

## New Jersey Court of Errors and Appeals.

BETWEEN

PATRICK H. WOODRUFF and DICKINSON  
WOODRUFF, appellants,

and

THE TRENTON WATER POWER COMPANY,  
respondents,

} On appeal from the  
Chancellor.

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### BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

To his Honor Benjamin Williamson, Chancellor of the State of  
New Jersey.

Humbly complaining, show unto your Honor your orators Patrick Houstoun Woodruff and Dickinson Woodruff, of the county of Mercer, in the state of New Jersey; that George Woodruff, esquire, now deceased, the father of your orators, was in his lifetime seized and possessed in fee simple of a certain farm, situate in the township of Ewing, in said county, called "Oaklands," containing about one hundred and eighty acres, upon which was situate a valuable mansion house and outbuildings, and upon which he resided with his family for many years next preceding his decease; that the said farm was situate upon the river Delaware, and had 10 an extended front upon and along the same, running down to low water mark, which afforded at all points an easy and convenient access to said river, so that it could be and was much resorted to and used by said George Woodruff and his family, and persons occupying and using said farm under him, for the purposes of bathing, boating, fishing, watering cattle, and procuring ice in winter, and for other purposes of business and pleasure. And the value of said farm, both as a desirable residence and for the purposes of cultivation, was much increased by its situation upon said river, and the ease and convenience with which the advantages thereof could 20 be used and enjoyed.

And your orators further show unto your Honor, that by an act

of the legislature of this state, passed on the sixteenth day of February, in the year of our Lord one thousand eight hundred and thirty-one, entitled, "An act to incorporate a company to create a water power at the city of Trenton and its vicinity, and for other purposes," a company was incorporated, by the name of "the Trenton Delaware Falls Company," for the purposes and with the powers and privileges therein described, and by that name were by said act declared to be a body politic and corporate in fact and in law, and, among other things in and by said act mentioned, the said  
 10 company were thereby empowered, in order to create a water power, to erect a wing dam in the Delaware river, between the mouth of the Assanpink creek and the head of Wells' falls, and also to cut a main raceway from said wing dam, in and along and near the bank of said river, to a point below the city of Trenton, and also lateral raceways from said main raceway to the river Delaware; that the said company was duly organized under the said act, and went into operation under the same, and proceeded to erect and make, and did erect and make, said wing dam and said main raceway and other works, in pursuance of the authority given  
 20 them in and by said act; that the route of said main raceway, as laid by the said company, was across that part of said farm of the said George Woodruff which lay next the said river Delaware, and it was necessary for said company to have a portion of said lands, in order to cut and make said raceway.

And your orators further show, that the said company applied to the said George Woodruff to sell and convey to them that part of his said farm which lay adjoining to said river, in order that they might make thereon that part of their main raceway which lay across his said farm, according to the route designated and fixed  
 30 by said company under their charter, and the said George Woodruff agreed to do so for a consideration agreed upon between him and said company, and which is expressed in the deed which he executed to them, as is herein after stated, to wit, the sum of three hundred dollars and of certain privileges granted to him, and of certain covenants and agreements to be performed and kept on the part of said company, and in said deed contained, as is herein after more fully expressed and set forth.

And your orators further show, that in pursuance of said agreement, the said George Woodruff and Jean his wife, on or about  
 40 the twenty-sixth day of January, in the year of our Lord eighteen hundred and thirty-two, did, in and by a certain deed of conveyance, bearing date on the day and year last aforesaid, made between the

said George Woodruff and Jean his wife, of the first part, and the said "the Trenton Delaware Falls Company," of the second part, in consideration of the sum of three hundred dollars, to them the said grantors paid, and of the covenants and agreements in said deed contained, grant, bargain, sell, and convey unto the said company, their successors and assigns, in fee simple, the following described portion of said farm, being all that part thereof which lay adjoining and next to the river Delaware, to wit: beginning at low water mark of the river Delaware, at line of lands of John Titus; thence by said line north, forty-four degrees east, one chain and 10 twenty-five links; thence north, fifty-nine and a half degrees west, four chains; thence north, fifty-nine degrees west, two chains; thence north, sixty-one degrees west, three chains; thence north, sixty-six degrees west, twelve chains and six links, to Hill's line; thence by said line south, thirty degrees west, one chain and twenty links, to low water mark; thence by low water mark, the several courses thereof, to the place of beginning, containing two acres and sixty-three hundredths of an acre, subject nevertheless to the following proviso and covenants contained in said deed, and therein set forth, as follows, to wit: "subject nevertheless to the following 20 proviso, that if the said main raceway shall not be made on said premises, in conformity to the act incorporating said company, the said lands and premises shall revert to the said George Woodruff, his heirs and assigns. And also that the said party of the second part shall erect, maintain, and keep in good repair a safe, convenient, and substantial bridge across said main raceway, at a place to be designated by the said George Woodruff, and also cause to be made and kept in order a convenient landing place on the side next the river Delaware, so that wagons may at all times safely pass over thereon, and shall also erect and maintain all necessary fences 30 across the said main raceway, together with fences across the said premises where the lines of the aforesaid John Titus and Jasper S. Hill cross the said main raceway, and shall also permit the said party of the first part to use the said raceway to give drink to his cattle, and also to take ice therefrom to fill his ice house, said party of the first part so to use said privileges that no damage shall accrue to said raceway," which said deed was afterwards, and on the day and year last aforesaid, duly acknowledged by said party of the first part, and delivered to the said company, and recorded in the clerk's office of the county of Hunterdon, in which said lands 40 were then situate; and your orators pray leave to refer to said record or to said deed, if the same shall be produced.

And your orators further show unto your Honor, that the said company, shortly after the said deed was executed and delivered to them as aforesaid, entered upon and took possession of said lands and premises thereby conveyed to them, and cut and made, through and across the same, the main raceway, which by the said act they were empowered to make, from their wing dam to a point below Trenton as aforesaid, and that said premises have been ever since held and occupied for their own use by the said company, or those claiming under them.

- 10 And your orators further show unto your Honor, that the said company, having made and erected their said main raceway and other works under their said charter, thereby created an extensive and valuable water power, which they used and leased for manufacturing or other purposes, and that they received from time to time a large income therefrom; that some time in the year eighteen hundred and forty-three, it was alleged that the said company had become insolvent, and a bill was then filed against them in this honorable court by Andrew Carrigan, one of their creditors, under the act entitled, "An act to prevent frauds by incorporated companies," and such proceedings were had thereon that by an order  
 20 of this court, made in said cause, James Ewing, Thomas J. Stryker, and Philemon Dickinson were appointed receivers of said company, with full powers to sell, convey, and dispose of the real and personal estate, works and franchises, of said company according to law, as in and by said proceedings, now on file in this court, and to which your orators pray leave to refer, will fully and at large appear. And the said receivers did, on or about the twentieth day of February, in the year of our Lord eighteen hundred and forty-four, sell the real estate (including said raceway) and the  
 30 works and franchises of said company at public sale, to the highest bidder, and did afterwards, and on or about the eighth day of March, in the year last aforesaid, execute and deliver to the purchasers thereof a deed conveying to them the said real estate, raceway, works, and franchises in fee simple.

- And your orators further show unto your Honor, that before the said sale was made, to wit, on the fifteenth day of February, in the year of our Lord eighteen hundred and forty-three, an act was passed by the legislature of this state entitled, "An act to relieve the creditors of the Trenton Delaware Falls Company," whereby  
 40 it was, among other things, enacted and declared that the purchasers of the real estate, franchises, and works of said company should hold the said works, franchises, and real estate as a joint stock

company, in the same manner as the original stockholders held the same, provided that they should not extend their capital beyond the limits of the charter, or in any wise contravene the provisions thereof; and provided further, that after said purchase, the said company should be known as "the Trenton Water Power Company," and by that name might sue and be sued, and have a common seal, and exercise all its corporate powers.

And your orators further show, that by virtue of the said last mentioned statute, the corporate name of the said corporation was, upon the sale of the said real estate, works, and franchises by the receivers as aforesaid, changed, from the title given to it in and by its original charter, to the name of "the Trenton Water Power Company," by which last mentioned name the said corporation was thereafter to be known in law, and to sue and be sued, and to exercise all its corporate powers, and that the purchasers of the said real estate, works, and franchises were, under said act, to hold, and did hold the same, as a joint stock company, in the same manner as the original stockholders held the same. And the said purchasers did accordingly, on or about the second day of January, in the year of our Lord eighteen hundred and forty-four, organize themselves under the name of "the Trenton Water Power Company," and by that name, as a body politic and corporate in law, have ever since claimed, held, exercised, and enjoyed, and do still claim, hold, exercise, and enjoy, subject however to the provisions of the original charter, all the corporate powers of the said corporation, and all the real estate, works, and franchises so as aforesaid sold and conveyed by said receivers, and in which is included the real estate sold and conveyed by the said George Woodruff in manner aforesaid.

And your orators further show unto your Honor, that the whole river front which the said farm of the said George Woodruff formerly had upon the river Delaware was, by the conveyance by him to said company of the premises above described, and the making of said main raceway through and across the same, entirely cut off and taken away, and he and all persons holding and using said farm were deprived of all benefits and advantages formerly enjoyed from an easy access to said river.

And your orators further show unto your Honor, that the said George Woodruff held and possessed said farm, as the owner thereof in fee simple, from the time of the aforesaid sale of a part thereof to said company until some time in the month of September, in the year of our Lord eighteen hundred and forty-six, when

he departed this life, leaving a last will and testament, executed in due form of law to pass real estate, and therein appointing his wife, Jean Woodruff, and your orator, Patrick Houstoun Woodruff, the executors thereof; that the said Jean Woodruff, desiring not to act as executrix of said will, your orator, Patrick Houstoun Woodruff, duly proved the same before the surrogate of the county of Mercer aforesaid, and received from him a grant of letters testamentary thereon, and took upon himself the execution thereof, as by said letters, bearing date on the fourteenth day of September, in the year of our Lord eighteen hundred and forty-six, now  
 10 in your orator's custody and ready to be produced, will fully appear.

