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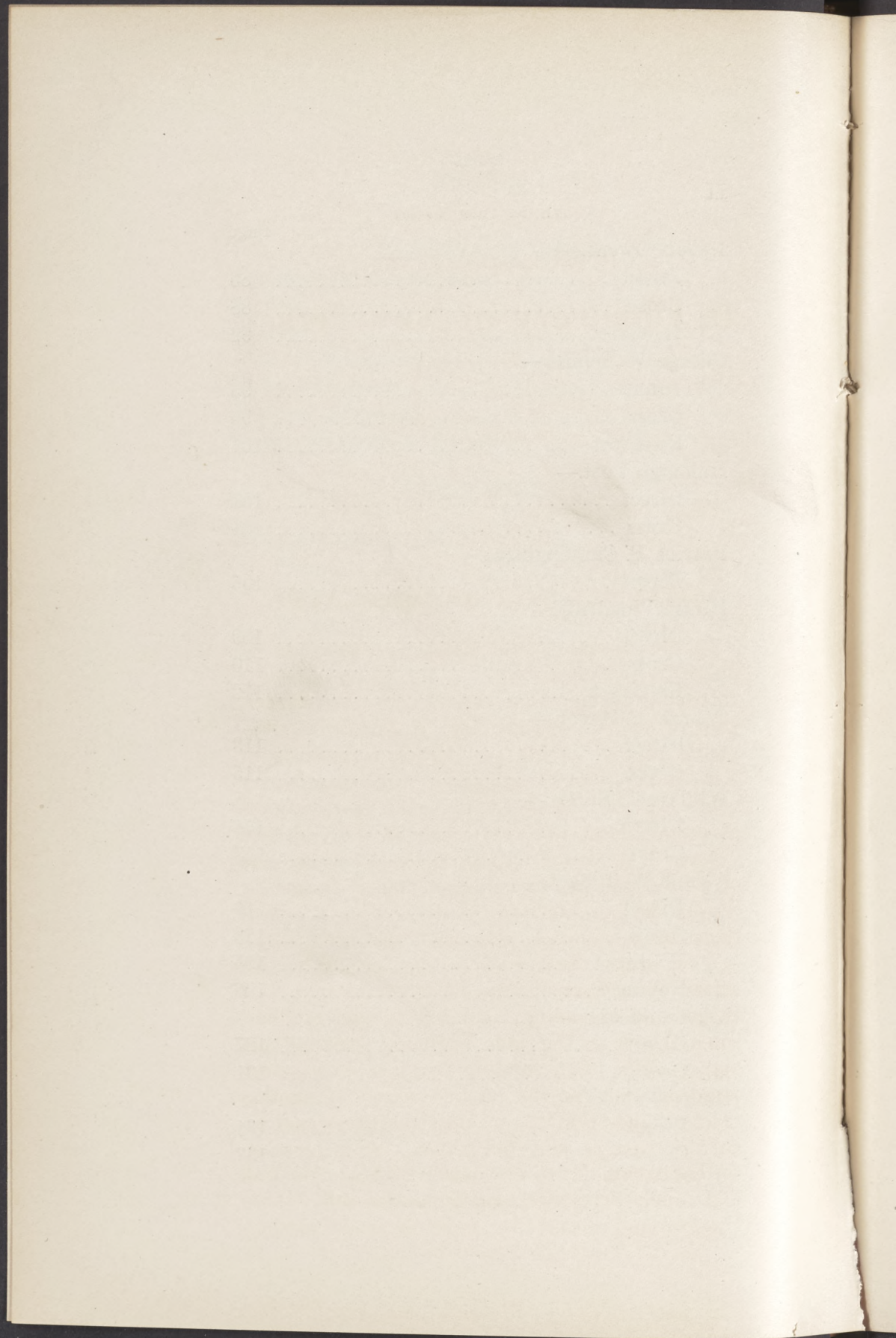
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BILL OF COMPLAINT.

(Filed February 13, 1912.)

In Chancery of New Jersey

Between

ROBERT SWINLEY,
Complainant,

vs.

ISAAC A. HALL,
Defendant.

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AMENDED BILL OF COMPLAINT.

To His Honor, Mahlon Pitney, Chancellor of the State of New Jersey:

Humbly complaining shows unto your Honor, your orator, Robert Swinley, of the City of Paterson, in the County of Passaic and State of New Jersey, that he is and for more than twenty years last past has been the owner in fee simple of certain land and real estate in the City and County aforesaid, fronting on the northerly side of Fair Street and extending northerly from Fair Street one hundred feet to the southerly line of the street or alley known as McPherson's Alley.

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Your orator further shows, that he first became seized of a tract of land fronting on said Fair Street and extending northerly to said McPherson's Alley, in the year Eighteen hundred and eighty-eight; that on July fourteenth, Nineteen hundred and two, he became seized of another tract of land fronting on said Fair Street, and extending back to said McPherson's Alley; that on the eighteenth day of December, Eighteen hundred and ninety-two, your orator became seized of a tract of land in said City, fronting on the souther-

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ly side of Hamilton Avenue, and extending southerly to the northerly side of said McPherson's Alley; that the last mentioned tract of land is particularly described as follows:—

10 Beginning on the southerly side of Hamilton Avenue, (formerly Division Street) at a point distant two hundred feet easterly from the southeasterly corner of Washington Street and Hamilton Avenue, and running from thence (1) Southerly one hundred feet about at right angles from said Hamilton Avenue to an alley twenty feet wide; thence (2) Easterly twenty-five feet to a point fifty feet westerly from the line now or late of Jacob Mercelis; thence (3) Northerly parallel with the first course, about one hundred feet more or less from said alley to said Hamilton Avenue, and thence (4) Westerly along said Hamilton Avenue 20 twenty-five feet to the point or place of beginning.

30 SECOND TRACT: Beginning on the southerly side of Hamilton Avenue, at a point distant two hundred and twenty-five feet easterly from the southeasterly corner of Washington Street and Hamilton Avenue, and running from thence (1) Southerly about parallel with Washington Street one hundred feet to an alley twenty-five feet wide; thence (2) Easterly along the northerly line of said alley, twenty-five feet; thence (3) Northerly parallel with the first course one hundred feet to the southerly side of Hamilton Avenue, and thence (4) Westerly along the southerly side of Hamilton Avenue, twenty-five feet to the point or place of beginning.

Your orator further shows that the alley mentioned in said descriptions of said Hamilton Avenue tracts is the aforesaid McPherson's Alley.

Your orator further shows that said McPherson's

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son's Alley begins in the easterly side of Washington Street about midway between Hamilton Avenue and Fair Street, and extends in an easterly direction for a distance of about four hundred feet; that the said McPherson's Alley is a public street or alley and has been and is used as such by persons, firms and corporations owning and renting buildings erected along said street or alley, and which said buildings are used for the purpose of stabling and storage, and that such stabling and storage buildings occupy both sides of said street or alley for almost the entire length thereof, and such street or alley is used at all hours of the day and night by said persons, firms and corporations in going to and from their said stables and storage warehouses, and that in such use of said street or alley horses and vehicles of all kinds pass and have passed through, over, in and out of said street or alley as and when required for the purposes of said persons, firms and corporations; and further, that the said street or alley has been and is used as a public highway by all persons, firms and corporations whatsoever, both with and without horses and vehicles of all kinds, having occasion or desire to so use the same.

Your orator further shows that as he is informed and believes to be true, the said street or alley known as McPherson's Alley has been used as aforesaid for at least sixty years last past, with the knowledge of all parties interested therein and in the lands adjoining the same, and such use has been made without interruption, let, suit or hindrance, by any person or persons whatsoever, and until quite recently as hereinafter mentioned, with the assent or acquiescence of all parties interested therein or in the lands adjoining the same; that during all of said period of sixty years the width

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of said street or alley has been established at about twenty feet for the distance of at least three hundred and fifty feet from said Washington Street; and that said street or alley, during all of said period, has been used as aforesaid at its entire width as aforesaid, with knowledge and assent or acquiescence as aforesaid; and your orator shows
10 that said persons, firms and corporations cannot have proper and sufficient use of their said buildings and their lands on which said buildings stand, unless the width of said street or alley continues to be and is maintained at the same width.

And your orator further shows that the said tract of land fronting on said Fair Street of which he became seized in the year Eighteen hundred and eighty-eight as aforesaid, begins at the distance of eighty-two feet and eighteen hundredths
20 of a foot easterly from the easterly line of Washington Street, and runs easterly along the northerly line of Fair Street and the southerly line of said McPherson street or alley twenty-eight feet, and is known as 27 Fair Street; and that the other tract of land fronting on said Fair Street of which your orator became seized in Nineteen hundred and two as aforesaid, adjoins the other Fair Street tract just mentioned on the east, and runs easterly along the northerly line of Fair Street
30 and the southerly line of said McPherson's Alley twenty-eight feet and six inches.

Your orator further shows, that one Isaac A. Hall is the owner of certain lands fronting on said Hamilton Avenue, and extending southerly to the northerly line of said street or alley known as McPherson's Alley, and then extending along said northerly line of said street or alley for a distance of about two hundred feet; that the said Isaac A. Hall has erected on a part of his said lands, a

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brick mill building and that the southerly wall of said brick mill building is erected along the northerly line of said street or alley; that part of the said lands of the said Isaac A. Hall are vacant and have been enclosed by a fence extending along the said northerly line of said street or alley, and that the remainder of the lands of said Isaac A. Hall are occupied by old buildings, one of which is built so that the most southerly side thereof indicates the northerly line of said street or alley and fronts on Washington Street. 10

And your orator further shows that on Tuesday, the twenty-first day of November, Nineteen hundred and eleven, said Isaac A. Hall began to erect and construct a fence in said street or alley known as McPherson's Alley; that said fence was being erected in said street or alley along a line therein running parallel with the said lines of said lands of said Isaac A. Hall, extending from Washington Street in an easterly direction about two hundred feet, and standing southerly from the northerly side of said alley about eight feet; and that if erected the said fence will diminish the width of said street or alley from its established width of about twenty feet to the width of about twelve feet for the distance of about two hundred feet from the beginning point of said street or alley at Washington Street, and that by the erection of said fence your orator will be deprived of the proper use of the said street or alley. 20 30

And your orator further shows that as he is informed and believes and charges to be true, it is the intention of the said Isaac A. Hall to not only erect and maintain said fence as aforesaid, but also to erect a building or buildings for a boiler room and additional mill space on the west side of his present mill on said lands on said street

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or alley known as McPherson's Alley, which will extend back to the line of said fence, and has, in fact, commenced excavating for a foundation therefor; that the west side of his said present mill is one hundred feet easterly from Washington Street; and that said building or buildings will further encumber said street or alley in that locality.

10 Your orator further shows that he has erected on his said lands fronting on Fair Street and extending northerly to said street or alley known as McPherson's Alley, a storage warehouse used in connection with his business of bottling of mineral waters, and also stables used by him in connection with his said business; that on said lands fronting on Hamilton Avenue and extending southerly to said last mentioned street or alley he has erected other buildings which are used by him as
20 storage warehouses in connection with his said business, and also as stables both for his own use and for use of persons to whom he rents the same; that by reason of the erection and maintenance of said fence and the erection and maintenance of said other building or buildings by the said Isaac A. Hall, your orator will be deprived of the proper and sufficient use of his said buildings upon his said lands and premises, and will be unable to derive an income therefrom by renting the part
30 thereof that he now rents for stabling purposes as aforesaid.

And your orator further shows that the said fence when erected as aforesaid will extend along said last mentioned street or alley in front of the said premises of your orator fronting on Fair Street, and with the said other building or buildings to be erected by the said Isaac A. Hall as aforesaid, will deprive your orator of proper ingress and egress to and from, and use of, the build-

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ings erected on your orator's said premises as aforesaid.

And your orator further shows that when he purchased his said lands reaching back to said last mentioned street or alley he supposed the said street or alley was fully established at its then and present width as hereinbefore described, and that he purchased his said Fair Street property for the purpose of conducting his said business of manufacturing mineral waters thereon, on account of the facilities afforded by said street or alley in the rear thereof; that ever since a few months after he obtained the said tract of land of which he became seized in the year Eighteen hundred and eighty-eight as aforesaid, he has maintained a factory on said land for use in said business, and a stable on that land or on the said tract of land of which he became seized in the year Nineteen hundred and two as aforesaid, for use in connection with his said business; the said stable having been first on said first mentioned tract of land, and removed by rebuilding to and on said last mentioned tract of land soon after he became seized of that land whereupon the said stable building on said first mentioned tract of land was converted into a storage warehouse and has ever since that time been used as a storage warehouse in connection with his said business; that ever since said year Eighteen hundred and eighty-eight your orator has made use of said street or alley as hereinbefore described without objection from anyone and with the knowledge of all parties interested therein or in the lands adjoining the same, and, except as hereinbefore mentioned, with the assent and acquiescence of all of said parties, for receiving and shipping supplies and goods by wagons and trucks; that in

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his said business he uses two horse wagons and trucks; that the said obstructions in said street or alley by said Isaac A. Hall will narrow said street or alley to such an extent that its width will not be more than twelve feet the entire length of said fence, which will extend from Washington Street along and beyond your orator's said lands; that

10 in your orator's said business it is necessary for him to drive his said wagons and trucks from his said stable and factory into said street or alley and from said street or alley into said stable and factory, both of which abut on said street or alley; that such obstructions in said street or alley will render it impossible for your orator to do this with the horses attached to said wagons and trucks, for the reason that there will not be sufficient room in said street or alley in which to make

20 the necessary turn therein, so that it will be necessary, in order to take said wagons and trucks from said stable and factory into said street or alley to run them out by hand, even when loaded, turn them about in the same way in said street or alley and then hitch the horses thereto; and that it will also be necessary, in order to take said wagons and trucks from said street or alley into said stable or factory, to first unhitch the horses therefrom, turn the said wagons and trucks about by hand, and then to either hitch

30 the horses to them again, or draw them into said stable or factory by hand; that ever since your orator established his said business on his said Fair street property, to wit, in or about the year eighteen hundred and eighty-eight, he has done much of the loading of his goods on wagons and trucks for delivery to his customers, and of the unloading of supplies from wagons and trucks for use in his said business, in the part of said

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street or alley that adjoins his said Fair street property; that with said street or alley at its said width of about twenty feet said wagons and trucks standing in said part of said street or alley for said purpose of loading or unloading and the loading or unloading of the same as aforesaid, did not hinder or interfere with the passage of wagons or other vehicles through or along said street or alley at that point; that the erection and maintenance of said fence and buildings, or even the erection and maintenance of said fence alone, and the reducing thereby of the width of said street or alley to about twelve feet would greatly interfere if not render impracticable your orator's said loading and unloading, as said street or alley would not then be of sufficient width for wagons or other vehicles to pass his wagons or trucks that would be standing there for those purposes, a width of about sixteen feet being necessary for wagons and other vehicles to pass each other; that the narrowness of said street or alley caused by such obstructions would not only render it impossible for two wagons or other vehicles to pass each other, but would render it impossible for any wagon or other vehicle to turn around in any part thereof where said obstructions or either of them would exist; by reason whereof your orator would suffer great detriment in the conduct of his said business, and the rentable value of his other stables and storage buildings would be greatly diminished if not destroyed. 10 20 30

And your orator further shows that to his personal knowledge the said street or alley known as McPherson's alley was used to its full width of about twenty feet as hereinbefore mentioned for at least twenty-five years prior to the time the said Isaac A. Hall began the erection of the afore-

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10 said fence; that to his personal knowledge the part of said street or alley north of said fence was so used during all of that time; that horses with wagons and other vehicles constantly passed and repassed your orator's wagons and trucks when the same were being loaded and unloaded as aforesaid, which they could not do without going on to the land north of said fence line; and that
20 your orator's said wagons and trucks and other vehicles of necessity went over said fence line every time they were driven from said street or alley into your orator's said Fair street premises and from said premises into said street or alley; and your orator further says that the erection of said fence was the first interference that, so far as your orator knows or is informed and as he believes, has ever been made with such use of said street or alley; and that your orator does not
20 know of anyone besides the said Isaac A. Hall who objects to such use of said street or alley, or disputes the rights herein set up to the use of said street or alley.

30 And your orator further shows that there are on said street or alley known as McPherson's alley, easterly of your orator's said factory, seven different stables exclusive of your orator's said stable on his said Fair street property, one of them being a double stable; that your orator stables eight horses in his said stable; that the number of horses stabled in the other of said stables is at least forty; that each of said horses represents at least one vehicle kept in the stable in which it is kept; that some of said stables are used as storage houses, as well as stables; that said street or alley has no outlet except into Washington street at its westerly end; and that all of said horses and vehicles in passing out of or

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into said alley have to pass through the part thereof that is reduced to about twelve feet in width as aforesaid; and all storage articles have to be carried the same way.

And your orator further shows that he is informed that the said Isaac A. Hall claims to be the owner of all of said alley on the north side of said fence under and by virtue of certain deeds purporting to convey lands to a twelve-foot alley, or something of the kind; but your orator avers that whatever may be the basis of such claim, the validity of which is not hereby admitted, and whatever may have been the original width of said street or alley known as McPherson's alley the same has, by common consent and use, for at least sixty years as your orator is informed and believes and charges, and for at least twenty-five years to your orator's personal knowledge, been used at its present width of about twenty feet; that the said Isaac A. Hall and his predecessors in title have known of such use of said street or alley at such width of about twenty feet, and particularly of the use your orator has made of the same as aforesaid, and have never prior to the erection of said fence, objected to such use, but have assented to and acquiesced in such use, so far as your orator knows and as he believes and charges; and that the said Isaac A. Hall and his predecessors in title had full knowledge of the erection by your orator of his said factory and stables and other buildings on said street or alley, and of the erection of the other stables and other building thereon, and that the same were erected with a view to the use of said street or alley at its width of about twenty feet, and neither of them have objected to the erection of said factory, stables and other buildings with such view,

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or given any notice of any such claim as that set up by the said Isaac A. Hall as aforesaid, so far as your orator knows and as he believes and charges; with this exception, that when your orator erected a building on his said Hamilton avenue property the said Isaac A. Hall objected to the location of the building as being over the line of said street or alley; and your orator charges that the said Isaac A. Hall is estopped from setting up or enforcing any claim to any part of said street or alley that will interfere with its use as aforesaid; and is particularly estopped from interfering in any way with the use of said street or alley by your orator as aforesaid.

And your orator further shows and charges that, for the reasons hereinbefore set forth, the erection and maintenance of said fence and buildings, and even the erection and maintenance of said fence alone, would occasion great loss, permanent damage and irreparable injury to your orator and to his said lands and premises.

All of which actings and doings of the said Isaac A. Hall are contrary to equity and good conscience and tend to the manifest wrong and injury and oppression of your orator in the premises.

In consideration whereof, and for as much as your orator is remediless in the premises at the common law, and cannot have adequate relief, except by the aid of this honorable court:

To the end, therefore, that the said Isaac A. Hall may (without oath), full, true and perfect answer make to all and singular the premises, according to the best of his knowledge, information and belief, and that the said Isaac A. Hall may be restrained by the order and injunction of this honorable court from erecting or maintaining the

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aforesaid buildings and fence, or either of them or any part of either of them, in the said street or alley known as McPherson's alley at its said width of about twenty feet, and from erecting or maintaining any other building or fence or any part thereof in said street or alley at its said width of about twenty feet, and from encroaching upon or obstructing in any way whatsoever the said street or alley at its said width of about twenty feet, and from depriving your orator of the free and proper use of said street or alley at its said width of about twenty feet and from depriving your orator of the free and proper ingress and egress to and from his said buildings or any of them. 10

May It Please Your Honor, the premises considered, to grant unto your orator, not only the State's writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said Isaac A. Hall, restraining the said Isaac A. Hall from erecting or maintaining the aforesaid buildings and fence, or either of them or any part of either of them, in said street or alley at its said width of about twenty feet, and from erecting or maintaining any other building or fence, or any part thereof, in said street or alley at its said width of about twenty feet, and from encroaching upon or obstructing in any way whatsoever the said street or alley at its said width of about twenty feet, and from depriving your orator of the free and proper use of said street or alley at its said width of about twenty feet, and from depriving your orator of the free and proper ingress and egress to and from his said buildings or any of them, but also the State's writ of subpoena issuing out of and under the seal of this honorable court, directed to the said Isaac 20 30

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10 A. Hall, therein and thereby commanding him, on a certain day and under a certain penalty to be therein expressed, personally to be and appear before your Honor, in this honorable court, then and there to answer the premises, and to stand to, and abide by and perform such order and decree therein as to his Honor shall seem meet, and as shall be agreeable to equity and good conscience.

And your orator will ever pray, &c.

WALTER R. HUDSON,
Solicitor for and of Counsel
with Complainant.

State of New Jersey,

County of Passaic,

} ss.:

20 Robert Swinley, the complainant in the foregoing bill of complaint named, being duly sworn, on his oath says that the matters and things therein set forth so far as they relate to his own acts and deeds are true and so far as they relate to the acts and deeds of any other person or persons or corporation he believes them to be true.

30 Deponent further says that he became seized of certain tracts of land fronting on Fair street and Hamilton avenue in the City of Paterson in said County of Passaic and extending back to the street or alley known as McPherson's alley, as in the foregoing bill alleged, and that the descriptions, location and dimensions thereof are as in said bill stated.

Deponent further says that said McPherson's alley begins in the easterly side of Washington Street, about midway between Hamilton Avenue and Fair Street, and extends in an easterly di-

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rection for a distance of about four hundred feet; that the said McPherson's alley is, as deponent believes, a public street or alley and that it has been and is used as such by persons, firms and corporations owning and renting building erected along said street or alley, and which said buildings are used for the purposes of stabling and storage, and that such stabling and storage buildings occupy both sides of said street or alley for almost the entire length thereof, and such street or alley is used at all hours of the day and night by said persons, firms and corporations in going to and from their said stables and storage warehouses, and that in such use of said street or alley horses and vehicles of all kinds pass and have passed through, over, in and out of said street or alley as and when required for the purposes of said persons, firms and corporations; and further, that the said street or alley has been and is used as a public highway by all persons, firms and corporations whatsoever, both with and without horses and vehicles of all kinds, having occasion or desire to so use the same.

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Deponent further says that, as he is informed and believes to be true, the said street or alley known as McPherson's alley has been used as aforesaid for at least sixty years last past, with the knowledge of all parties interested therein and in the lands adjoining the same, and that such use has been made without interruption, let, suit or hindrance by any person or persons whatsoever, and until quite recently as hereinafter mentioned, with the assent or acquiescence of all parties interested therein or in the lands adjoining the same; that during all of said period of sixty years the width of said street or alley has been established at about twenty feet for the distance

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of at least three hundred and fifty feet from said Washington street; and that said street or alley, during all of said period, has been used as aforesaid at its entire width as aforesaid, with knowledge and assent or acquiescence as aforesaid; and deponent avers that said persons, firms and corporations cannot have proper and sufficient use
10 of their said buildings and their lands on which said buildings stand, unless the width of said street or alley continues to be and is maintained at the same width.

Deponent further says that the said tract of land fronting on said Fair street of which he became seized in the year eighteen hundred and eighty-eight as aforesaid, begins at the distance of eighty-two feet and eighteen hundredths of a foot easterly from the easterly line of Washington street, and runs easterly along the northerly
20 line of Fair street and the southerly line of said McPherson's street or alley twenty-eight feet, and is known as 27 Fair street; and that the other tract of land fronting on said Fair street of which deponent became seized in nineteen hundred and two as aforesaid, adjoins the other Fair street tract just mentioned on the east, and runs easterly along the northerly line of Fair street and the southerly line of said McPherson's alley twenty-eight feet and six inches.

