

Court of Errors and Appeals.

BETWEEN THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES, Appellants,

and
HENRY V. BUTLER AND ROBERT L. TAYLOR, Respondents.

On Appeal from the Order of Chancellor.

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The following Bill of Complaint was filed by the respondents on the 23d day of October, 1858.

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BILL OF COMPLAINT.

TO HIS HONOR, BENJAMIN WILLIAMSON, ESQ., CHANCELLOR OF THE STATE OF NEW JERSEY :

Humbly complaining, shew un to your honor, your orators, Henry V. Butler, of the City of New York, in the State of New York, and Robert L. Taylor of the same place, that on or about the first day of February, in the year of our Lord one thousand eight hundred and fifty, the Society for Establishing Useful Manufactures, a corporation located at Paterson in this State, did, by a certain Indenture bearing date the day and year aforesaid, and made by and between the said Society of the first part and your orators, of the second part, for the consideration therein expressed, demise, lease and to farm let, to your orators, all that certain lot of land and premises, situate on the west side of Spruce street, in the (then Township) (now City) of Paterson, in the County of Passaic, and State of New Jersey, known as Mill Lots, Nos. 1 and 2, on the upper tier of Mill Seats, as more particularly described in said Indenture, together with the right and privilege of taking and using on said lots five square feet of water, to be drawn from the upper canal, in rear of said lots, through one or more cast-iron aperture or apertures; said apertures to be not less than six inches in depth, strict measure, so as not in any case to draw from said canal more than five square feet of water, and no devices or contrivances were to be made to increase the natural flow of water through the said aperture or

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apertures, and when used said water was to be discharged into the middle canal in the rear of said lots. To have and to hold the said lots with the privilege of taking and using water, as aforesaid, and when used to be emptied into the said middle canal in the rear of

5 said lots, subject to all the conditions, restrictions, covenants and agreements therein mentioned, unto your orators, their heirs, executors, administrators and assigns, from the day of the date of said Indenture for and during the full end and term of twenty-one years then next ensuing, and fully to be complete and ended, yielding and

10 paying therefor yearly and every year during the said term, to the said Society, their successors or assigns, the clear net rent of three thousand dollars lawful current money; the same to be paid in equal quarterly payments from the day of the date aforesaid, and to be free and clear of all deductions or abatements whatsoever, unto the said

15 Society, their successors or assigns, and in and by the said Indenture your orators did amongst other things, covenant to and with the said Society that your orators, their heirs, executors, administrators or assigns, or some of them, should cause a cast iron aperture or apertures to be made and permanently and securely placed in the trunk

20 leading from said upper canal in the rear of said lots, the bottom of said aperture or apertures to be on a level with the top of a stone monument in the said upper canal in rear of a certain lot in said indenture called "the lot lately occupied by the Boudinot Manufacturing Company," and the said Society for Establishing Useful Man-

25 ufactures in and by the said indenture, did amongst other things, covenant to and with your orators, their heirs, executors, administrators and assigns, for a renewal of the said lease at the expiration of the said term, upon the same terms and conditions, and for the like period of time, and so from time to time forever, as in and by

30 the said Indenture, executed under the corporate seal of the said corporation now in your orators' possession, ready to be produced and proved, may more fully and at large appear.

And your orators further show, that at the time of the execution and delivery of the said Indenture, your orators held a like lease as

35 that above described, for mill lot No. 3, on the west side of said Spruce street, commonly known as the Boudinot Manufacturing Company's lot, being the same lot herein above referred to, by that name, (and which adjoined said mill lot, No. 2,) and connected therewith the right to draw one square foot of water through a cast iron

40 aperture, of two feet in length by six inches in depth, from said up-

per canal, in rear of said lot, and when drawn to be used on said lot, and returned into the middle canal, also in rear of said lot; and being desirous of using the said one square foot of water on said mill lots Nos. 1 and 2, your orators on or about the day and year last aforesaid, obtained from the said Society for Establishing Useful Manufactures, bearing date the day and year aforesaid, an agreement executed under their corporate seal, in the words following, that is to say :

“ This agreement, made and entered into this first day of February, in the year of our Lord one thousand eight hundred and fifty, between ‘ The Society for Establishing Useful Manufactures,’ of the first part, and Robert L. Taylor and Henry V. Butler, of the City of New York, of the second part—whereas the Society for Establishing Useful Manufactures have heretofore granted to the owners of mill lot No. 3, on the west side of Spruce street, commonly known as the Boudinot Manufacturing Company’s lot, the right to draw one square foot of water through a cast-iron aperture of two feet in length by six inches in depth, from the present upper canal, in rear of said lot, and when drawn to be used on said lot, and returned into the middle canal, also in rear of said lot; and whereas the present owners of said lot No. 3, and water right, are the said Robert L. Taylor and Henry V. Butler, who are desirous to use said water, on lots Nos. 1 and 2, on the west side of Spruce street, adjoining said lot No. 3 on its North side; and whereas the said Society have under this date leased to the said Henry V. Butler and Robert L. Taylor said lots Nos. 1 and 2, with the right, to draw from the upper canal in rear of said lots five square feet of water under and subject to certain conditions as by reference to said lease will fully appear,—now, therefore, the said “ The Society for Establishing Useful Manufactures,” for and in consideration of the sum of one dollar to them in hand paid by said Henry V. Butler and Robert L. Taylor, the receipt whereof is hereby acknowledged, do hereby agree to and with the said Robert L. Taylor and Henry V. Butler, their heirs, executors, administrators and assigns, that they, the said Robert L. Taylor and Henry V. Butler, their heirs, executors, administrators and assigns may use the said one square foot of water belonging to said lot No. 3, on said lots Nos. 1 and 2, and when so used to be returned into the middle canal, so that the said Robert L. Taylor and Henry V. Butler may draw and use in all six square feet of water through one or more apertures, said aperture or aper-

tures not to be less than six inches in depth, subject to all the limitations, restrictions and conditions of said lease of this date, for said five feet of water and the renewals thereof, so long as said one square foot of water shall be used on said lots Nos. 1 and 2; but no fine for
 5 renewal for this one foot of water to be charged or claimed," as by the said agreement executed under the corporate seal of said Society now in your orators' possession, may appear.

And your orators further show that on or about the same day and year last aforesaid, to wit, the first day of February, eighteen hundred and fifty, by another Indenture bearing the same date and
 10 year aforesaid, made between the said Society for Establishing Useful Manufactures of the first part and your orators of the second part, it was amongst other things recited as follows, that is to say:

whereas the said parties of the second part hold under a certain
 15 lease bearing even date with these presents from the parties of the first part, those certain mill lots Nos. 1 and 2 on the west side of Spruce street,

And whereas the said parties of the second part are entitled under and by virtue of said lease to take from the upper canal in rear of said lots five square feet of water equals to seven
 20 hundred and twenty square inches of water strict measure, as by reference to said lease will appear.