And your orators further show, that in and by said last will and testament, the said George Woodruff devised his said farm unto your orators and their two brothers, Robert J. Woodruff and Thomas M. Woodruff, in fee simple, subject to the life estate therein of his wife, the said Jean Woodruff, who afterwards, in the month of April, in the year of our Lord eighteen hundred and forty-eight, departed this life, and to the payment of a certain legacy unto their sister Mary, wife of Charles L. Pearson, which hath since been fully paid and discharged, and that afterwards, and on or about the fourteenth day of October, in the year of our Lord eighteen hundred and fifty-one, the said Robert J. Woodruff and Thomas M. Woodruff conveyed all their estate and interest in said farm unto your orator, Patrick Houstoun Woodruff, in fee simple, as by their deed of conveyance to him, bearing date on the day and year last aforesaid, and now in his custody and ready to be produced, will appear, by means whereof your orators are now the owners in fee simple of the said farm, and of the estate and  
 20 interest which said George Woodruff had therein at the time of his decease, and they are now in the actual possession and enjoyment thereof.

And your orators further show unto your Honor, that the said George Woodruff, in his lifetime, and your orators and their two brothers, herein before named devisees as aforesaid, have at all times kept and performed all covenants and agreements in the said deed from said George Woodruff contained on his and their part to be kept and performed.

And your orators further show unto your Honor, that by reason  
 40 of the matters herein before set forth, and in particular by reason of the contracts and covenants contained in the said deed from the said George Woodruff to the said "the Trenton Delaware Falls

Company," the said company were bound to erect, maintain, and keep in good repair a safe, convenient, and substantial bridge across said main raceway, and also a convenient landing place on the side next the river Delaware, so that wagons might at all times pass over thereon from the said farm of the said George Woodruff, and also to erect and maintain fences across said main raceway and said premises, so conveyed by said George Woodruff to said company, at the places and in the manner expressed in said deed, and herein before mentioned and set forth. And further, that the name and organization of the said company having been changed, as is herein 10 before set forth, and said company being now known in law by the name of "the Trenton Water Power Company," that the said "the Trenton Water Power Company" are bound to erect and maintain, and keep in good repair, the said bridge, landing place, and fences, and in all things to perform and keep the said covenants and agreements in said deed contained; but neither the said "the Trenton Delaware Falls Company" nor "the Trenton Water Power Company" have ever performed or kept said covenants and agreements, in whole or in part, but have wholly failed and neglected so to do. 20

And the said George Woodruff, in his lifetime, frequently applied to the said "the Trenton Delaware Falls Company" and to "the Trenton Water Power Company," and requested them to keep and perform said covenants, and to erect and maintain said bridge and landing place and fences in the manner required by said covenants, and in all things to fulfil the requirements thereof, and they frequently promised to do so, but have always failed and neglected to attend to the same. And since the decease of the said George Woodruff, your orators and their brothers, herein before named, have, by themselves and their agents, frequently applied to the said 30 "the Trenton Water Power Company," and have pointed out the place at which they wished the bridge from said farm across said main raceway to be erected, to wit, at the place opposite to the end of the lane running from the feeder of the Delaware and Raritan canal to the main raceway aforesaid, and have requested said company to perform said covenants and to erect and maintain said bridge, landing place, and fences, and also to pay them a compensation or damages for the injury sustained from the failure of said company to erect and maintain the same, as by said covenants they were bound to do; and the said company frequently promised them 40 that they would do so, or if it would be equally satisfactory, that the company would pay your orators and their devisees afore-

said a sum of money in lieu of the performance of said covenants; but the said company have always failed to keep said promises, and have never erected any bridge, landing place, or fences upon said premises, nor in any manner performed the said covenants, or any part thereof; that, from the time of the making of said main raceway until the present time, there has been no bridge or fences across said main raceway upon said farm erected or maintained by the said company, either under its former or its present name, and the said George Woodruff and your orators, and all persons hold-  
 10 ing and using said farm under him or them, have in various ways suffered, and your orators do still suffer, much inconvenience and loss for the want of the same; that, for the want of such bridge and landing place, they have not been able to cross said main raceway from said farm to said river with their cattle, horses, and wagons, as they otherwise might have done, and which would have been of material service to them; that, for want of the fences which said company were bound to erect and maintain as aforesaid, the said George Woodruff, in his lifetime, and your orators since his decease, have been compelled either to make and maintain said  
 20 fences at their own expense or to suffer their lands to be exposed and open to trespass, and they have experienced much annoyance and loss from trespasses by cattle and persons, and have been put to great expense in putting up fences, by reason of the failure of said company to make and maintain the fences, which by their said agreement they were bound to make and maintain as aforesaid.

And your orators further show unto your Honor, that the said company, having been frequently applied to, as aforesaid, to keep and perform the said covenants, and having promised to do so, but without in any manner keeping such promise, your orators, to-  
 30 gether with their brothers before named, who had not then parted with their interest in said farm, did, on or about the fifth day of December, in the year of our Lord eighteen hundred and fifty-one, cause a notice and requirement in writing to be served upon the president of the said "the Trenton Water Power Company," pointing out the place where they wished the said bridge to be built across said main raceway upon said farm, being the same place herein before in that respect mentioned, and calling upon said company to keep and perform the covenants in said deed contained, and to erect and maintain said bridge, landing place, and  
 40 fences, and to pay unto them damages or compensation for the said company's past neglect to perform said covenants, and the

said company thereupon promised to do so, but have wholly failed and neglected to do it.

And your orators further show unto your Honor, that the full and faithful performance of said covenants by said company, according to the true intent and meaning thereof, would afford your orators a direct access to said river with their cattle, horses, and wagons, and would give them many advantages in the use and enjoyment of their said farm of which they are now deprived, and would save them from much annoyance and loss, which they have long suffered for the want thereof, and would also increase the market value of their farm, in case they wished to sell the same. 10

And your orators are advised, and respectfully insist, that the said George Woodruff, having, by the deed herein before mentioned, conveyed to said company that part of his said farm therein described, for the consideration, in part, of having fences kept up and maintained as aforesaid, and a bridge and landing place built and maintained in good order from his said farm across the main raceway aforesaid, and the said company having taken said land so conveyed to them, and used and enjoyed the same from that time to the present, that the said company were bound to keep and perform said covenants with the said George Woodruff in his lifetime, and are now bound to keep and perform the same with your orators, who are his heirs and devisees, and who now hold and possess the said farm in fee simple, by title derived from him in manner herein before set forth; and that the said company are also bound to pay to your orators compensation or damages for the past omission of said company to keep and perform the said covenants. 20

And your orators well hoped that the said company would have performed said covenants, and would have paid to them such compensation or damages as aforesaid, as in equity and good conscience they ought to have done, but now so it is, may it please your Honor, that the said "the Trenton Water Power Company," combining and confederating with divers persons at present unknown to your orators, but whose names, when discovered, they pray may be inserted herein, with proper and apt words to charge them as defendants hereto, sometimes give out and pretend that the said company is not bound to keep and perform the said covenants with your orators, nor to compensate them for any damages your orators may have sustained by said company's neglect and omission to perform said covenants—the contrary of all which your orators charge to be true. 30 40

In tender consideration whereof, and forasmuch as your orators

cannot at law compel the said company specifically to perform and keep the said covenants, and have not an adequate remedy, save in this honorable court—To the end, therefore, that the said “the Trenton Water Power Company,” and their confederates, when discovered, may in a due and proper manner, and according to the rules and practice of this court, full, true, direct, and perfect answers make to the matters herein before set forth, as fully as if the same were here again repeated, and they thereto particularly interrogated, and that they may be decreed to erect and maintain, and

10 keep in good repair, a safe, convenient, and substantial bridge across said main raceway at the said farm of your orators, and also to make and keep in order a convenient landing place on the side next the river Delaware, so that wagons may at all times safely pass over thereon, and also to erect and maintain all necessary fences across said main raceway, together with fences across the said premises where the lines of the aforesaid John Titus and Jasper S. Hill cross the said main raceway, and in all things specifically to perform the covenants in said deed contained, and also to

20 compensate your orators for the injury they have sustained by reason of the said company’s failure to perform and keep the covenants aforesaid in time past, and that your orators may have such other and further relief in the premises as the nature of their case may require and as shall be agreeable to equity and good conscience, may it please your Honor, the premises considered, to grant unto your orators the state’s writ of subpœna, issuing out of this honorable court, and under the seal thereof, and to the said

30 “the Trenton Water Power Company,” and their confederates, when discovered, to be directed, commanding them, at a certain day and under a certain penalty, to be therein limited, to be and appear before your Honor, in this honorable court, then and there to answer the premises, and to stand to, abide, and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable and good conscience.

And your orators will ever pray, &c.

J. WILSON,

*Solicitor and of counsel with complainants.*

## ANSWER.

## IN CHANCERY OF NEW JERSEY.

*The answer of the Trenton Water Power Company, defendants, to the bill of complaint of Patrick Houstoun Woodruff and Dickin-son Woodruff, complainants.*

These defendants, now and at all times hereafter saving and reserving unto themselves all and all manner of benefit and advantage of exception to the manifold errors, uncertainties, and imperfections in the complainants' bill of complaint contained, nevertheless for answer thereunto, or unto so much thereof as these defendants are advised is in any wise material or necessary for them to make answer unto, they answer and say—that they have been informed, and believe it to be true, that George Woodruff, esq., the father of the complainants, was in his lifetime seized and possessed of the farm and mansion house mentioned in the complainants' bill, situate 10 in the township of Ewing, in the county of Mercer, (formerly Trenton, in the county of Hunterdon,) that the said farm fronted for some distance upon the river Delaware, running down to low water mark, and that the said premises were occupied by the said George Woodruff, who resided thereon with his family for many years next preceding his decease, as stated and set forth in said bill of complaint.