30 Deponent further says that the defendant Isaac A. Hall is the owner of certain lands fronting on said Hamilton avenue, and extending southerly to the northerly line of said street or alley known as McPherson's alley, and then extending along said northerly line of said street or alley for a distance of about two hundred feet; that the said Isaac A. Hall has erected on a part of his said lands, a brick mill building and that the southerly

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wall of said brick mill building is erected along the northerly line of said street or alley; that part of the said lands of the said Isaac A. Hall are vacant and have been enclosed by a fence extending along the said northerly line of said street or alley, and that the remainder of the lands of said Isaac A. Hall are occupied by old buildings, one of which is built so that the most southerly side thereof indicates the northerly line of said street or alley and fronts on Washington street. 10

Deponent further says that on Tuesday, the twenty-first day of November, nineteen hundred and eleven, said Isaac A. Hall began to erect and construct a fence in said street or alley known as McPherson's alley; that said fence was being erected in said street or alley along a line therein running parallel with the said lines of said lands of said Isaac A. Hall, extending from Washington street in an easterly direction about two hundred feet, and standing southerly from the northerly side of said alley about eight feet; and that if erected the said fence will diminish the width of said street or alley from its established width of about twenty feet to the width of about twelve feet for the distance of about two hundred feet from the beginning point of said street or alley at Washington street, and that by the erection of said fence deponent will be deprived of the proper use of the said street or alley. 20 30

Deponent further says that as he is informed and believes and charges to be true, it is the intention of the said Isaac A. Hall to not only erect and maintain said fence as aforesaid, but also to erect a building or buildings for a boiler room and additional mill space on the west side of his present mill on said lands on said street or alley known as McPherson's alley, which will extend

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back to the line of said fence, and has, in fact, commenced excavating for a foundation therefor; that the west side of his said present mill is one hundred feet easterly from Washington street; and that said building or buildings will further encumber said street or alley in that locality.

10 Deponent further says that he has erected on his said lands fronting on Fair street and extending northerly to said street or alley known as McPherson's alley, a storage warehouse used in connection with his business of bottling of mineral waters, and also stables used by him in connection with his said business; that on said lands fronting on Hamilton avenue and extending southerly to said last mentioned street or alley he has erected other buildings which are used by him as storage warehouses in connection with his said business, and also as stables both for his own use
20 and for the use of persons to whom he rents the same; that by reason of the erection and maintenance of said fence and the erection and maintenance of said other building or buildings by the said Isaac A. Hall, deponent will be deprived of the proper and sufficient use of his said buildings upon his said lands and premises, and will be unable to derive an income therefrom by renting the part thereof that he now rents for stabling purposes as aforesaid.

30 Deponent further says that the said fence when erected as aforesaid will extend along said last mentioned street or alley in front of the said premises of deponent fronting on Fair street, and with the said other building or buildings to be erected by the said Isaac A. Hall as aforesaid, will deprive deponent of proper ingress and egress to and from, and use of, the buildings erected on deponent's said premises as aforesaid.

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Deponent further says that when he purchased his said lands reaching back to said last mentioned street or alley he supposed the said street or alley was fully established at its then and present width as hereinbefore described, and that he purchased his said Fair street property for the purpose of conducting his said business of manufacturing mineral waters thereon, on account of the facilities afforded by said street or alley in the rear thereof; that ever since a few months after he obtained the said tract of land of which he became seized in the year eighteen hundrd and eighty-eight as aforesaid, he has maintained a factory on said land for use in said business, and a stable on that land or on the said tract of land of which he became seized in the year nineteen hundred and two as aforesaid, for use in connection with his said business; the said stable having been first on said first mentioned tract of land and removed by rebuilding to and on said last mentioned tract of land soon after he became seized of that land, whereupon the said stable building on said first mentioned tract of land was converted into a storage warehouse in connection with his said business; that ever since said year eighteen hundred and eighty-eight deponent has made use of said street or alley as hereinbefore described without objection from anyone and with the knowledge of all parties interested therein or in the lands adjoining the same, and, except as hereinbefore mentioned, with the assent and acquiescence of all of said parties, for receiving and shipping supplies and goods by wagons and trucks; that in his said business he uses two-horse wagons and trucks; that the said obstructions in said street or alley by said Isaac A. Hall will narrow said street or

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alley to such an extent that its width will not be more than twelve feet wide the entire length of said fence, which will extend from Washington street along and beyond deponent's lands; that in deponent's said business it is necessary for him to drive his said wagons and trucks from his said stable and factory into said street or alley and
10 from said street or alley into said stable and factory, both of which abut on said street or alley; that such obstruction in said street or alley will render it impossible for deponent to do this with the horses attached to said wagons and trucks, for the reason that there will not be sufficient room in said street or alley in which to make the necessary turn therein, so that it will be necessary, in order to take said wagons and trucks from said stable and factory into said street or alley to run
20 them out by hand, even when loaded; turn them about in the same way in said street or alley and then hitch the horses thereto; and that it will also be necessary, in order to take said wagons and trucks from said street or alley into said stable or factory, to first unhitch the horses therefrom, turn the said wagons and trucks about by hand, and then to either hitch the horses to them again, or draw them into said stable or factory by hand; that ever since deponent established his said business on his said Fair street property, to wit, in or
30 about the year eighteen hundred and eighty-eight, he has done much of the loading of his goods on wagons and trucks for delivery to his customers, and of the unloading of supplies from wagons and trucks for use in his said business, in the part of said street or alley that adjoins his said Fair street property: that with said street or alley at its said width of about twenty feet said wagons and trucks standing in said part of said

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street or alley for said purpose of loading or unloading and the loading or unloading of the same as aforesaid, did not hinder or interfere with the passage of wagons or other vehicles through or along said street or alley at that point; that the erection and maintenance of said fence and buildings, or even the erection and maintenance of said fence alone, and the reducing thereby of the width of said street or alley to about twelve feet would greatly interfere if not render impracticable deponent's said loading and unloading, as said street or alley would not then be of sufficient width for wagons or other vehicles to pass his wagons or trucks that would be standing there for those purposes, a width of about sixteen feet being necessary for wagons and other vehicles to pass each other; that the narrowness of said street or alley caused by such obstructions would not only render it impossible for two wagons or other vehicles to pass each other, but would render it impossible for any wagon or other vehicle to turn around in any part thereof where said obstructions or either of them would exist; by reason whereof deponent would suffer great detriment in the conduct of his said business, and the rentable value of his other stables and storage buildings would be greatly diminished if not destroyed.

Deponent further says that to his personal knowledge the said street or alley known as McPherson's alley was used to its full width of about twenty feet as hereinbefore mentioned for at least twenty-five years prior to the time the said Isaac A. Hall began the erection of the aforesaid fence; that to his personal knowledge the part of said street or alley north of said proposed fence was so used during all of that time; that horses with wagons and other vehicles constantly passed and

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10 repassed deponent's wagons and trucks when the same were being loaded and unloaded as aforesaid, which they could not do without going on to the land north of said fence line; and that deponent's said wagons and trucks and other vehicles of necessity went over said fence line every time they were driven from said street or alley into deponent's said Fair street premises and from said premises into said street or alley; and deponent further says that the erection of said fence was the first interference that, so far as deponent knows or is informed and as he believes, that has ever been made with such use of said street or alley; and that deponent does not know of anyone besides the said Isaac A. Hall who objects to such use of said street or alley, or disputes the rights herein set up to the use of said street or alley.

20 Deponent further says that there are on said street or alley known as McPherson's alley, easterly of deponent's said factory, seven different stables exclusive of deponent's said stable on his said Fair street property, one of them being a double stable; that deponent stables eight horses in his said stable; that the number of horses stabled in the other of said stables is at least forty; that each of said horses represents at least one vehicle kept in the stable in which it is kept; that some of said stables are used as storage
30 houses, as well as stables; that said street or alley has no outlet except into Washington street at its westerly end; and that all of said horses and vehicles in passing out of or into said alley have to pass through the part thereof that is reduced to about twelve feet in width as aforesaid; and all storage articles have to be carried the same way.

Deponent further says that he is informed that

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the said Isaac A. Hall claims to be the owner of all of said alley on the north side of said fence under and by virtue of certain deeds purporting to convey lands to a twelve-foot alley, or something of the kind; but deponent avers that whatever may be the basis of such claim the validity of which is not hereby admitted, and whatever may have been the original width of said street or alley known as McPherson's alley the same has, by common consent and use, for at least sixty years as deponent is informed and believes and charges, and for at least twenty-five years to deponent's personal knowledge, been used at its present width of about twenty feet; that the said Isaac A. Hall and his predecessors in title have known of such use of said street or alley at such width of about twenty feet, and particularly of the use deponent has made of the same as aforesaid, and have never prior to the erection of said fence, objected to such use, but have assented to and acquiesced in such use, so far as deponent knows and as he believes and charges; and that the said Isaac A. Hall and his predecessors in title had full knowledge of the erection by deponent of his said factory and stables and other buildings on said street or alley, and of the erection of the other stables and other buildings thereon, and that the same were erected with a view to the use of said street or alley at its width of about twenty feet, and neither of them have objected to the erection of said factory, stables and other buildings with such view, or given any notice of any such claim as that set up by the said Isaac A. Hall as aforesaid, so far as deponent knows and as he believes and charges; with this exception, that when deponent erected a building on his said Hamilton

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avenue property the said Isaac A. Hall objected to the location of the building as being over the line of said street or alley.

ROBERT SWINLEY.

10 Sworn and subscribed this 14th
day of February, 1912, before me,
ALBIN SMITH,
Master in Chancery of N. J.

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ANSWER.

(Filed February 29, 1913.)

IN CHANCERY OF NEW JERSEY.

Between

ROBERT SWINLEY,
*Complainant,**and*ISAAC A. HALL,
*Defendant.**On Bill, &c.*

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ANSWER.

The said defendant answering the amended bill of complaint filed in the aforesaid cause says:

1: Defendant admits that complainant is the owner of certain lands fronting on the northerly side of Fair street, which is located about eighty-two feet east from Washington street and extending for a depth of one hundred feet to the southerly line of McPherson alley, and says that there are erected thereon two brick buildings, both of which extend over the deed line of said complainant and encroach upon said alley; that the most westerly end encroaches ten and three-eighths inches over the line of the lands of said Swinley and into said McPherson alley, and the most easterly end extends one foot and six and seven-eighths inches over the line of lands of said complainant and encroaches over to that extent on said McPherson alley.

2: Said defendant has no knowledge as to when complainant became seized of his tracts of land on Fair street and therefore neither admits nor denies the same and therefore leaves complainant

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to make his proof thereof. Defendant admits that complainant is seized of the lands and premises fronting on the southerly side of Hamilton avenue and which is referred to in his said bill of complaint, and says that complainant is also seized of another tract of land, not mentioned in his said bill, and adjoining the second tract described in his said bill on the east fronting twenty-six feet on Hamilton avenue, and extending about one hundred and eight feet south to an alley described in the conveyance to said complainant as being twelve feet in width; which alley is McPherson alley, and upon which tract said complainant has erected a brick building, the most southerly boundary of which is about one hundred and five feet from the southerly side of Hamilton avenue; that along the southerly side of said building and extending into said McPherson alley, said complainant has erected a manure pit which he and tenants now use.

That the two tracts of land on Hamilton avenue described by complainant in his said bill were originally a part of a tract of land owned by James Van Blarcom and his brother Brant Van Blarcom, title to which they acquired in the year eighteen hundred and thirteen, and said James Van Blarcom later became sole owner of said land and premises; that the original deed from the heirs of said James Van Blarcom to Ann Kipp covering said two tracts describe said alley as twelve feet in width.

3: Defendant admits that said McPherson alley begins in the easterly side of Washington street at a point one hundred feet north from the north line of Fair street which point marks its southerly boundary, is twelve feet in width, and extends easterly parallel with Fair street for

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about three hundred and sixty-five feet. Defendant says that said alley is a cul-de-sac, its only entrance and exit being on Washington street as aforesaid; that all of the land lying between Hamilton avenue and Fair street and bounded on the west by Washington street and on the east by what is known as the Colt line which is approximately the end of said alley was originally owned by the aforesaid James and Brant Van Blarcom and that they obtained title about the year 1813 and that Brant Van Blarcom released his interest therein to his brother James Van Blarcom. That said James Van Blarcom established said alley twelve feet in width and running parallel with Fair street at a distance of one hundred feet from the northerly line of Fair street; that in all the deeds from said James Van Blarcom or his heirs which convey any portion of said lands and premises, where said alley is mentioned, the alley referred to as being twelve feet in width and the metes and bounds of said conveyances establish the line of said alley as twelve feet in width and located as aforesaid.

That the owners of lands and premises abutting said alley are as follows:

Beginning at Washington street, north of said alley, and lying between said alley and Hamilton avenue, this defendant is the owner of two hundred feet fronting on Hamilton avenue; that next adjoining him, the complainant is the owner of seventy-six feet fronting on Hamilton avenue; that adjoining said complainant Charles Levenstein is the owner of thirty-eight and eighty-hundredths feet in width but his title does not extend north to Hamilton avenue and that the balance of the land on the northerly side of said alley and which abuts it, being about fifty and a half feet,

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is owned by the David Boyle Realty Company, which also owns the land marking the easterly boundary of said alley; that beginning at Washington street the owners of the land on the southerly side of said alley and fronting on Fair street are as follows: The defendant owns eighty-two and fifteen-hundredths feet fronting on Fair street; the complainant adjoining that tract then owns fifty-six and one-half feet fronting on Fair street; adjoining this H. W. Mills & Company owns twenty-five feet on Fair street; adjoining this defendant owns ninety-nine and seventy-eight hundredths feet fronting on Fair street; adjoining that tract William T. Allen & Son owns twenty-seven feet fronting on Fair street; adjoining that tract J. Traphagen Doremus owns twenty-seven feet fronting on Fair street and adjoining that the balance of the land south of said alley is owned by the David Boyle Realty Company.

That said alley has never been ordained as a public street by any ordinance passed by the governing bodies of the City of Paterson, but said City did in the year 1908 pave and sewer said alley, thereby accepting the same as a public street; that the alley, as paved by said City of Paterson, consists of a strip twelve feet in width running parallel with and one hundred feet from the northerly boundary of Fair street, except where the buildings of any of the owners of land on Fair street may have encroached upon and extended into said alley.

That the use of said alley is practically confined to the owners of property abutting upon it or their tenants, it not being frequented or used by the public at large for traffic, since it has no outlet, but is a blind alley that the established width of twelve feet is a sufficient width for any use to

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which said alley may properly be put by any of the owners abutting thereon or their tenants.

4: Defendant denies that the public at large, or the complainant in particular, has had the free use of any lands and premises owned by defendant or his predecessors in title and which was enclosed by the fence of this defendant, without interruption, let, suit, or hindrance by any person or persons whatsoever, and he denies that the width of said alley has ever exceeded twelve feet; and says that defendant has always claimed the full and free use of all of the lands and premises bordering on said alley to which he had title and which includes the strip of land enclosed by defendant with the fence mentioned in complainant's bill; that for the past twelve years this defendant has let to Charles G. Secor, a livery man, and Samuel Sobel and others the privilege of storing wagons upon his premises lying along the northerly boundary of said alley and extending from Washington street east for a distance of about one hundred and fifty feet, and it has been occupied to a greater or less extent by said Secor and Sobel during all of that period; that defendant has used a portion of said strip sought to be enclosed by said fence for the purpose of unloading lumber to be used in his said mill for use and during all the time that he has been the owner of said lands and premises, being since the years 1888 and 1892 he has used said lands and premises, being so sought to be enclosed, for the purposes aforesaid and for other purposes; that neither he nor his predecessors in title have ever dedicated said lands and premises so sought to be enclosed to the use of the public at large or the complainant in particular. Defendant denies that complainant cannot have the proper and sufficient use of his said build-

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ings or lands to which he is entitled without the use of the lands and premises owned by this defendant.

5: Defendant admits that complainant is the owner of fifty-six and one-half feet fronting on Fair street, but has no knowledge of the exact date on which complainant acquired title thereto.
10 Defendant admits that he is the owner of certain lands and premises fronting on Hamilton avenue, and extending southerly to the northerly line of said alley and extending along its northerly line for a distance of about one hundred and fifty feet, and that he has erected on his lands a brick mill; but denies that the southerly boundary of said mill marks the northerly boundary of said alley; defendant denies that the fence, said by complainant to extend along the northerly line of said alley,
20 is on said line and denies that the southerly boundary of the frame building referred to marks the northerly boundary of said alley.

6: Defendant admits that he did begin to erect and construct a fence, but denies that the same was erected in or upon any portion of said alley, and says that said fence was erected upon the southerly boundary of his lands which front upon Hamilton avenue and along the northerly boundary of said alley and was erected upon the lands and premises of which this defendant is and was then
30 the owner in fee simple; defendant denies that the erection of said fence will or did in anywise interfere with the rights of said complainant, in and to his use of said alley.

Defendant further says that the fence was completed on Monday, November 27th, 1911, by 9 A. M. and that on the morning of Tuesday, November 28th, 1911, and the next day after the order to show cause in this case was advised by Vice

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Chancellor Howell, said complainant with the assistance of other men in his employ, completely demolished the fence which said defendant had erected along the southerly line of his said lands, and to enjoin the defendant from erecting which, said complainant's bill is filed, with the exception of one post left standing because complainant and his men were forbidden to remove it by Sergeant Fitzpatrick and Policeman Graham, of the Paterson Police Force. That upon the hearing of said matter on the rule to show cause why an injunction should not issue and the denial of the prayer of complainant for a preliminary injunction, this defendant again erected said fence and it was later demolished by said defendant. Defendant admits that it is his intention to erect and maintain said fence as aforesaid and to erect a building or buildings for a boiler room and additional mill space on the west side of his present mill on said lands adjoining said McPherson Alley and he has commenced excavating therefor. He also admits that his present mill is about one hundred feet easterly from Washington street. He denies, however, that said proposed new building will encumber said alley. 10

7: Defendant admits that complainant has erected on his lands fronting on Fair street, and extending to said alley, two buildings used by him in connection with said business and alleges that said buildings extend over the line of the lands to which said complainant has title, from ten and three-eighths inches on their most westerly end to one foot and six and seven-eighths inches on their most westerly end; defendant admits that on the lands or premises fronting on Hamilton avenue and extending southerly, complainant has erected other buildings and says that the distance between 20 30

ANSWER.

the southerly end of the most easterly of these buildings, and the northerly end of the building of William T. Allen & Son, directly across said alley, is about thirteen feet. Defendant denies that complainant will be deprived of his proper and sufficient use of said building on his lands and premises and that he will be unable to derive an income therefrom by renting the same.

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8: Defendant denies that said complainant has ever acquired any rights in and to said lands and premises so sought to be enclosed by said fence or to the use thereof. Defendant denies that said fence or proposed new building will deprive said complainant of proper ingress and egress to and from and use of the buildings erected by him on his said premises.

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9: Defendant has no knowledge as to the supposition of complainant as to the boundary or width of said alley when he purchased his said Fair street property or as to the purposes for which complainant purchased the same. Defendant has no accurate knowledge as to the dates since which complainant has maintained his factory or stables on said premises. Defendant denies that since Eighteen hundred and eighty-eight complainant has made use of the lands and premises sought to be enclosed by defendant by his force without any objection from this defendant and says that he and his agents and servants have repeatedly warned and directed said complainant and his agents and servants to remove any of the personal property of complainant, which he or his said agents and servants might attempt to leave upon said lands and premises so sought to be enclosed by said fence and have repeatedly warned complainant and his agents and servants against the use of said strip.

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Defendant denies that complainant cannot have the proper use of his premises and the use to which he is entitled if said fence and buildings proposed to be erected by complainant are so erected.

10: Defendant denies that the said strip of land sought to be enclosed by his said fence has been used by persons other than himself or excepting by persons with his express consent. 10

11: Defendant has no accurate knowledge as to the number of horses stabled by complainant or by persons having other stables abutting upon said alley or the exact number of vehicles stabled in said stables on said alley.

12: Defendant admits that he does claim to be the owner of all of said lands and premises sought to be enclosed by said fence and says that he is the true and lawful owner thereof in fee, without any right in the complainant to use the same and that said lands and premises so sought to be enclosed by said fence have never been dedicated, by this defendant or his predecessors in title, to the use of the public in general or this complainant in particular. Defendant denies that he or his predecessors in title had any knowledge of the fact that defendant erected any of his buildings abutting on said alley with a view to the use of the lands and premises sought to be enclosed by said fence. 20

13: This defendant denies that the complainant has any right of way over or easement in the lands and premises sought to be enclosed by said fence and submits to this honorable court that the matters and issues stated by said amended bill and this answer are matters and issues which may and should be tried and determined at law and with respect to which said complainant is not entitled to any relief in this court and this defendant hopes 30

ANSWER.

he shall have the same benefit of this defense as if he had demurred to the said complainant's bill.

And this defendant humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

WAYNE DUMONT,
Solicitor and of Counsel with Defendant.

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WILLIAM FERGUSON—DIRECT

IN CHANCERY OF NEW JERSEY.

Between

ROBERT SWINLEY,

Complainant.

—and—

ISAAC A. HALL,

*Defendant.**On Bill, &c.,*

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TESTIMONY.

Transcript of testimony taken in the above entitled cause, before Hon. Vivian M. Lewis, Vice-Chancellor, at the Paterson, Passaic County Court House, on the eighteenth day of November, nineteen hundred and twelve, at ten o'clock A. M.

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APPEARANCES:

HUDSON & JOELSON, ESQS., *for the Complainant;*
WAYNE DUMONT, ESQ., *for the Defendant.*

WILLIAM FERGUSON, JR., sworn for the Complainant, testified as follows:

Direct Examination by Mr. Hudson.

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Q. What is your occupation? A. I am a surveyor and civil engineer.

Q. Where do you carry on your business? A. I do business in the City of Paterson.

Q. How long have you been engaged in civil engineering? A. About 20 years.

Q. I show you this map, and ask you if that map was made by you? A. It was.

WILLIAM FERGUSON—DIRECT

Q. And from surveys made by you? A. Yes, sir.

Q. Can you tell when those surveys were made?

A. The original survey was made August, 1903, and revised in 1911.

Q. Since that time have any changes been made on the map? A. A new fence line has been shown, which is located September 11, 1912.

Q. That map indicates McPherson's Alley? A. It does.

Q. And does it indicate a sewer in that alley? A. Yes, sir.

Q. How is that indicated; indicate the McPherson Alley as it is laid out. A. Right along there (indicating).

Q. How is it indicated on the map? A. By black lines.

Q. And in fixing the line of McPherson's Alley, what do you follow? A. Follow the line of the buildings and the fences, as they are on the ground.

Q. The map indicates the width of that alley at various points? A. Yes, sir.

Q. And what are those? A. It is not regular.

Q. What is the width at Washington Street? A. Eighteen feet and 7-10 of an inch.

Q. And what is the width between the property of Swinley's Fair street property and Hall's Hamilton Avenue property? A. 20½ feet.

Q. And what is the distance between Hall's Fair Street property and Swinley's Hamilton Avenue property? A. 20 feet.

Q. What is the width of the alley at its end? A. 14½ feet.

Q. Your map shows that the alley grows narrower as you get away from Washington Street? A. Yes, sir, it does.

WILLIAM FERGUSON—DIRECT

Q. And where is the narrowest point in the alley itself? A. At the Eastern terminus of the alley.

Q. Is there no part of the alley itself which is narrower than the terminus? A. It makes it 100 feet West of the Eastern extremity. It is about $13\frac{1}{2}$ feet between the buildings.