And whereas the said parties of the second part are desirous of engaging a further additional supply of water for the use of said lots from the said Society, if they have the same to spare.
 25 And whereas the said Society have already authorized certain parties to draw from the upper canal in rear of said lots, a flow of twenty-seven square feet of water for the use of the mills built or to be built and supplied from said canal under certain

limitations, and therefore cannot grant a flow of water greater than said twenty-seven square feet of water; and whereas the said parties
 30 of the second part, notwithstanding these grants, and this uncertainty, are anxious to engage a further contingent and uncertain supply of said surplus water if any there be, of two square feet of water, equal to two hundred and eighty eight square inches of water, to be drawn from said surplus water through a cast iron aperture or apertures from said upper canal, in rear of said lots, if there shall be so
 35 much to spare over and above the above mentioned twenty-seven square feet of water aforesaid, under the restrictions and limitations herein contained:

and thereupon by the said last mentioned Indenture, the said Society for Establishing Useful Manufactures, for the
 40 consideration therein expressed, did demise, lease, and to farm let to

your orators, their heirs, executors, administrators or assigns, the privilege of taking and drawing from said upper canal, in rear of said lots, after the said twenty-seven square feet of water taken from the said upper canal should first have been taken or drawn, two square feet of water, equal to 288 square inches of water, strict measure, to be drawn through a cast iron aperture or apertures of such size and dimensions as would allow of the natural flow of two square feet of water, strict measure, and no more;—said aperture or apertures to be securely placed in the trunk leading from said upper canal in rear of said lots; the bottom of said aperture or apertures to be on a level with the top of a stone monument in the said upper canal, in rear of the lot then lately occupied by the Boudinot Manufacturing Company, and the water when used on said lot to be discharged into the middle canal in rear of said lots, which demise was limited to the first day of February, eighteen hundred and seventy-one, as by the said last mentioned Indenture duly executed under the corporate seal of said corporation, now in your orators' possession, ready to be produced and proved, may more fully appear.

And your orators further show that your orators have at great expense erected an extensive paper mill on the said lots so leased to your orators as aforesaid, which is called the Ivanhoe Mill, and have constructed trunks for leading water from the said upper canal to their said mill, to be employed as power in carrying the works of said mill, and have caused apertures to be inserted in said trunks, for the admission of water from said canal, in accordance with the terms of said leases and agreement above mentioned, and have use for all the water to which they are entitled by said leases and agreement, and actually employ in addition thereto a sixty horse power steam engine in their said paper mill.

And your orators further show, that their said paper mill is the first mill or factory which the water passes in said upper canal, in flowing from the Passaic River; and that below the said mill, several mills or factories are situated on the said canal, which draw water therefrom, each mill or factory, being entitled by virtue of a lease or leases heretofore given by the said Society, to a specific amount, or number of square feet and inches of water; which leases are mostly of long standing, or renewals of leases of long standing; and in the year eighteen hundred and fifty-five, and before and afterwards, your orators held a lease of a certain other mill situated on the said upper canal, called the Passaic Mill, some distance below

their said Ivanhoe Mill (but along the same canal or tier of mills) with a right connected therewith to draw eight square feet of water from said upper canal; but neither the leases held by your orators for the said Ivanhoe Mill or Passaic Mill nor the leases of said other mills situated on said upper canal, specified the head of water under which the said number of square feet or square inches of water should or might be drawn.

And your orators show that by reason of said uncertainty as to the head of water, much disagreement and difficulty arose between the tenants of water on said canal and the said Society for Establishing Useful Manufactures; which difficulty was increased by the fact that the said Society by its agents in and prior to the said year, eighteen hundred and fifty-five, did sometimes, especially when the water in the Passaic River was low, draw off the water from the said upper canal by means of waste gates and other devices so as to precipitate the same sooner than it would otherwise fall into the middle canal below, thereby reducing the head of water in the upper canal from which your orators and others as aforesaid drew their supply: and in particular the said Society had constructed, and used for the purpose aforesaid, a pitch gate or weir immediately above and near the said Ivanhoe Mill, whereby much water was precipitated into the middle canal before it reached any of the mills on said upper canal, and your orators and others disputed the right of the said Society thus to reduce or draw down the head of water in said upper canal, until at last in or about the said year eighteen hundred and fifty-six, your orators kept back a portion of their water rents, and refused to pay the same, on the ground that the said Society by reducing the said head of water, deprived your orators of a material part of the water which had been demised to them, and had, as it were, evicted your orators from a material portion of the premises or subject matter devised; and your orators further show that thereupon in the year eighteen hundred and fifty-six, the said Society for Establishing Useful Manufactures, sued your orators for the said rent so kept back by them as aforesaid, in an action or actions of debt, and your orators set up and insisted upon the said eviction and proceedings of the said Society in defence of the said actions, and insisted that they were entitled to a certain definite head of water, which the said Society had no right to reduce or draw down; and the said defence was set up with the view of testing the right claimed by said Society of so reducing and drawing down the head of water

in said upper canal, whether by waste gates or any other means whatever. And the said actions came on to be tried at Paterson on the seventeenth day of April, in the year eighteen hundred and fifty-seven, and the said trial was so far proceeded in, that the counsel of your orators opened their said defence to the jury, and were commencing to adduce evidence in support thereof, when on the eighteenth day of said month of April, in said year, a compromise was made between the said Society and your orators, by means of an agreement in writing, mutually executed by and between them, for the permanent settlement of the said dispute and difficulty: One part of which agreement duly executed under the corporate seal of the said Society and the hands and seals of your orators, is in the possession of your orators, ready to be produced and proved as this honorable Court shall direct; and is in the words following, that is to say: "An agreement made between the Society for Establishing Useful Manufactures, on the one part, and Henry V. Butler and Robert L. Taylor on the other part:—It is agreed that the water in the upper race or canal at Paterson from which the said Butler & Taylor draw for their mills, shall be regulated as follows: Instead of being discharged at the first pitch near the Ivanhoe Mill, a waste weir shall be constructed between the Passaic Mill of the said Butler & Taylor, and the mill now occupied by the Paterson Manufacturing Company, called Passaic Mill No. 2, the top of which waste weir shall be on a level with the top of the weir or pitch now existing in rear of said Passaic Mill No. 2, and the length of which waste weir shall be sixty feet, and in the option of the Society aforesaid, shall and may be made one hundred feet long, including the said weir already there; and for the purpose of getting the requisite length to said waste weir, the said Society may make so much of the same over that part of the bank opposite to the said Passaic Mill of the said Butler and Taylor, as may be necessary, not to exceed sixty feet in all. And it is agreed, that the pitch or weir at the Ivanhoe Mill shall be so elevated as to compel the waste water in the said upper race or canal to pass over and be discharged at the said new waste weir, to be built as aforesaid, including the said old pitch or weir, in rear of said Passaic Mill No. 2, and the gate in said pitch or weir at the Ivanhoe Mill, shall not be lifted for the discharge of water from said upper race or canal, except in emergencies, when the repair or protection of the works shall render it necessary. In witness whereof, the Governor of said Society hath hereunto put his hand and affixed the seal

of said Society, and the said Henry V. Butler and Robert L. Taylor have hereunto set their hands and seals, the eighteenth day of April, A. D. one thousand eight hundred and fifty seven. (Signed,) Morgan G. Colt, Governor S. U. M., [seal] (Signed,) H. V. Butler; [seal] (Signed,) Robert L. Taylor, [seal]; Signed, sealed and delivered in presence of [on this page the word said was erased before execution,] witness for Society U. M., (signed,) Thos. O. Smith; witness for H. V. Butler and R. L. Taylor; (signed,) John Ramage;