And these defendants in further answering admit, that by an act of the legislature of the state of New Jersey, entitled, "An act to incorporate a company to create a water power at the city of Trenton and its vicinity, and for other purposes," passed at or about 20 the time in said bill mentioned, the Trenton Delaware Falls Company were incorporated and created a body politic and corporate, for the purposes and with the powers and privileges in said act mentioned and described, and that the said company were thereby authorized to erect a wing dam in the river Delaware, and to cut a main raceway from the said wing dam to a point below the city of Trenton, and also to cut and erect such lateral raceways and other works as the said company should deem expedient. And these defendants further say, that by the said act of incorporation, 30 the said company were authorized to enter upon, take possession of, and use, for the purposes contemplated by said act, any lands and premises whatever, subject to such compensation to be made therefor as is therein directed, as by the said act of incorporation, reference being thereunto had, will more fully appear.

And these defendants in further answering admit, that the said the Trenton Delaware Falls Company was duly organized and went into operation under the said act of incorporation, and in pursuance of the authority thereby given, proceeded to locate, construct, and erect said wing dam, main raceway, and other works for the purpose of creating a water power, and that the route of the said main raceway was located by the said company over and across that part of the farm of the said George Woodruff lying next and adjacent to the river Delaware.

- 10 And these defendants in further answering admit, that the said the Trenton Delaware Falls Company and the said George Woodruff, having agreed upon the compensation to be paid by the said company for such portion of the farm of the said George Woodruff as was necessary and useful for the construction of the main raceway of said company, the said George Woodruff and Jean his wife, at or about the time in said bill mentioned, executed, acknowledged, and delivered to the said the Trenton Delaware Falls Company a deed of conveyance for the strip or parcel of land in the said bill of complaint described, being part of the farm herein be-  
 20 fore mentioned, which said deed is in the words, or to the purport and effect following, that is to say :

This indenture, made this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and thirty-two, between George Woodruff and Jean his wife, of the township of Trenton, in the county of Hunterdon, and state of New Jersey, party of the first part, and the Trenton Delaware Falls Company, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of three hundred dollars, lawful money of the state of New Jersey, in hand well and truly  
 30 paid, the receipt whereof the said George Woodruff doth hereby acknowledge, have granted, bargained, sold, aliened, enfeoffed, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, release, convey, and confirm unto the said the Trenton Delaware Falls Company, their successors and assigns, a certain parcel of land, situate in the township aforesaid, and bounded as follows : Beginning, at low water mark of the river Delaware, at line of lands of John Titus; thence by said line north, forty-four degrees east, one chain and twenty-five links ; thence north, fifty-nine and a half degrees west, four chains ; thence north, fifty-nine  
 40 degrees west, two chains ; thence north, sixty-one degrees west, three chains ; thence north, sixty-six degrees west, twelve chains and six links to Hill's line ; thence by said line south, thirty west,

one chain and twenty-five links to low water mark; thence by low water mark, the several courses thereof, to the place of beginning, containing two acres and sixty-three hundredths of an acre of land, subject nevertheless to the following proviso, that if the said main raceway shall not be made on said premises in conformity to the act incorporating said company, the said lands and premises shall revert to the said George Woodruff, his heirs and assigns; and also that the said party of the second part shall erect, maintain, and keep in good repair a safe, convenient, and substantial bridge across said main raceway, at a place to be designated by the said George Woodruff; and also cause to be made and kept in order a convenient landing place on the side next the river Delaware, so that wagons may at all times safely pass over thereon; and shall also erect and maintain all necessary fences across the said main raceway, together with fences across the said premises where the lines of the aforesaid John Titus and Jasper S. Hill cross the said main raceway; and shall also permit the said party of the first part to use the said raceway to give drink to his cattle, and also to take ice therefrom to fill his ice house, said party of the first part so to use said privileges that no damage shall accrue to said raceway; 10 and also that the said party of the second part shall possess and enjoy all and singular the rights, liberties, privileges, ways, waters, watercourses, hereditaments, and appurtenances to the same belonging or in any wise appertaining, and also the remainders, rents, issues, and profits thereof and of every part and parcel thereof; and also all the estate, right, title, interest, use, property, claim, and demand whatever, either in law or equity, of the said party of the first part of, in, and to the said premises, together with the appurtenances—to have and to hold all the said premises hereby granted, together with the appurtenances, unto the said Trenton 30 Delaware Falls Company, their successors and assigns, for ever. And the said George Woodruff, for himself, his heirs, and assigns, doth hereby covenant, promise, and agree, to and with the said Trenton Delaware Falls Company, that he is seized of an absolute estate of inheritance in fee simple of, in, and to the hereby granted premises, with all and singular the appurtenances thereto appertaining; and also that the said George Woodruff and his heirs, all and singular, the hereditaments and appurtenances hereby granted to the said Delaware Falls Company, their successors and assigns, against him, the said party of the first part, his heirs and assigns, 40 and against all other persons lawfully claiming or to claim the same, will for ever warrant and defend by these premises. In wit-

ness whereof, the parties to these presents have set their hands and seals the day and year above written.

G. WOODRUFF, [ L. S. ]  
 JEAN WOODRUFF, [ L. S. ]

Sealed and delivered in presence of P. H. Woodruff, Thomas M. Woodruff.

as in and by the said deed, now in the possession of these defendants and ready to be produced when and where this honorable court shall direct, reference being thereunto had, will appear.

- 10 And these defendants in further answering admit, that shortly after the execution and delivery of the said deed, the Trenton Delaware Falls Company entered upon and took possession of the lands and premises thereby conveyed to them, and cut and constructed their main raceway through and across the same, and that the said company, by the construction of their main raceway and other works authorized by their charter, created an extensive water power, which they used and leased for manufacturing and other purposes.

- 20 And these defendants in further answering admit, that some time in the year eighteen hundred and forty-three, the Trenton Delaware Falls Company having become insolvent, a bill was filed against them in this honorable court by Andrew Carrigan, one of the creditors of said company, under the act entitled, "An act to prevent frauds by incorporated companies," and that such proceedings were thereupon had that, by an order of this court made in said cause, James Ewing, Thomas J. Stryker, and Philemon Dickinson were appointed receivers of said company, with full power and authority to sell, convey, and dispose of the real and personal estate, franchises, and works of the said company.

- 30 And these defendants in further answering say, that by the act of the legislature of the state of New Jersey entitled, "An act to relieve the creditors of the Trenton Delaware Falls Company," passed on the fifteenth day of February, eighteen hundred and forty-four, the said receivers were authorized to sell the real estate, franchises, and works of the said the Trenton Delaware Falls Company at public sale to the highest bidder, free and clear of all encumbrance, and to make to the purchasers thereof as good and sufficient title in law as the said company had in said real estate, franchises, and works, free and clear of all mortgages, judgments,  
 40 or other liens whatever.

And these defendants in further answering admit, that in and by

the said act it was, among other things, enacted and provided that the purchasers of the real estate, franchises, and works aforesaid should hold the same, as a joint stock company, in the same manner as the original stockholders held the same, and that the said company should be known as "the Trenton Water Power Company," and by that name might sue and be sued, have a common seal, and exercise all its corporate powers.

And these defendants in further answering admit, that at or about the time in said bill mentioned, the said receivers sold the said real estate, works, and franchises of the Trenton Delaware Falls Company at public sale to the highest bidder, and afterwards, to wit, on or about the eighth day of March, A. D. eighteen hundred and forty-four, executed and delivered to the purchasers thereof a deed of conveyance for the real estate, works, and franchises aforesaid; but these defendants deny that by virtue of the last mentioned act of the legislature the corporate name of the Trenton Delaware Falls Company was, upon the sale of the said real estate, franchises, and works, changed to the name of the Trenton Water Power Company, or that the said companies are one and the same corporation, either in fact or in law, or that these defendants are, by virtue of the said act, or in any wise whatever, bound by or liable for the covenants or obligations of the Trenton Delaware Falls Company. 10 20

And these defendants in further answering admit, that under and by virtue of the said last mentioned act of the legislature, and on or about the second day of June, eighteen hundred and forty-four, the Trenton Water Power Company was organized and went into operation, and that these defendants thereupon entered into possession of all the lands and real estate of the said the Trenton Delaware Falls Company, including the strip or parcel of land conveyed to them as aforesaid by the said George Woodruff, and that these defendants from that time have continued, and still do continue and remain, in the quiet possession, occupation, and enjoyment thereof. 30

And these defendants in further answering admit, that the said George Woodruff held and possessed the farm in the complainants' bill mentioned (excepting the part conveyed by him as aforesaid) until his death, in the month of September, eighteen hundred and forty-six.

And these defendants further say, that they have been informed and believe that the said complainants are now in possession of the said farm, but whether as tenants or owners thereof in fee simple, 40

and under what title and how acquired, these defendants have never been informed, save by the complainants' said bill, and cannot set forth, as to their belief or otherwise.

And these defendants in further answering admit, that from the time of the construction of said main raceway until the present time, neither the Trenton Delaware Falls Company nor these defendants have ever erected or maintained the bridge, landing place, or fences mentioned in the said deed from the said George Woodruff to the Trenton Delaware Falls Company; but these defendants deny that the said George Woodruff in his lifetime ever applied either to the Trenton Delaware Falls Company or to these defendants, and requested them to erect and maintain said bridge, landing place, and fences specified in said deed, or any or either of them, or that the said George Woodruff in his lifetime ever designated or pointed out to the Trenton Delaware Falls Company or to these defendants the place for the erection of said bridge, or that either the Trenton Delaware Falls Company or these defendants ever promised the said George Woodruff to erect or maintain such bridge, landing place, or fences.

20 And these defendants in further answering deny that the said conveyance was made by the said George Woodruff to the said the Trenton Delaware Falls Company for or in consideration, in whole or in part, of the alleged covenants and agreements in the complainants' bill set forth, or of any other covenants or agreements on the part of the said company to be kept and performed, or that any such consideration was expressed in the said deed, or that the said company ever entered into any such covenants or agreements.