Q. Your map indicates a fence; how is that shown on the map? A. It is shown by a green line. 10

Q. And what is the length of the fence? A. About 175 feet in length.

Q. Now, what distance is that fence from the property line at the Washington Street end of the alley—Mr. Hall's property line? A. 5 feet 7 inches.

Q. And what distance is it at the corner of Mr. Hall's mill? A. 9 feet $9\frac{1}{2}$ inches. 20

Q. And what distances at the end? A. 8 feet $3\frac{3}{4}$ inches.

Q. When you made that survey in September, 1912—made the measurement of the fence—was the fence then erected for the whole distance you have given? A. Yes, sir.

Q. What is the character of the fence, what is it made of? A. Why, the portions nearest from Washington Street for 100 feet, is close board fence, about $7\frac{1}{2}$ feet high, and it is built along with the posts and rails, iron rails, for 71 feet and 9 inches. 30

Q. How much of the land abutting on the alley and running through to Hamilton Avenue does Mr. Hall own? A. About 200 feet.

Q. And the plot next East is owned by Mr. Swinley, isn't it, according to the map? A. Yes, sir.

Q. Now, the land running from the alley South-

ward to Fair Street, beginning at Washington Street, who owns the first plot? A. Isaac A. Hall.

Q. How much frontage on the alley? A. About 82 feet.

Q. And the next plot is owned by whom? A. Robert Swinley.

Q. What is the frontage? A. About 55½ feet.

10 Q. And the next plot is owned by whom? A. H. W. Mills and Company; their frontage is 25 feet,—and the next plot is owned by Mr. Hall—his frontage is about 100 feet.

Q. Your map indicates a sewer? A. It does.

Q. How is that indicated on the map? A. Indicated by a blue dash line.

Q. Through what part of the alley does that sewer run? A. Approximately the center of the alley—that is, taking the buildings for the line of the alley.

20 Q. How far does it extend? A. It begins at Washington Street and runs in an Easterly direction about 315 feet.

Q. And there are manholes used in connection with that sewer? A. Yes, sir; they are indicated on the map by a circle.

Q. Are there also catch basins used in connection with the sewer? A. Yes, sir, they are indicated on the map by blue edge lines.

30 Q. What is the location of those manholes with regard to the fence that Mr. Hall has erected? A. The center of the manholes is about two feet from the line of the new fence.

Q. And the catch basins—what are the locations of those in regard to the fence of Mr. Hall? A. The catch basin there to Washington Street on the north side is five feet north of the fence.

Q. That would be within the fence line? A. Yes, sir.

Q. Do you know where Robert Swinley carried on his business as a soda water manufacturer?

A. On Fair Street.

Q. Do you know which property on your map it is? A. I think it is this property—east of Mr. Hall's.

Q. What is the distance between Mr. Swinley's property and the fence? A. 10 feet 9 inches.

Q. Does that width vary at all in front of his property? A. Yes, sir, it narrows up a little as you go East, about one-half a foot.

Q. What is the distance between Mr. Hall's property—at Washington Street—where it runs through to Fair Street, and the fence,—the distance between the fence and Mr. Hall's property which runs through to Fair street? A. 12 feet 2 inches.

Q. That is the property on the South side of the alley? A. Yes, sir.

Q. Now, that fence, as erected, extends in front of Mr. Hall's property—Mr. Swinley's property, and the property of H. W. Mills and Company? A. It does.

Q. And what is the distance between the Mills property and the fence? A. 11 feet 9 inches.

Q. Your map also shows the property lines as taken from the deeds of the various properties, doesn't it? A. Yes, sir, it does.

Q. In regard to Mr. Hall's property on the North side of the alley, does the fence follow the property lines? A. It follows just about the line of the deed.

Q. For what distance? A. For the distance in from Hamilton Avenue—measured from Hamilton Avenue.

Q. For what distance does the fence follow the property line? A. For about 150 feet.

WILLIAM FERGUSON—DIRECT—CROSS

Q. Then this fence extends out into the alley further than the property line to Mr. Hall? A. Yes, sir.

Q. For what distance does it so extend? A. 25 feet.

Q. In making this map, Mr. Ferguson, you followed the property lines as they are now, from Fair Street? A. I did, yes, sir.

Q. And the buildings as they are now erected along the alley? A. As they stand to-day.

Q. What is the depth of Mr. Swinley's property on the South side of the alley, the depth from the alley to Fair Street? A. About 100 feet.

Q. Is that answer true as to both sides of that property? A. Yes, sir, they are both practically the same.

20 *Cross Examination by Mr. Dumont.*

Q. Did you have any deeds when you made that map, Mr. Ferguson? A. I had the Hall deed.

Q. Did you have anybody else's deed? A. I probably had the Swinley deed, I don't remember.

Q. When you say you had the Hall deed, you mean you had descriptions,—you did not have the original deeds? A. No, sir.

Q. So you only know from descriptions the other side gave you? A. Yes, sir.

30 Q. As you drew that map you followed the fence line—the property lines, that is, the building lines? A. Yes, sir, the actual location.

Q. For instance, when you went to H. W. Mills and Company, there you simply took the measurements of the building as it stood on the premises? A. That is true.

Q. You did not know anything about the Mills deed? A. No, sir, I did not have the Mills deed.

Q. And when you had the Hall property here, you simply took it as it was on the premises—you did not have any description to that, did you? A. No, sir.

Q. And over here—the entrance to Washington Street and McPherson's Alley, on the Southerly corner, you did not have any description for that, did you? A. I don't remember.

Q. Your map seems to indicate the descriptions you had were the Northern descriptions? A. Yes, sir.

Q. You did not have any of the old deeds—for instance, the deed to Rosa Klenert of one of these properties? A. I don't remember having that.

Q. Now, then, you went and looked at this property pretty carefully, didn't you? A. Yes, sir.

Q. To see whether the street was paved; was there any paving on this alley? A. Yes, sir, a Belgian block pavement.

Q. How wide was it—did you take any measurements? A. It run along the new fence that Mr. Hall has erected.

Q. You did not take the measurement of it at all? A. No, sir.

Q. You did not get the line that the city made there when they laid out this Belgian block pavement? A. The only thing I can say is, that the Belgian block pavement runs right along the new fence line.

Q. This new fence Mr. Hall erected, about which you have testified that you were down there in September, 1912, that runs right along the line fixed by the city there with the Belgian block? A. Yes, sir.

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Q. It does not go over it a bit? A. No, sir.

Q. How far along does that Belgian block paving go? A. I think it runs, probably, the full length of the alley.

Q. Now, did you anywhere take the average width the city put down of this Belgian block pavement? A. No, sir, I did not measure that.

10 Q. Why didn't you indicate that on your map; you seem to have indicated sewers and catch basins and everything else; why didn't you put down the city pavement; did they tell you not to do it? A. No, sir.

Q. You cannot give any reason why you put down the sewer and catch basins and did not note the paving, on your map? A. No, sir; I did not think it was of any importance.

20 Q. Well, now, then, did you take any of these measurements with reference to the paving that the city had done there; for instance, do you know what the average width of the pavement is there? A. It is about 12 feet on an average, I think.

Q. Here at the entrance it could not be that much, could it? A. Yes, sir, it is 12 feet 2 inches there—as to the new fence; and the paving runs along the new fence.

30 Q. How far along is this fence built, as indicated by your map, with the narrow boards? A. About 100 feet.

Q. Are you sure of that? A. Yes, sir.

Q. Not 150 feet? A. No, sir.

Q. How far is it built along with the posts and the rails—iron rails that you speak of? A. 71 feet 9 inches.

Q. So that the fence is—without considering the kind of fence—the fence built along there is 171

feet 9 inches? A. There is about 102 feet there, and the iron fence is 71 feet 9 inches.

Q. Did you notice whether or not the city had paved over this other portion in here? A. I don't think so.

Q. Now, then, this brick mill of Mr. Swinley is on the North side; did you notice who occupied this? A. It is occupied for a stable.

Q. You don't know who occupied it? A. No, sir.

Q. You have heretofore testified you do not think you had the deed of Mr. Hall as to this first 100 feet here—the corner of Washington and McPherson's Alley, on the Southeast corner—that is right, isn't it? A. I don't remember having a deed.

Q. Now, I notice by your map that this building of Mr. Swinley's, next to it, projects,—is that right? A. It projects about a foot beyond the line—

Q. Tell me whether that is a foot or whether it is not—from your scale? A. It averages about a foot.

Q. Give me the measurement towards the end of McPherson's Alley near Washington Street? A. That is about six inches there.

Q. And on the lower end, opposite Mr. Hall's big mill, what do you find? A. About 18 inches.

Q. Now, do you know whether or not, from observation, that this building extended over the city paving line? A. It stands right to the pavement line.

Q. Is it in a direct line East with the premises of Mr. Hall; you have indicated here on your map that there is a projection of this property out on the alley here; you have made a line apparently going through here (indicating)—do you see what

I mean—the black line? A. That line is 100 feet from Fair Street.

Q. And that, I understood you to say, you had the Swinley deed for? A. Yes, sir.

Q. If that indicates the Swinley deed 100 feet from Fair street, and this upper black line with the red indicates the building, then the building extends over on the alley? A. Yes, sir, but the deed says “100 feet to an alley.”

By the Court.

Q. How much would it extend over? A. From six inches to $1\frac{1}{2}$ feet.

Q. That is, Mr. Swinley's building would extend over the alley? A. Yes, sir.

Further Cross.

20 Q. And from this distance at the extreme end of this building here to Mr. Hall's fence would be how much? A. $10\frac{1}{2}$ feet.

Q. And if this $1\frac{1}{2}$ feet he had there were not extended to the building, it would be a 12 ft. alley? A. Yes, sir.

Q. Now, just show the distance from Mr. Mills' property to Mr. Hall's fence, and tell us how wide the alley is. A. 11 feet 9 inches.

30 Q. How do you make that out? A. I suppose the building is not exactly parallel with the fence.

Q. Let us see—right here at the extension of Mr. Swinley's property you say it is $10\frac{1}{2}$ feet, and this extra $1\frac{1}{2}$ feet would make it 12 feet; now, Mr. Mills is right next door, how do you get it three inches shorter than it? A. This last measurement was taken ten or fifteen feet East.

Q. Take it in the middle? A. It would be nearly 12 feet.

Q. So that practically all along here—how much further along here—the big stable of Mr. Hall—show us what that width is across? A. 12 feet 4 inches.

Q. Practically all along here you have 12 feet from the very beginning? A. Practically 12 feet.

Q. Average width of 12 feet all the way through? A. That is correct.

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By the Court.

Q. You observed the paving done by the city there; where were the manholes located in reference to the pavement? A. They were about two feet from the north side of the pavement.

Further cross.

Q. Now, did you observe Mr. Swinley's buildings very closely while you were there,—this building referred to is this brick stable? A. Not any more than any of the other buildings.

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Q. Did you notice whether or not there were leaders coming off of the building and extending out into the alley, projecting out some distance into the alley from the building? A. No, sir.

Q. Did you notice there was a manure pit there? A. I think I do remember; I am not certain, though, as to that exact location.

Q. Don't you know that just about near where this basin is, there is a manure pit, extending half-way across the alley, built right in there? A. I don't remember that.

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Q. Do you know whether or not in this lower stable there is a manure pit extending out over the alley? A. I think there is one extending beyond the line of his building—

Q. Right out into the alley, isn't there?

A. I think there is.

Q. Now, I am indicating in the building, the building with the brick stable on the North side—not the one about which Mr. Swinley is complaining—you remember you say there is a manure pit there? A. Yes, sir, I think there is.

Q. But you do not recall any down at this stable? A. No, sir.

10 Q. You do not remember? A. I cannot recall it.

Q. You say there are two manholes and two catch basins there? A. Yes, sir.

Q. How large a manhole is there—have you any idea? A. The diameter is about two feet, that is, the cover.

Q. How large a catch basin? A. The basin is two feet by three feet.

20 Q. Did you make any close observation of the properties around there to determine whether or not a brook ever flowed around that section or not—or any walls indicated it? A. No, sir, I did not.

Q. This alley is what we call a blind alley, isn't it? A. Yes, sir.

30 Q. And did you have any of the measurements for these properties owned by Mr. Doremus and Mr. Boyle and others, when you made this survey, or did you just take it from the building and fences, as you have described? A. As the building stood.

Q. So that really, when you made this map, all that you had was some data that was furnished you by the solicitors for the complainant, and you took your instruments and went down there with the helper and measured this according to the buildings and fences? A. That is right.

Q. Do you know whether or not this manhole that you speak of was—I mean the manhole that

you said was about 2 feet from the fence on the north side of the alley, on Mr. Hall's property; do you know whether or not that was an old manhole or a new manhole? A. There are four manholes in that sewer, and they had the appearance of being about the same age, as far as I know.

Q. You don't know when it was put there? A. The manhole?

Q. Yes. A. Possibly 18 years ago, when the sewer was built.

Q. Do you remember the building of that sewer? A. Yes, sir.

Q. Was your father city engineer at that time? A. Yes, sir.

Q. And you had to do with it personally? A. No, sir, I was just an apprentice boy then.

Re-direct examination by Mr. Hudson.

Q. Have you any knowledge about the pavement that has been spoken of, as to who put that pavement down? A. I think it was the city.

Q. But you have no knowledge concerning the paving, have you? A. As to who put it down?

Q. Yes. A. No, I could not say that I have—absolutely.

Q. You have no knowledge concerning the width—why it was made 12 feet? A. No, sir, I have not.

Q. In telling the time that you made this map, you refer to 1903, don't you? A. That is when the first survey was made; that survey was made for Mr. Hall.

Q. And at that time you got your information concerning Hall's property, from him, didn't you? A. Yes, sir, I think I must have done so.

Q. Now, this property of Swinley's, at 27 and 29 Fair street, when you gave the distances along

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the westerly and easterly side, did you give the distance of the property or of the building? A. From Fair street do you mean?

Q. Yes, from Fair street extending towards the alley, north? A. No, sir.

Q. The property line is different from the line indicated by the building? A. It is, yes, sir.

10 Q. The fence erected by Mr. Hall has an offset at the Washington street end, hasn't it? A. There is a slight angle there.

Q. If that fence was continued straight, what would be the width of the alley at Washington street—produced to Washington street? A. About 12 feet 3 inches.

Q. (*By the Court*) That would be the width of the alley? A. Yes, sir.

20 Q. Do you say the manhole is inside the fence, between the line of the property and the fence? A. (No answer.)

Q. There is one catch basin within the fence line? A. Yes, sir, there is.

Q. And the catch basin which is within the fence line was directly opposite the catch basin on the alley? A. Yes, sir, it is.

Q. Point to me the eastern end of the fence line. A. Right there (indicating).

Q. In the rear of Mr. Hall's property? A. He goes a little beyond that.

30 Q. Whose property? A. It is in front of Mr. Hall's property, but his easterly line is a little on that.

HAY OWER—DIRECT

MR. HAY OWER, sworn in behalf of the complainant, testified as follows:

Direct examination by Mr. Hudson.

Q. Where do you live? A. 85 Bridge street.

Q. How long have you lived there? A. I guess about three and a half years.

Q. Where did you live previously? A. 25 Fair street. 10

Q. How long did you live at 25 Fair street? A. About 40 years.

Q. Where did you live before you lived at 25 Fair street? A. I lived with my brother over the river—the number I don't know.

Q. How old are you? A. 82.

Q. Do you own the property in which you live on Bridge street? A. Yes, sir.

Q. Did you own the property in which you lived at 25 Fair street? A. Yes, sir. 20

Q. Did you own any other property near McPherson's alley, or were you interested in any property near it—did you own any property near McPherson's alley, or were you interested in any property near McPherson's alley? A. None but my own lot, 25 Fair street; the other was my brother's.

Q. Which property was your brother's? A. Well, he had some lots which ran from Fair street down to the alley. 30

Q. It ran along Washington street, didn't it? A. Yes, sir.

Q. So it would be the southerly corner of the alley, and the easterly side of Washington street? A. Yes, sir.

Q. What did you have to do with that property? A. When he died Mr. Pollock and myself were the executors.

Q. You are an executor of your brother? A. Yes, sir.

Q. What was his name? A. Peter.

Q. And who was the other executor? A. My sister-in-law, Peter's wife, myself and George W. Pollock.

10 Q. When did your brother Peter die? A. Well, I don't remember.

Q. How long have you known this property which he owned at Washington street, McPherson's alley? A. I don't remember that either.

Q. Have you known it since you first lived at 25 Fair street? A. Yes, sir.

Q. And before that? A. And before that.

Q. And how much longer do you think before that, that you lived at 25 Fair street? A. I could not say.

20 Q. What is your first recollection of the alley? A. My first recollection of the alley was, that there was no—the alley was not built up on the northerly side at all; there was a brook ran through there.

Q. On the northerly side? A. Yes, sir.

Q. That is the side toward Hamilton avenue? A. Yes, sir.

Q. Where did that brook run? A. It ran down to the river.

30 Q. But where did it run with reference to the alley? A. It ran to a property of Mr. Kean, the carpenter, and across Hamilton avenue down to the river.

Q. But where did it run with regard to the alley itself? A. It ran alongside of the alley.

Q. Along which side of the alley? A. The north side.

Q. And how close to the alley as it now is, would that brook be? A. I always thought that that

was the width of the alley, to that brook.

Q. How many years ago was that—can you tell about how many years ago it was that that brook was there? A. The brook was there long before I knew anything about it.

Q. When do you last remember of the brook?

A. I could not say.

Q. Was the brook there when you bought your property at 25 Fair street? A. Yes, sir, it was there then. 10

Q. Do you remember the building which was on the north side of the alley at Washington street? A. Yes, sir.

Q. How long a time can you remember that building? A. Oh, that must be over 40 years ago.

Q. Was that building there at the time you remember the brook? A. Yes, sir.

Q. And where did the brook run with reference to that building? A. It run right under the building. 20

Q. Is that building in the same place now that it was when the brook ran under it? A. Yes, sir.

Q. And this building on the southerly side of the alley, formerly owned by your brother, is that in the same place that it was when you first remember it? A. No, sir, that building was on the corner of Fair street and Washington, and my brother moved it down to the foot of the yard.

Q. How long ago is it since he moved it? A. I guess it must be over 30 years ago. 30

Q. And has it remained in the same place ever since? A. Yes, sir.

Q. Now, the brook ran through the house at the corner? A. Yes, sir.

Q. And did it—can you indicate upon the map the property which was Kean's? A. No, sir, I could not exactly say; I think it was about, maybe,

100 or 150 feet from Bridge street.

Q. And at that point the brook turned off and ran towards the river? A. Yes, sir, turned over and went across Hamilton avenue.

Q. Was there any difference in grade of that alley from Washington street to its end? A. Yes, sir.

10 Q. And what was that difference? A. That difference must have been all of two feet; it was filled in, because, when I built my shop there, I was a step up, and now it is more than a step down.

Q. Was there any difference in the grade of Washington street and the far end of the alley? A. I don't think there was any grade.

20 Q. What was the alley there for when you first remembered it? A. Well, there was one or two stables on it; there was nothing on the north side at all.

Q. Was it used for any other purpose besides stabling? A. No, sir, I don't think it was.

Q. Do you know which of the properties on the south side were used for stabling? A. No, sir; I don't think there was a stable on the north side until they got away up to within about 100 feet of Bridge street.

30 Q. That was beyond where the brook turned off, was it? A. Just about where it turned off.

Q. But I ask you if you know which buildings on the south side of the alley were used as stables? A. No, sir, I don't think there were any.

Q. On the south side of the alley—on the Fair street side of the alley? A. I don't think there was any.

Q. Can you recall when any buildings were first put along the north side of the alley? A. There was that house on the corner, and then there was no other house until you came to Kean's.

Q. What did Kean have on his lot? A. I don't remember.

Q. Which is the first building that you can recall on the north side of the alley? A. Well, that house on the corner.

Q. Well, after that? A. Then, Mr. Goetschins moved his old school house on the alley and made a stable of it.

Q. And where did he place that school house with reference to the brook? A. Well, it was close to the brook.

Q. Did it extend over the brook? A. No, sir.

Q. Where was the next building that you recall? A. I cannot remember.

Q. Do you remember Mr. Terton having had a stable on the alley? A. He had a stable on the end of the alley.

Q. And his stable was located where Mr. Hall now owns property running through from Fair street to the alley? A. I think it was located on the south side of the alley.

Q. Do you remember for what purpose Mr. Terton made use of the alley, if any? A. He had it for a stable, I think; he did have it for a stable.

Q. And what business did Mr. Terton carry on? A. He had horses and worked for the gas company.

Q. Did he bring his wagon in and out through that alleyway to his stable? A. Yes, sir.

Q. Have you had occasion to pass through the alley in all those years, frequently? A. To go into my shop.

Q. Where was your shop? A. Adjoining my brother's, and right next to Mr. Osborne's.

Q. Your shop would be at the bottom of 25 Fair street? A. Yes, sir.

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Q. And what business did you carry on there?
A. Tinsmith.

Q. And you would go in and out from that shop almost every day, then? A. Yes, sir.

Q. And you saw the alley, of course? A. Yes, sir.

10 Q. What have you to say as to the width of the alley; whether it is less now than it was before,—or whether it is greater? A. I never knew how wide the alley was.

Q. What do you say as to whether the buildings were ever any closer together than they are; how lately have you been in that alley? A. I have not been in that alley for two months.

Q. Do you see any change in the width now to what it was during all the years you have known it? A. Well, there is a fence put up there.

20 Q. Aside from that fence, do you see any change in the width of the alley? A. Of course, the alley is a good deal narrower than it was.

Q. Narrower than it has been in all the years that you have known it? A. Yes, sir.

Q. Caused by the fence? A. Yes, sir.

Q. And if the fence were removed, would the width then be as it has been all the time that you have known it? A. No, sir; there has been some buildings built over the alley.

30 Q. And what buildings are they? A. Well, I think Mr. Swinley's building is built over, and that is all I can remember.

Q. Which building of Mr. Swinley do you refer to? A. Way up at the upper end of the alley.

Q. And that is the only change that you can remember? A. Yes, sir.

Q. That is Mr. Swinley's building on the lot which runs through to Hamilton avenue? A. Yes, sir.

Mr. Hudson.—(Indicating that by R-1375.)

Q. Within your recollection of the alley, what have you to say concerning its width at the end towards Bridge street? A. The stable was built over into the alley.

Q. You mean Mr. Swinley's stable? A. Yes, sir.

Q. All the time that you have remembered it, was it as wide on the Bridge street end as it was at the other end? A. I think it was.

Q. You saw people using this alley? A. Yes, sir.

Q. In all those years? A. Yes, sir.

Q. And who would use it; who did use it? A. Mr. Terton used it, and I don't know—well, there were other stables built, and they used it.

Q. Did feed wagons and coal wagons come in there? A. I don't know that any coal wagons came in, but feed wagons came in.

Q. Did you have things brought into your place of business? A. Yes, sir.

Q. There was general use made of the alley? A. Yes, sir.

Q. By everybody? A. Yes, sir.

Cross-examination by Mr. Dumont.

Q. I understood you to say you never knew how wide the alley was? A. That is right.

Q. And this brook that you speak of, ran under this frame house on the north end? A. Well, on the north end I took that to be the width of the alley.

Q. I am speaking about the brook; the brook that you speak of ran under this frame house? A. Yes, sir.

Q. And on down about 100 feet or so before it turned? A. Yes, sir.

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Q. Was there any wall there by the brook—a sort of a dry wall? A. Yes, sir, the brook was walled in.

Q. Where was it on the alley that you did business—here on your brother's property—the south side? A. No, sir, it was on my own property; my brother owned the two lots on the west side, and my lot came the next.

Q. I understood you to say, that since you have been down there within the last two months, the only change you noticed is this fence that Mr. Hall put up, and this stable that Mr. Swinley has erected out here on the alley? A. Yes, sir.

