arise on account of the following facts:

Twenty-first Avenue, upon which the Appellant's lots abut, is itself one of the streets dedicated on the map that dedicated the streets to be vacated. The evidence shows that Twenty-first Avenue has already been opened from the railroad to Market Street (Case, p. 69).

The City would in any event open the remainder of Twenty-first Avenue, between the Appellant's lots and the railroad where Twenty-first Avenue is already opened, before there would be any occasion to open East Thirty-fifth Street, East Thirty-sixth Street or East Thirty-seventh Street.

The nearest way from the Appellant's lots to the centre of the City by Market Street is to go by Twenty-first Avenue directly to Market Street. To go by way of East Thirty-fifth Street, East Thirty-sixth Street or East Thirty-seventh Street would be to traverse two sides of a triangle instead one by way of Twenty-first Avenue to reach the same point on Market Street on the way to the centre of the City (see Plate 9 and 10, Map Exhibit S-4, Testimony of Mr. Doremus, Case, p. 71).

Moreover, Twentieth Avenue has for some time been open

and now actually affords a nearer approach to the centre of the City from Appellant's lots than would be afforded if by any possibility East Thirty-fifth Street, East Thirty-sixth Street and East Thirty-seventh Street should be opened.

From the above facts it is evident that the only suggestion of special damage to this land made by the Appellant is refuted.

3rd. Even if all these streets had been actually opened and used, the Appellant's land would not be specially injured, according to the decisions, because his land abuts on Twenty-first Avenue, which is an intervening cross street between plaintiff's land and the north side of the railroad, and the parts of the streets vacated are on the south side of the railroad.

Where the Appellant's land is not left in a *cul de sac* by the vacation, but an intervening cross street remains between Appellant's land and the portion vacated, there are no special damages.

In *Newark* v. *Hatt,* 50 *Vr.,* 548, this distinction in such case is made between the right to damages where land is left in a *cul de sac* and without an intervening cross street, and otherwise. In that case, the opinion of the Court quotes *Dodge* v. *Pennsylvania R. R. Co.,* 16 *Stew. Eq.,* 351, and other cases, where the owners' right does not extend, in case of vacation, beyond the next adjacent cross streets.

Mr. Justice BERGEN, in the opinion of the Court of Errors, confines the right to damages to an owner who is left by the vacation in a *cul de sac,* as appears from his language, as follows:

> "We are of the opinion that such right of access is of special advantage to all land abutting a highway *on a block between two streets* and that the vacation of a part of such streets diminishes the value of all the land between the *next adjacent cross streets.*"

This opinion of this Court clearly implies that there is no special damage to property not abutting on the block or beyond an adjacent cross street. In that case the right of the owner to special damages was directly involved, but the rule in that case determining when an owner is specially damaged applies as well, whether an owner's special damage is to be determined or whether the question is with reference to his right to notice or hearing, or his standing to prosecute a certiorari.

All of the above facts show that the Appellant was not in fact specially injured by such vacation, within the rule already mentioned requiring such special damages to appear in order to make the action judicial, so as to require notice and hearing.

SIXTH.

Counsel for Appellant, at page 23 of his brief, states his Fourth Point as follows:

"Said ordinance was passed upon certain stipulations and conditions shown in the resolution for the same and otherwise which renders it illegal."

Afterwards, at page 24 of his brief, he states:

"This ground of appeal is not now pressed."

We presume that this means an abandonment of his fourth point, and that we need give it no consideration, but, lest there be any question as to the Court's consideration of the matter, we submit the following as showing the untenableness of this point:

1st. The ordinance is an unqualified ordinance to vacate the streets and was not passed upon any conditions or stipulations whatever. It is true that when the original resolution was made on November 10th, 1914, at the first meeting when the matter came before the Board, the resolution passed

provided that the Pipe Works should acquire ownership of part of the streets to be closed, and the consent of the National Ribbon Co.

This condition, however, was merely a provision that the Board deemed proper in the preliminary steps taken before the ordinance itself was introduced and passed, but when the ordinance itself was passed no condition whatever was incorporated in or connected with the ordinance, and it was not intended by the Board that any preliminary condition should be in any wise attached to the ordinance itself (see Testimony of Mr. Doremus, Case, pp. 73-74).