10 And your orators further show that the said actions of debt were settled and discontinued; immediately after the execution of the said agreement and the said Society shortly afterwards caused a waste-weir to be constructed between the said Passaic mill, then of your orators and the mill then occupied by the Paterson Manufacturing
 15 Company, called Passaic Mill No. 2; the top of which waste-weir was made on a level with the top of the weir or pitch then and still existing in the rear of said Passaic mill No. 2; and the length of which was sixty feet or thereabouts, in accordance with the said agreement; and the said Society at the same time caused the pitch
 20 or weir at the Ivanhoe mill to be so elevated as to compel the waste water in said upper race or canal to pass over and be discharged at the said new waste-weir, and the said old pitch or weir in rear of of said Passaic mill No. 2; and to be permanently kept and fastened at such elevation, also in accordance with the said agreement, by
 25 means of which improvements the water in said upper canal has been kept up at a better and more permanent head, and your orators show that by thus having a fixed and permanent weir for the escape of the waste water (when there was any such) at or near the lower termination of the said upper canal, and for husbanding and
 30 keeping up the head of water in times of low water, the mills situated thereon, and amongst others, your orators' Ivanhoe mill, have had the benefit of the increased head of water that resulted at any time from the temporary stoppage of any of said mills, either during the night time, or at any other time or times, and either for repairs
 35 or any other cause. To which benefit the said mills were respectively entitled, as an incident of their position and mutual relations. And your orators further show that they well hoped that all disagreement and difficulty with regard to the head of water in said upper canal, between them and the said Society, were forever and per-
 40 manently settled by the said agreement, and the conveying thereof

into effect as before mentioned. But now so it is, may it please your honor, that the said Society confederating with other persons unknown, to injure your orators, have recently and within a day or two past, commenced operations by digging and cutting about the said old weir or pitch in the rear of Passaic mill No. 2, aforesaid, and threaten and intend to take down the said old weir (which by the said agreement was to continue and remain as a part of the new permanent weir) and to insert a gate or gates therein in place of said weir, so as to be able by raising said gates, (which they threaten and intend to do) to let the water out of said upper canal at will :—And your orators have received reliable information that the said Society, by their agents and workmen, intend to take down said weir and insert said gates on Sunday morning next, when the mills are not running, and the water can be discharged for the purpose; and that they are hastening their preparations for effecting such object; and your orators state and show to your honor, that such acts and designs of the said Society are directly opposed both to the letter and spirit of the said agreement, and will be a serious and irremediable injury to your orators as proprietors of said Ivanhoe mill.

Wherefore your orators pray that the said Society for Establishing Useful Manufactures, may answer the premises according to law, and that a decree may be made for a perpetual injunction against the said Society to enjoin and restrain them, their officers, agents and workmen, from taking down, removing or interfering with the said old weir or pitch in rear of Passaic mill No. 2; or with the new weir constructed by the said Society in pursuance of said agreement, made on the eighteenth day of April, 1857, except to repair and keep up the same according to the terms of said agreement; and from putting up any gate or gates in the said weir or weirs, or elsewhere in the side of said upper canal, in violation of said agreement; and from in any way, drawing down the head of water in said canal by any gates, weirs or pitches, so as to interfere with the head of water naturally produced by the permanent weir already constructed and used as aforesaid, according to said agreement. And that your orators may have such other or further relief as to your honor shall seem meet and shall be agreeable to equity and good conscience.

To which end, may it please your honor to grant unto your orators, a writ of injunction, to enjoin and restrain the said Society for Establishing Useful Manufactures, their officers, agents and work-

men in manner aforesaid; and also a writ of subpoena, to be directed to said Society for Establishing Useful Manufactures, commanding them to appear and answer the premises according to the course of this honorable court. And your orators shall ever pray, &c.

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JOSEPH P. BRADLEY,

Solicitor of the Complainants.

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

- 10 Henry V. Butler, one of the complainants named in the foregoing bill of complaint maketh oath and saith, that the allegations of said bill are true so far as they relate to the act and deed of this deponent, and so far as they relate to the act and deed of other persons, he believes them to be true, and further says that the threatened erection of gates at the waste weir in said bill mentioned,
- 15 be a great injury to the complainants.

H. V. BUTLER.

Sworn and Subscribed before me, }
 at Newark, October 22d, 1858. }

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THEO. BRADLEY,

Master in Chancery of N. J.

And thereupon the Chancellor, on same day, granted the following

INJUNCTION :

NEW JERSEY, TO WIT :—*The State of New Jersey to the Society for Establishing Useful Manufactures, their Officers, Agents and Workmen, Greeting :*

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WHEREAS, it hath been represented to us in our Court of Chancery on the part of Henry V. Butler and Robert L. Taylor, complainants, that they have lately exhibited their bill of complaints against you, the said Society for Establishing Useful Manufactures.

Defendants to be relieved touching the matters contained therein, in which said bill it is, among other matters, set forth that you, the said defendants, are combining and confederating to injure the complainants, touching the matters set forth in the said bills, and more particularly, that you the said Society for Establishing Useful Manufactures, by your agents and workmen, do threaten and intend to take down the old weir or pitch in the upper canal at Paterson, in rear of Passaic mill No. 2, formerly occupied by the Paterson Manufacturing Company, and to insert a gate or gates, therein whereby the water in said upper canal may be drawn down and the head of water reduced.

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These are, therefore, to command you, and we do hereby command you, that you do absolutely desist and refrain from taking down, removing, or interfering with the said old weir or pitch in rear of Passaic mill No. 2, or with the new weir constructed by you in pursuance of the agreement made by you, the said Society, with the said complainants, dated the eighteenth day of April, eighteen hundred and fifty seven, except to repair and keep up the same according to the terms of said agreement, and from putting up any gate or gates in the said weir or weirs, or elsewhere in the side of said upper canal, in violation of said agreement; and from, in any way, drawing down the head of water in said canal by any gates, weirs, or pitches, so as to interfere with the head of water naturally produced by the permanent weir already constructed and used as aforesaid, according to said agreement, until our said court shall order to the contrary.

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Witness, his HONOR BENJAMIN WILLIAMSON, Esq., our Chancellor at Trenton, the twenty-third day of October, in the year eighteen hundred and fifty-eight.

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W. M. BABBIT, Clerk.

JOSEPH P. BRADLEY, Sol.

In Chancery of New Jersey.

BETWEEN HENRY V. BUTLER AND ROBERT L. TAYLOR, *Complainants*,
and
5 THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES, *Defendants*. } *On Bill, &c.*
Answer.

The following answer and affidavits were filed by the appellants on
10 the 8th day of November, 1858.

ANSWER.

The answer of the Society for Establishing Useful Manufactures, defendants to the bill of complaint of Henry V. Butler and Robert
15 L. Taylor, complainants.

These defendants, now and at all times hereafter, saving and reserving to themselves all manner of benefit and advantage of exceptions to the many errors and insufficiencies, in the complainants' said bill of complaint contained, for answer thereto, or unto so much and
20 such part thereof, as these defendants are advised is material for them to make answer unto, they answer and say :

They admit the execution of the Indenture referred to in the first paragraph of the complainants' bill of complaint, for mill lot No. 1 and mill lot No. 2, at the time in said bill mentioned, and that the
25 same among other things, contains the clauses and covenants set forth in said bill in said paragraph, to which Indenture in defendant's possession, and ready to be produced as this honorable court shall direct, defendants beg leave to refer your honor.