Q. Referring to the stable on the north side of the alley belonging to Mr. Swinley? A. Yes, sir.

Q. Did you ever know Mr. McPherson, after whom the alley was named? A. Yes, sir.

Q. Do you remember when the alley was first there; do you remember the existence of it the first time; was it there before you knew it? A. It was.

Q. Do you remember when Mr. McPherson died? A. I do not.

Q. Do you ever remember whether Mr. McPherson closed up the alley? A. I don't remember whether I remember that or not; I know he did try to close it up and Mr. Terton knocked it down.

Q. But Mr. McPherson, in his lifetime, you have heard, attempted to close the alley? A. Yes, sir.

Q. Do you know where, on the alley, Mr. McPherson owned any property? A. He claimed to own all the property, I understood, on Hamilton avenue.

Q. On Hamilton avenue? A. Yes, sir.

Q. That is all of the property on the north side of this alley? A. Yes, sir.

Q. Where Mr. Hall now owns? A. Yes, sir.

Q. All in there? A. Yes, sir.

HAY OWER—CROSS

ALBERT DOREMUS—DIRECT

Q. Do you remember when that brook was closed up and built over? A. I do not.

Q. Mr. Ower, this frame house here, was it ever used or operated by people going round in here; wasn't there a saloon there (indicating)? A. Yes, sir.

Q. And they used this on Sundays to go round the back way? A. I suppose they did. 10

Q. You never saw that? A. No, sir.

Q. Of course, you did not go yourself? A. No, sir.

ALBERT DOREMUS, sworn in behalf of the complainant, testified as follows:

Direct examination by Mr. Hudson.

Q. Where do you live? A. 199 Ellison street. 20

Q. How long have you lived there? A. I have lived there eleven years.

Q. Prior to that, where did you live? A. I lived over at Benson street for five years.

Q. Prior to living there, where did you live? A. Fair street, at No. 45.

Q. How old are you? A. I am 73 years of age the 29th of this month.

Q. Your property at 45 Fair street abuts on this alley? A. It belonged to my father. 30

Q. It abutted on this alley? A. Yes, sir.

Q. How long did you live at 45 Fair street? A. Somewhere round 58 years.

Q. What is your first recollection of the alley? A. I can remember it as long as I can remember anything; there was always an alley as long as I can remember.

Q. And what use was made of the alley? A. My father used to get his coal in the alley.

Q. What use was made by other people of the alley? A. Mr. Terton did carting—he used to get in that way with his teams.

Q. Did anyone else make use of the alley? A. Different ones stabled on the alley; Dr. Van Riper stabled there.

10 Q. And was use made of the alley by persons who had no stables there? A. There were some stables there that were hired there by outsiders, different parties.

Q. And feed and coal and such articles were brought in? A. Yes, sir; they were carted through.

20 Q. Do you know about the location of the house on the southwest corner of the alley in Washington street? A. No, sir, I don't know that I do; the building stood there as long as I can remember; that old building.

Q. The one on the south corner? A. The one on the left-hand side as you enter the alley.

Q. That has been there as long as you can remember? A. Yes, sir.

Q. Do you remember the brook? A. Yes, sir.

30 Q. And what was the course of the brook, as you recall it? A. It ran under through Brown's tannery on Washington street; that was across the street from the entrance of this alley—across Washington street.

Q. Then where did the brook run? A. It ran down Bridge in the rear of our lot as far as the alley ran, and run right down this side of Robinson's church.

Q. You mean west of Robinson's church? A. Yes, sir, and through to the river.

Q. What was its course after it passed through this little house on the north side of the alley; how did it travel then? A. It ran down as far as

the church on Hamilton avenue and emptied into the river.

Q. It ran down what—did it run along the alley, do you mean? A. Yes, sir; there was a brick wall on each side.

Q. Where was the brick wall? A. Right on the other side of the alleyway.

Q. And that brick wall confined this little brook that you speak of? A. Yes, sir. 10

Q. What buildings, if any, do you remember on that north side of the alley? A. They were mostly all stables along that side.

Q. Mr. Doremus, could you look at this map and show us just where this brook turned from the alley? A. Where is Mr. King's property?

Q. There is your property—J. T. Doremus—here is No. 45; show where the brook ran with reference to your property? A. It ran up here (indicating). 20

Q. Show where the brook ran; start at the corner and run it right along; there is Washington street and there is the alleyway; now, trace the brook along the alley as well as you can to the point where you say it ran up. A. About here (pointing to property marked "Rachel Benedict" on the north side of the alley; it is now part of R. Swinley's property).

Q. Tell me about the barns. A. There are different barns there; of course, I could not tell you about them. 30

Q. Now, what barns do you remember as being on the same side of the alley with the brook? A. The old school-house was used for a barn.

Q. Where was that located with reference to the brook? A. Somewhere in the rear of Mr. Swinley's property.

Q. Did that extend over the brook? A. I think it was right over the brook.

Q. You think it was? A. Yes, sir.

Q. And on the other side of the alley you recall Mr. Terton's? A. Yes, sir.

Q. Anyone else's? A. And Dr. Van Riper's, he had a barn there.

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Cross-examination by Mr. Dumont.

Q. You lived at 45 Fair street? A. Yes, sir.

Q. It is now indicated on the south side of the map as being the property of J. T. Doremus? A. Yes, sir.

Q. You say this brook started at Brown's tannery, which was opposite this frame house on the north side of McPherson's alley and Washington street? A. Yes, sir.

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Q. And did it pursue any regular course; did it go along in a straight line? A. It turned; it ran straight for quite a ways, and then it turned, as I said, at Robinson's church on Hamilton avenue.

Q. That is the gentleman they used to refer to as "Dominie Robinson?" A. Yes, sir.

Q. You say there was a brick wall on each side of the brook? A. Yes, sir.

Q. Were there any buildings across this brick wall? A. After awhile there were.

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Q. And what has become of the brook? A. It has been built up, as far as I know.

Q. Then it has been built up around that section? A. Yes, sir.

Q. How many years all together has it been since it has been filled up, to your knowledge? A. I could not tell you exactly.

Q. Would you say 20 years? A. It is longer than that.

Q. Would you say 50 years? A. It is 35 or 40 years.

Q. And up to that time the brook ran through there in the way that you state? A. Yes, sir.

Q. And it became filled up and was built over; is that right? A. Yes, sir.

Q. Did this alley seem to have any particular boundaries when you lived along there? A. Not that I know of. 10

Q. Simply people built in there, apparently, almost any way? A. It was all open on Fair Street from 45 to 29, for a number of years.

Q. There used to be what they called the Old Goose pasture? A. That was on Godwin Street.

Q. The brook finally got over into that direction, did it? A. Yes, sir, and emptied into the river.

Q. At the time you lived there were there any buildings, so far as you know, on the North side of the street from this house on the corner of McPherson Alley and Washington Street? A. No, sir, there was only one building there for a long time. 20

Q. The alley has been a blind alley for a long time, hasn't it? A. Yes, sir, it never ran through to Bridge Street.

Q. Do you remember Mr. McPherson? A. I do.

Q. Where did he own? A. I don't know whether he owned the property or not; he used to use it for stone; he had stone carted there. 30

Q. Where would he put this stone? A. Right in the vacant lot.

Q. You mean the property now that Mr. Hall has? A. Yes, sir.

Q. Put it all over that? A. Well, off towards Washington Street.

Q. There was a saloon here by this frame house? A. Yes, sir.

Q. Was this used as a path here on the South side of the frame house on the corner? A. Yes, sir.

Q. People used to go round there and use that as an alleyway, did they? A. Yes, sir.

10 Q. Do you remember Mrs. Van Winkle, who used to live there? A. Yes, sir, she owned that property.

Q. How did she get into her property? A. She would go in there and she had an entrance also on Washington Street.

Q. But the rear entrance to her property was this way? A. I don't know.

Q. Do you remember seeing this used—that alleyway? A. Yes, sir.

20 Q. You remember it as an alleyway in there? A. My father used to use it.

Q. Have you seen this alley lately? A. No, sir, I have not been in it for some time.

Q. Would it be impossible to drive in there now, do you know? A. I don't know; of course, it would not be as easy to get in now as it was before Mr. Hall put up that fence.

Q. Would you say it was more than six feet? A. I could not say.

30 Q. Would you say it would be impossible to drive in there at this width Mr. Ferguson gave, at 12 feet 4 inches, with a wagon? A. I should think you could get in there very easily.

Q. And get out there easily too? A. Yes, sir.

Q. Did you ever notice the city paved in that alley? A. No, sir.

Re-direct Examination by Mr. Hudson:

Q. When do you say you saw the alley last? A. I pass there often, but I have not been in it for some time.

Q. What do you say concerning its present width and the width as you have always known it?

A. It is pretty much the same width as it was before that fence was put up, as far as I can tell; there might have been little variations. 10

Q. You have been asked about the property of Mrs. Van Winkle; do you remember a fence extending from the Van Winkle property along the alley? A. Yes, sir, there used to be a fence along there.

Q. How was that fence in regard to Mrs. Van Winkle's house? A. It ran right in line with the house.

Q. How long a fence was that? A. The lots, of course, were not very cheap. 20

Q. How long have you known that fence to be there? A. About 60 years—probably over.

Q. How did Mr. McPherson get into his lot, from Hamilton Avenue? A. There was no buildings there.

Q. Was the brook covered over at the time he used the lot? A. I don't think so.

Q. Do you remember the condition—how he got into his lot? A. No, sir, I do not. 30

Re-cross Examination by Mr. Dumont.

Q. Do you remember how long it has been since Mrs. Van Winkle lived there? A. Over 20 years.

Q. She sold to Mrs. Van Houten; do you remember when she was there? A. No, sir; I know the property belonged to Mrs. Van Winkle.

Q. That has been over 20 years ago? A. Yes, sir.

PETER DOREMUS—DIRECT

Q. Would you say it was 30 years? A. Yes, sir; probably 40 years.

Q. When she lived there, her fence was taken down, wasn't it? A. I could not say.

Q. It is not there now; do you remember when it was taken down? A. I have no recollection.

10

MR. PETER DOREMUS, sworn in behalf of the Complainant, testified as follows:

Direct Examination by Mr. Hudson.

Q. How old are you? A. 84 years of age.

Q. And how long have you lived in the City of Paterson? A. Since 1844.

Q. Did you, at one time, live in the vicinity of this McPherson house? A. No, sir; I never lived
20 near it—that is, not adjoining it.

Q. Where did you live formerly? A. I lived on the corner of Bridge Street and Fair street.

Q. And for how long a time did you live there? A. About 30 years.

Q. How long is it since you moved from there? A. Well, it is 15 years.

Q. And during the time that you lived at Bridge and Fair streets, did you know this McPherson Alley? A. Oh, yes.

Q. Did you ever stable in the alley? A. No, sir.
30

Q. Did you know who did stable in that alley? A. Well, no; I don't know really who did; there were a number of them, I know.

Q. You were formerly in the grocery business? A. Yes, sir.

Q. Did you ever deliver goods in that alley? A. In the alley?

Q. Yes? A. Not that I am aware of.

Q. Do you know what use was made of the al-

ley? A. It was used for general purposes,—driving in.

Q. Have you seen that use made of it? A. Oh, yes.

Q. During all the 30 years you lived at Fair street? A. Yes, sir; I have known it for 50 years.

Q. During all that 50 years was general use made of it? A. It was used for general use for everyone to drive in that had any business in there. 10

Q. Do you recall the location of the buildings at the entrance of the alley—at the Washington street entrance? A. I know there are buildings there.

Q. Have you known of any change in those buildings? A. Not that I am aware of.

Q. How lately have you seen the alley? A. Oh, I don't know; I have not been down there in probably eight or ten years. 20

Q. And how was its width when you last saw the alley? A. It appeared to be a uniform width.

Q. How did its width compare with the width you had known it for 50 years? A. About the same condition.

Q. There had not been any appreciable change in the width during all the time you have known it? A. No, sir; not from that time,—only what I have been told, that there have been changes made in it; that is all. 30

Q. And what changes were you told about?

Mr. Dumont.—I object to that.

Q. When you first knew the alley, how far did it run in from Washington street? A. It ran up as far as Society Line; there were farm land lines.

Q. Do you recall the brook which has been mentioned? A. Yes, sir.

Q. Where did that run, with reference to the alley? A. It crossed from the Warren Brown Tannery on the other side, across the street.

10 Q. That is across Washington street? A. Yes, sir; crossed Washington street into this alley, and then from the alley it turned and crossed Division street; it was called at that time Division street; it is Hamilton avenue now.

Q. Now, give us the line of that brook in the alley, as nearly as you can? A. The brook ran along one side of the alley.

Q. On which side of the alley was that? A. I think it was on the North side.

Q. The side towards Hamilton avenue? A. Yes, sir.

20 Q. Can you indicate about the point where the brook ran off towards Hamilton avenue? A. Well, it was somewhere near the church; it crossed Division street at that time near the Methodist Church there.

Cross Examination by Mr. Dumont.

30 Q. When you say, Mr. Doremus, that this was used for general purposes, in answer to Mr. Hudson's question, do you mean that the public drove all the way through there, or that goods were just delivered in there, if anyone wanted them? A. It was not open through to Bridge street.

Q. If anyone here ordered coal or anything, it would be delivered in there? A. Yes, sir, delivered into that alley.

Q. That is what you mean by the words "general use?" A. Yes, sir; or for any other goods.

Q. To the persons who were in the alley? A. Yes, sir.

PETER DOREMUS—CROSS

GEORGE YOUNG—DIRECT

Q. But it was not used for a thoroughfare? A. It was called at that time "McPherson Alley," and there was a stone yard there at that time; this was McPherson's alley; he used it for stone.

Q. Do you remember the brook—how many years has it been since that brook has been covered and not used—35 or 40 years? A. It was taken out and put in the sewer— 10

Q. How many years back would you say that was? A. It must be 20 years or 25 years ago.

Q. And since that time have you seen the alley at all? A. Oh, I have seen it, yes, sir; I have taken no particular notice of it; I have had no interest, any more than knowing that the alley was there, and that it had been used, and I have seen it used.

20

GEORGE YOUNG, sworn in behalf of the Complainant, testified as follows:

Direct Examination by Mr. Hudson:

Q. How old are you? A. I am in my 57th year.

Q. Where do you live? A. 27 Fair Street.

Q. How long have you lived on Fair Street?

A. I was born on Fair Street, at No. 45.

Q. How long did you live at 45 Fair Street? A. Seven years. 30

Q. Where did you live then? A. On Auburn Street.

Q. How long did you live there? A. Five years.

Q. Where did you move to from there? A. 105 Straight Street.

Q. How long have you known this McPherson's Alley? A. All my life.

Q. What use was made of it during the time you

GEORGE YOUNG—DIRECT

have known it? A. For people delivering goods in there, coal and straw, and things like that.

Q. Have you ever had business in the alley?

A. Yes, sir.

Q. What was the nature of your business? A. Plumbing business, roofing, and things like that.

10 Q. Did you take materials in and out of the alley? A. Yes, sir.

Q. Where was your place of business? A. 17 Fair Street.

Q. 15 and 17 Fair street? A. Yes, sir.

Q. Do you recall the location of the buildings at the Washington Street end of the alley? A. I do.

Q. And what is their location now, compared with what they were when you first knew them?

20 A. The same, as far as I can remember. The Ower property, I remember that being moved there.

Q. Do you remember a fence extending from Van Winkle's house? A. Yes, sir.

Q. Where did that run? A. It ran on the north side of the alley, back from the end of the building about 60 or 70 feet.

Q. For how long a time can you recall that fence being there? A. As long as I can remember.

30 Q. Have you seen the alley lately? A. Yes, sir.

Q. Do you see the alley frequently? A. Most every day.

Q. And what change, if any, is there in the width of this alley? A. I do not see any difference worth speaking of, only that fence Mr. Hall put up.

Q. Is that so as to all the time that you have known the alley? A. It has about the same

lines; some buildings have been built in the rear that project a little more than they used to.

Q. As to the width of the alley, extending from Washington Street, past Hall's mill,—has there been any change in the width of the alley? A. None that I know of.

Q. Do you recall the brook? A. I do.

Q. Where was it located? A. On the northerly side of the alley. 10

Q. How did it run in reference to the house on the north side of the alley? A. It run underneath that house easterly until it turned towards Division Street.

Q. Do you know about where it turned? A. It turned, as near as I can remember, and went through the yard owned by Abraham Israel now—the garage property.

Q. That is east of Mr. Hall's mill? A. Probably 100 feet the other side of Mr. Hall's mill. 20

Q. What buildings do you recall on the north side of the alley, if any, besides the Van Vinkle house? A. On the easterly end of the alley a family lives there named Davoseney; it is owned by David Boyle now; next to that was the Doremus property.

Q. That is the south side of the alley? A. Yes, sir; next to that was the Doremus property; they kept their coal there, and then Mr. Terton had his stable there. 30

Q. What business did he have? A. Moving, and he carried pipe for the gas company and the water company.

Q. Did he have his horses and wagons in and out of that alley? A. Yes, sir, and close to that was a stable of William Eangurth, for stabling horses there; next to that came Dr. Van Riper's stable; and next to that Mr. Swinley built after

that, he built two stables there; and next to that was Mr. Ower's shed; and next to that was the corner house; Mr. Osborne had a place in there; he had his woodshed in the yard there too.

Q. What use, if any, was made of the alley by these people? A. They carted whatever goods they wanted through it.

10 Q. There was a free and general use of the alley? A. Yes, sir.

Q. For how long a time can you remember that to have been so? A. For as long as I can remember.

Q. Now, on the north side of the alley, what buildings can you remember? A. The corner house, and the next I remember was woodsheds in the rear of a man by the name of King; the property is owned by the Brown estate.

20 Q. And was the ground all vacant between the corner—A. There was nothing there except the King's.

Q. When do you first remember any buildings erected between Mrs. Van Winkle's property and the King's property? A. There was a brick house put up there; John Regner had a house there.

30 Q. Did they have buildings on the alley? A. Regner was the first man to build his stable on that side of the alley, that I remember of.

Q. This property was west of King's property? A. Mr. Regner's?

Q. Yes. A. Yes, sir, the brook ran round through what was Mr. Regner's property; that is where the garage is now.

Q. Was any use made of the alley—the north side of the alley, during the time the brook was there? A. It was all open, except that there was some stone dumped in there, but I did not know

who owned them; Mr. Langstaff had a marble yard there at one time.

By the Court:

Q. Do you remember the closing up of the brook? A. Yes, sir.

Q. How many years ago was that? A. Between 30 and 35 years ago.

10

Further direct.

Q. This brook you say, ran along one side of the alley? A. It ran on the northerly side of the alley.

Q. How wide would the alley be? A. From 18 to 20 feet.

Q. And there were buildings along the southerly side? A. Yes, sir.

Q. So that you could indicate the width of the alley there—you could indicate the line of the alley by the buildings? A. Yes, sir.

20

Q. And the northerly side of the alley was indicated by the brook? A. Yes, sir.

Q. Has there been any appreciable change in the width of that alley during the time you have known it? A. The only thing that I know is, that Mr. Regner built his stable there and Mr. Swinley built his stable there.

30

Cross-examination by Mr. Dumont:

Q. As long as the brook was there, the whole northern side here was used as a commons? A. Yes, sir.

Q. Then the brook was filled in? A. Yes, sir.

Q. Now, for more than 20 years last past the Northern boundary of the alley has not been

where the brook was, has it? A. But there are buildings on where the brook stood.

Q. Then it is narrower, isn't it? A. No, sir.

Q. It is not? A. No, sir.

Q. Let us see—the brook, you say, indicated the northern boundary of the alley, and on that was the commons? A. Yes, sir.

10 Q. And, as far as you know, the boundary of the alley was as wide as from the southern line to the brook? A. The brook ran directly east.

Q. Now, after the brook was filled in, or after it was fixed so that it ran into the city sewer, then people built all over this brook, didn't they? A. Yes, sir.

Q. So that that has been more than twenty years ago? A. Yes, sir.

20 Q. So that for more than twenty years it has been built over there considerably? A. Yes, sir.

Q. When you say these people here on the south side of the alley had their woodsheds, you do not mean that they did a coal and wood business? A. No, sir.

Q. Everybody in there is doing it yet—there is free use of the alley? A. Anyone can drive in and out that wants to.

30 Q. Mr. Swinley's stable on the north side is occupied now by J. Y. Demarest, the butter and egg man. A. Sam Demarest.

Q. He goes in and out, doesn't he? A. Yes, sir.

Q. Dave Boyle had buildings there for a while? A. Yes, sir, he has them there yet.

Q. Mr. Doremus is there yet? A. Yes, sir.

Q. He can go in and out? A. Yes, sir.

Q. Then there has not been any change in regard to their going in and out; now, how wide is the alley? A. I don't know.

Q. Have you seen the city paving there? A. Yes, sir.

Q. How wide is that? A. I don't know.

Q. The city only went 12 feet, didn't it? A. I never measured it.

Q. It is not the width you always knew the alley to be, is it? A. I think the alley went to the brook.

10

Q. And after the brook was built over, how do you reconcile that view with the thought that it went to the brook; what do you think? A. I don't think anything at all about it.

Q. Mr. Mills uses his place, doesn't he? A. He does not use the back entrance at all.

Q. Mr. Hall uses his, doesn't he? A. Yes, sir.

Q. He has been hauling things in and out? A. Yes, sir.

Q. Has he quit hauling them in since the fence is up? A. No, sir.

20

Q. If the lot was ten feet wide, wouldn't it be possible for him to drive his horses into the stable? A. No, sir, there is not room to turn there, not with a team of horses.

Q. A wagon is six feet wide? A. Yes, sir.

Q. If the alley was ten feet wide, do you mean you could not turn the horses into the stable? A. No, sir.

Q. Have you ever driven? A. No, sir, not in that alley.

30

Q. Suppose it was twelve feet?

Mr. Hudson.—Objected to as a conclusion.

The Court: Objection sustained.

Q. If the alley here were twelve feet wide at Mr. Swinley's place, then would there be room to turn a wagon and come in?

GEORGE YOUNG—CROSS—RE-DIRECT

Mr. Hudson.—Objected to.

Q. If the alley here were twelve feet wide by Mr. Swinley's place, then would there be room to turn a wagon and come in? A. I could not say.

Q. You have not seen them try to do it? A. No, sir.

10 Q. You have seen the wagon pass in and out of the alley? A. Yes, sir; there is room for two wagons to pass.

Re-direct Examination by Mr. Hudson:

Q. You speak of the building over this brook—do you recall how far the buildings extended—did they extend over the brook at all—beyond the brook at all; did they extend beyond the brook line? A. I could not remember.

20 Q. Has the alley, as you have known it since the brook has been taken away, has the alley been narrower than it was when the brook was there?

A. Not at the Washington Street end; it is about the same width, except for that fence.

Q. Take it where Mr. Hall's mill is; would you say it was any narrower there? A. It is about the same width.

30 Q. You have seen people make use of that alley by turning their horses and wagons around? A. Yes, sir.

Q. And driving in and out of the stables? A. Yes, sir.

Q. And wagons passing each other in the alley? A. Yes, sir.

Q. In all these years that you have known it? A. Yes, sir.

Q. That cannot be done now where this fence is? A. No, sir.

GEORGE YOUNG—RE-DIRECT

CHARLES CUTHBERT—DIRECT

Q. You have noticed the paving runs a long distance in the alley? A. It runs back to Mr. Hall's mill there, and then it is wider.