And these defendants further say, that the consideration expressed in said deed, to wit, the sum of three hundred dollars, was, 30 as these defendants have been informed and believe, the true consideration of the said conveyance, and a full and fair consideration and compensation for the land conveyed to the said company by the said George Woodruff, and for all damages sustained by him by reason of the construction of said main raceway, and that the provisions in said deed contained, relative to the erection and maintenance of said bridge, landing, and fences, were inserted in the said deed without the authority or consent of the Trenton Delaware Falls Company; that the said deed was never sealed or executed by the said company, or the conditions and provisions there- 40 of, as set forth in the complainants' bill, nor assented to by them, otherwise than by the acceptance of the estate thereby conveyed, and that the said George Woodruff, as these defendants have been

informed and believe, never called upon or applied to the Trenton Delaware Falls Company to keep and perform said alleged covenants and agreements, or to erect and maintain the said bridge, landing place, and fences, as is untruly stated and set forth in the complainants' bill.

And these defendants in further answering admit, that the complainants, since the death of the said George Woodruff, have on several occasions applied to these defendants, or to some of their officers or agents, and requested them to erect and maintain said bridge, landing place, and fences, and also to pay the said complainants some compensation or damages for the injury alleged to have been sustained by them by reason of the non erection of said bridge and fences; but these defendants expressly deny that they ever promised the complainants or their agents, or any person or persons on their behalf, to comply with such requests, or to erect said bridge, landing place, and fences, or any or either of them, or to pay for any damages alleged to have been sustained by the complainants by reason of their non erection, but on the contrary thereof, these defendants, when applied to as aforesaid, always refused to comply with such requests of the complainants, upon the ground that these defendants were and are under no obligation whatever to erect and maintain the bridge, landing place, and fences, specified in the deed from the said George Woodruff to the Trenton Delaware Falls Company, or any or either of them.

And these defendants in further answering admit, that although these defendants always refused to comply with the requests and demands of the complainants, and always denied any obligation upon their part to erect and maintain said bridge, landing place, and fences, yet these defendants admit that some of their officers and agents, without any authority from these defendants, for the purpose of avoiding litigation and of settling the matters in controversy between the complainants and these defendants, on one occasion offered to pay to the complainants a sum of money (the amount whereof these defendants cannot now precisely designate) as a compromise of the matters in controversy as aforesaid, but which offer was not accepted by the complainants, and is not binding on these defendants.

And these defendants in further answering admit, that at or about the time in the said bill mentioned, the complainants caused a notice in writing to be served upon these defendants, or some of their officers, requiring these defendants to erect and maintain the bridge, landing place, and fences specified in the said deed to the

Trenton Delaware Falls Company, but as to the precise date or contents of the said notice, the same having been lost or destroyed, and these defendants being unable after diligent search to find the same, these defendants are unable to set forth as to their belief or otherwise; but these defendants expressly deny that they then, or at any other time, promised the complainants or their brothers, or any or either of them, or any person on their behalf, to comply with the said notice, or to erect and maintain the said bridge, landing place, and fences, or any of them, or to pay to the complainants, or to any other person or persons, any compensation or damages for any past omission or refusal to erect and maintain the same.

And these defendants in further answering say, that by the provisions of the deed herein before set forth, the Trenton Delaware Falls Company, if bound to erect the bridge and landing place therein mentioned, were only bound to erect the same at a place to be designated by the said George Woodruff, and the said George Woodruff having failed and omitted in his lifetime to designate the place for the erection of said bridge, these defendants submit to this honorable court whether the Trenton Delaware Falls Company, and all persons claiming by, from, or under them, are not discharged from said obligation, so that neither these defendants nor any other person or persons can be called upon by the heirs or devisees of the said George Woodruff to erect and maintain the said bridge and landing place.

And these defendants in further answering say, that if by reason of any provision, condition, or covenant in the said deed contained, the Trenton Delaware Falls Company were bound to erect and maintain the said bridge, landing place, and fences, (which these defendants do in no wise admit) yet these defendants insist that by virtue of the act of the legislature, herein before mentioned, the real estate, works, and franchises of the said company were sold free and clear of all encumbrances and liens whatever, and these defendants submit to this honorable court whether they are not entitled, under the authority of the said statute, to hold the said lands free and clear of and from any covenant or obligation entered into by the said the Trenton Delaware Falls Company and of and from the conditions and provisions in the said deed contained.

And these defendants in further answering say, that from the time of the construction of the said raceway through and across the said premises, in the year eighteen hundred and thirty-two, until the exhibition of the complainants' bill in this cause (a period

of more than twenty years), the said George Woodruff and the said complainants have slept over their pretended claim for relief in the premises. And these defendants submit, that the long delay of the said George Woodruff and the said complainants in instituting their suit is a circumstance strongly corroborative of the truth and validity of the defence herein set up against the same, and that the said complainants ought not in equity to be allowed to prosecute at this late day so stale a claim, when the death of the said George Woodruff and the great lapse of time have put it out of the power of these defendants to prove and establish many of the facts herein 10 before set forth.

And these defendants in further answering say, that the complainants have no land or real estate between said main raceway and the river Delaware; that the outside bank of said raceway opposite the complainants' farm is very high above the river, and that the erection and maintenance of the said bridge and landing place would be attended with great expense and inconvenience to these defendants.

And these defendants in further answering deny that the erection of the said bridge and landing place would be of any material 20 benefit, advantage, or convenience to the complainants, or that the value of their said farm, either as a desirable residence or for the purposes of cultivation, would be increased thereby, or that the complainants have suffered or sustained any material loss, damage, annoyance, or inconvenience for the want thereof.

And these defendants in further answering submit to this honorable court, that even if the complainants have sustained any loss or damage by reason of the non erection of the said bridge, landing place, and fences (which these defendants do in no wise admit), yet that the complainants have a full, complete, and adequate remedy 30 at law therefor, and are not entitled to any relief from a court of equity in respect thereto.

And these defendants deny all and all manner of fraud and unlawful combination and confederacy wherewith they are by the said bill charged, without this, that there is any other matter, cause, or thing, in the said bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered; confessed, traversed, and avoided or denied, is true to the knowledge or belief of these defendants. All which matters and things these defendants are willing 40 and ready to aver, maintain, and prove, as this honorable court

shall direct, and humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

CALEB S. GREEN,  
*Solicitor of defendants.*

X. J. MAYNARD,  
*President of the Trenton Water Power Company.*

The foregoing answer was put in by consent of the complainants' solicitor, without the corporate seal of the defendants being  
10 thereto affixed.

J. WILSON,  
*Solicitor of complainants.*

To the answer, the common replication was filed, and an order taken substituting J. F. Randolph solicitor for complainants, in the place of J. Wilson.

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COMPLAINANTS' EVIDENCE.

*Examination of witnesses taken in the aforesaid case before James Ewing, one of the masters of the said court, at his office in the city of Trenton, on the twenty-fifth day of April, A. D. 1854, in  
20 the presence of Joseph F. Randolph, esq., solicitor of the complainants, and of Caleb S. Green, esq., solicitor of the defendants.*

*Dr. John McKelway, of the city of Trenton, being duly sworn as a witness on the part of the complainants, deposes and says— That the Trenton Delaware Falls Company commenced taking lands for the use of the company some time in 1832; deponent was the president of the company for a number of years, and was a member of the board during the continuance of the company, except for the last year or two; the minutes of the company deponent believes to have been mislaid or lost; deponent thinks Mr.  
30 Woodruff was president for the first two or three years; Mr. Woodruff's land taken for the company was appraised in 1831, early in the fall or late in the summer; the works through Mr. Woodruff's land were completed in the fall of 1833, as deponent thinks.*

*(A book entitled "proposals, &c.," offered as an exhibit, and marked Exhibit A on part of complainants)—From 1832 until it closed, in about 1843. The company after the exhaustion of the*

first subscription, which did not complete the works, the company were eventually embarrassed for want of funds; this embarrassment continued until the works went into the hands of receivers; the works was completed by the company, but they had great difficulty in completing the work. Mr. Woodruff was a stockholder; deponent knew Mr. Woodruff; he was an easy man in his disposition; he was a man living on his own means; the works went into the hands of the receivers in 1843, as deponent thinks; the company continued embarrassed after the appointment of receivers; Mr. Woodruff was the first president of the company, as deponent 10 thinks.

JOHN MCKELWAY.

Sworn and subscribed, at Trenton, this 25th day of April, A. D. 1854, before me.

JAMES EWING, M. C.

*Joseph B. Anderson*, of the township of Ewing, in the county of Mercer, being duly sworn as a witness on the part of the complainants, deposes and says—That he is acquainted with the property formerly owned by Mr. George Woodruff and now owned by his sons; the complainants are the owners of the property formerly owned by George Woodruff, and mentioned in the deed now produced, and marked *Exhibit B* on the part of complainants; deponent estimates that it would cost at least as much as ten dollars a year to keep up the line fences between the property of Mr. Woodruff and that of Mr. Jasper S. Hill and John Titus, and that the want of those fences would be at least as much as ten dollars damage to the property of Mr. Woodruff; by the line fences, deponent means the line fences mentioned in the deed offered as an exhibit; deponent estimates that the damage done to the Woodruff property for want of a bridge and wagon way, as specified in 20 said deed, would be at least twenty dollars a year.