And that complainants at the time last aforesaid, held the lease
30 for mill lot No. 3, as set forth in said bill of complaint, with the right of drawing one foot of water as in said bill is specified ; that said mill lot No. 3 adjoins mill lot No. 2 ; and that the agreement dated February 1st, 1850, between complainants and defendants, set out in said bill of complaint, was made and executed as in said bill
35 is set forth, and that upon that day, by another Indenture dated on

that day, made by and between the complainants and defendants, after reciting as in said bill is next recited, defendants did demise to the complainants the privilege of drawing two feet of surplus water from said upper canal, as in said bill is set forth, in the manner and at the place and on the terms and conditions in said bill and Indenture set forth; and defendants aver that in and by said last mentioned Indenture complainants covenanted that they would erect and maintain an aperture through which they would draw said last mentioned water, and would construct said aperture with a gate so that it might be closed by defendants, when deemed necessary by defendants; and defendants further aver that complainants never have constructed such aperture and gate as required by the last mentioned Indenture, to which Indenture defendants beg leave to refer if need be, and that complainants have long drawn and now draw more water at the Ivanhoe Mill than their leases grant.

And these defendants admit that complainants erected an extensive and expensive paper mill on the lots of land leased as aforesaid, to them, called the Ivanhoe Mill; and have constructed a trunk or trunks for leading water from said upper canal to said mill, to be employed as power in carrying on said works, but do not know that complainants have use for all the water they are entitled to under said leases and agreement; but these defendants deny that complainants have caused apertures to be inserted and maintained in said trunks for the admission of water from said canal, in accordance with the terms of said leases, and aver the fact to be that complainants draw from said canal a large quantity of water which they use for other purposes than power, and that all the water they now draw and have for a long time drawn from said canal for use in said mill has been drawn otherwise than through apertures as prescribed by the said leases, and in direct violations of their covenant in that behalf, in said leases contained, and that if complainants ever did insert such apertures in said trunks, they removed the same again and drew water from said upper canal for said mill without such apertures.

And these defendants further answering say, they have heard that complainants have erected or are now erecting on said lots a steam engine to be used in furnishing power for a machine shop used by complainants, and not in the manufacturing of paper, but have no other knowledge on that subject except from complainants' bill; that said Ivanhoe Mill is the first mill on said upper canal which the

water passes in flowing from the Passaic River, and that below said mill on said canal are situated other mills which draw water from said upper canal, each mill being entitled to a specific number of square feet or square inches of water, and that said leases are mostly
5 of long standing or are renewals of long standing leases, and that in the year 1855, and before and until May 1st, 1857, complainants held a lease of a certain other mill on said upper canal, called the Passaic Mill, some distance below their Ivanhoe Mill, with the right to draw from said upper canal eight feet of water; and they aver that
10 nearly all the water of the Passaic River which said upper canal could convey, was permitted by defendants at all times to flow through said canal for the use of the lessees of defendants and others entitled to draw water from said upper canal, and that none of said leases of complainants for water on said upper canal, specified
15 the head of water under which the said water should or might be drawn, and that the only specification of head in any of the leases on said canal is for two feet of head.

And these defendants further answering say, they deny that by reason of the uncertainty as to the head of water, much disagreement and difficulty arose between the defendants and their water
20 tenants on said upper canal, or that such difficulty and disagreement was increased as in said bill is stated: and aver the fact to be that all or nearly all the difficulty or disagreement that has existed on this subject, has been with the complainants.

And these defendants further answering say, that many years ago, and before complainants took either or any of their said leases, these
25 defendants constructed a weir on said upper canal in rear of and above and about one hundred feet from the trunk, on the lot now occupied by said Ivanhoe mill at great expense, and so arranged with gates
30 that the water could be in part discharged from said upper canal into the said middle canal, without passing over the wheels of the mills on said upper canal, and used for that purpose mainly, when any of said mills were wholly or partly stopped; that such weir and gates were constructed in part for the purpose of so discharging a
35 part of such water and were used for that purpose, and water was so discharged through them many years before the execution of said lease to complainants, not continually, but from time to time, when necessary for the proper supply of the regular water to the mills on the middle and lower canal, especially when any mill on said upper
40 canal ceased to draw such water over its wheels, down to the time of

the execution of the agreement of April, 1847, in said bill recited, and that the existence of such weir and gates and the use thereof made by defendants, were well known to complainants when they procured the execution of the said several leases, and when they first located their works on said upper canal; and that these defendants 5 did not, nor did their agents, draw off the water from said upper canal in any other manner nor for any other reason or purpose, or by any other means or devices, than is herein set forth.

And these defendants deny that the head in said upper canal was thereby reduced; and they aver the fact to be, that oftentimes when 10 such weir was closed so that in water passed over or through its gates, the water of the River instead of passing into said upper canal would flow over the dam of defendants, hereinafter mentioned, and pass over the Passaic Falls.

And these defendants further answering, deny that to their knowl- 15 edge the complainants or others disputed the right of these defendants thus to discharge water through said weir, near said Ivanhoe mill, or to draw down the head in said upper canal, or that such rights were ever in question between defendants and complainants, but they admit that complainants have averred to defendants that 20 the water tender of defendants, did sometimes unnecessarily discharge water at that point to their injury.

And these defendants further answering say, they admit that complainants did keep back a portion of the water rents due upon their lease for Passaic mill, which is situated some distance below said 25 Ivanhoe mill on the same upper canal, and refused to pay the same, but defendants aver that they never could learn from complainants on what precise ground they so kept back and refused to pay such rents, and never did learn that it was done on the ground stated in said bill, except as hereinafter mentioned. 30

And these defendants further answering say, that prior to the filing of the bill in this cause, complainants have always paid up the water rents due upon leases for water used at the Ivanhoe mill promptly, and have never kept back or refused to pay the same or any part thereof when due, according to the terms of their said leases. 35

And these defendants further answering say, they admit that they sued the complainants, as in said bill is averred, for the rents so kept back by complainants, and that they then first learned by a notice from the Attorney of complainants, that complainants intend- 40 ed to insist by way of defence that complainants had been evicted

from the use of a part of the subject matters and things demised in the lease, on which the suits against complainants were brought; and that in said actions complainants set up and insisted alone upon the matters set forth in said notice, in defence of said actions; but
 5 defendants are not informed except by said bill, with what view said defence was set up, and leave complainants to show that matter by proof to this honorable court.

And these defendants further answering say, that up to the time of receiving said notice, all the complaints of complainants, in regard
 10 to the water used by them, were made on account of the back water as alleged in the middle canal at their Passaic mill; that the said Henry V. Butler requested defendants to widen the said middle canal for the purpose of taking the water away more rapidly, and so relieving their wheel at said Passaic mill, from such back water; that
 15 at the urgent request and solicitation of said Butler, and to aid the water tenants in the use of water in their mills, these defendants did straighten the banks of said middle canal, and did remove obstructions from the same and did widen the same in some places, and that defendants were informed by agents and workmen of complainants that
 20 by such work of defendants the difficulty complained of had been removed; and that during the said controversy, defendants never heard or knew of any trouble about the water at said Ivanhoe mill.

And these defendants further answering say, they admit that at the point in said proceedings alleged in said bill and at the time
 25 therein mentioned, the complainants and defendants made and executed the writing mentioned and set forth in said bill of complaint, and dated April 18th, 1857; and that said suits were settled immediately thereafter, and that they shortly after under said agreement constructed a waste weir at the place and of the size and level in
 30 said bill specified, and also caused said weir at the Ivanhoe mill to be elevated so as to prevent the waste water in said upper canal from being discharged there.

And these defendants further answering say, they do not know except from the allegations in said bill of complaint, that by means of
 35 said weir the water in said upper canal has been kept up at a better and more permanent head, or that the same has husbanded the water in said canal, or that by reason of the premises said Ivanhoe mill and complainants had the benefit of any increased head of water resulting from the temporary stoppage of any of said mills on said upper canal,
 40 and deny that they were of right entitled to any such increased head.