Q. How far does it extend? A. It extends up to the buildings of Mr. Hall's mill.

Q. Did you notice the width of the paving in front of a part of Mr. Hall's mill—the most easterly part of Mr. Hall's mill? A. I could not recall it. 10

MR. CHARLES CUTHBERT, sworn in behalf of the complainant, testified as follows:

Direct Examination by Mr. Hudson:

Q. How old are you? A. 53.

Q. Where are you employed? A. With Hart and Company. 20

Q. Where were you employed formerly? A. C. F. W. Meyers.

Q. Is that Dr. Myers? A. Yes, sir.

Q. What did you do for Dr. Myers? A. Took care of his horses.

Q. How long is it since you worked for Dr. Myers? A. About nine years, I guess.

Q. And where did Dr. Myers have his stable at the time he died? A. He was in Petry's stable at the time he died. 30

Q. Had he, at one time, had his stables in McPherson's alley? A. Yes, sir.

Q. For how long a time did he have his stables in McPherson's Alley? A. Well, I could not say for just how long; I was in there in 1887.

Q. And do you know the year when you went out of McPherson's Alley? A. That I don't remember.

CHARLES CUTHBERT—DIRECT

Q. How long was it before the doctor's death?

A. It was quite a few years.

Q. Where was Dr. Meyers's stables in this alley; was it where Mr. Hall's mill is? A. Up at the other end of Hall's mill.

Q. You mean the easterly end of Hall's mill?

A. Yes, sir.

10

(It is marked on the map "formerly F. W. Myers").

Q. Well, when you were stableman for Dr. Myers, how many horses did you have in there? A. Three.

Q. And what use did you make of the alley? A. Driving in and out.

20

Q. And was there any certain part of that alley that you used, or did you make use of the whole alley? A. From the stable out to Washington Street.

Q. Was there any restriction upon your use of that alley as to its width? A. No, sir.

Q. How lately have you seen the alley? A. I saw it this morning.

Q. Do you see it frequently? A. Yes, sir.

Q. How often? A. Oh, sometimes two or three times a week.

30

Q. You are now employed near this alley, are you not? A. Yes, sir.

Q. Has there been any change in the width of the alley from Washington Street to the point where your stable formerly was, in all the time that you have used it, up to the present time? A. No, sir—outside of the fence that Mr. Hall put up.

Q. Were you in the alley at the time the pavement was laid? A. No, sir.

Q. Were you there at the time the sewer was put in? A. No, sir, it was put in since I left.

Q. When you went in and out of that alley, did you confine yourself to any certain part of it, or did you go wherever you chose in the alley; did you keep to one side, or to the center, or to the other side, or did you go just where you choose? A. Just where I liked.

Q. Was there no question as to your use of the alley? A. No, sir.

Q. Did you ever drive along the northerly side of the alley? A. Yes, sir.

Q. You have driven along all parts of the alley? A. Yes, sir.

Q. During the time that you were there, was the alley open and used openly by the public? A. Yes, sir.

Q. People came in and out with all kinds of vehicles and goods? A. Yes, sir,—up above my stable—there were other stables above me.

Q. Coal wagons came in that alley? A. Yes, sir.

Q. And was it any trouble for you to drive up and turn into your stables with your rigs? A. No, sir.

Q. And you could hitch your horses inside and drive out? A. Yes, sir.

Q. Dr. Van Riper had his stable there at the time you were there? A. Yes, sir.

Q. Where was his stable? A. Right across from ours.

Q. And he could drive out and in? A. Yes, sir.

Q. And two wagons could pass one another? A. Yes, sir.

Q. In McPherson's Alley? A. Yes, sir.

Q. Can two wagons pass each other there now? A. No, sir.

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20

30

CHARLES CUTHBERT—CROSS

Q. You drive a wagon now? A. Yes, sir.

Q. Have you examined the situation up at Mr. Swinley's place, to see whether or not he can drive in with a team of horses into his building? A. I don't think he can.

Cross-examination by Mr. Dumont:

10 Q. You have not tried it, have you? A. No, sir.

Q. Then you don't know? A. By the looks of it, I would not want to try it myself.

Q. Now, that piece of property where you used to work is owned by Mr. Hall now? A. Yes, sir.

Q. And it is still 25 feet wide there, isn't it? A. Yes, sir.

Q. It has not changed a bit, has it? A. No, sir.

Q. If Mr. Hall wanted to go in here now, to drive in and out, he could do so? A. Yes, sir.

20 Q. Dr. Cornelius Van Riper could do so? A. Yes, sir.

Q. So what you have been testifying about has nothing to do with the fence, has it? A. Only down at this end.

Q. Mr. Hall still has all this open, the 50 feet? A. Yes, sir.

Q. Only this turndown below that is marked by this green line has the fence, hasn't it? A. Yes, sir.

30 Q. Where it says "formerly F. W. Myers," is beyond the line of this fence—the green line of the fence? A. Yes, sir.

Q. You have frequently seen wagons along here, haven't you—Charles Secor used to be out here, didn't he—he had a stable up here on the North side? A. Yes, sir.

Q. And his wagons used to be along here? A. Very seldom; not while I was in the alley.

Q. Didn't you ever see anything standing along here (indicating)? A. Two old wagons would stand there on Saturday night.

Q. Did you ever see a load of lumber lying along there by the mill? A. No, sir.

Q. Mr. Swinley has always taken his wagons in every night? A. Yes, sir.

Q. So, if he never let them stand out, he still does not leave them stand out, does he? A. No, sir. 10

Q. So he has the same use of the alley that he had before? A. Not to get into his stable.

Q. You are a practical driver of a large team?

A. Yes, sir.

Q. Two horse team? A. Yes, sir.

Q. How wide is the wagon—how wide is an ordinary wagon? A. I never measured it.

Q. Would you say it was more than six feet? A. Yes, sir, I think it would be more than six feet. 20

Q. A wagon swings around at the front with the wheels? A. Yes, sir.

Q. How much of a distance would you need if you were driving in here, if this was Swinley's stable here, and you were coming in the alley, and you had ten or twelve feet here; would it be impossible to drive on this side and turn around and go in the stable? A. It would be hard for twelve feet, unless you had a swinging wagon; of course, if you had a surrey, you could not swing in there. 30

Q. I am talking about a light truck wagon, or a heavy truck wagon? A. You could not swing in with two horses.

Q. Are you sure of that? A. Not the way it is there now.

Q. You have not tried it, though? A. No, sir, but I could see.

JAMES LANGSTAFF—DIRECT

JAMES LANGSTAFF, sworn in behalf of the Complainant, testified as follows:

Direct Examination by Mr. Hudson:

Q. Mr. Langstaff, how old are you? A. 64 the 7th of December.

10 Q. Did you at one time have a business at McPherson's Alley? A. It used to be a brown stone yard; I leased it from Mr. C. T. Gurnee, who bought it under a tax title.

Q. Where was that yard of yours? A. Well, it is about where Mr. Hall's mill is now, part of it; I had two lots there that run from Hamilton Avenue back to the alley.

Q. When did you first locate your marble yard? A. In the summer of 1871.

20 Q. And was that McPherson Alley then an open thoroughfare? A. Yes, sir.

Q. Was the brook, which has been spoken of, there at that time? A. Yes, sir.

Q. The brook had been taken away? A. Yes, sir.

30 Q. How long before 1871 can you recall the alley? A. From the time the boys knew it as Green Hill; we used to ride down the hill and across the brook; there used to be an old-school-house there; the first public school in my recollection was started in the Swedenborg church: and this old school-house was moved from where the present Swedenborg church is, over near what used to be the brook; the brook I cannot recollect much about any more than its being located near the old red school-house.

Q. Was the brook there at the time the school-house was there? A. The old red school-house was, and the one that Mr. Hosford was principal of—

Q. Do you remember the location of the buildings at the Washington Street end of this alley?

A. Well, I recollect the old building as you go down Washington Street from Fair, on the right hand side.

Q. Do you mean the building after you cross the alley? A. Yes, sir, that old building.

Q. Has there been any change in the location of that building within your recollection? A. Not to my recollection. 10

Q. Do you recall the building on the other side of the alley? A. I think that building on the other side of the alley was moved from the corner of Fair Street down there.

Q. And since it has been moved to the corner of the alley, has there been any change in it? A. Not that I know of.

Q. Do you use this alley frequently? A. Once in a while, not often. 20

Q. Have you seen it lately? A. I have seen it once or twice since there was a fence put up there.

Q. And during all the years since it was known as Green's Hill, has there been any change in the width of this alley? A. Well, there might be some minor changes; that is, somebody encroaching on the alley—with the exception of the fence that I speak of—

Q. There has been no such change in the width of the alley as was noticeable to you? A. No, sir, not outside of that. 30

Q. Do you recall the fence that has been spoken of in connection with the house of Mrs. Van Winkle? A. I don't know anything about that.

Q. Did you make any use of the alley when you had your stone yard there? A. Well, we used to load there and unload, and if we were hitched to a truck, we would back in.

Q. And what other use was made of this alley?

A. Nothing any more than to go in and out.

Q. And did not people other than those who owned property in there, come into the alley with coal and feed and such things? A. I suppose they did; it was in general use.

Q. It was always open? A. Yes, sir.

10 Q. There was no attempt at confining you to the use of any part of it? A. No particular part.

Q. You never knew of any such attempt? A. I never heard of any.

Q. Was there a fence along your lot at the alley side? A. Yes, sir; I got it from Mr. Gurnee who had bought the property at tax sale; I wanted to know where to put up a fence, so he came and told me to put it on the line with that old house that I spoke of, at the lower side of McPherson's Alley.

20 Q. Was there a fence running out from that house, do you recall? A. Yes, sir, it run to the next lot or barn, on a line with that.

Q. Was the next lot yours? A. No sir, I covered two lots and I ran the fence to the barn.

Q. How did the line on which your fence was built, compare with the line of the fence which ran out from the house on the north side of the alley?

30 A. Mine was right on a line with that; it was on a line with the building on the Washington Street end of the alley—back.

Q. So you continued a straight line out to that building next to you? A. Yes, sir.

Q. How long did you continue to occupy those premises? A. A little over three years.

Cross-examination by Mr. Dumont:

Q. I understood you to say you were there in

1871? A. The summer of 1871.

Q. That was the first you were there? A. Yes, sir.

Q. Then you stayed there three years? A. Yes, sir.

Q. You just tell me where, on the north side of this map, the two lots you had were located. A. Well, I should judge about—well, there is an old building stands now on the corner of Washington and Hamilton Avenue—that is the old frame house; I was the next lot to that old house—the old house on the corner. 10

Q. Then you were right in here (indicating the north side next to the frame house)? A. Yes, sir.

Q. You came through from the Hamilton Avenue side, and through to what was known as McPherson's Alley? A. Yes, sir, that was the back end of the lot. 20

Q. Did you say that you had a tax deed to that?

A. Well, Mr. Gurnee bought the property under a tax title, and he leased it to me; the property after that went into the hands of a man named Axman, known as "Blueskin."

Q. The brook was closed then while you were there? A. Yes, sir.

Q. Have you seen the property within the last twenty years? A. Yes, sir.

Q. And has it been built over since, beyond where you were? A. I could not say. 30

Q. That was the condition— A. The only thing that I know of is this fence that I speak of, that is built there.

Q. That is the fence that Mr. Hall has built since? A. Yes, sir, but there was an alley both sides on a line, all the way up.

Q. Regular line? A. Yes, sir, as near as I can judge.

Q. Here is the line; is that a regular line; here is an encroachment; here is another one? A. Well, I say there may be some minor encroachments.

Q. There was not any regular line there at all, was there? A. We so considered it in those days.

10 Q. There was a regular north line that you had here, was there? A. Yes, sir, as near as I can judge.

Q. And everybody kept up to that line, did they? A. I guess they did; I never made any inquiries.

Q. And were there any buildings at all when you were there, to the east of you, on the north side of the alley; were there any buildings there at all when you were there in 1871? A. Yes, sir, there were stables.

20 Q. There were on the South side, but I am talking about the north side, in 1871, when you occupied this tract, were there any buildings down there? A. The buildings which you are speaking of, the corner that abuts on the alley from Fair street down—there were those buildings; that was to the right as you went in from Washington street.

30 Q. I am asking you, when you occupied this strip on the north side here that you said you occupied, were there any buildings to the east of you? A. Yes, sir.

Q. How many? A. Regner had a house there, and I don't know who owned that property next to where I was.

Q. Were you here all morning? A. Yes, sir.

Q. Did you hear one of the witnesses testify that Regner built over the creek? A. No, sir.

Q. Was the little brook there when you were there? A. No, sir, it was all gone.

ROBERT OWENS—DIRECT

Q. You really do not recollect anything at all about it, except as you have testified? A. That is all.

ROBERT OWENS, sworn in behalf of the Complainant, testified as follows:

Direct Examination by Mr. Hudson:

10

Q. How old are you? A. I shall be 66 in January.

Q. What do you work at? A. Nothing, just now.

Q. What is your business? A. Horseman.

Q. Did you ever work in this McPherson Alley? A. Yes, sir.

Q. When did you first work in McPherson's Alley? A. I guess it was around about thirty 20 years ago.

Q. For whom did you work then? A. For A. L. Swartz.

Q. And what did you do for Mr. Swartz? A. Teaming.

Q. Where did he have his place on the alley? A. Right where Mr. Hall's mill is now—his stable was there.

Q. Which part of the mill? A. The first part.

Q. Nearest Washington Street? A. Yes, sir. 30

Q. And Swartz had his stables there? A. Yes, sir.

Q. How long did you work for Mr. Swartz? A. Twelve years.

Q. Always had that place? A. Not always there—when Mr. Hall bought the stable we had to get out.

Q. Did you work for Mr. Swartz up to the time Mr. Hall bought the stables? A. Yes, sir.

Q. What kind of building was it that Mr. Swartz occupied for a stable? A. A brick building.

Q. Is that building still there? A. Yes, sir.

Q. You say the building that Swartz occupied as a stable is still there? A. Yes, sir, it is still there, I guess; it was not torn down.

10 Q. Is it still occupied as a stable? A. No, sir, it has become part of the mill now, I guess.

Q. What use was made of the alley by you? A. We had our carting done there; we carted hay and everything all through there; we used to get bottles and things there.

Q. What use was made of the alley, to your knowledge, by others? A. They carted wood and coal and everything up the alley.

20 Q. Do you know the location of any other buildings on that alley besides Swartz', particularly on the north side of the alley? A. Yes, sir.

Q. Will you give the location of those buildings, starting at Washington Street? A. There was Mr. Myers, Mangle and Kingle's carpenter shop.

Q. And where was that located? A. That was located right across from the stable, Mr. Langley's stable, on the east side.

30 Q. This carpenter shop that you speak of, was on the North side of the alley, and it was further in the alley than your stable? A. This side of Meyers' stable.

Q. Between Swartz' stable and Myers'? A. This side of Myers'.

Q. What other buildings were there on that side of the alley? A. Z. M. Ward was on that side.

Q. Where was his stable? A. On this end of the alley, right across from Osburn's place.

Q. That was nearer Washington Street than

your stable, was it? A. Yes, sir, there is a vacant lot there now.

Q. How long ago is it since Z. M. Ward had his stable on the alley? A. I guess it is about thirty years ago.

Q. How long is it since that carpenter shop was there? A. That is 40 years ago.

Q. What was the width of the alley in front of the stable of Ward? A. Well, the width of it, I could not say as to that; it was from Mrs. Van Winkle's property to the other house towards us. 10

Q. So you would judge the width in front of Ward's property to be the same as at the Washington street end of the alley? A. It was just as I say it was from Moore's to Van Winkle's.

Q. What was the width of the alley in front of the carpenter shop? A. From Van Winkle's building, the last one up the alley, to Mr. Achell's place. 20

Q. You mean there was a straight line from Mrs. Van Winkle's property to Achell's? A. Yes, sir.

Q. Can you point out here the Achell property; do you know now who owns it? A. No, sir, I don't know who owns it now.

Q. Can you locate it with reference to Mr. Hall's mill? A. It is up next to Regner's place.

Q. And can you locate Regner's place with reference to Hall's mill? A. It was further east. 30

Q. About how much further east? A. I guess it is about two stables above.

Q. When you were working for Swartz, did you drive a team? A. Yes, sir.

Q. Could you drive from the alley into your stable building? A. Yes, sir.

Q. Could you hitch your team in the stable and drive out into the alley? A. Yes, sir.

Q. Was that also true—could that be done up where the carpenter shop was? A. No, sir.

Q. Where the carpenter shop was located, was it possible to drive with a team into the building?

A. They could drive in with a team.

Q. The alley was wide enough at that point to drive in with a team? A. Yes, sir.

10 Q. Where Mr. Swartz has his bottling works on Fair Street, has there been any change in the width of the alley at that point, to your recollection? A. No change, except in that fence along there, and that never was there when I was there.

Q. When you used the alley was there any restriction on you as to what part of it you should use? A. No, sir.

Q. Did you drive along the north side of that alley at times? A. On both sides.

20 Q. Did anyone ever question your right to drive on any side of that alley? A. No, sir.

Cross-examination by Mr. Dumont:

Q. Do you recollect just about where, on this map that is in evidence, that Swartz' stable stood, can you show us that? A. (Witness examines the map) (Indicating the north side of the map at about tract marked "formerly Roas Klenert, north side").

30 Q. And that is where you worked on that side for Mr. Swartz? A. Yes, sir.

Q. Swartz sold to Klenert? A. He hired the stable from Klenert.

Q. And were there people at that time to the east of that stable where you were working? A. Yes, sir, there were over on the east side.

Q. How many buildings were there, do you recollect? A. Well, there was Mr. Swinley there, and a bottling establishment, and Dr. Van Riper

and Mr. Terton; that was all on that side at that time.

Q. Have you been in this alley lately? A. Yes, sir.

Q. How long ago? A. Oh, about a week ago.

Q. Did you observe wagons coming in and out—can wagons come in and out now; is it wide enough for a wagon to drive in? A. It is wide enough for one wagon to drive in. 10

Q. And if the wagon can drive in, why couldn't it drive out? A. After it turned around, it could, but one could not pass another.

Q. I will ask you about one wagon now; it is wide enough for a wagon to drive in, and it is wide enough for it to drive out? A. Yes, sir.

Q. Now, have you noticed the paving on this street? A. Yes, sir; I saw there was Belgian block put there; that was in there when I was there. 20

Q. Are you sure of that? A. Yes, sir.

Q. You are very positive that the city paved that thirty years ago? A. Dr. Van Riper had the front of his stable paved.

Q. I am not talking about particular spots; I am talking about the city paving? A. No, sir, that was not there.

Q. It is there now? A. Yes, sir.

Q. It runs all the way up to the Hall mill, 20 feet wide here, up here, for instance, at the beginning of the alley, how wide is it? A. I don't know. 30

Q. Do you know how wide it is at Mr. Hall's mill? A. I don't know how wide the paving is.

Q. You don't recollect having seen it? A. No, sir.

Q. You know it is paved there? A. Yes, sir.

Q. Now, these stables here on the north side of

Robert Swinley's are tenanted now, are they not?

A. Yes, sir.

Q. They are occupied? A. I guess they are.

Q. You don't know? A. I don't know, but I think so.

Q. Is Mr. Doremus's occupied on the south side? A. I don't know of any Doremus.

10 Q. Now, what did you go there for about two weeks ago—just to look at this fence? A. No, sir, I went up with a friend of mine.

Q. Did you observe everything carefully in the alley—did you look at it closely? A. No, sir.

Q. How far down did you say that fence ran? A. It ran down to Mr. Swinley's other place.

Q. Way down to Mr. Swinley's other place? A. Yes, sir.

Q. Sure of that? A. Yes, sir.

20 Q. Now, Mr. Swinley's other place is here below the property that Dr. Myers used to have? A. Yes, sir.

Q. And you are sure this fence runs clean on down to Mr. Swinley's other place? A. Yes, sir, the rail fence does, but the board fence does not.

Q. Were you there when Mr. Swinley's stable on the north side was built? A. Yes, sir, I lived right on the corner there.

30 Q. Where did Mr. Regner have his place? A. On the north side.

Q. Was that there, Mr. Swinley's present brick stable, on the north side? A. Yes, sir.

Q. And at the end of the alley was it? A. It went up a little further than that.

Q. Who used to keep the coal yard there? A. There was no coal yard there.

Q. Then the only use that was made in the way of hauling in coal and wood was for people who

wanted it in the rear of their premises? A. Yes, sir.

Q. They can get coal and wood now, cannot they? A. They cannot get there all the way—they don't live up there now where they used to live; it is built over.

Q. What is built over? A. Smith's place.

Q. I ask you would it be possible for anyone who owned property on the north or south side now, to have coal or wood or anything else that they wanted in the way of necessities, delivered in the back way? A. That saves dirtying up the front. 10

Q. Wouldn't it be possible for Mr. Swinley to get hay on the north side of his stable? A. No, sir, a good load of hay would not go through there.

Q. It would not go through the alley at all? A. No, sir. 20

Q. And this has not been changed a bit here, has it? A. Not at the upper end it has not.

Q. Then the hay could not have gotten through there, with or without the change? A. They would have to go in the front way with the hay; they could not get a good load of hay in.

By the Court.

Q. What do you mean? A. In a twelve foot alley. 30

Q. (*Further Cross*) They never did take a load of hay in there, as far as you know? A. No, sir.

Q. Did Mr. Swartz ever get any hay while you were there? A. They brought it right into the alley.

Q. You just said that Mr. Swinley, on the north side, could not get a load of hay in at any time?

A. Swinley is on the east side; the other part is on the north.

Q. You could not get a load of hay in here at all? A. They could not get through.

Q. How wide is a wagon? A. Some of them are six feet and eight feet.

10 Q. How wide is a load of hay? A. They pile that.

Q. How wide do they pile it? A. When they put on two or three tons on a load—

Q. That makes it more than twelve feet wide? A. I guess they do.

Re-direct Examination by Mr. Hudson:

Q. When you speak of the hay not going through, you are referring to the part of the alley where the fence is built? A. Yes, sir.

20 Q. Can two wagons pass in that part of the alley where the fence is erected? A. Not a ten foot wagon—would not go through.

Q. Can two wagons pass in that part of the alley where this fence is erected? A. No, sir.

Q. When you spoke of the paving that was in the alley years ago—there was paving in front of these stables? A. Yes, sir.

Q. There was paving in front of Dr. Myers' stable? A. Yes, sir.

30 Q. And so on with the other stables along there? A. Yes, sir.

Q. And that is the paving you refer to as having been there years ago? A. Yes, sir, that is the paving I refer to as having been there years ago.

Recess to 2 p. m.

After Recess.

GEORGE W. POLLITT—DIRECT

GEORGE W. POLLITT, sworn in behalf of the Complainant, testified as follows:

Direct Examination by Mr. Hudson:

Q. You know the location of this McPherson Alley? A. Yes, sir.

Q. And for how long a time have you known of that alley? A. Since 1858.

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Q. And is your knowledge of it by reason of your having lived in the vicinity? A. When I was a boy I lived at the corner of Hamilton Avenue and Washington Street for about two years; beginning in 1854, and continuing on down from that time, I have quite a good knowledge of that locality, especially of that corner.

Q. During the time you have known the alley, what do you say as to the use made of it? A. I know of the alley because I was a clerk for my uncle in his store at the corner of Hamilton Avenue and Main Street, and our stable was at the rear of Lot No. 23 Fair Street, and I took care of the horse in the alley, and I went there three times a day to look after the horses, and at other times during the day to get the horse and hitch him up to the wagon and deliver groceries.

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Q. And at the time when you attended your uncle's horse in that alley, were there other stables located in the alley? A. The only other stable that I recall was the old school-house formerly on the corner of Berdan alley, which was moved over to the McPherson Alley and placed across the brook; and Z. M. Ward, the lawyer, he had two or three horses stabled there; and further along Dr. Van Riper, I think had a stable at the foot of his lot, and Mr. Terton had a stable at the alley end of his lot.