And being cross-examined, deponent says—He thinks the length of the fences, put together, would be about one hundred and fifty feet; that would be about the length of fourteen panel of fence at least; deponent's calculation is for the fence from the north side of the ditch on raceway to the south side; the top of the bank of the water power, deponent thinks, is about six or ten feet above the river at low water mark; deponent does not know whether there has ever been a fence across the water power there; has never seen a fence across the water power at that place; deponent has 40 seen some staking out into the water power from the north banks;

the average depth of the water in the water power deponent does not know, deponent thinks from four to six feet; the cheapest kind of a fence cannot be put up and kept there for less than ten dollars a year, either of wood or iron; an iron fence could not be put there for less than that sum; about half of the fence, or a little more, would be in the water; cattle cannot conveniently get up the bank from the river; it is tolerably steep; in a high river or ordinary spring flood, deponent thinks the water of the river does not overflow the bank of the water power—part of it may be, but not the  
 10 whole length; deponent thinks the fence would have to be renewed every year; if deponent was the owner of the Woodruff property he would not be deprived of the bridge and wagon way for the amount of thirty dollars; my opinion is founded on my valuation of the farm; it would give a convenience for going to the river for sand and for fish; Mr. White's fishery is nearly opposite or nearly in a line; can go there in a wagon; there is a convenience of getting fine stone there from the river for building; if a man wanted lumber or ice he could get them from the river there; there is no place to get lumber there, unless there was a raft of lumber  
 20 came there.

*Question.* Are the bridge and wagon way of any value to the farm for farming purposes?

Witness answers yes; deponent considers the value for such purposes would be in the neighborhood of ten dollars.

*Question.* How much more would this farm bring per acre for having the bridge and wagon way?

*Answer.* To some men it would bring a good deal more, to others a little more; it would be owing to the man; to some men it would bring four dollars an acre more.

30 In chief.—To any man, deponent thinks, the farm would bring something more.

Cross-examined.—Deponent does not know whether the Woodruffs own any land between the water power and the river.

JOSEPH B. ANDERSON.

Sworn and subscribed, at Trenton, this 25th day of April, A. D. 1854, before me.

JAMES EWING, M. C.

*James Wilson, esq.*, a witness produced on the part of the complainants, being duly sworn, doth declare—That the claim of Mr.  
 40 Woodruff against the water power company was put in the hands

of the deponent, as his solicitor, some time in the year 1849; deponent opened a negotiation with defendants as soon as the claim was placed in deponent's hands; he informed the officers of the company, and expressed a wish to them that they would settle it amicably; the claim consisted of two branches or parts; the first arose under the deed from George Woodruff to the company, and was a claim that the company should build a bridge and landing place across their raceway, as expressed in the deed, and to keep the same up, and also the fences at the upper and lower line, and keep them up, and pay damages for their past omission to keep up the bridge and fences; the second branch of the claim was for damages for washing away the bank on the north side of the water power, which Mr. Woodruff alleged was done by the water of the raceway; deponent had numerous interviews at different times with the officers of the company upon the subject of the claims—these extended down from the time the claim was first put into my hands to the time the work was said to have been sold to Peter Cooper; the directors appointed a committee to confer with me upon the subject; deponent was informed they were so appointed, the committee; they acted as a committee; these persons were X. 20 J. Maynard, Ralph H. Shreve, and William P. Sherman. Mr. Maynard was president part of the time, perhaps all the time during my negotiation with that committee; had frequent interviews with that committee, together and separately; they said that the company admitted they were bound to build the bridge, landing place, and fences, and keep them up, and that they would do so, and keep them up, or would pay Mr. Woodruff as much money as it would cost to build them, if he would take it upon himself to keep them up after that. In the course of my conversation with Mr. Sherman, he mentioned, two or three times, that it was his opinion, individually, that the company were not bound to build a bridge and landing place, because it was expressed in the deed that the place at which they were to be built was to be pointed out by George Woodruff, and that he had died without pointing it out, and therefore the company were not bound to erect them. Mr. Shreve once expressed to me similar opinions; he was at the house of Mr. Maynard, where deponent had met the committee by appointment, and where we were engaged the whole evening in trying to settle the claim of Mr. Woodruff upon them in an amicable way. When Mr. Shreve expressed that opinion, I said to him, that if the company 40 meant to put themselves upon that ground, deponent thought it useless for me to spend any more time in discussing the matter with

them; he laughed, and said nothing more about it; he then went on discussing and trying to settle the claim. It was agreed that Mr. Maynard should go with me out to Mr. Woodruff's farm, and view the place where his land had been washed away, which he alleged had been done by the water of the water power. Mr. Shreve and Mr. Sherman said that they had seen the ground, and did not care to go again; and if Mr. Maynard would view it, and report to them, they would be satisfied with what he said. They did not admit the liability of the company to pay for the land of

10 Mr. Woodruff, which had been washed away; they doubted, in the first place, whether it had been washed away by the flow of the water in the raceway or by the freshets from the high water in the Delaware river; and, in the second place, they doubted whether the company was liable for any damages, even if the wash had been occasioned by the water in the raceway, because, as they said, it must then be considered as one of the natural conveyances of the purpose for which the land had been bought from Mr. Woodruff. Mr. Maynard, after this, called upon deponent, and took me out to Mr. Woodruff's house; Mr. Houstoun Woodruff joined us

20 there, and we went together to the raceway, and examined the place where the bank had been washed away. After making the examination, we returned to Trenton; after this, but how long exactly deponent does not remember, Mr. Maynard told me that he had come to the conclusion that the washing of the bank, as complained of by Mr. Woodruff, was not caused by the water in the raceway, but by the freshets from the Delaware river or other causes, and that he had so stated to his associates on the committee, and also to the directors of the company. He also said, or repeated what he had before said, that the company were willing to

30 build the bridge, and landing place and the fences, and keep them up, as was required by the deed, or that they would pay Mr. Woodruff what it would cost to erect the bridge and landing place. Deponent showed to Mr. Maynard a statement or calculation, made by Charles Potts, of the cost of erecting a bridge and landing place; the amount was fixed, in that statement, at five hundred and thirty-five dollars.

(A paper was exhibited by deponent, as the calculation of Charles Potts, and marked *Exhibit C* on the part of complainants.)—This paper was shown to Mr. Shreve and Mr. Sherman, the committee

40 of the directors. The persons above named afterwards said to me that his calculation was entirely too high; that they had had bridges built over other parts of the water power for a much less sum, by

a Mr. Conover, and that they would get from him an estimate of the cost of building a bridge and landing place across the raceway on Mr. Woodruff's farm. A paper was afterwards brought to me by Mr. Maynard, either alone or in company with Mr. Sherman, which they said was the estimate of building the proposed bridge and landing place, made out by Conover at their request. Conover's estimate fixes the expense of making a road down to the river and a floating bridge at one hundred and fifty dollars, and the cost of a permanent bridge, with an abutment on the land side and a road down to the river, he fixed at two hundred dollars. 10

(A paper writing was exhibited by deponent, as Conover's estimate, and marked *Exhibit D* on part of complainants.) They told deponent the company were willing to pay Mr. Woodruff the amount fixed by Conover; and deponent told them he would communicate the proposition to Mr. Woodruff; deponent did so; Mr. Woodruff was not satisfied to receive it, because, he said, the sum was entirely too small, and deponent reported that to the committee. After this, there were various conversations between the members of the committee and myself upon the subject, in which they urged that Mr. Woodruff should accept the amount fixed in 20 Conover's statement; deponent wanted they should pay more, strived to show them why. The matter remained in an unfinished state until some time in the fall of 1851, when deponent heard, as a public rumor, that Peter Cooper was about to buy the whole, or nearly so, of the stock of the water power company. Deponent called on Mr. Maynard, as soon as he heard this report, and inquired if it was true; he said the sale had not yet taken place, but probably would, and deponent said something about having Mr. Woodruff's claim first settled. Mr. Maynard said he hoped it would be attended to by the persons into whose hands the work 30 would pass. Soon after this, deponent prepared a formal notice in writing, calling upon the water power company to erect a bridge and landing place and fences, and pay damages, as mentioned in the notice; deponent sent this notice to Mr. Maynard through the Trenton post office; this was on the fifth of December, 1851. (A paper, offered by deponent as the rough draft copy of the notice sent to Mr. Maynard, was marked *Exhibit E* on the part of complainants.) (A paper was offered by deponent as a copy of the letter sent with the notice to Mr. Maynard was marked *Exhibit F* on part of complainants.) A few days after dropping the letter in 40 the post office enclosing the notice, deponent met Mr. Maynard, and then inquired of him if he had received the letter and notice;

he said he had; deponent made a memorandum in pencil, now appearing on the back of the notice. On the 30th of December, 1851, deponent addressed a letter to Peter Cooper, which I sent through the post office. (A paper was offered by deponent as the copy of such letter, and marked *Exhibit G* on the part of complainants.) In that letter deponent enclosed a copy of the notice which he had sent to Mr. Maynard on the fifth of December; shortly afterwards Abraham Hewitt called at deponent's office, and said that he came to acknowledge the receipt of my letter to Mr. Cooper in regard

10 to the water power; he said that Mr. Cooper was negotiating for the purchase of the work; that he knew nothing in regard to any claim of Mr. Woodruff against the company until the letter containing deponent's notice was received, and that he was glad deponent had sent it before the negotiation was completed; he then said that if we do purchase the work we will inquire into Mr. Woodruff's claim, and if well founded it should be settled promptly. Mr. Hewitt did not call upon me for some time after that. While the water power company were engaged before the legislature, deponent forbore to press it upon his attention. Deponent had one or two other conversations with him afterwards, towards the next spring, and he told me he was trying to collect information to satisfy his mind upon the subject, and as soon as he did so he would communicate with me. I was disappointed in not hearing from him in some time, and wrote him a letter. (A paper was offered by deponent as a copy of said letter, and marked *Exhibit H* on the part of complainants.) Deponent saw him soon after, and he told me that his brother Charles was authorized, on the part of the company, to inquire into the matter, and would inform me what the company would be willing to do. After this, on

20 the 29th of July, 1852, as deponent finds by a memorandum made at the time, Charles Hewitt called upon me, and said the company were willing to pay Mr. Woodruff the sum of three hundred dollars, in lieu of all claims for the past and in regard to the fences in future; deponent communicated this offer to Mr. Woodruff, and he was not willing to accept it; he desired me to address a letter directly to Peter Cooper, at New York; deponent did so. (A paper was offered by deponent, as a rough draft copy of such letter, and marked *Exhibit I* on the part of the complainants.) Deponent received a reply to that letter soon after, signed Cooper and Hewitt. (A paper writing was offered by deponent as such reply, and marked *Exhibit K* on the part of complainants.) Deponent showed that to Mr. Woodruff, and after some consideration, he instructed