No matter what conditions the Board suggested before it took up the consideration of the ordinance, it had a right to pass the ordinance itself, without incorporating or making the same a part of the ordinance and entirely free from such conditions, whether such conditions had been performed or not. All such matters were in the discretion of the Board and not subject to review by this Court.

2nd. But if the Board had made such conditions in the ordinance itself, such conditions would not have been illegal or improper.

> *Hutchinson* v. *Belman,* 32 *Vr.,* 443; affirmed, 33 *Vr.,* 450.

And even if such condition had been annexed to the ordinance, the performance of such condition would be a matter exclusively for the Board and not a matter which the Appellant could raise as to the validity of the ordinance in this proceeding.

But, in fact, the ownership of the streets has been acquired and the owners of the land where the Ribbon Company is located have been made parties to these proceedings in certiorari and have made no objection whatever to the vacation of the streets and have stated that they would not make any objections (see Testimony of Mr. Hilton, Case, p. 93), and their consent and acquiescence in the vacation is implied

from the fact that they are parties to this certiorari and make no objections.

SEVENTH.

The remaining objections of the Appellant relate to the judiciousness or discretion of the Board in its action in passing the ordinance rather than to its power or as to the legality of the procedure.

These remaining objections generally claim that the public was not benefited by the vacation and that some parts of the streets vacated were of no benefit to the defendant.

As to all of these objections, however, which relate merely to the judiciousness or discretion of the Board, it is sufficient to say that the courts will not review those questions.

Counsel also objects that the ordinance was unreasonable in attempting to vacate East Thirty-seventh Street, because he says that the vacation of that street was not essential to the purposes of the Pipe Company, and could not have any effect upon its decision as to whether it would remain in Paterson. It is sufficient to say that the officers of the company, who should know as much about their needs as counsel, believed that they needed it, and the members of the Board of Public Works believed likewise, else the application for the ordinance never would have been made. And it is unlikely that the defendant would have requested the vacation of this street unless it needed it.

The Board evidently considered that the defendant's proposition to keep its plant in Paterson may have depended upon the vacation of all these streets which the defendant said were requisite for that purpose, and surely it was not unreasonable for the Board to make an ordinance which fulfilled the whole proposition of defendant instead of a part. If the retention of the defendant's works at Paterson was a public benefit properly to be taken into consideration in passing the ordinance, as held in *Kean* v. *Elizabeth, supra,* then it cannot

be said that the ordinance was unreasonable in doing what was necessary to accomplish that purpose. There is no reason to suppose that the defendant would have made its proposition unless East Thirty-seventh Street should be vacated as well as East Thirty-sixth Street and East Thirty-fifth Street. As we have said, an ordinance like the ordinance in question, that merely relinquishes the right of the public to use merely mapped streets, which have lain for forty-four years without any improvement or use and without any probability that they will be used, has practically the same effect upon the Appellant and all others as it would be if the streets had been dedicated merely and never accepted, and the Board's refusal to accept them were objected to as illegal.

In such a case the Board's action in determining what part of the streets may be relinquished under all the circumstances is a matter for the Board's discretion and judgment; and the Board's action in vacating East Thirty-seventh Street was a part of the thing needed to retain defendant's works at Paterson, for the public benefit. Under such circumstances, the presumption is that the ordinance is reasonable, and nothing short of a clear demonstration that it is not reasonable will induce the Court to interfere.

Ivins v. *Trenton,* 39 *Vr.,* 501, 505.
Traction Co. v. *Elizabeth,* 29 *Vr.,* 619.
Trenton Horse Ry. Co. v. *Trenton,* 24 *Vr.,* 132.

EIGHTH.

Since the Appellant objects that the ordinance is beyond the power of the Board, his objection in that respect can avail only in case he sustains special injury by the vacation.

Oliver v. *Jersey City,* 34 *Vr.,* 634.
Beecher v. *Newark,* 35 *Vr.,* 475, 476, 477.