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Q. When was it that you worked for your uncle

then? A. I went to work for him in the fall of 1864.

Q. And for how long a time did you continue?

A. Until February, 1875.

Q. Can you locate the old school-house, with reference as to whether or not it extended beyond the brook on the alley? A. Beginning at the corner of the alley and going down on the north side.

10

Q. Yes. A. Beginning at the corner there was the frame house standing, which is still there; it was occupied by a man named Van Riper, who was a shoemaker, a cobbler, and that house was then exactly as it is now, so far as the dimensions are concerned, next to the alley; then the fence began and ran probably from 50 to 75 feet, where it met this old school-house, which was then used as a stable by Mr. Ward.

20

Q. Now, did the corner house, the fence, and the building occupied by Mr. Ward, did they make one continuous line along the alley? A. Yes, sir; there was a gate at the end of the house next to the alley, which led you about three or four steps, which led down into the yard at the back of the house occupied by Van Riper; that let into the premises of Mrs. Holt—that gate.

Q. That was later. Do you see the alley frequently? A. I come up there occasionally, yes, sir.

30

Q. And what do you say concerning its present width as compared with its width during the years that you have known it; whether or not there has been any change in the width of the alley? A. I know very little about the easterly end of the alley, beyond Terton's line, but at this end the only change I notice is the fence recently erected by Mr. Hall; that is the only change I know of.

Q. Would you say it has always been as wide

between the premises of Swinley and Hall as it now is—outside of that fence? A. That is, less the fence—I don't recall that there has been any change made, so far as my uncle's property is concerned, Nos. 21 and 23—the corner being 23, and Hay Ower's property, which was No. 25. Now, the reason why I fix the location of the old school-house, is because the brook ran directly under-
10

neath the old school-house.
Q. That was also true as to the corner house?
A. I presume so, but there was not any indication of the brook in the corner house, that I recall; the basement was used and the fence of the yard occupied by the Van Ripers and by the Holts and their predecessors; the brook was open from that on down to the old school-house, which was Mr. Z. M. Ward's stable—the brook was entirely open.

Q. You say there was a basement used in the corner house? A. Yes, sir, and about three steps down from Washington Street led to the door, and there was a high stoop from the Washington street and the McPherson alley corner of the Van Riper house.
20

Q. Can you locate Ward's stable, approximately, with the present location of Mr. Hall's mill?
A. Mr. Hall's mill is a three-story building; that is on the easterly part; and on the west there is an addition of one or two stories high,—not quite so high as the main building. If that is correct, then the westerly building,—the westerly part of the Hall building, is located, so far as the alley is concerned, about where Z. M. Ward's stable was.
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Q. And during all the time that you have known the alley, it has been used by the public generally? A. Yes, sir, as a boy I have taken in a load of hay occasionally to the stable, and the wagons drove in from Washington Street in the alley.

10 Q. Have others who owned property further up the alley, have they had goods delivered through the alley? A. I saw wagons going through—Mr. Terton has gone through frequently, and the Wards drove in, of course, with their teams; and later than that, when other buildings were put up—when Mr. Swinley built on the property west of the Regner property, then I saw him going in and out with his wagons.

Cross-examination by Mr. Dumont:

Q. That school-house you speak of, was about 150 feet or 175 feet from Washington Street on the north side of McPherson's alley, wasn't it? A. The westerly end of the building would hardly be 150 feet from Washington Street.

20 Q. About in here, at the point indicated by this manhole? A. If those dimensions are correct of the building on the corner of McPherson Alley and Washington Street, that is, the northeast corner, then that distance is about correct. That first line showing the line of lots, that is the sheds of the Washington Street property, and the next long line showing the stretch of fence next to the brook.

30 Q. You spoke about a gate; what do you mean—down here? A. At the lower end of that square on the map—is this Washington Street here?

Q. Yes. A. Here is the gate (indicating on the north side of McPherson's Alley, next to the frame house).

Q. How far down did that fence extend? A. There was a fence there; this gate is about to this point; in here were a lot of wood sheds, and then came the fence leading on down to the old school-house on the north side of the alley.

Q. Now, you say that at the end of that space,

Z. M. Ward had his stable? A. Just about in here.

Q. And the brook ran under that? A. Yes, sir.

Q. Your recollection of that is when the brook was first there—as far back as you can remember, the brook was there? A. Yes, sir.

Q. Do you remember when the brook was filled in? A. About 1872, when they first began to put the sewers through the lower end of the city, the sewer was put in Main Street, and another one in Washington Avenue, and that cut off the Dublin Spring Brook. 10

Q. Now, after that they began to build across different places where this brook had been? A. Yes, sir.

Q. So that this filling in over the brook and the encroaching on this north line began after the brook was filled in? A. Yes, sir; the brook really was an open sewer. 20

Q. Then, this encroachment has been going on since 1872, about? A. I would not call it an encroachment; at no time do I remember that the fence was anything further out than apparently this fence here.

Q. When was Mr. Hall's mill built? A. I don't recall.

Q. Do you recollect when the extension was put on? A. No, sir.

Q. Do you know whether or not the brick mill came where the brook formerly ran? A. My recollection is, the southerly wall of Mr. Hall's mill was just about where the fence is; on a line with this fence. 30

Q. Do you remember whether or not Mr. Hall's mill covers the same ground that Mr. Ward's stable did, or whether it is further over? A. I believe it is just about the same.

Q. Did this brook run under Mr. Ward's stable?
A. Yes, sir.

Q. So that, if that were true, then Mr. Hall's mill would run right over the brook? A. Yes, sir, the southerly side of the old school-house—Ward's stable—was set right on the stone duck part of the brook, that is the Southerly bank of the brook.

10

Q. Now, when you were first there, did you recollect this property that Mr. Swinley now owns, marked "brick stable?" A. I recollect it; it was a common, and, in fact, it was open from here right on down.

20

Q. What do you indicate as the open space? A. (Witness points to the entire section to the north of McPherson's Alley, now owned by Mr. Hall—points to that portion of the map indicated on the south side, being owned by Isaac A. Hall; that was the Green hill.)

Q. And where did this brook turn, as you recollect it, as indicated on the map? A. It turned at about this point.

Q. It is about 250 feet from Washington Street on the North side—up through or under Hamilton Avenue? A. Yes, sir, up from Division Street, just about 50 feet west of Dominie Robinson's church.

30

Q. Please indicate on the map where you kept the horses that you speak of. A. Right in here—this is 75 feet—the stable was just about in here (indicating on the south side of McPherson alley at the first plot owned by Mr. Hall—in the middle of the same.)

Q. And this frame stable near Washington Street was not then on that spot you speak of. A. That was Mr. Hay Ower's plumbing shop.

Q. Have you observed that property as to the paving of the alley? A. Yes, sir.

Q. How wide is it paved? A. I should think about ten to twelve feet.

Q. And all the way down the alley? A. That I don't know—the entire width of the alley is not paved—at the front next to Washington Street—I noticed it was not paved there.

10

Q. Is it paved beyond where Mr. Hall has put up his fence; or is that fence right on the line, as you recollect it? A. I think not.

Q. Do you recollect down here further in front of the mill, on the North side, whether the paving is up to the mill? A. That I did not notice.

Q. You did not notice the lower or eastern end, whether that was so or not? A. No, sir.

Q. Are you familiar with Mr. Swinley's property on the south side? A. Reasonably so.

20

Q. Do you know whether or not that property encroaches on the street, as shown by this map? A. I think I have heard Mr. Hay Ower say that it did. I did not look into the matter. I have no idea about the dimensions; I could not say how wide the alley was when we used it at that time.

Q. Now, you have been down there recently, and frequently go by there—seven or eight times a year you go by that section? A. Yes, sir.

Q. Do you recollect the last time you looked at this alley? A. It is two weeks—within two weeks.

30

Q. Well, now, then, would it be possible to drive a load in here of anything at all—a double wagon? A. Yes, sir, I think it would.

Q. Would it be possible to drive the same wagon out, if it were turned? A. Yes, sir; when I was a boy there was no trouble in turning a wagon in the alley.

Q. But there would not be any trouble now, would there, where it is indicated at 20 feet? A. No, sir.

10 Q. Would it be possible to turn here—here is Mr. Swinley's brick stable on the north side, and, apparently, from the map, it extends five feet ten inches beyond the brick stable of his adjoining it on the west; now, would it be possible there to turn a wagon in front of that, do you think? If this width here, as indicated on the map be 20 feet, and this extends five feet ten inches further over, that would leave a little less than 15 feet; now, would it be possible in front of that stable to turn a wagon at that point? A. It might be done.

Q. Could two wagons pass very easily? A. If there is 15 feet there, it would require a great deal of care for one wagon to pass another.

20 Q. This is a blind alley here, isn't it? A. The upper portion is really a hill, and back of the Doremus property I do not think it is used very much, except to get the material in and out.

Q. Now, as you understand, the use of this made by tenants and owners, was to get necessities in and out? A. Yes, sir, and for any purpose.

Q. If Mr. Hay Ower, for instance, had his shop there, he could bring in things and take them in and out? A. Yes, sir.

30 Q. And no one ever kept a coal or brick yard there, did they? A. No, sir, not to my knowledge.

Q. It was just used for people taking their necessities in and out? A. Yes, sir.

Q. Did you know Mr. McPherson personally? A. I just remember seeing him, and that is all; he was a very old man.

Q. You don't remember when he closed up the alley? A. No, sir.

GEORGE W. POLLITT—CROSS—REDIRECT
 HALMAGH POST—DIRECT

Q. Now, one more question; if an actual measurement here should show that on the south side this brick stable opposite the eastern brick stable of Mr. Swinley's were but twelve feet from Mr. Swinley's eastern brick stable on the north side of the alley, would there be sufficient room there to turn and to go in and out? A. I should say, that for a man to be able to turn a horse and wagon at that point, he would have to be very careful; he might turn a single horse and wagon— 10

Q. If that be 12 feet here, as I before stated, wouldn't it be just the same as at the upper end of the alley, where it has been testified it is 12 feet, would not there be just the same difficulty? A. Just the same, exactly.

Re-direct examination by Mr. Hudson.

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Q. You were asked concerning the width of the paving through that alley; did you notice whether or not the width of the paving was as great as the distance between the curb line of the alley—as shown on Washington street? A. No, sir, I did not notice that; all I noticed was about the width of the pavement, and it began on the south side of the alley from the lot's line out towards the center of the alley.

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HALMAGH POST, sworn in behalf of the complainant, testified as follows:

Direct examination by Mr. Hudson.

Q. How old are you? A. 76.

Q. Do you know the location of this McPherson alley? A. Yes, sir.

HALMAGH POST—DIRECT

Q. And how long have you known about it? A. About 50 years.

Q. Did you ever stable on that alley? A. Yes, sir.

Q. How long ago? A. Well, since I stabled there, it is nearly 40 years—38 to 40 years.

10 Q. For how long a time did you have a stable there? A. About 15 years.

Q. Where was your stable located on the alley? A. At the stone stable on the south side of the alley.

Mr. Hudson.—Indicated on the map
“Stone stable.”

Q. That is part of the property now owned by Mr. Hall? A. I don't know about that.

20 Q. How many horses and wagons did you have there? A. Well, sometimes I had four or five wagons.

Q. What was your business? A. I was in the produce business on Main street—part of the time; and at other times I was in the peddling business.

Q. Can you tell who else had stables or business in that alley when you were there? A. Van Riper was in there.

30 Q. What Van Riper is that? A. Doctor Van Riper; and Myers was in there before I moved out.

Q. Doctor Myers? A. Yes, sir; and there was one or two others, whose names I cannot remember.

Q. Do you know the location of the buildings at the Washington street end of the alley? A. Well, I know they are there; they were there, but I don't know about the location of them much.

HALMAGH POST—DIRECT

Q. Do you know whether there has been any change in those buildings? A. There has been no change.

Q. During all the time you have known the alley? A. That is right.

Q. What about the width of the alley; has there been any change in that? A. No change, except the fence that has been put up; I never took notice of any. 10

Q. During the time you stabled there, and when you have known the alley, were you restricted in any manner as to the use of it? A. No, sir.

Q. Any part of it? A. No, sir.

Q. When you made use of the alley, did you have any trouble in getting in and out? A. No, sir, there was room for three wagons—

Q. Was there any difficulty about turning your wagons around in the alley, or driving into your stable? A. At that time we had wagons that it would take the whole Court House to turn in. 20

Q. Have you seen use made of this southerly side of the alley, the same as the other part of it—along where Mr. Hall's mill is now? A. Yes, sir.

Q. Was that used the same as the rest of the alley? A. Yes, sir.

Q. Did you drive over that? A. Yes, sir, we drove in one side, and when we drove out, we kept on the other— 30

Q. If there was a wagon coming in and you were going out, you would drive over on that side? A. Yes, sir.

Q. You have seen other people use the alley in the same way? A. Yes, sir.

Cross-examination by Mr. Dumont.

Q. You said you were up here at this stone stable? A. Yes, sir.

Q. The same stone stable stands there yet? A. Yes, sir, I think so.

Q. Where did you get into that from the rear? A. From the alley.

10 Q. Is there a back entrance to it? A. There was a back entrance with the gate to walk in, from Fair street.

Q. Did you never drive in there with your horses? A. Yes, sir, always did.

Q. Didn't you go in on the Fair street way? A. No, sir.

Q. Never? A. No, sir.

Q. Now, you used the side of the stable, didn't you, where the gate was? A. Mostly.

20 Q. Now, then, that is just as wide there now as it ever was, isn't it? A. Yes, sir.

Q. There is no fence there? A. No, sir.

Q. And anybody using that at the present time, would have just as much room as they ever had? A. Yes, sir, if they have no buildings there—I don't know.

Q. When you were there the last time, it was about 20 feet wide there, wasn't it? A. Yes, sir.

30 Q. And have you seen this fence? A. I have seen it from Washington street.

Q. You have not walked down the alley to see where it went? A. No, sir.

Q. So you really don't know anything about this fence down the alley? A. No, sir.

Q. Have you seen the paving there that the city put there? A. Yes, sir.

Q. Do you know how wide it extends there? A. No, sir.

HALMAGH POST—CROSS

Q. Do you know whether it extends way across the alley? A. No, sir; I saw the pavement from Washington street.

Q. Would it be possible to take a two-horse wagon and drive through this alley? A. Yes, sir—you can drive a big wagon right straight through it.

Q. Suppose you wanted to turn in any of these stables, could you turn in with a double wagon, if it was 12 feet wide? A. Hardly. 10

Q. Could you turn in with a large truck wagon? A. No, sir; you would not have room.

Q. How long is the ordinary horse, do you know? A. I don't know.

Q. Would you say the ordinary horse is more than six feet long? A. Yes, sir.

Q. Eight feet? A. Yes, sir.

Q. And how long are the shafts to the wagon? A. Seven and one-half feet—about 8 feet, I think. 20

Q. You think then, the reason you could not turn would be on account of the length of the shaft? A. The pole is longer than the shaft.

Q. Do you think the pole is ten feet long? A. I should think so.

Q. How long is the average double wagon that is used in business? A. Some are long and some are short; an average double wagon in the body is eight or ten feet, and they are built up to twenty feet, pretty nearly. 30

Q. You have seen these heavy wagons that they haul with now? A. Yes, sir.

Q. Now, take a wagon of that character; could you go in here? A. Not with a team.

Q. Sure of that? A. I am sure.

Q. Could you have done it if you had had twenty feet? A. Yes, sir, easily.

Q. Could you do it with fifteen feet? A. No,

HALMAGH POST—CROSS
PATRICK F. CUNNINGHAM—DIRECT

sir, I don't think so; you have to have a sweep.

Q. So that you think it would take at least twenty feet to make that sweep? A. You might do it with less than that—probably eighteen feet.

10 Q. Suppose you came up here to the upper end of the alley, at these stables opposite Mr. Hall's property on the south side—the stables being on the north side—here is Mr. Swinley's stable on the north side of the alley, projects 5 feet 10 inches—now, here is a width of 15 feet less than that,—14 feet ten inches, probably; just take and consider that and tell me whether or not, if that be the correct measurement there, you would be able to drive in there with the team? A. You might if you had a platform spring that you could turn short.

20

PATRICK F. CUNNINGHAM, sworn in behalf of the complainant, testified as follows:

Direct examination by Mr. Hudson.

Q. Are you in the employ of the County Clerk of the Passaic County? A. Yes, sir.

30 Q. Have you in your charge now, the proceedings relating to the sewer laid through McPherson's alley?

A. Yes, sir.

Q. Amongst those papers is a petition? A. Yes, sir, here it is.

Mr. Hudson.—I wish to offer the petition contained in these papers.

The Court.—All right, it will be received.

Mr. Dumont.—Mr. Hall was not one of the signers of that petition.

PATRICK F. CUNNINGHAM—DIRECT

A. (Witness reading) "Paterson, N. J., 188—. To the Honorable, the Board of Aldermen of the City of Paterson, N. J.:

We, the undersigned, owners of property interests on McPherson's alley, do petition to have a sewer constructed through said alley from Washington street to the easterly end of said alley, in accordance with the Act of the Legislature, entitled An Act to authorize cities to construct sewers and drains, and to provide for the payment of the cost thereof. Approved March eighth, 1882, and the supplements thereto.

10

Signatures: Robert Swinley, street and number of lot, 27 Fair street; 38 and 40 Division street. Elizabeth Dilger, 33 Fair street. Isaac A. Hall, No. 30 and 32 and 34 Division. Charles F. Meyers, 36 Division street. C. H. A. Tiffany, 35 Fair street.

20

Q. There is, with these papers, Mr. Cunningham, a record of the assessment made? A. Report of commissioners, you mean—I find a report of commissioners on file, yes, sir.

Mr. Hudson.—I wish to have entered in the record, that part of this report, at least, which shows an assessment against the property of Isaac A. Hall and Robert Swinley.

30

Mr. Dumont.—Better read it in.

Mr. Hudson.—(Reading) "Number 27, Robert Swinley, Fair street, 27 by 50, assessment \$20.00. No. 30, No. 32, No. 34 Hamilton avenue, I. A. Hall, 75 by 28, \$40.00."

In each case, it says: "Rear of the Fair street lot and rear of Division street lots."

PATRICK F. CUNNINGHAM—DIRECT
WILLIAM FERGUSON, JR.—RECALLED—DIRECT

Q. You have also a map? A. Yes, sir.

Q. There is no sewer map with these papers?

A. That is the sewer map (indicating).

Q. There is no sewer map? A. No, sir.

The Court.—Read the title of the map.

10 *The Witness.*—(Reading) “Commissioners’ Map for the Permanent Improvement of Washington Street from River Street to Broadway, Paterson, New Jersey, H. A. Harder, Civil Engineer, October, 1902; filed March 5th, 1903, John J. Slater.”

Map marked “Exhibit C-3.”

Q. You say there is no map of this McPherson
20 alley sewer? A. No, sir.

Mr. Hudson.—I would like to call Mr. Ferguson for one question in regard to that map.

WILLIAM FERGUSON, JR., recalled.

Direct examination by Mr. Hudson.

30 Q. Mr. Ferguson, on your map what do these blue lines indicate? A. That is the curb line.

Q. And what is the distance between the curb lines at the Washington street end of McPherson’s alley? A. 16 feet.

HIRAM WOODRUFF—DIRECT

HIRAM WOODRUFF, sworn in behalf of the complainant, testified as follows:

Direct examination by Mr. Hudson.

Q. By whom are you employed? A. James Colgan.

Q. How long have you worked for him? A. Since 1871.

10

Q. What do you do for him? A. Drive in and out, until lately, when I got pensioned off.

Q. Are you a clerk in the store now? A. Yes, sir.

Q. When working for Mr. Colgan did you at times have horses on this McPherson alley? A. Well, at first I worked for Mr. Langley in the stone barn; that was in 1867.

Q. How long did you work for Mr. Langley? A. Not long.

20

Q. Then after that for whom did you work? A. Mr. Colgan.

Q. And how long did you work for Mr. Colgan in this alley? A. About 30 years, or more.

Q. Where was Mr. Colgan's stable? A. On the same side we are on now—the south side—it is on the lefthand side.

Q. Which stable does Mr. Colgan have now? A. Mr. Swinley's.

Q. On the right-hand side? A. Yes, sir.

30

Q. East of Mr. Hall's mill? A. Yes, sir, but when we stabled there first, there was no mill there.

Q. Do you remember Mr. Ward's stable there? A. Yes, sir.

Q. How was the alley used all the time you knew it? A. It was always open.

Q. You drove in and out of that alley with wagons? A. Yes, sir.

Q. Did you see other horses and wagons drive in and out? A. Yes, sir.

Q. Did you see horses and wagons of others, other than those who had stables in there, drive in and out? A. Feed men and men like that. I saw drive in and out.

10 Q. If you go in, you have to come out the same way you go in? A. Yes, sir—when you get in the center of the alley, there is where the trouble is; if there is a wagon coming through where Mr. Hall has the fence, a man up the alley cannot get out.

Q. Did you ever have any trouble, Hiram, in all the years you have known the place before that fence was put up, about getting out and in? A. No, sir.

Q. Could loads of hay come in? A. Yes, sir.

20 Q. You could turn round in the alley? A. Yes, sir.

Q. And drive in and out to your barn? A. Yes, sir.

Cross examination by Mr. Dumont.

Q. Come down here and look at this map. Now, this is Washington street and this is McPherson's alley? A. Yes, sir.

Q. This is Mr. Hall's mill in here? A. Yes, sir.

30 Q. This is Mr. Swinley's present place of business? A. Yes, sir.

Q. Now, Hiram, show us where your stable is. A. It is here (indicating).

Q. You are in the eastern brick stable? A. Yes, sir, on that side.

Q. On the north side of the alley? A. Yes, sir.

Q. How wide is it in here between the brick stable and this piece of property opposite—you can turn around easily, can't you? A. Yes, sir—

down below Mr. Swinley's stable you cannot turn around.

Q. How many wagons do you have go in and out every day? A. We have four wagons.

Q. How many times do they go in and out every day? A. They go out in the morning and come in at night, and also at dinner time.

Q. Now, you go out early in the morning? A. 10
Yes, sir.

Q. About what time? A. We generally leave about five o'clock.

Q. The alley is not blocked then? A. No, sir.

Q. When you come in at night, the day is over? A. Yes, sir.

Q. Then you are not blocked? A. Then everybody is waiting; there is where the whole trouble is,—when Swinley is unloading.

Q. Now, then, if Mr. Swinley was simply pulling in there and not unloading, there would be no trouble, would there? A. We would have to wait until he unhitched the horses. 20

Q. It would not take a great while to do that, would it? A. It would depend.

Q. How long have you been down in this stable? A. Thirty years.

Q. How often have you been to the stable since you quit the horse? A. I am there at different times.

Q. Where do you sleep, in the stable? A. No, sir, I sleep home with my wife; I am an early riser. 30

Q. This part of Mr. Hall's mill here,—has that been made any narrower in here, opposite this stable? A. Just the same.

Q. Now, the only difference is, that you notice in this alley, since 1871, to what it is now, is this fence? A. That is all.

HIRAM WOODRUFF—RE-DIRECT

Re-direct examination by Mr. Hudson.

Q. Hiram, have you ever seen how they get Mr. Swinley's wagons into his barn? A. Yes, sir.

Q. How do they do it? A. They drive in, and then they unhook, and then they have to squeeze them around, and then pull the wagon in.

10 Q. Have you ever been stopped by any wagon other than Mr. Swinley's? A. Yes, sir.

Q. Have you ever been stopped by any of Mr. Hall's wagons? A. Mr. Hall don't have any wagons—only that truck that he has to do his business to hoist his stuff into his mill; we were stopped by that one night for quite a while.