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40

me to file a bill against the company for a specific performance and damages; and in consequence deponent prepared and filed the complainants' bill in this cause. The negotiations carried on between deponent and the committee were in regard only to the amount, not with respect to the right of Mr. Woodruff to recover; deponent is acquainted with the writing of Mr. Woodruff. (A paper offered, and marked *Exhibit L* on the part of the complainants, deponent says is in the handwriting of Mr. George Woodruff. Deponent is acquainted with the handwriting of James M. Redmond, and a paper offered, and marked *Exhibit M* on the part of the complainants, deponent believes to be the handwriting of said Redmond, also another paper, marked *Exhibit N*, deponent says is in the handwriting of said Redmond. 10

Notice to produce the original letters from the two Mr. Woodruffs to Mr. Redmond, and the original letters of Mr. Wilson to X. J. Maynard, Peter Cooper, and Abraham Hewitt, is admitted by the solicitor of defendants. [C. S. Green, esq., solicitor of the defendants, objects to all the foregoing evidence of Mr. Wilson, as respects the acts, declarations, and conversations of the various persons referred to by him in his testimony, and the various persons mentioned in his testimony, without producing evidence that they were the officers of the Trenton Water Power Company, and duly authorized to act in their behalf. 20

J. WILSON.

*Charles Potts*, of the city of Trenton, a witness produced on the part of the defendants, being duly affirmed, doth declare—That he is a civil engineer by profession; deponent prepared for Mr. Woodruff the paper marked *Exhibit C*; deponent was one of the engineers engaged in constructing the work, and is well acquainted with the water power and its banks; the top of the outside bank of the water power, along Mr. Woodruff's place, is about twelve feet above low water mark; the outside bank along that farm next the river is protected by a sloping stone wall; the top part of the banks is of an arched form, and the slope is about an angle of thirty degrees; the level of Mr. Woodruff's farm, inside of the water power, is considerably higher than the top of the outside bank of the water power; the bridge in *Exhibit C* is about twenty feet higher than low water mark—the outside bank of the raceway of the water power and the raceway itself is covered with water at the time of high floods in the river; it was necessary to raise the bridge to its present height to keep it out of the way of the floods 40

in the river—that was the object; the bank of the water power, along Mr. Woodruff's farm, extends into the river beyond low water mark; the whole of the landing place and the road would have to be constructed in the river bed below low water mark; the water of the river at low water now flows along the bottom of the slope wall; according to the plan marked *Exhibit C*, the bridge and embankment are always liable to be carried away in a heavy flood; all structures of the kind would be liable to the same injury; in his estimate, deponent endeavored to make the bridge strong  
 10 enough to sustain the exposure; in ordinary stages of low water in the river it is not deep enough for boats to come up to the landing; the bridge was made high as well for the convenience of the farm as to protect it from the river; if the bridge was any lower, it would be more liable to be carried away by the floods.

CHARLES POTTS.

Affirmed and subscribed, at Trenton, this 20th day of October, A. D. 1854, before me.

JAMES EWING, *M. C.*

It is agreed by the parties that the books of the water power  
 20 company may be used in evidence.

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COMPLAINANTS' EXHIBITS.

EXHIBIT A.

Extract from a pamphlet entitled, "Proposals by the president and managers of the Trenton Delaware Falls Company," page 10—printed 1833.

"That part of the line extending from the head of Scudder's Falls to the Assanpink, being the most difficult and expensive part of the work, was immediately put out under contract; and it is confidently expected that by the close of the ensuing summer, the  
 30 whole of this work will be finished, and the water ready for use."

## EXHIBIT C.

To H. Woodruff, esq.

Dear sir,—From the survey and measurements which I made last Tuesday (Dec. 18,) of that portion of the canal of the Trenton Water Power which runs along your premises, and comparing it with the original survey referred to in the deed from George Woodruff to the Trenton Delaware Falls Company, I find this canal has overrun the old survey, and consequently covers more ground than therein conveyed, by *six-tenths* of an acre. At your upper line, the canal has increased in width 25 feet, and at your lower line, next to Keller's, it has widened 14 feet.

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The following is an estimate of the quantity of materials and work, with the probable cost thereof, to construct a bridge and *landing* place across the canal of the water power at a point near the tenement on the river bank, as required in the aforesaid deed. This structure, to be permanent, must necessarily be elevated above the highest floods of the river, or nearly as high as the original banks are at present. The landing on the outside of the water power bank, in order to resist the floods and ice, would require to be protected with a stout wall.

*Estimate.*

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300 perches dry stone wall, at 75 cents,	-	-	\$225
550 c. yds. embankment, at 20 cents,	-	-	110
Bridge cost span,	-	-	200
			<hr/>
			\$535

CHARLES POTTS, *Civil engineer.*

Trenton, Dec. 22, 1849.

## EXHIBIT D.

To the Committee of the T. W. P. Co.

Gent.—Having examined the ground and bank at Mr. Woodruff's house, and having made estimates for two kinds of bridges 30 over the water power raceway, one a floating bridge, the other similar to those I have made for your company, I have estimated the floating bridge, together with the expenses of making a road

down to the river, at one hundred and fifty dollars; and this is the kind of bridge I would recommend, because in case of freshets, or running rafts or boats, it can be swung around out of the way of rafts, and will not be carried away by freshets.

The cost of a permanent bridge, elevated so that rafts and boats can pass under it, like those I have made, together with abutment on land side and a road down to the river, will be two hundred dollars.

JOHN CONOVER.

10 March 31, 1851.

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EXHIBIT E.

The Trenton Water Power Company are hereby notified, and required forthwith to erect and to maintain and keep in good repair, a safe, convenient, and substantial bridge across their main raceway at the place upon the farm situate in the township of Ewing, in the county of Mercer, late of George Woodruff, esq., deceased, and now in the occupation of P. Houstoun Woodruff, opposite to the end of the lane on said farm running from the feeder of the Delaware and Raritan canal towards the said main raceway, and also to make and keep in order a convenient landing place on the side next the river Delaware, so that wagons may at all times safely pass over thereon, and also to erect and maintain fences across said premises where the lines of lands formerly of John Titus and Jasper S. Hill cross the said main raceway. The said company are also notified that damages are claimed by P. Houstoun Woodruff and others, heirs and devisees of said George Woodruff, deceased, for the neglect and omission of said company heretofore to do the acts aforesaid, and also for injury done to the aforesaid farm and premises by the waters of said main raceway and by the servants and agents of the said company.

30

J. WILSON,

*Att'y of P. Houstoun Woodruff and others, heirs  
and devisees of George Woodruff, deceased.*

To Xenophon J. Maynard, esq., president of said company, or whom it may concern.

Dated 4th December, '51.

## EXHIBIT F.

Trenton, 4th December, 1851.

Dear sir,—I saw Mr. Woodruff after the conversation I had with you on Wednesday morning. He feels much dissatisfied with the way in which matters stand between him and the Water Power Company, and has requested me to serve the enclosed notice upon you.

Very respectfully yours,

J. WILSON.

X. J. Maynard, esq., President Water Power Co.

## EXHIBIT G.

Trenton, 30th December, 1851. 10

Dear sir,—A notice was lately served upon the president of the Trenton Water Power Company, on behalf of P. Houstoun Woodruff and others, and they have been informed that you have some interest in the concerns of the company, which may make it proper that you should be informed of the contents of that notice. At their request, therefore, I herewith send you a copy of it.

Your ob't serv't,

J. WILSON.

Peter Cooper, esq.

## EXHIBIT H.

Trenton, 20th July, 1852. 20

Dear sir,—Will you please inform me what you propose to do respecting the claim of Mr. Woodruff, of which we have heretofore spoken.

Yours, &amp;c.,

J. W.

Mr. Abm. Hewitt.

## EXHIBIT I.

Trenton, 30th February, 1853.

Dear sir,—On 30th December, 1851, I sent to you a copy of a notice, which had been given to the Trenton Water Power Co., calling on them to perform certain covenants entered into by them with Geo. Woodruff, in regard to erecting and maintaining a bridge and landing place across their raceway on his farm, and to pay proper damages for past omissions and injuries.

Mr. Hewitt soon after called, and acknowledged the receipt of the notice on your part, and said that the claim should receive proper attention. He has since made to Messrs. Woodruff (heirs of  
10 George Woodruff and owning the same farm) offers for a settlement of the matter; but they do not deem any of them satisfactory, and feel compelled to take further measures for redress. Their relations with the company having always been friendly, they desire, if possible, to avoid a resort to legal proceedings. I am requested by them to inquire whether the offers made by Mr. Hewitt are to be considered final.

The company are by their contract bound to erect, maintain, and keep in good repair a bridge and landing place, and also fences, &c.  
20 The first cost of the bridge and landing, according to the written estimate and statement of Mr. Potts, an experienced engineer, are \$535.

The Messrs. Woodruff, as matter of compromise, are willing to accept \$600, in lieu of the bridge and landing, and in discharge of damages for the past want of them. Mr. Hewitt's offer is only \$350, which they think is hardly an approach to what is really and in strictness due to them, and but little more than half of what ought to be paid them on a compromise and amicable settlement, in which they are willing to abate something.

30 I request as early an answer as may suit your convenience.

Your ob't serv't,

J. WILSON.

Peter Cooper, esq., New York.

## EXHIBIT K.

New York, Feb. 3d, 1853.

James Wilson, esq., Trenton, N. J.

Dear sir,—Your favor of 3d inst. is received, addressed to Peter Cooper, esq. You labor under a mistake in supposing that he has any pecuniary interest in the water power. He has none, and I attended to the previous note accordingly.