It is well settled law that *certiorari* will not lie in favor of private prosecutors to review the action of public officials,

unless such prosecutors have a personal or property interest which will be specially and immediately affected by the action complained of; and unless the person who applies for the writ shows that he will suffer a special injury beyond that which shall affect him in common with the remainder of the public, the writ will be denied him.

Tallon v. *Hoboken,* 31 *Vr.,* 212.

The prosecutor must show *affirmatively* such interest and right to prosecute, else he has no standing.

Tallon v. *Hoboken,* 30 *Vr.,* 383, 387.
West Jersey Traction Co. v. *Camden,* 29 *Vr.,* 362.

In the fourth paragraph of this brief we have already shown that the Appellant, by the mere relinquishment of the public of its right to open these streets existing merely on maps, and under the other conditions existing in this case, has not shown as a *matter of fact* that he is so specially injured as to give him standing to prosecute this writ, and this fact, *under the circumstances of each case,* must be shown, as appears from the language of Mr. Justice Dixon, in *Beecher* v. *Newark, supra,* at page 477, as follows:

> "On this footing, the question whether the requisite interest or injury appears when alteration of a highway is intended seems to be one of fact, to be answered on consideration of *all* the circumstances of *each* case."

But apart from these last considerations, the Appellant has no special interest to give him standing, because his lands in question are north of Twenty-first Avenue, an intervening cross street between his lands and the proposed vacations. In such case he is not specially damaged, according to the rule in *Newark* v. *Hatt,* 50 *Vr.,* 548, already referred to.

The ordinance is valid and the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

SAMUEL S. SHERWOOD, Prosecutor and Appellant, vs. THE CITY OF PATERSON, *et als.*, Defendants and Respondents.	On Appeal from Supreme Court.

REPLY TO RESPONDENTS' BRIEF.

The counsel for the respondents have somewhat the advantage of me in this matter. They were furnished with copies of my brief on the fifteenth of November, and I received proof sheets of their brief on the second and bound copies thereof on the third of December. Considering that the time within which the briefs have to be sent in expires on the sixth, and the fifth is a Sunday, the time in which to prepare and have printed a reply to their brief is rather limited. I am therefore compelled to make this brief a *brief* one.

The counsel devoted the third part of a long brief to an attempt to show that the Board of Public Works of the City of Paterson has power to vacate streets. A member of Congress once said, in speaking in Congress upon a constitutional question, that when it required a long argument to make out that Congress possessed a certain power, he felt sure Congress did not possess the power. And so

here; the long argument the counsel found it necessary, or at least expedient, to make in support of the power of the Board of Public Works to vacate streets, is about as clear proof as could well be given that such power is not conferred upon that municipal body.

The counsel begin their argument upon this point with a misunderstanding of my position. I claimed and proved beyond question that all the power conferred upon the department of streets of the City of Paterson was executive power, from which it necessarily followed that if the power conferred upon such department was transferred to the Board of Public Works, the power so conferred would still be only executive power. And the counsel say they understand from this position that I assume that all the powers transferred to that Board are mere executive powers. It will be observed that all the powers I referred to here are those supposed to be transferred by the transference of the power of the street department, and that I do not refer here at all to the powers expressly conferred by the first and last parts of Section 2 of the act in question. The counsel are men of clear and good understanding, but their understanding surely got befogged this time.

The counsel's argument upon this point runs thus: The power to vacate is expressly conferred; if it is not expressly conferred it is conferred by implication; if it is not conferred either expressly or by implication, it exists as a *de facto* power. Well! Well! And then the counsel and the Supreme Court don't seem to agree upon the subject. The Supreme Court held, in substance, that the power is not expressly conferred, and that if it is conferred it is by implication; the counsel contend that the power is expressly conferred. Therefore, as to whether or not the power is expressly con-

ferred, the Supreme Court and the counsel differ. Worse than this the counsel, holding that the power is expressly conferred, and the Court, holding that if it is conferred it is by implication, rely upon precisely the same words of the act. And then comes the Legislature and virtually declares that the act does not confer the power at all, by expressly giving the power, as an additional one, to boards of public works organized under statutory provisions that read in precisely the same way as in this act. See "Note 2" at end of my former brief. Surely, there can be no doubt from all this that the words in question are at least ambiguous. Such being the case, the construction must be against the power. See page 6 of former brief, near bottom.