And these defendants deny that they have commenced operations and threaten and intend to take down said old weir in rear of Passaic mill, and to insert a gate or gates therein in place of said weir, so as to be able to let the water out of said upper canal at will, as complainants allege in their bill of complaint, or that they ever threatened or intended to raise said gates, or that said old weir was by said agreement to be a permanent weir, subject only to repair and support; or that they intended to take down said weir and insert such gates on Sunday last, or that they were hastening their preparations for affecting such object; and they aver that all the allegations in this behalf in said bill of complaint are unfounded and untrue, except the allegation that defendants had begun to dig about said old weir. 5

And these defendants further answering say, that the water of defendants is supplied by the Passaic River, through gates constructed by them, near the Great Falls of the Passaic, and is conducted by a trunk to the canal called the upper canal; that several mills are constructed along the bank of this canal whose owners or occupiers use such water, and draw the same through trunks from said canal to their works, and after using the same discharge it again into the next or middle canal, whence it is in like manner drawn and used by the second tier of mills, and then again discharged into the lower canal, whence it is in like manner drawn and used by the third tier of mills, and then again discharged into the said river. 10 15 20

And these defendants further answering say, that all of said water lawfully used is used by virtue of leases or grants from defendants, or the renewals thereof, either by defendants or their assigns, and that since the construction of said upper canal, no water can flow to said middle or lower canal, except through said upper canal, and that said middle and lower canals were constructed, and most of the water used by the mills on said two canals, was used under grants by the said Society, long before the construction of said upper canal, and long before the execution of any of the leases for the water drawn from said upper canal. 25 30

And these defendants further answering say, that all the water leased, and necessary for said mills that said river can supply, and said upper canal convey, is conveyed and supplied by said upper canal for the use of the lessees of defendants, and others entitled to draw and use the water from said upper canal, without any attempt or design, or devices on the part of defendants to diminish such supply and flow of water. 35 40

And these defendants in further answering say, they never claimed the right to deprive any person, entitled to draw water from any of their said canals, of the water mentioned in their several leases and grants, or to diminish the flow of water in any of said canals, to the
 5 persons entitled to draw the same therefrom, but they always claimed the right to grant to any parties further supplies of water, if for any reason or by any means defendants had the same to grant.

And these defendants further answering say, that there was leased upon said upper canal, at the date of the writing of April, 1857, above
 10 referred to, twenty-two feet of certain regular water, and nine feet of contingent or surplus water, the same being so known and designated; the said contingent water being the water in said canals leased from time to time over and above said twenty-two feet of water; and that a like amount of certain regular water, and nearly as large an
 15 amount of contingent or surplus water, is leased on each of the lower canals, and that all the certain water on said lower canals was leased before the water on said upper canal was leased.

And these defendants further answering say, that the mills on said upper canal do not at all times work all of their machinery, and hence do not need or use all their power and do not need or use all
 20 the water granted by their leases, that at the present time much of the water granted by the leases for water on that canal is not required or used by the lessees; that no water is used in said Passaic Mill because complainants' lease for the same expired about May 1st,
 25 1858, and they have abandoned the same and the said mill; that if the head of water in said upper canal be thereby increased, the complainants acquire no right to such increased head; and that defendants have the right to draw off such unused regular water from said upper canal, or to lease it to other parties, subject to the right of the
 30 present lessees of it, to draw the same at will; that the six feet of water used at Passaic Mill by complainants, under leases from defendants, have reverted to defendants, and are now unleased, and that complainants have no right to any increase of head occasioned thereby, if any, but defendants have the right to lease the said water
 35 or draw the same from said upper canal.

And these defendants further answer and say, they aver the fact to be that contrary to the representations of the said Henry V. Butler, when aforesaid writing was executed in April, 1857, and contrary to the expectations of complainants and defendants, the said
 40 new weir constructed by defendants does not discharge the waste

water, but on the contrary and especially when complainants stop their mill or shut off any water from their wheel, forces back into the river not only such waste water but also a large quantity of the regular and certain water needed for the mills on the middle and lower canals, and in consequence thereof, the supply of regular water 5
or a portion thereof required on said lower canals, is driven over the Passaic Falls, and is wholly lost to all the water tenants, including the complainants.

And these defendants further answering say, that the mills on the middle and lower canals are entitled by their leases to a certain 10
quantity of regular and certain water, and a certain quantity of contingent water, without which their works cannot be carried on, and that they never intended by the writing aforesaid, executed in April, 1857, nor did complainants so mean it, to prevent or in anywise interfere with the flow of regular water needed as aforesaid, by the 15
mills on the middle and lower canals, to which regular water the lessees and grantees of defendants are and then were entitled, under the several leases and grants, and that they had no right to prevent such flow by any means or contrivance if they desired so to do.

And these defendants further answering say, that when their said 20
leases and when the writing referred to in the preceding paragraph were executed, complainants well knew that twenty two feet of certain and regular water, besides a large amount of contingent water, were to be drawn from said upper canal at all times; that the water in said upper canal was subject to the continual draft and discharge 25
of said regular water, both certain and contingent, leaving the surplus or waste water beyond such certain and contingent water, to flow away or be used as the case might be, and that like amount was to be drawn from each of the two lower canals at all times, and that said amount must be drawn in order to supply said mills on the lower 30
races; and they aver that neither complainants nor defendants intended in anywise to interfere with such flow, or to deprive such lower mills of their regular water by means of the agreement last aforesaid; and also that defendants had at all times during the pendency of said suits, and before the commencement of the same, 35
invariably and always refused to interfere with the head of water in said upper canal, or to specify any particular head of water therein, except as aforesaid.

And these defendants further answering say, that when complainants and others on said upper canal, use their full supply of regular 40

water to which they are entitled, the supply of regular water to which the lessees and mill owners below on said middle and lower canals are entitled, flows over the wheels of mills on said upper canal into said middle canal, and thence again over wheels of the mills on said middle canal, into said lower canal, and thence again over wheels of the mills on said lower canal into the Passaic River; while the waste water, if any, is discharged in part at said new weir; and when complainants or others on said middle canal shut off the water wholly or partly from their wheels, being the regular water on which the mills on said middle and lower canals depend, instead of being discharged at said new weir is discharged in part there, and a large proportion thereof passes back to the River, and over defendants' dam, then and so is lost to all use by said mills on said canals.

And these defendants further answering say, that the water of the Passaic River is forced into said upper canal by a dam built across said river near the Passaic Falls, which is permanent and of a fixed height; that no water can be supplied to the two lower tiers of mills, except through said upper canal; that more water has been granted and leased on said upper canal than on either the middle or lower canals; and that unless the water does pass from said upper canal to said lower canals, the mills situated on the latter are short of power and cannot run as they might and ought.

And these defendants further answering say, that always, both before and after the making of the leases aforesaid to said complainants, the defendants had used the weir in rear of said Ivanhoe mill for the purpose of discharging water into said middle canal, to supply the mills on the middle and lower canals, because some of the mills on said upper canal did not commence operations as early as some of those on the lower canals, and the amount discharged over the wheels of the mills which did start early in the morning was not enough for that purpose; that defendants also opened said weir when any of the mills on said upper canals shut off their water, in order to supply the mills on the lower races, the regular water to which they were entitled, under grants from defendants, and which could not pass down to such lower races, except through said weir, when not discharged over the wheels of the mills on said upper canal; that defendants also opened said weir when there was too much water in said upper canal in order to discharge the waste water from said canal into the canal below; and that such regulation of said weir was well known to complainants when they located their said Ivan-

hoe mill, and that complainants or one of them operated a paper mill on the site of said Ivanhoe mill, several years before said Ivanhoe mill was built.