The Trenton Water Power Co. is, as you know, much embarrassed, and quite unable to raise money. I made an offer to Mr. Woodruff, which would have taken the money from my own pocket. When I originally made the offer, I thought that the water power could be made to pay. I have since changed my mind. I felt, however, bound to Mr. Woodruff, but am glad that he has declined the offer, as I shall personally save \$350.

I am aware of the friendly feeling of Mr. W., and have assured him of my wish to do all in my power to see his claim adjusted. I have done so, and remain yours truly.

COOPER &amp; HEWITT.

## EXHIBIT L.

Trenton, August 25, 1845.

James M. Redmond, esq.

Dear sir,—While the managers of the Water Power Company 20 are repairing the canal of the company, I beg leave to call their attention to that portion of the canal running through my farm.

The Trenton Delaware Falls Company purchased of me, for the use of their canal, eighty-two and a half feet in width. Since its construction, it has, I am informed, encroached upon my land, opposite the farm house, from forty to fifty feet, leaving only about twenty feet to the well, and thirty-four feet to the dwelling house, thus creating some uneasiness as to the safety of both.

I hope and trust the owners or managers of the company will consider what compensation I am entitled to, not only on the loss 30 I have already sustained, but the best mode of securing me from further damage. While on this subject, permit me to remind the company that, under my deed of conveyance to the T. D. Falls Company, they are to build me a bridge across the canal when required.

Respectfully your obed't serv't,

G. W.

## EXHIBIT M.

Trenton, August 29, 1845.

Geo. Woodruff, esq.

Dear sir,—I have received your letter of the 25th inst., and will lay the matter before the parties interested. Although there may be some difference of opinion as to the rights and duties of the new company, I assure you that the subject will receive the most respectful attention as soon as the pressure of business arising from repairing the canal and investigating the situation of title, &c., has subsided.

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Very respectfully your ob't serv't,

J. M. REDMOND, *Pres't.*

## EXHIBIT N.

Trenton, May 15, 1847.

Dear sir,—I have received your note calling my attention to a letter of the late Mr. Geo. Woodruff on the subject of the raceway of the Trenton Water Power Company. In reply I would state, that there will be a meeting of the company early in June, and I will lay the matter before them, and communicate with you on the subject.

It appears to me it would be better for the company to purchase  
20 the land to such an extent as it is injured by the raceway than to attempt to build a wall, which would cost more than the value of the land. I had supposed that the wasting of your land was caused by the freshets in the river rather than the water in the raceway, and this view is confirmed by the statement of the owners of land (where the raceway does not affect it) along the river in other places. With an earnest desire to make an arrangement that may be mutually satisfactory,

I am, with much respect, yours,

J. M. REDMOND, *Pres't.*

30 P. H. Woodruff, esq.

## DEFENDANTS' EVIDENCE.

*Examination of witnesses, &c., in a cause depending in the Court of Chancery of the state of New Jersey, wherein P. Houstoun Woodruff and others are complainants, and the Trenton Water Power Company are defendants, taken before Egbert H. Grandin, one of the masters and examiners of the said court, at his office in the city of Trenton, on the twenty-fourth day of October, in the year of our Lord eighteen hundred and fifty-four, in the presence of Joseph F. Randolph, esquire, solicitor and of counsel for the said complainants, and Caleb S. Green, esquire, solicitor and of counsel for the said defendants.*

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*Morgan Scudder, of the township of Ewing, in the county of Mercer, a witness produced on the part of the defendants, being duly sworn, deposes and saith—That he is a farmer by occupation, and resides in the township of Ewing, on the banks of the Delaware; is acquainted with the farm formerly the property of George Woodruff, and with the situation along down the river bank by the water power; in my judgment, a bridge across the water power at Mr. Woodruff's farm would be of no material benefit for farming purposes; we used to think a landing at the river was of value before the canal—now we get off all our pro-  
duce by the canal; a boat could not come to Mr. Woodruff's farm  
by the river at low water, only in time of freshets; the river opposite Mr. Woodruff's place, for some distance out, is very shoal; I never knew any stone suitable for building to be taken out of that part of the river; the stone in the river about here are round boulders; ordinary fences cannot be put up and maintained across the water power on the line of Mr. Woodruff's land; they would be washed away by the freshets and ice every year; I should not think that fences across the water power would be of any service to Mr. Woodruff; I should say that the line fences carried down  
the inside bank of the water power to the water would answer the  
same purpose as a fence across; there are no bridges across the  
water power above Mr. Woodruff's farm till you come to Yard-  
leyville; none of the farms above Mr. Woodruff's have bridges  
across the water power; for all purposes of navigation and the  
carrying of produce the canal is much more available than the  
river, even if Mr. Woodruff had access to the river; if Mr. Wood-  
ruff's farm was for sale I would not give more for it if it had a*

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bridge across the water power than I would without a bridge; there are quarries in the township of Ewing from which stone of much greater value for building purposes can be got than can be got from the river; I should think that the expense of stone from the quarries would be less than that of stone from the river; there is a public bridge across the water power about a mile below Mr. Woodruff's.

And being cross-examined says—If I owned the Woodruff farm, I should require a small compensation for being deprived of the  
 10 privileges of the water power and river; if I were fond of boating and fishing, I should require a compensation for being deprived of access to the river; if I owned the Woodruff farm and were to advertise it for sale, I should not mention in the advertisement that it lay handsomely along the river, with convenient access to the river for boating and fishing, sand, and so forth; I do not think that any body would give more for the farm on account of having free access to the river; I look at a farm as valuable purely for farming purposes; I think to extend the line fence down to the  
 20 water power would answer the same purpose as a fence across the water power; a fence across the water power is not necessary.

And being again examined in chief says—A foot bridge across the water power would be as serviceable for fishing and boating as a wagon bridge and landing; my farm runs down to the river, and is cut off by the water power in precisely the same manner as Mr. Woodruff's; I have no bridge or fences across the water power; at the time of the construction of the water power I should think that Mr. Woodruff's farm was worth one hundred dollars an acre down to low water mark.

MORGAN SCUDDER.

30 Sworn to and subscribed before me, this 24th day of October, A. D. 1854.

E. H. GRANDIN, M. C.

## DEFENDANTS' EXHIBITS.

The following extracts from the minutes of the Trenton Water Power Company were read on the hearing of the cause.

November 20th, 1848.

"The president laid before the board a communication from A. D. Woodruff, esq., on behalf of the heirs of George Woodruff, deceased, making certain claims against the company, which was read, and referred to Messrs. *Shreve and Sherman*, to ascertain the legal obligations of the company, if any, in the premises."

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December 22d, 1850.

"Mr. Maynard was added to the committee, appointed November 20th, 1848, in relation to certain claims set up against this company by the heirs of George Woodruff, deceased."

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March 6th, 1851.

The committee on the claim of the heirs of George Woodruff, deceased, presented the following report:

"The committee to whom was referred the claim presented by the heirs of George Woodruff, deceased, respectfully report:

That they have conferred with Mr. P. H. Woodruff and with Mr. Wilson, the attorney of the complainants.

In the deed by which George Woodruff conveyed the land occupied by the raceway, he bound the old company to make fences across the raceway for his protection, to make him a bridge over the race at such point as he should in future designate, and a road way from the far end of said bridge to the Delaware river.

As to the bridge and road way, they are confessedly not needed by the claimants, but they urge that they have a right to them, or to what they would cost. Without conceding the obligation, we recommend, to avoid litigation, that an estimate be made of the cost of said works, and that the amount of said cost be paid the Messrs. Woodruff on their giving a full discharge of the claim." 30

## DECREE OF DISMISSAL.

This cause coming on to be heard at the last regular term of the Court of Chancery, held at the state house in Trenton in the presence of the counsel of the respective parties, and the pleadings, depositions, and proofs being read, and the arguments of counsel heard and considered, and the chancellor having taken time to advise thereon, and being now of opinion that the complainants are not entitled to the relief sought and prayed for by them in their bill of complaint—it is, on this twentieth day of June, in the year of our Lord one thousand eight hundred and fifty-five, on motion  
 10 of Caleb S. Green, of counsel with the defendants, ordered, adjudged, and decreed, that the complainants' said bill be and the same is hereby dismissed with costs.

B. WILLIAMSON, C.

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 PETITION OF APPEAL.

## COURT OF ERRORS AND APPEALS.

BETWEEN

PATRICK H. WOODRUFF and DICKINSON  
 WOODRUFF, appellants,

*and*

20 THE TRENTON WATER POWER COMPANY,  
 respondents,

} *On bill, &c.*  
 } *Petition of appeal.*

The humble petition of the above named appellants respectfully shows, that your petitioners find themselves aggrieved by a final decree, made in the Court of Chancery by the Honorable Benjamin Williamson, Chancellor of New Jersey, bearing date the 20th day of June, 1855, wherein the said appellants were complainants, and the said respondents were defendants, in this respect, to wit, that in and by said decree, the complainants' bill of complaint was thereby dismissed with costs. And your petitioners humbly appeal from the said decree, upon the ground that the same is erroneous.  
 30 Your petitioners therefore pray that the said decree may be reversed and set aside, and for nothing holden, and that your petitioners may have such relief in the premises as to this honorable court shall seem meet.