In applying the provisions of the act in question to the board of public works in any particular city, its provisions must be construed with reference to the charter of that city. Where, for instance, the act transfers powers of the board of aldermen or common counsel of any city to the board of public works of that city, the powers so transferred are confined to the powers of the board of aldermen or common counsel of that city, and not of any other city. And so the term "department of streets" as used in that act means, in any particular city, the department of streets as it exists in that city under its charter. The term, therefore, may mean different things in different cities. I do not hold, as the counsel seem to think I do, that this term as used in the act means in all cases such department as defined in the Paterson Charter. What I do hold is that as applied to the Board of Public Works of that city, the term bears just the meaning given it in the charter of that city. That the Supreme Court took this view of the subject is plain from its opinion.

The counsel make a long dissertation upon the subject of "necessary implication." The conclusion of the counsel, as applied to this case is, in substance, that if, in the opinion of the Court, it is improbable and unreasonable to suppose the Legislature, in creating a municipal body, purposely omitted a certain power not in terms conferred, such power is to be held to have been conferred by necessary implication. There is no authority for such a proposition, and the mere statement of it condemns it. In this connection I call attention to the language of Chancellor Williamson in the case of *Morris & Essex R. R. Co.* v. *City of Newark*, 2 Stock, 352, who there said:

> "The public have rights in the public highways of the State, which can be impaired or interfered with by nothing short of authority conferred by the sovereign power of the State itself. That authority must be *expressly* given; or if conferred by *implication*, it must be a *necessary* implication, such as will necessarily and naturally flow out of the law from whence it is derived, not a necessary implication to be whittled down into a reasonable intendment, and then to become a mere matter of expediency, and then to be resolved into a mere question of dollars and cents" (p. 363). (The italics are the Chancellor's.)

The counsel are clearly undertaking in this matter to whittle down "necessary implication" in this case into even less than a "reasonable intendment."

But, the counsel say, the Board of Public Works is a *de facto* body exercising the power to vacate streets. There can be no such thing as a *de jure* body possessing a power expressly conferred upon

it and a *de facto* body exercising the same power not conferred upon it, at the same time. The authority of a *de facto* body in respect to any matter is recognized only in the absence of a *de jure* body possessing such authority. In this case, if this power to vacate was not transferred from the Board of Aldermen to the Board of Public Works, its exercise by the Board of Public Works is a clear usurpation no matter how long or how many times it may have exercised the same. In fact, it does not appear how long or how many times the Board of Public Works has exercised that power. The only evidence upon the subject is that it has exercised the power (p. 84). So far as appears, the Board may have exercised the power only once or twice, and may have done so only shortly before the exercise of the power in this case. And it will be seen that this statement, which was made by the City Clerk, was made under my objection upon the ground that the proper proof was the record.

The counsel refer twice at least to the case of *Moore* v. *Haddonfield,* 33 *Vr.,* 386. That appears to have been a case of mere bad faith. This is not a case of mere bad faith, but, aside from want of power to vacate, is a case of illegal action; and illegal action appearing on the face of the proceedings. There is no doubt that the Court will set aside an ordinance that is unauthorized, or that is unreasonable, or that is an abuse of power conferred, without regard to whether the municipal legislature acted in good faith or bad faith in passing the same. The same is the case in respect to any other illegal action of such a body.

Some of the remarks of the counsel seem to be intended to show that the appellant does not sustain any special injury by these vacations, and, therefore, has no standing in court to call them in question. In the case of *Levy* v. *Elizabeth,* 52 *Vr.,* 643,

it was held that "after the allowance of a writ of certiorari, the *status* of a prosecutor will be presumed in the absence of proof to the contrary." Now all the proof in respect to the appellant's *status* as prosecutor in the case was before the Supreme Court, and this same point was made by defendant's counsel therein. And the fact that the Court, instead of dismissing the writ, decided the case, shows that the Court did not consider the point well taken. This Court will not review that Court's action therein.

To reply to those parts of the counsel's brief not already herein mentioned would be merely to give a repetition of what I said in my former brief, which I do not think it worth while to inflict upon the Court.

GEORGE S. HILTON,
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