Q. Have you ever seen Mr. Hall use the hoist? A. Yes, sir.

20 Q. Can you turn here by Regner's stable—the old Regner stable—further down the alley—towards the dead end of the alley? A. Sure, you could.

Q. You could easily turn here by Regner's stable? A. Yes, sir.

Q. Lots of room? A. Yes, sir.

Q. You said you had been acquainted with this alley from 1871; now, could you always turn there at Regner's stable without any trouble? A. Yes, sir.

30 Q. According to this map, that is about 16 feet wide—you could easily do that in 16 feet, with your big wagon? A. Yes, sir.

Q. Secor used to have a stable there, didn't he? A. Yes, sir—you cannot turn around there.

Q. Is not Secor where Regner was; was not Regner's stable always occupied by Secor? A. You could not hardly turn a handcart up there.

Q. That is right up here by Mr. Swinley's stable, isn't it? A. Yes, sir.

Q. Then at the lower end of this alley you

HIRAM WOODRUFF—RE-DIRECT

GEORGE A. MEYERS—DIRECT

could not turn and go round? A. No, sir.

Q. Is that any different from what it used to be now, on the alley? A. It is lower; it used to be higher.

Q. Is the alley any different in width? A. It is a little different.

Q. Narrower? A. A little bit—on that side it is all right. 10

Q. Have you ever seen Mr. Secor's wagon along here (indicating the north side of the alley, by Mr. Hall's property)? A. Yes, sir, he said Mr. Hall gave him permission.

GEORGE A. MEYER, sworn in behalf of the complainant, testifies as follows:

Direct examination by Mr. Hudson. 20

Q. Do you know the location of this McPherson alley? A. Yes, sir.

Q. And for how long a time have you known McPherson's alley? A. Somewhere in the early eighties.

Q. What was the occasion of your first knowing the location of this alley? A. My brother had purchased a stable property there.

Q. Your brother is Dr. C. F. W. Meyers? A. Yes, sir. 30

Q. Can you locate your brother's property on this map? A. Yes, sir.

Q. Will you do so, please? A. (Witness indicating "Formerly F. W. Meyers, now Isaac A. Hall.")

Q. What had you to do with your brother's property? A. Well, I rather looked after it for him part of the time, he being busy, and he left me to look after things for him.

Q. How was your brother's property located; what did it consist of? A. It consisted of an old frame building, and he made it over, and changed the front of it, and in doing that he found the floor was all rotten, and he took the floor up, and found there must have been a brook under that building. Frank Hokey filled it up.

10 Q. Now, how far beyond the brook did your brother's building extend into the alley? A. I should think that from the edge of the brook, about two feet. This gully was from five feet to six feet deep.

Q. Do you know how the southerly line of your brother's building compares with the southerly line of Mr. Hall's mill? A. On the same line, I think.

20 Q. Do you know whether or not your brother's building was on his property line? A. I am not positive about that.

Q. Have you seen the alley frequently since 1880? A. Yes, sir, quite frequently.

Q. How frequently? A. Well, I have not had occasion to look at it for about ten years, that I know of.

Q. While your brother was located in the alley? A. Then I used to go in very frequently.

30 Q. Your place of business is nearby this alley? A. Yes, sir, it was on Main street at that time.

Q. Do you know the width of the alley as it now is, the approximate width? A. I should think it was the same width then as it is now.

Q. Can you notice any change in the width of the alley from the time you first knew it in 1880 up to the present time? A. No, sir.

Q. Have you seen this fence that Mr. Hall has erected? A. I saw it when passing by on Washington street.

Q. When you say there has been no change in the width of the alley, of course, you are not referring to the fence? A. No, sir.

Q. You are excluding the fence? A. Yes, sir.

Q. Have you made use of this alley yourself, Mr. Meyers? A. Well, yes, I used to stable there once in a while, and when I had an extra horse I put it in his stable.

10

Q. Do you know how the alley is used? A. I have always supposed it was a common alley for everybody; I have driven in and out, and I have seen others drive in and out hundreds of times; I have seen wagons deliver goods in that alley, frequently.

Q. While your brother was there, was there any restriction upon the use of any part of the alley? A. Not that I know of; I never heard of any.

20

Q. Your brother continued there till almost up to the time of his death? A. No, sir, I don't know just exactly; I think it is about—I cannot say positively, but I think it is fifteen or sixteen years ago—he sold the property to Mr. Hall.

Q. All the time your brother owned the property, was the use of the alley, as you have said, general and free—by everybody? A. Yes, sir.

Q. And has that been your observation regarding the use of the alley since that time? A. Yes, sir.

30

Cross-examination by Mr. Dumont.

Q. When you speak of this alley being for general use, you simply mean that anybody who had a property in here who wished to take anything in or out, could do so? A. Anybody could drive in and out.

GEORGE A. MEYER—CROSS
WILLIAM T. SUTTLE—DIRECT

Q. People did not go in and out of there unless they had reason to? A. No, sir.

Q. And this property that you say Mr. Hall purchased, do you recollect if your brother sold it to him? A. My brother sold it to him.

10 Q. You are not acquainted with the dimensions of your brother's deed? A. No, sir.

Q. As you recollect the property, this width that seems to be indicated here, of about 20 feet—that portion of the alley seems to be about right? A. Yes, sir.

Q. And the last time you saw it, it was still that way? A. Yes, sir.

Q. And you say that all you have seen of this fence is simply passing by? A. Yes, sir.

20 Q. You have no personal knowledge of whether or not that fence extends beyond where your brother's place was or not? A. No, sir.

WILLIAM T. SUTTLE, sworn in behalf of the complainant, testified as follows:

Direct examination by Mr. Hudson.

Q. How old are you? A. 54.

30 Q. Do you know the location of this McPherson's alley? A. Yes, sir.

Q. Your place of business was near McPherson's Alley? A. Yes, sir.

Q. Where was your place of business? A. No. 66 Washington street.

Q. You carried on the business of a blacksmith? A. Yes, sir, and my father before me.

Q. Do you know the use that was made of this alley? A. Yes, sir, it was a thoroughfare.

Q. Was the use of it general and free? A. As far as I know, yes, sir.

HENRY PEHNKE—DIRECT—CROSS

WILLIAM T. SUTTLE—DIRECT—CROSS

Q. What have you seen in regard to its use? A. I have seen vehicles driven in and out of there, and hay being taken in here to supply the horses with feed.

Q. And you have taken horses in and out of there? A. Yes, sir.

Q. What do you say about the width of the alley during the time you have known it? A. I should judge it would be about equal in width from east to west. 10

Q. Has there been any change in the width that you have seen? A. Well, lately, there has been a fence put up.

Q. Aside from the fence has there been any change? A. Not that I know of.

Q. Do you remember when the brook ran along the side of the alley? A. Yes, sir. 20

Q. And when the brook ran along the side of the alley, was the thoroughfare as wide as it has been since? A. About the same width, I should judge; I was about 14 years old when I first remember that.

Q. You have never known of any change in the width of the alley? A. No, sir.

Q. It has always been as it now is, with the exception of the fence? A. Yes, sir.

Cross-examination by Mr. Dumont. 30

Q. Now, how long have you known of the existence of this alley? A. Well, about 40 years.

Q. Your father, you say, kept a blacksmith shop about opposite to the alley here? A. No, sir—66—

Q. How did you come to know about this alley—did you used to play around there as a boy? A. Yes, sir.

Q. Do you remember when these buildings were

built on the north side here, where Mr. Swinley owns now, and where Mr. Hall's mill is? A. I remember the people who lived there before those buildings went up there; I cannot tell you the exact date, but I remember when the buildings went up.

10 Q. When you say the alley was as wide at one end as the other, you don't mean that literally? A. It looked to me that way, to my eyes; there might have been a couple of feet difference.

Q. This map indicates Mr. Swinley's building—
A. I think there is one stable that extends a little bit on the alley—encroaches on the alley.

Q. Have you seen the city paving in there? A. No, sir.

Q. You just noticed the fence? A. I have noticed the fence.

20 Q. Where? A. On Washington street.

Q. You have not gone down the alley to look at this? A. Yes, sir, I walked down there last week.

Q. And looked at the whole thing? A. Yes, sir.

Q. How far down does it extend? A. About 100 feet.

Q. 100 feet from Washington street? A. Yes, sir.

30 Q. Do you know whether or not down here in this part of the alley now used by Demarest on the north side, whether or not there is very much distance between that and the brick stable opposite—are you familiar with it? A. I have not been up there for some time.

Q. And the use you have seen of this alley—people going in and out when they had occasion to deliver, and bringing their horses in— A. Yes, sir.

ALFRED W. PIAGET—DIRECT

ALFRED W. PIAGET, sworn in behalf of the complainant, testified as follows:

Direct examination by Mr. Hudson.

Q. How old are you? A. 80.

Q. Where do you live? A. 66 Bridge street.

Q. That is about where this alley would come if it were open through to Bridge street. A. It was formerly open right up to the rear of my lot that I bought in 1873, formerly. 10

Q. How long have you known of this alley? A. Since about 1856, when I lived at 25 Fair street.

Q. Have you lived in the neighborhood of McPherson's Alley since? A. Very close by.

Q. What use has been made of that alley during the time you have known of it? A. Well, it was used for transportation of goods in and out, and it was formerly opened by McPherson. 20

Q. Do you remember the brook? A. Very well.

Q. Where did the brook run? A. Somewhere in the neighborhood of Mr. Suttle's shop across Washington street, and then under the house on the corner, and then down along the alley probably 150 or 200 feet, and then it took an abrupt turn to the left and went across Division street down to the river.

Q. Now, did the brook have anything to do with the width of the alley—did it define the alley in any way? A. I did not see that it did. 30

Q. How wide was the alley when you first knew it? A. Of course, there was nothing to define any lines, not until you came 150 or 200 feet from Washington street, then there was a fence up. On the opposite side were stables and coal bins and some fences—that is the rear of Fair street.

Q. When you first knew the alley, the little

house of Mr. Ower on the southwest corner was not there? A. The house on the northwest corner—that was there—but the other house on the opposite corner was moved from the corner of Fair street by Mr. Ower.

10 Q. Take the north side of the alley—what do you remember as to the house on the corner? A. It was all vacant lots only—I won't say what lot it was, but I know there were some sheds there or stables, excepting the old school-house which Gritz moved across the street; they then put the edge of that over the brook.

Q. Do you remember whether or not there was a fence from the house at the corner—the Van Winkle house—do you remember that fence being there? A. Yes, sir.

20 Q. Do you remember when Holt lived in one of those little houses on the left hand corner? A. Yes, sir.

Q. Do you remember whether there was a fence up at that time? A. Yes, sir I think there was.

Q. Can you tell the line of that fence? A. That line is shown on a line with the house.

Q. Then after that fence came the school-house? A. The school-house was a little off from that; I think that was torn down, unless I am mistaken.

30 Q. Then, were there any other buildings on the north side of the alley? A. Not for 150 feet or 200 feet; there was not much of a building on the north side until Mr. Regner put up a brick stable from Hamilton avenue.

Q. What about the south side of the alley; were there buildings there? A. That was stables and coal-sheds, and things of that kind, most in a straight line all the way along on the south side.

Q. Do you know whether or not that south side

of the alley has been changed? A. Not that I am aware of.

Q. So that all the time you have known the alley, the south side has been defined by buildings and sheds? A. Yes, sir.

Q. And was there anything to define the north side of the alley? A. Nothing till the fence was put up, and then some buildings further down.

10

Q. Do you know how those buildings were located as to this brook which has been mentioned? A. Most of these buildings were located beyond the brook; the brook took a turn before it came to these buildings.

Q. But during the years that the buildings were put up between the point where the brook turned, and Washington street, how were they located? A. There are no buildings there, excepting the school-house that I speak of, and the house on the corner.

20

Q. Swartz had a stable there, you remember? A. Yes, sir.

Q. Would you say the alley has changed any in width from what it was during the time you have known it? A. Very little—the only change I know, is Regner's building was the first encroachment I know of, four or five feet encroachment on the alley.

Q. Have you seen this fence? A. Yes, sir.

Q. The fence that Mr. Hall has erected? A. Yes, sir.

30

Q. Now, in saying the width has not changed, do you include the fence or not? A. No, sir; I include between the two houses—the two houses on the corner.

Q. What have you to say as to whether or not the width between those two houses on the corner was approximately the width of that alley? A. I always considered it was.

Q. And did it always appear to be so, so far as you could see? A. It seemed to be the same width all the way through, right up to my line, back of 1873.

Q. Have you ever made use of the alley to bring any goods into your premises? A. No, sir.

10 Q. Whom have you seen making use of the alley? A. Almost everyone that had lots backing on that.

Q. What use have you seen made of it? A. I saw Mr. Terton—he used to take loads of hay up there—and Tiffany and Allen used to run up to their stables—they used to drive in through the alley and out Fair street.

Q. They drove in with their mineral water wagon, didn't they? A. Yes, sir.

20 Q. Have you seen coal wagons in that alley? A. Yes, sir.

Q. Have you seen merchandise being brought in the alley? A. Yes, sir; they used to bring coal in to me.

Q. The coal wagon could turn in the alley? A. Yes, sir.

Q. How long has the use of the alley continued—the use of the alley such as you have spoken of? A. 1856.

30 Q. Up to how late a time? A. Up to the present time.

Q. The alley is still being use? A. Yes, sir.

Q. There has not been any change that you know of in the lines of that alley? A. None that I am aware of, excepting this one building that I speak of—Regner's.

Q. And the fence put up from the open lots? A. Yes, sir.

Q. Did you notice the pavement in the alley?

A. I have seen it—I knew there was a pavement there about twelve feet in the alley.

Q. You did not notice the width between the curb lines of the alley, did you? A. I should judge the alley between the two houses there—there is a curb there now, but I should judge between the two houses there is 18 feet or 20 feet.

Cross Examination by Mr. Dumont.

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Q. Where on this map was the Regner's stables—sit down here, please. Which would be the Regners' stable; this is Mr. Hall's brick mill; here is Mr. Swinley's stables, including the one Demarest is in? A. I think it is that (indicating the one that Mr. Swinley now owns).

Q. If that is the building you mean, that is the first one you speak of, and the only change in the alley is the encroachment on the alley? A. I did not know that the back east of that was there; that has been built up towards me, and I cannot see it from my place, from my lot.

20

Q. Their lot comes out to the barn here which Mr. Boyle has? A. No, sir; it is Mr. Boyle and Mr. Smith.

Q. Now prior to this building of Mr. Swinley's here being built, there was almost 20 feet width there, wasn't there? A. I don't know.

Q. If that is 20 feet, as indicated on this map, and that extends five feet ten inches, as shown on the map, then there would be about 15 feet width there, wouldn't there? A. I can only tell by looking from my house from here when this building was put up (indicating Swinley's stable to the north); I could not see this encroachment here from my house, but I could see it from Washington street, and that is the first I ever

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knew there was an encroachment on the alley (pointing to Mr. Swinley's stable on the north side).

Q. Have you any knowledge of the stable of Mr. Swinley on the south side here? A. No, sir.

Q. You say that the use that has been made of this is by everybody generally, who had any property in here?

10

Mr. Hudson.—Objected to.

A. It was in use by everybody who had property in there, and also by feedmen who had not any property in there.

Q. And was it ever used by anyone except people who had business in there; was it a thoroughfare for people to travel through? A. No, sir; it was not.

20

Q. Did you observe carefully the pavement that was laid in there by the city, Belgian blocks? A. I have seen it from the street.

Q. Have you noticed how wide it extended in the alley? A. About twelve feet, I think.

Q. Have you noticed as you went by and looked at the fence there, whether or not Mr. Hall has built the fence over any of the pavement? A. No, sir; I have not noticed that; all I noticed was that there was a fence there.

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Q. Would you say that any person driving in here with a wagon could drive in easily, and drive out? A. One wagon can drive in, but it was always open in such a way that two wagons could pass anywhere.

Q. And when in this lower part here where Mr. Swinley's and the old Regner stable is, you always turned in there easily? A. I don't know any reason why you could not.

Q. And if this brick stable had the ordinary doors, would you say whether or not you could drive in that stable, coming from the alley? A. I am not horseman enough to say that.

Q. Have you ever seen Mr. Swinley's wagons on the south side in front of his own property? A. I could not say whose they were.

Re-direct Examination by Mr. Hudson.

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Q. When you mentioned the encroachment on the alley—who did you say erected that building? A. Regner, as I understood.

Q. You did not say Swinley? A. No, sir; he told me he was going to have some of that alley when he put the building up, and then I saw he was building on the alley.

Q. That is Mr. Regner? A. Yes, sir.

Q. So that Mr. Regner was the one who ran the building out in the alley? A. That is the way I understood it. 20

Q. When you spoke about that alley not being a thoroughfare did you mean that people could not go from one street to another? A. No, sir.

Q. Did you mean that people did not use it to pass through? A. They did not use it to go through from one street to another, only to their own properties; most of them had an opening on Fair street, as well as on the alley, and they would go through the alley with their teams, and, therefore, go out through Fair street. 30

Q. But there was no restriction that you could see, on the use of that alley—anyone could use it that wanted to? A. Yes, sir.

Q. It was open and free? A. Yes, sir.

Q. And people went in and out, apparently, as they chose? A. Yes, sir.

Q. But they did not go through to Bridge street,

ALFRED W. PIAGET—RE-DIRECT—RE-CROSS

for the reason that it was closed on Bridge street?

A. That is right.

Q. Now, you say you saw wagons in that alley? A. Yes, sir.

Q. At any particular place? A. Most generally they were on the north side, because most of the stables were on the south side.

10 Q. And it was customary for all the people in that alley to let their wagons stand out there? A. It was a common thing.

Re-cross Examination by Mr. Dumont

Q. Which of these stables is the Regner stable? A. I could not tell you.

Q. Well, if Mr. Swinley's is not the Regner stable, then that is the Regner stable—the property adjoining it on the east? A. I have not been
20 up the alley for a long time.

Q. Now, this was built how many years ago? A. I don't know.

Q. This has been built since, if it is there? A. Yes, sir.

Q. Have you observed the property joining the Regner property? A. No, sir.

Q. Do you know whether it encroaches? A. No, sir, I do not know; I always supposed that, seeing this from Washington street, that that building
30 projected from Regner's stable as I first saw it.

Q. You don't know to-day whether it is or not? A. No, sir.

Q. Was there at any time since you owned this property, any conversation between you and other owners there as to having some hope of getting this widened and opened up through Bridge street—having the city purchase— A. There may have been a casual conversation, but at the same time it never amounted to anything.

NELSON STICKLE—DIRECT

NELSON STICKLE, sworn in behalf of the Complainant, testified as follows:

Direct Examination by Mr. Hudson.

Q. You are employed by Robert Swinley? A. Yes, sir.

Q. The complainant? A. Yes, sir.

Q. How long have you been employed by Mr. Swinley? A. Fifteen years. 10

Q. In what capacity are you employed by him? A. Driving a soda water wagon.

Q. And all the time you worked for Mr. Swinley, you have been driving a soda water wagon? A. Yes, sir.

Q. Where has Mr. Swinley's place of business been all the time you have been working for him? A. 27 Fair street.

Q. You have your stable in the rear of 27 Fair street? A. Yes, sir. 20

Q. It abuts on McPherson's Alley? A. Yes, sir.

Q. Is it part of your business to go in and out of that stable with your horses and wagons? A. Yes, sir.

Q. What kind of wagons have you used? A. Regular, ordinary—

Q. One horse or two horses? A. Two horses.

Q. Wagons with two horses? A. Two horses. 30

Q. Can you drive in and out of the stable at the present time with the two horses attached to a wagon? A. No, sir.

Q. Why not? A. There is not room; you have to unhitch and draw it by hand.

Q. What is the cause of that? A. On account of that fence.

Q. The fence built by Mr. Hall on the alley? A. Yes, sir.

NELSON STICKLE—DIRECT

Q. Before the fence was built, could you drive out and in with your teams and wagons? A. Yes, sir.

10 Q. What was your custom before the fence was built—as to loading your wagon with goods? A. We could drive right through there and load up, and other people could come down the alley and go on by us without any trouble; now they have to wait until we get loaded before they can get out.

Q. What was your custom before the fence was built, at noon time— A. We left the rigs outside in front of the building, then, on Fair street.

Q. Have you tried to drive in and out of the stable since this fence was erected? A. That would be foolishness; you could not do it; anyone would know you could not drive in or out.

20 *By the Court.*

Q. The question is, have you tried it? A. No, sir; I have never tried it; I know better.

Further Direct.

Q. Before you worked for Mr. Swinley, did you work for someone else who had business on that alley? A. Yes, sir; for Tiffany and Allen, for about thirteen years.

30 Q. Did you work for them immediately before working for Mr. Swinley? A. No, sir.

Q. How long a time elapsed from the time you worked for Tiffany and Allen until you started to work for Mr. Swinley? A. Five or six years—something like that.

Q. What did you do for Tiffany and Allen? A. Drove a mineral water wagon.

Q. Did you make use of the alley when working for Tiffany and Allen? A. No, sir.

Q. Do you know what use was made of the alley while you were working for Tiffany and Allen? A. For stabling there—people driving in and out.

Q. What people would drive in and out? A. Anyone bringing in a load of hay or a load of feed, or people who had horses in there in the alley.

Q. How long have you known the alley? A. A little over thirty years. 10

Q. And during all that time has there been any change in the use which has been made of the alley? A. Oh, yes—what do you mean?

Q. Any change in the use that was made of it? A. Buildings?

Q. Has it been used the same way during all those thirty years? A. Yes, sir; as near as I can see.

Q. During the thirty years that you have known it, people have driven in and out, apparently, with perfect freedom? A. Yes, sir. 20

Q. There never were any barriers up—never any gate—it was always open? A. Yes, sir.

Q. Anyone could go in who wanted to do so, and anyone could come out who wanted to do so? A. Yes, sir.

Q. You have seen wagons pass each other? A. Yes, sir.

Q. What do you say about wagons being able to turn around in the alley? A. You could turn around in the alley all right. 30

Q. Before this fence was erected, could you turn around in front of Mr. Swinley's stable? A. Oh, no.

Q. I say, before the fence was erected, I am asking you could you turn a wagon in front of Mr. Swinley's stable? A. Oh, yes; you could.

Q. Were you ever restricted in any way in your

use of the alley by anyone? A. What is that?

Q. Were you ever restricted in any manner regarding the use of this alley? A. That fence stopped us a good deal—people passing.

Q. But until the fence was put up, were you ever hindered in any way in the use of the alley? A. Not before, no, sir.

10 Q. Could you use one part as much as the other? A. Yes, sir.

Q. And you used the side next to Mr. Hall's mill, without any question? A. Yes, sir.

Q. Used the side where Swinley's property is on Fair street, without question? A. Yes, sir.

Q. Swinley would sometimes leave his wagons out in the alley? A. I have seen them out there

Q. Have you seen other wagons in that alley? A. Yes, sir.

20 Q. Was that quite general—that use of the alley, for letting wagons stand there? A. Yes, sir.

Q. Before the fence was erected, what was your custom as to getting your horses ready to go out on your route? A. We would hitch them to the wagon and drive out.

Q. You would hitch the horses to the wagon inside the buildings? A. Yes, sir.

Q. Now, have you tried to do that since the fence was up? A. No, sir; I know we cannot do it, so I have not tried it.

30 Q. How do you do now? A. Draw the wagon out by hand, and hitch up afterwards.

Q. When you have your wagon drawn out in front of Mr. Swinley's place of business, can another wagon come up that alley? A. No, sir.