JOS. F. RANDOLPH,

*Solicitor for and of counsel with appellants.*

## OPINION OF THE CHANCELLOR.

The complainants are before the court as the devisees of George Woodruff, deceased. They allege, in their bill, that George Woodruff was seized and possessed in fee simple of a valuable farm, of about one hundred and eighty acres, situated on the river Delaware, with an extensive front along that river, running down to low water mark and affording at all points an easy and convenient access to the river, which was much resorted to and used by George Woodruff and his family, and by persons occupying the farm under him, for the purpose of bathing, boating, fishing, watering cattle, and procuring ice in winter, and for other purposes of business 10 and pleasure; and that the value of the farm, both as a desirable residence and for the purposes of cultivation, was much enhanced by its situation upon the the river and the ease and convenience with which the advantages thereof could be used and enjoyed; that the Trenton Delaware Falls Company was incorporated by the legislature of this state, with power and authority to cut a raceway for the purpose of creating a water power from the head of Wells' Falls in the Delaware river, in and along and near the banks of said river, to a point below the city of Trenton; that the company located their main raceway across that part of the farm of the said 20 George Woodruff which lay next the river, so that it was necessary for the company to have a portion of the farm upon which to construct their work; that, in pursuance of an agreement made between the said George Woodruff and the company, the said Woodruff and wife, on the twenty-sixth of January, 1832, did, in and by a certain deed of conveyance made between the said George Woodruff and his wife, of the first part, and the said the Trenton Delaware Falls Company, of the second part, in consideration of the sum of three hundred dollars to them, the said grantors, paid, and of the covenants and agreements in said deed contained, grant 30 and convey unto the said company, their successors and assigns, in fee simple, the following described portion of said farm, being all that part thereof which lay adjoining and next to the river Delaware, to wit: beginning at low water mark of the river Delaware, &c., containing two acres and sixty-three hundredths of an acre, subject nevertheless to the following proviso and covenants, contained in said deed and therein set forth, as follows, to wit: "subject nevertheless to the following proviso, that if the said main raceway shall not be made on said premises in conformity to the act incor-

porating said company, the said lands and premises shall revert to the said George Woodruff, his heirs and assigns. And also, that the said party of the second part shall erect, maintain, and keep in good repair a safe, convenient, and substantial bridge across said main raceway, at a place to be designated by the said George Woodruff; and also cause to be made and kept in order a convenient landing place on the side next the river Delaware, so that wagons  
 10 er with fences across the said premises; and shall also permit the said party of the first part to use the said raceway to give drink to his cattle, and also to take ice therefrom to fill his ice house."

The bill alleges that the grantees cut the main raceway, and that it has been, and is now used as such; and that it came into the possession of the defendants, as assignees of the grantees, by virtue of several acts of the legislature of the state; that, by reason of the contracts and covenants contained in the deed aforesaid, the grantees therein named were bound to erect, maintain, and keep  
 20 in good repair a safe, convenient, and substantial bridge across said main raceway, and a landing place, and to erect and maintain the fences, and that the defendants, as holding under them, are bound to perform their covenants and agreements; that although frequently applied to by the said Woodruff, in his lifetime, and by these complainants since his decease, both the said grantees and these defendants have always refused to perform their said covenants and agreements. The bill prays for a specific performance and also compensation for the injury sustained by reason of the failure to perform and keep the covenants in time past.

The defendants answered the bill, and some evidence has been  
 30 taken on both sides; but the case, as I have stated it from the bill, presents the points upon which I shall decide the case.

If the matters mentioned in the proviso of the deed could be legally regarded as covenants, and as such be enforced at law, I should have no difficulty in declaring them to be covenants relating to the realty and running with the land, and that both the liability to perform them and the right to take advantage of them passed to the assignee of the land and of the reversion. It appears to me that such a construction would not conflict with the principles established (I use the word established, because those principles have ruled  
 40 and regulated all subsequent authorities) in *Spencer's case*. *Coke's Rep.* 17.

It is argued that the word assigns, being omitted in reference to

the things to be performed by the grantees, and the things to be done not being in *esse* and parcel of the premises, the defendants, as the *assignees* of the Trenton Delaware Falls Company, are not bound; that it is directly within Spencer's case, and the first resolution, as there laid down.

And it also insisted that, by the principle laid down in the second resolution in Spencer's case, the defendants are not bound, because the thing to be done is collateral to the land.

It was resolved (by the second resolution) that in this case (Spencer's case) if the lessee had covenanted for him and his assigns that they would make a new wall upon some part of the thing demised, that for as much as it is to be done upon the land demised that it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised or that is assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it no more than any other stranger.

In the present case there was nothing to be done *collateral* to the land conveyed, the grantor reserved to himself a right of way on the main raceway, and also a convenient landing place at the river. This right of way, as well as landing place, was an interest in the thing granted, and would pass as appurtenant to the grantor's farm. The thing to be done upon the land was the medium which created the privity of estate between the grantor and the grantee. It was an incident to the land conveyed enuring to the benefit of the grantor as the owner in fee of the adjacent soil. It is not like a mere personal covenant which does not affect or concern the premises conveyed, as to build a house or a wall upon the land of the grantor which is not parcel of the thing granted, or merely to pay a sum of money to the grantor or to a stranger.

In *Bally v. Wells*, Wilmot's opinion, 341, 3 *Wils.* 25, Lord Chief Justice Wilmot says, "the reason why the assignees, though named, are not bound, is because the thing covenanted to be done

has not *the least reference* to the thing demised. It is a substantive independent agreement, not *quodam modo* but *null modo*, annexed or appurtenant to the thing leased." But although this is a covenant running with the land, yet, according to the first resolution in Spencer's case, it does not bind the assignee not expressly named, if the covenant does not extend to a thing in *esse* at the time of the covenant. The principle is well settled—the only question is as to its application. It does not extend to repairs. In *Cockson v. Cook* (*Cro. Jac.* 125), it was decided that covenant lies against the

10 assignee on a covenant not to plough, although assignees are not named in the deed, for it runs with the land, but not on a collateral act, as to build *de novo*. And in the *Dean and Chapter of Windsor's case*, 5 *R.* 24, it was resolved that the assignee is bound to repair, though not mentioned in the lease. To apply the principle properly, it is necessary that we should look at the character of the thing covenanted to be done, its connection with the land, the mode of its enjoyment, and for whose benefit it is intended. At the time of the conveyance of this land, it constituted the grantor's mode of access to the river, and also a landing place, both of which conveniences

20 were necessary to the grantor's beneficial enjoyment of his property. That way and landing place were to be kept good by the grantees. (I am assuming that the stipulation named in the *proviso* constituted covenants on the part of the grantee.) By digging the race-way the grantees destroyed the grantor's access to the river. The reconstruction of the way and landing place was not like doing a thing *de novo*, but a reparation of that which had been destroyed. The particular manner in which the way was to be reconstructed does not alter its legal character in this respect. A covenants in a lease to repair; the building is destroyed by fire; the covenant can be

30 fulfilled only by erecting a new building. Suppose there had been a covenant in this deed by which the grantor was always to have access to the river by a right of way over the land in as convenient a manner as it existed at the time of the grant, there cannot be a doubt but that the assignee of the grantor would have been entitled to the benefit of the covenant, although not named in it. Is the covenant impaired or limited in its extent because it specified that this right of way shall be in the shape of a bridge to be erected by the covenantor?

But it is unnecessary to pursue this investigation any further.

40 There is another point in the case of less difficulty, which, I think, must determine the rights of the parties in this court. There are no covenants contained in this deed on the part of the grantees.

They did not sign the deed. It is true this is not necessary always. The acceptance of the conveyance, and the land granted, will in some cases bind the grantees to the performance of the covenants; but it cannot bind them to covenants which do not exist. I have already recited all that part of the deed in which it is said the covenant exists. There is a *proviso* by which it is declared, that unless the grantees perform certain things specifically stipulated, the said lands and premises shall revert to the said George Woodruff. A condition is quite distinct from a covenant. The language in this deed is appropriate to create a condition, and, as if to avoid any doubt, the legal consequences of a breach or violation of the condition is inserted. Upon covenants, the legal responsibility of their nonfulfilment is, that the party violating them must respond in damages. The consequence of the nonfulfilment of a condition is a forfeiture of the estate. The grantor may re-enter at his will, and possess himself of his former estate. The grantees were to make the raceway in conformity to their act of incorporation; they were to erect, maintain, and keep in good repair a safe and substantial bridge over the raceway; they were to make a landing place on the river Delaware, and to make and maintain the fences. But they entered into no covenants to do these things. They were to enjoy the land, provided they did perform these stipulations, and they accepted the deed, and entered upon the land, upon the condition, that if they did not perform them, they should forfeit all the benefits of the grant. Unless there are conditions, then there exists no distinction between a condition and a covenant. *Nicoll v. The New York and Erie Railroad Co.*, 12 *Barb. S. C. Rep.* 460; *Coke upon Litt.*, by Thomas, 4; *Com. Dig.*, Condition 1, A. 2; *Co. Litt.* 216 C.; *Hamilton v. Elliot*, 5 *Serg. & Rawle* 375; *Platt on Corp.* 36, 37; *Bouv. Law Dict.*, title *Proviso*. 30

It appears to me there can be no question as to the proper legal construction of the deed. The only question then is, can this court enforce the specific performance in a deed, the nonperformance of which works a forfeiture of the estate? This was not contended on the argument. I cannot see upon what principle the court can exercise this branch of its jurisdiction in such a case. The grantor has fixed his own remedy, and can forfeit the estate at his pleasure. There is no agreement upon which the party can maintain a suit at law for damages. I admit that this is not a criterion universally applicable. But it is one test. It has many exceptions, but this is not one of them. If any authority can be furnished by counsel, I

am willing to hear the counsel further upon the point. My impression is none can be found.

In the case of *Stuyvesant v. The Mayor, &c., of New York*, 11 *Paige* 414, there was a condition in the grant upon which the title of the corporation to the land depended; but there was other and additional language in the deed, which the chancellor said amounted to a covenant on the part of the corporation to perform such condition. The deed, too, was executed by the defendants, under their corporate seal.

- 10 The defendants further insisted, that this was not such a case as to justify the court in the exercise of its peculiar jurisdiction of decreeing a specific performance. The great delay in applying to this court for relief; the fact, that George Woodruff never pointed out the place, as the deed provided, where the bridge and landing place should be made; the change of the original parties to the contract; the death of the original grantor, and the transmission of the property by the authority of the legislature to others than the original grantees; the character by which the complainants now hold, some by purchase and others by descent, these constitute  
20 serious objections to the action of this court, but I am satisfied to decide the cause upon the other ground.