And these defendants further answering say, that complainants had declared to defendants that the opening of said weir at the Ivanhoe mill was often done unnecessarily, and to their injury, by the water-tender of defendants, and that when said last mentioned agreement was made between complainants and defendants, it was represented by complainants to defendants and contemplated by both parties, that the new weir to be constructed under said agreement would discharge into said middle canal the waste water, after the mills on said upper canal had been supplied; and that when any mill on said upper canal stopped drawing water, such weir would discharge the water so stopped into said middle canal, so that at all times and in all cases the water of the river leased as aforesaid, should be discharged by the wheels of the mills on said upper canal, or said weir, or both, into said middle canal, to be used by the mills on said middle and lower canals, without the intervention of any water tender as had been theretofore the case; and that by means of the premises there would be regularity and uniformity in the supply of water to all the mills on each of said canals.

And these defendants further answering say, that all the water in said canals belongs to defendants, subject to the rights existing by virtue of the leases and grants by defendants.

And these defendants further answering say, that the new weir does not husband the water of defendants in said upper canal, nor in said river; and that if all the mills on said upper canal should stop at once, not more than half the quantity of water required by said mills on the lower canals would be discharged by said weir.

And these defendants further answering say, that in order to husband such regular water which now runs over said dam as aforesaid, and in order to preserve uniformity in the depth and supply of water in said upper canal, and in order to secure to all the mills on said canals their just supply of water, these defendants intended and are now preparing and have been for some time preparing to insert a new weir on said upper canal, which is called and in fact is a self regulating waste weir; that the top of said weir will be on a level with the top of the said old weir in rear of said Passaic mill; that said self-regulating weir will be so constructed with leaves hung on pivots, that when by reason of an excess of water in said upper canal

from over supply in said river, or from the stopping of any mill on said upper canal, the water rises above the top of said weir, such leaves will open and so remain until the hight of the water is on a level with the top of said weir, and then said leaves will close again ;
 5 and that said weir will be placed on the spot occupied by part of the present weir, and will require no attendance from any person, and will preserve almost perfect uniformity in hight of water in said upper canal when such water is level with or above the top of said weir, and will be inoperative when the water in said upper canal is below
 10 the top of said weir. And that the sole object of the weirs herein described is to secure to the mills on the middle and lower canals their supply of regular water, which is rendered irregular by stopping of the flow of water over the wheels of mills on the upper canal, and especially by complainants at their Ivanhoe mill.

15 And these defendants further answering say, that when complainants shut off the water at their Ivanhoe mill which occurs almost every day, the portion which passes over said new weirs near the Passaic mill, does not reach the mills on the other canals for a considerable portion of time, and that the effects of such shutting off
 20 are felt by the mills on the middle canal sometimes for half an hour at a time, at which times they are compelled by the consequent loss of power to stop a portion of their machinery, until the water is again drawn from the upper canal and reaches them, and that the manufacturers below on the other canals, complain greatly that their water
 25 is thus interfered with, kept back, and made irregular in its supply by the mill owners on the upper canal, and especially by complainants.

And these defendants further answering say, that the said writing executed in April, 1857, as aforesaid, was not intended to interfere
 30 with the flow of the regular water to which the mills on the lower canals are entitled, and which is necessary for the proper operating of the works on said canals ; nor to prevent defendants supplying to such mills their said regular water by such weirs as may be necessary for that purpose ; nor to prevent the flow into the middle canal of the
 35 regular water and waste water which now, at times, is by the present weirs forced into the river and over the Passaic Falls, and is so lost for all uses to the mills on said canals.

And these defendants further answering say, that a small portion of the water used on each of their three canals is held under deed as
 40 in fee simple, and that the rest of it is held and used under leases

from defendants for the term of twenty one years, renewable forever, and that all of said water is required by the grantees and lessees thereof for the proper working of the machinery in the several mills on said races.

And these defendants deny all unlawful combination and confederacy in said bill charged, without that, that any other matter or thing, material for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed or avoided, traversed or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready to aver and maintain, and prove as this court shall direct, and humbly pray that the Injunction granted and issued in this behalf, in favor of complainants, be dissolved, and that defendants may be hence dismissed, with their reasonable costs and charges, in this behalf most wrongfully sustained.

WM. GLEDHILL,

[SEAL] Sol. for and of Counsel with Defendants.

MORGAN G. COLT, Gov. S. U. M.

STATE OF NEW-JERSEY, ss :

The answer of the defendants, the Society for Establishing Useful Manufactures, to the bill of Complaint aforesaid, was taken this 6th day of November, A. D. 1858, before me, under the common seal of the said Society, at Paterson, in said State, as by said seal affixed and the signature of the Governor of said Society, here appears.

C. E. VAN BUREN,

Master in Chancery, N. J.

NEW JERSEY, ss :

William H. K. Bibby being by me duly sworn according to law, on his oath saith, that he is Secretary of the Phenix Manufacturing Company, whose works are on the Society's lower canal in Boudinot street, and are entitled to draw from said canal four feet of regular certain water by leases from the Society for Establishing Useful Manufactures; that when all the mills on the upper canal draw their

full supply of water, the mills below can run their works without difficulty; that when any of said mills on the upper canal shut off their water or any considerable part of it, the supply to the mills below is diminished and they all suffer, not only from diminished supply, but also because the water which in such cases is discharged out of said upper canal by the said Society's weirs into the middle canal, is kept back and retarded for a considerable time, and the mills of said Phenix Company will sometimes be half an hour in receiving the portion of water so discharged; that great loss is thereby occasioned to the said company, and that they often have been incommoded in that manner when the water has been shut off from the Ivanhoe mill on said upper canal; that in such instances the supply of water is suddenly cut off and suddenly let on again without any interference by the agents of the Society, and that the amount of regular water so retarded and kept back is so great as to greatly diminish the speed of their machinery, and oftentimes to compel the company to stop a part of their works; and that it is absolutely necessary that some means be devised to let down from the upper canal the regular water needed by the mills on the middle and lower canals, when the water is shut off by the mills on the upper canal.

And deponent further saith, that when the water in the river is low and any of the mills on said upper canal stop drawing water from said canal, the amount shut off is almost entirely diverted from the mills below, and especially when the Ivanhoe mill shuts off its water, and that such shutting off of water, by the Ivanhoe mill has been very frequent, and very injurious and very annoying to the mills on the lower races, and has been a subject of much complaint by the mill owners on said middle and lower canals.

W. H. K. BIBBY.

30 Sworn and Subscribed this 6th day of }
November, A. D. 1858, at Paterson, }
before me.

C. E. VAN BEUREN,

Master in Chancery, N. J.

35

NEW JERSEY, ss:

William Ridgway alleging himself to be conscientiously scrupulous of taking an oath, and being by me affirmed duly according to law saith, that he is Superintendent of works of A. Prall & Company,

Cotton Spinners, on middle canal; that their supply of regular water is diminished at their mill at certain times and almost daily; that the like occurrence has been observed by other mill owners, and mill managers on that canal, and often been matter of talk among them; that it is generally attributed to the shutting off of water by the Ivanhoe mill of Henry V. Butler and Robert L. Taylor; that after the lapse of considerable time, sometimes half an hour or more, after such diminution of the water, it would begin to flow down again to the mills on the lower canals, by reason, as deponent believes, of the Ivanhoe mill again drawing their supply of water; that a like result will follow when the mills on the upper canal do not draw their full supply of water therefrom; that the shutting off of water as aforesaid, by said mills, and especially by said Ivanhoe mill, effects almost every mill on the middle and lower canals, and is a positive injury to every mill owner and manufacturer on those canals by depriving them of the proper amount of power with which to drive their machinery; and that these effects which deponent believes to be caused by the shutting off of the water by the mills on said upper canal, and especially by said Ivanhoe mill, are felt by the manufacturers on the middle and lower canals very often, and by some of them almost every day of the week, and that unless some means be devised to let down into the middle canal the regular water needed to drive the mills on the middle and lower canals, when it is not discharged by the wheels of the mills on the upper canal, the operation of the mills on the middle and lower canals, is at the mercy and under the control of the persons having charge of the wheels of the mills on the upper canal.

WILLIAM RIDGWAY.

Affirmed and Subscribed this 6th }
 day of November, A. D. 1858, }
 at Paterson, before me.

C. E. VAN BEUREN,
 Master in Chancery, N. J.

NEW JERSEY, ss:

Lawrence Holms being by me duly sworn according to law, on his oath saith, that he has been familiar with works of the Society for Establishing Useful Manufactures for several years; that he knows of the location and erection of the present weirs in rear of Passaic mill,

and of existence and use of old weir in rear of Ivanhoe mill; that he has noticed and examined several times into the working and operation of said weirs in rear of Passaic mill: That his examination and observation show that when all the mills on the upper canal draw their
5 full supply of water said new weirs do not discharge the waste water of said canal into said middle canal, but on the contrary a portion only of such waste water is discharged at said weirs, and a large part of same is driven back into the Passaic River and over the Society's main dam, and so escapes over the Great Falls of the Passaic, and
10 is lost to all use to the mills on the Society's canals; that when any of said mills on said upper canal stop their works in whole or in part, the regular water used by them for power to drive their works is thrown back into said upper canal, and the operation of said new weir is to discharge a part of such unused regular water and to force
15 a part of it back into the Passaic River, and over the Society's main dam and over the said Falls; and that by means of such weirs a large portion, both of the waste water and of the regular water, is kept away from the mills on the middle and lower canals of the Society, and said last mentioned mills are deprived of the regular water needed and required by them for driving their machinery. And
20 deponent further saith, that by reason of the peculiar location of said upper canal and of the mills below it, a weir cannot be constructed on said upper canal of the form of the present weirs sufficiently large to avoid the loss of water aforesaid, and that the operation of said weirs is correctly set forth in the annexed answer: And
25 that by wasting at times a large proportion of the water, all the mills on the middle and lower canals, about twenty in number, are deprived of a portion of their regular water, which is a serious loss to the mill owners and to the city of Paterson.

30 And deponent further says, that by the operation of said weirs as observed by him, when any of the mills on said upper canal shut off any of their water, considerable time elapses before the effect of it is shown at said weirs by discharge of water there, and that in the meantime the mills below are affected injuriously by the stop of
35 water from their Ivanhoe mill.

And deponent further saith, that the new weir which the Society propose to build is correctly described in the annexed answer, both
40 as to its size, location, and construction; that such new proposed weir will preserve a head of water in said upper canal almost com-

pletely uniform—will keep the head level with the top of said weir and never below it, when there is enough water in Passaic River, and will furnish a proper and safe means of discharge for the waste water in said canal, and also for the regular water needed for the mills on the middle and lower canals, when that is not discharged 5
over the wheels of mills on said upper canal; that when water in said upper canal is on a level with the top of said weir or below it, said weir will be inoperative; and when the water rises above said level, the leaves of the proposed weir will open and discharge water so long as it rises above the top of said weir and 10
no longer, and will close when the water is level with or below the top of said weir.

And deponent further saith, that said proposed weir will be a self-regulating waste weir, and will be operated by the water alone as above described, without the aid of any person, and that when the 15
mills on said upper canal are all in full operation, the leaves of said weir can be made fast so as to prevent the discharge of waste water into said middle canal except over the top of said leaves, and that if all the mills on said upper canal should stop at one time, the present weirs cannot discharge more than half the quantity of regular water 20
needed for the purpose of driving the machinery of the mills on the middle canal, and leased or granted to them.

LAWRENCE HOLMS.

Sworn and Subscribed this 6th }
day of November, A. D. }
1858, at Paterson, before me. }

25

C. E. VAN BEUREN,

Master in Chancery, N. J.

NEW JERSEY, ss:

30

Thomas O. Smith being by me duly sworn according to law on his oath saith, he is agent of the Society for Establishing Useful Man-
ufactures, and has been such agent for several years, and has, during that time had superintendence of the works of said Society; that prior to and on April 18, 1857, there were leased and granted by 35
the Society to tenants on the upper canal, twenty-two feet of regular water for power, and nine feet of contingent water, and a like amount of certain water and considerable amount of contingent water, are

held by leases and grants from the Society on their middle canal, and a like amount on their lower canal; that previous and up to May 1st, last, Henry V. Butler and Robert L. Taylor held under lease from the Society, for Passaic mill, three feet of regular certain water
 5 and three feet of surplus or contingent water, all of which is now unleased and unused by any parties under lease; that the amount of contingent water leased on the upper canal, including the amount formerly leased to Butler and Taylor for the Passaic mill, exceeds the amount leased on either of the other canals; that no water can
 10 flow into the middle canal or lower canal except through the upper canal; that the regular water for the supply of the lower tiers of mills is discharged over the wheels of the mills on the upper canal, when the latter use all their water.

And deponent further saith, that when any of the mills on said
 15 upper canal do not draw their full supply of regular water, or when from any cause they shut off their regular water, or any part of it, a portion of it is discharged by the Society's weirs in rear of Passaic mill, and a part is forced back into the river, and so is kept back from the mills on the middle and lower canals, and the mills on the lower
 20 canals do not then get their supply of regular water, and cannot get their full supply of power, by reason whereof they cannot drive their works regularly, but are obliged to carry on their business at great disadvantage, and sometimes by reason of the premises as lessees of Society have alleged to them, they are compelled to stop a part of their
 25 works for want of water, though water will be running to waste over the Society's dam in the river; that when the mills on the upper canal do draw their full supply of regular water, the regular water for the mills on the other canals is discharged over the wheels of the mills on the upper canal, and in addition a part of the waste
 30 water in said upper canal is discharged at said weirs, and flows down the other canals of the Society.

And deponent further saith, that all the water used in said canals is used under grants or leases from the Society or their assigns, and said leases, with two or three exceptions, are given for a term of
 35 twenty one years, renewable forever.

And deponent further saith, that many complaints have been made to the Society since the erection of the said new weir on account of the want of water in the middle and lower canals, when water is shut off from the wheels of mills on the upper canal, and especially when
 40 water is shut off at the Ivanhoe mill; and that the supply of water

in the two lower canals will often become suddenly short and again become suddenly plenty, and that such variation is understood by the manufacturers to be caused by the shutting off of water at the Ivanhoe mill, and the turning of it again on the wheels of said mill; that such variation is injurious to all of the mills below, by making their motive power variable, so that at times they are compelled to stop part of their machinery; that when water is so shut off and again drawn upon the wheels at the upper canal, considerable time elapses, sometimes half an hour, before it again can be used at the lower mills; and that said weirs in rear of Passaic mill, instead of discharging the waste water of the upper canal and the unused regular water of the same into the middle canal, forces a large portion of it back into the Passaic River.

And deponent further saith, that there is not now and has not been for some time, as he is informed by the Superintendent of Ivanhoe mill, such an aperture for flow of water at said mill as required by the leases of Butler and Taylor.

And deponent further saith, that the facts, matters and things in the annexed answer, so far as they relate to the acts and deeds of the said Society, are true; and so far as they relate to the acts and deeds of any other person or persons, he believes them to be true.

THOS. O. SMITH.

Sworn and Subscribed this 6th day
of November, A. D 1858, at
Paterson, before me.

C. E. VAN BEUREN,

Master in Chancery, N. J.

NEW JERSEY, ss.

Philip Chapman being by me duly sworn according to law on his oath saith, that he is and has been for several years, Water Tender for the Society for Establishing Useful Manufactures; that he has frequently noticed that when the mills on the upper canal or any of them shut off a considerable portion of their water from their wheels, that the water is forced back into the river, and does not escape except in a small degree over the weirs in rear of Passaic mill into the middle canal; that part of the water at the Ivanhoe mill is very often shut off from the wheels of said mill during working hours, and

he has observed often that when such is the case, the water in the upper canal is backed up into the Passaic River, and often is discharged over the dam of the Society in said River, instead of passing over the said weirs.

5

PHILIP CHAPMAN.

Sworn and Subscribed this 6th day
of November, A. D. 1858, at }
Paterson, before me.

C. E. VAN BEUREN,

10

Master in Chancery, N. J.

The appellants moved the Chancellor on the 22d day of November, 1858, to dissolve the Injunction ; which motion was argued upon the bill, answer, and affidavits ; and on the 17th day of December, 1858,
15 the Chancellor made the following

ORDER.

In Chancery of New Jersey.

20 BETWEEN HENRY V. BUTLER AND ROBERT L. TAYLOR, *Complainants,*
and
THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES, *Defendants.*

} *On Bill, &c.*

25 This cause being heard on motion to dissolve the injunction, upon the bill and answer, and the affidavits accompanying the same, and the Chancellor being of opinion that the same should not be dissolved, it is ordered that the said motion be denied.

B. WILLIAMSON, C.

30 Dated December 17, 1858.

And delivered the following

OPINION.

In Chancery of New-Jersey.

HENRY V. BUTLER AND ROBERT L. TAYLOR, <i>vs.</i>	} <i>Opinion.</i>	5
THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES.		10

The complainants are the lessees of water rights or privileges, held under the Society Useful Manufactures, at Paterson. They hold several "water lots" under different leases. These lots are along the upper canal and are supplied with water from that canal. A dispute arose between the complainants and defendants, as to the manner in which the water was drawn off from the upper canal, the complainants complaining that the water was precipitated from the upper to the lower canal, by a pitch, gate, or weir, in such a manner as to draw down the head of water in the upper canal, and so as to deprive the complainants of the full benefit of the supply of water under their leases. 15 20

The difficulties were compromised between the parties, and they entered into an agreement on the 18th of April, 1857, by which it was agreed that the water in the upper race or canal should be regulated as follows: that the defendants should erect a waste wier in a place designated in the agreement, the top of which waste weir should be on a level with the top of the weir or pitch then existing, and the length of which waste weir should be 60 ft. and at the option of the Society should be made 100 ft. long, including the weir then there, and the water from the upper to the lower canal was to pass over and be discharged at the new waste weir, so to be built under the agreement. 25 30

The waste weir was constructed according to the agreement, and the water was discharged over it. The bill charges that the Society 35

have commenced digging and cutting about the weir, and threaten and intend to take it down and insert a gate or gates therein, so as to be able by raising said gates to let the water out of the upper canal at will. An Injunction was granted to prevent the defendants
5 making the alteration in the weir.

The defendants have answered the bill. They admit the agreement and its execution, and the regulation of the water in the upper canal so as to discharge the water over the weir. They admit that they are about making an alteration in the weir, by putting in what
10 they call a self-regulating weir, which will be so constructed with leaves hung on pivots, that when by reason of an excess of water in the upper canal, from any cause, the water rises above the top of the weir, such leaves will open and so remain, until the height of the water is on a level with the top of the weir, and then the said leaves
15 will close again.

The defendants in a very lengthy answer give their reasons why they consider they have a right to make this alteration. They insist the alteration will not injure the complainants, and is not inconsistent with their rights under the agreement.

20 That the head of water in the upper canal is of great importance to the complainants is too evident to admit of dispute. It is quite as clear that the head of water in the canal will be materially different, whether the water is discharged over the weir or whether it is discharged lower down through the leaves hung on, pivots at the
25 bottom of the weir. If this be so, then the contemplated alteration will be a great and permanent detriment to the complainants.

Now I do not intend to decide on this motion, whether the reasons given in the answer are a sufficient justification, for the defendants making a structure different from that which the agreement stipu-
30 lates. They present new matter by way of defence, which ought to be investigated before the rights of the parties are determined.

The bill and answer both admit the agreement. It was carried into execution. By the agreement a weir was to be constructed, and the water to be discharged over that weir. This was done, and both
35 parties are enjoying their rights under that agreement. The defendants say they are disappointed in their expectations as to the working of the weir, and they are preparing an apparatus by which the water will not be discharged over the weir but in some other way. This is clearly in violation of the agreement. The question now is,
40 whether the court will keep the parties in statu quo until the merits

of the controversy are heard, and until it shall be decided whether for the reasons assigned in the answer, the defendants are entitled to have the water discharged in any other manner, than in that specified in the agreement.

The equity of the bill is attempted to be avoided by setting up new matter. The rule is, where new matter is alleged in avoidance the injunction will not be dissolved. This case is not an exception to the rule, and I think the defendants should be enjoined until the rights of the parties are determined. The case is a proper one for an injunction and its continuance is proper, as the case is presented by the bill and answer, until a final hearing. 5 10

The appellants appealed from the said order and filed the following

PETITION OF APPEAL.

Court of Errors and Appeals. 15

BETWEEN THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES, Appellants,

and

HENRY V. BUTLER AND ROBERT L. TAYLOR, Respondents.

On Bill, &c.

Petition of Appeal. 20

TO THE HONORABLE THE COURT OF ERRORS AND APPEALS :

The petition of the Society for Establishing Useful Manufactures, the appellants in the cause above stated, respectfully show that your petitioners find themselves aggrieved by an order made in the Court of Chancery of New Jersey, by his honor, Benjamin Williamson, Chancellor, bearing date on the seventeenth day of December, Anno Domini, eighteen hundred and fifty eight, in a certain cause wherein the said appellants were defendants, and the said respondents were complainants, in this respect, to wit : that the said Chancellor by the said order refuses to dissolve the injunction referred to in said order, and granted by him against the said defendants in favor of the said complainants. 25 30 35

And your petitioners humbly appeal from the said order of the Chancellor, upon the ground that the same is erroneous, for that the said Injunction ought of right to have been dissolved, and that the defendants' answer denies all the equity of the complainants' bill.

5 Your petitioners therefore pray that the said order of the Chancellor may be reversed, 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.

W. GLEDHILL,

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Sol. of and Counsel with Appellants.

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

WM. PENNINGTON,

of Counsel with Appellants.

To which respondents have filed the common answer.