Q. While your wagon is there loading or unloading, the alley is entirely blocked, is it? A. Yes, sir; you cannot drive past either way.

Q. Have you seen other wagons stop there by

NELSON STICKLE—DIRECT—CROSS

HENRY PEHNKE—DIRECT

reason of this fence being erected? A. Certainly.

Q. How often have you seen that ? A. Quite often.

Q. And has that occurred frequently? A. Yes, sir.

Q. Now, when hay wagons come in and out there, do they have any difficulty, have you noticed? A. Yes, sir; they have difficulty—yesterday a hay wagon went in there, and he had to back out of the alley, and two of us were blocked out-side until he got out. 10

Q. Did he back out with his hay on the wagon? A. He backed the team out of the alley after he had unloaded.

Q. Did you have to wait outside until he had unloaded? A. No, sir, he was backing out; we had to wait until he backed out. 20

Q. Mr. Hall has no stable up there now? A. No, sir; not as far as I know.

Cross Examination by Mr. Dumont.

Q. If that alley in front of Mr. Swinley's was twelve feet instead of ten feet, could you drive in and out? A. I could not say, but I don't think so.

Q. You don't think that two feet additional would help any ? A. It might help, but I don't think you could drive in or out, though. 30

HENRY PEHNKE, sworn in behalf of the Complainant, testified as follows:

Direct Examination by Mr. Hudson.

Q. You are employed by Mr. Swinley? A. Yes, sir.

Q. How long did you work for Mr. Swinley? A. About twenty years.

Q. You worked for him before this fence was erected? A. Yes, sir.

Q. And do you know about taking the wagons in and out? A. Well, whenever the wagon comes in, we have to take the horse out and get two or three men to shove the wagon in by hand.

10 Q. That is, since the fence was erected? A. Yes, sir; since the fence was erected.

Q. Now, before the fence was erected, what do you say? A. Then we simply drove into the stable and unhooked the horse.

Q. When you were going out on business, you would hook up the horse in the stable and drive out? A. Yes, sir.

Q. Can you do that now? A. No, sir.

20 Q. Have you seen any trouble in this alley because of that fence? A. Well, in the mornings when we load up, sometimes the men—further up in the alley they cannot pass us by until our wagon gets out.

Q. Do you find that true at other times? A. Yes, sir; around eleven or twelve o'clock it happens very often that one man has to wait for another man to get out of the way.

Q. All the time you have been working for Mr. Swinley, he has been located at 27 Fair street? A. Yes, sir.

30 Q. Has there ever been any difficulty about the use of this alley before this fence was put up? A. No, sir.

Q. You have seen wagons go in and out there? A. Yes, sir; a great many times.

Q. Passing each other? A. Yes, sir.

Q. And turning around? A. Yes, sir.

Q. What do you say about the use of the alley—whether it has been free to everybody? A. It has

been free to everyone that wanted to come in that had business in that alley.

Q. And it was used considerably, wasn't it? A. Yes, sir.

Q. You have seen all kinds of wagons in there?

A. Yes, sir; I have seen trucks and everything.

Q. You have seen goods brought to Mr. Hall's place of business? A. Yes, sir.

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Q. And to these various properties up above? A. Yes, sir.

Q. And Mr. Swinley got his goods in that way and sent goods out that way? A. Yes, sir.

Cross Examination by Mr. Dumont.

Q. The only people who are held up going in and out of the alley, are people that are held up while you are loading and unloading, are they not? A. No, sir; sometimes people come in and leave loads at our place, people who bring merchandise to our place. 20

Q. They are not interfering with your use of it, are they; if someone brings in a load of goods and unloads it at your place, that it not interfering with you, is it? A. But it holds up the men on the alley.

Q. But it is not interfering with you. A. No, sir.

Q. When you unhitch here, and take your wagons, it does not take a great while to back them in? A. Yes, sir. 30

Q. You have to unhitch the wagon anyhow; is the wagon so heavy that it takes two men to pull them in? A. It takes more than two men; it takes three or four men with block and tackle to pull the wagon in.

Q. How heavy are your wagons? A. I could not say.

HENRY PEHNKE—CROSS

Q. How long are they? A. I don't know.

Q. You drive them every day, don't you? A. No, sir; I am the stableman there.

Q. They are just ordinary double wagons? A. They are an ordinary truck.

Q. Four wheels—two horses to them— A. Double truck, yes, sir.

10 Q. How many of them do you run? A. In the winter time we run two, and in the summer time three, most of the time.

Q. You could go down near the lower end of the alley and turn very easily with your wagons? A. I have not tried it.

Q. Have you ever seen any wagons out here on Mr. Hall's side? A. Sometimes.

Q. On Mr. Hall's side? A. Yes, sir.

20 Q. Do you leave your own out over night—did you ever see anyone's wagons out over night? A. For the last few years, I have.

Q. Have you seen Mr. Secor's? A. That was only the last two or three years.

Q. Then they stood there? A. Yes, sir.

Q. Did you ever see any lumber piled up along there? A. Only when Mr. Hall was erecting the mill.

Q. Did you ever see any mill supplies piled up along in there? A. No, sir.

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The Court.—We shall have to stop for today, and I will let you know later on when I can give you another day.

(Filed September 7, 1913.)

OPINION.

At conclusion of first hearing. V. M. LEWIS (orally).

It appears that the Court is without jurisdiction in the premises. This case does not fall within the class of cases dealt with in Hart vs. Leonard, in which this court will enforce and protect legal rights in land. I am not satisfied that this is a case involving irreparable injury and that there is not adequate remedy at law. The fact is that the plaintiff, in this case, after he has maintained his right in a suit at law, can apply to the court for an injunction against the defendant and thus avoid any further litigation in the law courts. As I view the controversy the paper title is in the defendant. The title is to a strip eight feet in width along this so-called alley. Upon this strip the fence has been erected by the defendant, this making the width of the alley-way about twelve feet, instead of twenty feet, which the complainant alleges should be the case. This obstruction the complainant claims is unlawful, asserting that the alley-way is a public highway in actual use for many years, and that defendant says he built it on his own land to which he has legal title. A suit at law, therefore, seems necessary to determine the rights of the parties. In Mason vs. Ross, Chief Justice Gummere indicates the procedure which I shall follow in the present action. The bill will be retained, pending the determination of the rights of the complainant in a proceeding at law.

OPINION.

Counsel of Complainant.—We should like to be heard on this subject before an order is made.

The Court.—You may be heard orally or on brief, and I will withhold the order until this is done.

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ORDER RETAINING CAUSE

(Filed July 18, 1913.)

IN CHANCERY OF NEW JERSEY.

Between

ROBERT SWINLEY,

*Complainant,**and*

ISAAC A. HALL,

Defendant.

On Bill, &c.,

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ORDER RETAINING CAUSE.

This cause coming on regularly to be heard, and preliminary arguments thereon having been made by George S. Hilton and Walter R. Hudson of counsel with the complainant, and Wayne Dumont and Clifford L. Newman of counsel with the defendant, it is, on this fifth day of July, Nineteen Hundred and Thirteen, Ordered, that the bill in this cause be retained until the further order of the court herein; that liberty be given to the complainant within fifteen days from the date hereof to proceed at law touching the matters in question in this cause as he shall be advised; the said proceedings at law to be diligently prosecuted, and it is further ordered that if the complainant shall commence an action within the time above specified and proceed diligently to the trial thereon, the court reserves the consideration of the costs of this suit, and of all further directions, until after such trial shall be had. And in case the complainant shall not proceed at law within the

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ORDER RETAINING CAUSE

time aforesaid, his bill is, from thenceforth, to stand dismissed out of this court with costs to be taxed. And in either case, any of the parties are to be at liberty to apply to this court as they shall be advised.

10 And it is further ordered that in case the complainant shall commence said actions as aforesaid, and fail to prosecute the same as aforesaid, the defendant shall be at liberty, upon two days' notice, to apply for the dismissal of the complainant's bill.

Respectfully advised,

VIVIAN M. LEWIS,
V. C.

EDWIN R. WALKER,
C.

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NOTICE OF APPEAL

(Filed July 18, 1913.)

IN CHANCERY OF NEW JERSEY.

Between

ROBERT SWINLEY,
*Complainant,**and*ISAAC A. HALL,
Defendant.

On Bill, etc.

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NOTICE OF APPEAL.

The complainant hereby appeals from the order made on the fifth day of July, Nineteen Hundred and Thirteen, and from the whole and every part thereof, to the Court of Errors and Appeals, in the last resort in all causes.

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HUDSON & JOELSON,
Sol'rs. of Complainant.

GEORGE S. HILTON,
Of counsel.

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

GEORGE S. HILTON,
Of counsel with complainant.

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PETITION OF APPEAL

(Filed October 18, 1913.)

COURT OF ERRORS AND APPEALS.

10 Between
 ROBERT SWINLEY,
 Complainant,
 and
 ISAAC A. HALL,
 Defendant.

PETITION OF APPEAL.

20 To the Honorable the Court of Errors and Appeals in the last resort in all causes:

30 The petition of Robert Swinley, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by His Honor Edwin R. Walker, Chancellor of New Jersey, bearing date the fifth day of July, in the year nineteen hundred and thirteen, in a cause wherein the said Robert Swinley was complainant and Isaac A. Hall was defendant, which said order reads as follows: "This cause coming on regularly to be heard and preliminary arguments thereon having been made by George S. Hilton and Walter R. Hudson of counsel with the complainant, and Wayne Dumont and Clifford L. Newman of counsel with the defendant, it is, on this fifth day of July, nineteen hundred and thirteen, on motion of Wayne Dumont, solicitor of the defendant, ordered, that the bill in this cause be retained

PETITION OF APPEAL

until the further order of the court herein; that liberty be given to the complainant within fifteen days from the date hereof to proceed at law touching the matters in question in this cause as he shall be advised; the said proceedings at law to be diligently prosecuted, and it is further ordered that if the complainant shall commence an action within the time above specified and proceed diligently to the trial thereof, the court reserves the consideration of the costs of this suit, and of all further directions, until after such trial shall be had. And in case the complainant shall not proceed at law within the time aforesaid his bill is, from thenceforth, to stand dismissed out of this court, with costs to be taxed. And in either case, any of the parties are to be at liberty to apply to this court as they shall be advised. And it is further ordered that in case the complainant shall commence said action as aforesaid, and fail to prosecute the same as aforesaid, the defendant shall be at liberty, upon two days' notice, to apply for the dismissal of the complainant's bill." And your petitioner humbly appeals from all of said order with the exception of that part thereof which orders that said cause be retained, upon the ground that the same is erroneous, for that the said order requires your petitioner to proceed at law touching the matters in question in said cause, whereas:

1. All those matters are matters over which the Court of Chancery has and should exercise jurisdiction.

2. At least one of those matters, namely the question of equitable estoppel, set up in the bill

PETITION OF APPEAL

against the defendant, is cognizable only in that court.

3. The case involves irreparable injury to your petitioner, for which adequate remedy cannot be had in a court of law.

10 4. Said order was improvidently made, after a good part of your petitioner's testimony had been submitted and without anything in the pleadings or evidence to justify it.

5. Such proceedings at law would not be effective in obtaining for the petitioner the relief to which he is entitled.

20 6. The Court of Chancery should have continued the hearing of the case to its conclusion.

Your petitioner therefore prays that the said order of the said Chancellor may be except in the particular aforesaid, reversed, set aside and for nothing holden. And your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

HUDSON & JOELSON,
GEORGE S. HILTON,
Sol'rs of Petitioner.

30 The within petition of appeal may be filed at this time.

.. WAYNE DUMONT,
Sol'r of Defendant
Isaac A. Hall.

ANSWER TO PETITION OF APPEAL •

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

ROBERT SWINLEY,
*Appellant,**and*ISAAC A. HALL,
Respondent.

On Bill.

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**ANSWER TO PETITION.
OF APPEAL.**

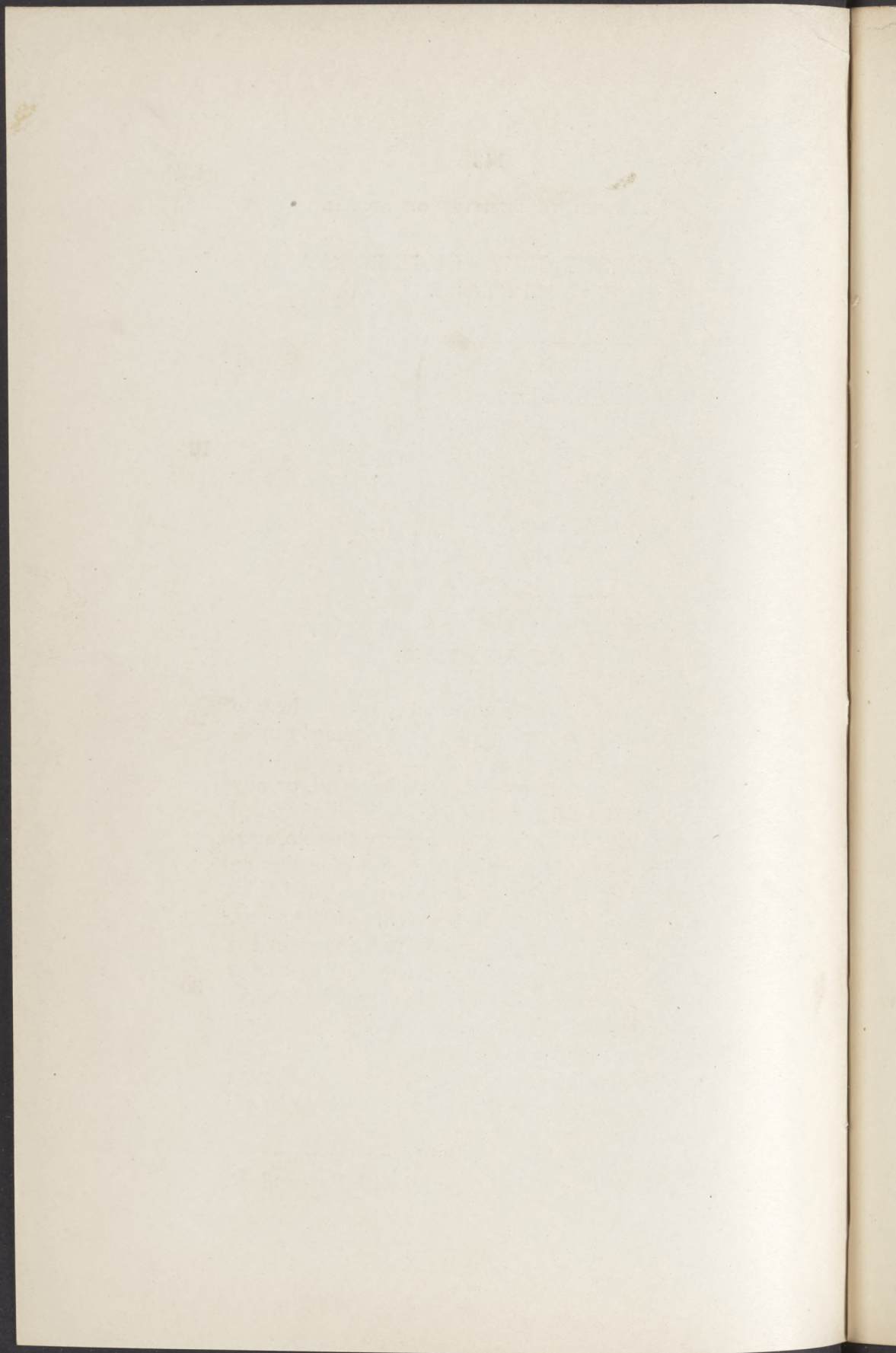
The answer of the above named respondent to the petition of appeal of the above named appellant.

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This respondent, not acknowledging all, or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that an order was on the fifth day of July, nineteen hundred and thirteen, made and entered in the Court of Chancery, in the cause, for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised, and believes that the said order is agreeable to equity, and he prays that the same may be affirmed with costs to be adjudged to this respondent.

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WAYNE DUMONT,
Solicitor and of Counsel with Respondent.



New Jersey Court of Errors and Appeals

Between

ROBERT SWINLEY,
Complainant-Appellant,

and

ISAAC A. HALL,
Defendant-Respondent.

On Appeal
from Order
of Court of
Chancery.

APPELLANT'S BRIEF (REVISION).

STATEMENT OF THE CASE.

The bill in this case was filed for an injunction against the erection or maintenance by the respondent, Isaac A. Hall, of a fence and building in what the appellant claims to be a public highway in the City of Paterson, called McPherson's Alley. The original bill was filed some time in or about November, 1911; the amended bill, now before the Court, was filed February 13th, 1912. Defendant's answer to the amended bill was filed February 29th, 1912. The case was referred to Vice-Chancellor Lewis, who proceeded to hear the same on November 18th, 1912. At the close of the taking of the testimony on that day, and before the appellant had concluded the testimony on his part, the Vice-Chancellor raised the question of jurisdiction of the Court in the case based on the view

that the case involves legal rights in land without irreparable injury or want of adequate remedy at law (Case, p. 135). Afterwards, after hearing counsel on the subject, he made an order virtually directing the appellant to proceed at law in the case, the case to be retained in the meantime (Case, p. 137); which direction appellant claims to be erroneous on the following grounds, substantially stated in somewhat different language in the petition of appeal:

FIRST. The Court of Chancery has jurisdiction of the case. And in support of this the following points are urged: (1) There is no substantial dispute in the case in respect to legal rights in land. (2) There is in the case what is considered irreparable injury and want of adequate remedy at law. (3) The case involves an equitable estoppel in favor of the appellant against the respondent and his predecessors in title.

SECOND. The order in question was improvidently made.

THIRD. The Court of Chancery should have exercised its jurisdiction in the case and continued the hearing thereof to its conclusion.

That the order is appealable appears from *Newark & N. Y. R. R. Co. v. Mayor, &c., of Newark*, 8 C. E. Gr., 515, followed in *American Dock, &c., Co. v. Trustees for Public Schools*, 10 Stew. Eq., 266, 270.

INTRODUCTION.

This alley begins on the east side of Washington Street about midway between Hamilton Avenue and Fair Street, and extends easterly, parallel or nearly so, with Hamilton Avenue and Fair Street, about 400 feet; Hamilton Avenue being on the

north of the alley and Fair Street being on the south of the alley.

This alley is what is called a *cul de sac*.

200 feet of the land between Hamilton Avenue and the alley, running easterly from Washington Street, is owned by the respondent (Case, p. 4, ll. 32 &c.; p. 37, ll. 33 &c.). The next 50 feet is owned by the appellant (Case, p. 2, ll. 5 &c.; p. 37, ll. 26 &c.). On the other side of the alley the first 82 feet is owned by the respondent (Case, p. 37, last line and top of next page); and the next 55½ feet is owned by the appellant (Case, p. 4, ll. 15 &c.; p. 38, ll. 5 &c.).

The appellant has erected on his said lands fronting on Fair Street and extending northerly to said alley a storage warehouse, used in connection with his business of bottling of mineral waters, and also stables used by him in connection with his said business; and he has erected on his said land fronting on Hamilton Avenue other buildings which are used by him as storage warehouses in connection with his said business, and also as stables, both for his own use and for the use of persons to whom he rents the same (Case, pp. 10 &c.).

The bill alleges that the respondent's said land fronting on Hamilton Avenue consists of (1) a brick mill, the southerly wall of which is along the northerly line of this alley, (2) vacant land enclosed by a fence extending along the northerly line of said alley, and (3) some old buildings, one of which is built so that the most southerly side thereof indicates the most northerly line of said alley (Case, p. 4, ll. 32 &c.).

The bill alleges that on the 21st of November, 1911, the respondent began to erect a fence in said alley running easterly from Washington Street about 200 feet and standing about 8 feet southerly

from the northerly line of the alley, by means of which the width of the alley would be reduced from about 20 feet to about 12 feet (Case, p. 5, ll. 14 &c.).

The bill also alleges that the respondent intends to erect a building or buildings for a boiler room and additional mill space on the west side of his present mill, which will extend back to the line of said fence, and had, in fact, commenced excavating for a foundation therefor (Case, p. 5, ll. 33 &c.).

The appellant claims that such narrowing of the alley would cause great injury to himself, his property on the alley and his business (Case, pp. 7, 8 and 9).

The bill now before the Court, as already stated, is an amended bill, filed February 13th, 1912 (Case, p. 1).

It does not appear just when the original bill was filed; but it does appear that it was promptly filed; for the respondent says in his answer that the fence was completed on the 27th of November, 1911, and that the order to show cause in this case was made on the next day (Case, p. 30, ll. 35 &c.).

As it must have taken some time to prepare the bill and affidavits, there does not appear to have been any time lost in the matter.

According to the answer this fence was demolished by the appellant and another fence erected there in its place by the respondent was also demolished by the appellant (Case, p. 30, l. 35, to p. 31, ll. 16 &c.). As I understand the fence has since been replaced, I will refer to it here as an existing fence.

The respondent admits in his answer that it is his intention to erect and maintain said fence and to erect a building or buildings for a boiler room and additional mill space on the west side of his present mill, "on lands adjoining said McPherson's Alley" (Case, p. 31, ll. 16 &c.).

By "adjoining said McPherson's Alley," he means adjoining the part of the alley outside of the line of his fence, as will presently appear.

There is no dispute about the actual existence of such an alley, or about its being known as "McPherson's Alley," or about its having been in existence for a long period of time.

Nor is there any dispute that at the place where this alley lies there was, when the respondent built his fence, and had been for a long period of time, a vacant piece of land, which, for at least 200 feet easterly from Washington Street, was about 20 feet wide.

Our contention is that the whole of this vacant piece of land is included in the alley; the respondent's contention is that only the southerly part of it, about 12 feet in width, is included in the alley, and that the rest of it, about 8 feet in width, and which is cut off by his fence, belongs to him.

There is no pretention on the part of the respondent that these two strips of land—the 12-foot strip and the 8-foot strip—were ever separated before he put up his fence.

Taking our view of the width of the alley, the fence built by the respondent is in the alley, and his contemplated new building when erected will be in the alley; but according to the respondent's view, the fence runs along the northerly line of the alley, and his contemplated building will be "on lands adjoining" the alley, which is the reason why he speaks in his answer of said building as one to be erected "on lands adjoining" the alley as above mentioned.

If, therefore, our view of the matter be correct, the said fence is a public nuisance, and the said building when erected will be a public nuisance.

And, in the case of a public nuisance, any person who receives special and irreparable injury there-

from is entitled to relief in a court of equity upon his individual application.

We claim that the fence in question causes, and said contemplated building when erected will cause, the appellant special and irreparable injury.

If this alley as it lies upon the ground, about 20 feet in width, should be held by the Court to be a public highway, and it should be found that the appellant does not suffer any special and irreparable injury from the said fence, and will not suffer any such injury from the said contemplated building when erected, he cannot obtain any relief in this case upon the public nuisance basis.

That, however, would not end this suit; for the appellant claims that even if the respondent's contention in regard to the real and legal width of the alley be true, and it be also true that he owns the 8-foot strip, yet the appellant is entitled to maintain this suit for two reasons: (1) because he has acquired by user the right to the use and benefit of the 8-foot strip in connection with the 12-foot strip for alley or street purposes; (2) because the respondent is barred by an equitable estoppel from making any effective denial of such right.

If it should be determined by the Court that the appellant does not and will not suffer any such injury from such nuisances, or either of them, and that he has not acquired any such right as that above mentioned, then, in order for the suit to be prosecuted upon the public nuisance ground, some other party, representing the public, would have to be brought into the case by an amendment of the bill.

I have made this rather lengthy introduction in order that it may be seen at the outset just what there is in this case.

But before proceeding with the argument I will

give some authorities upon certain matters involved in the case.

(Test for Determining the Existence of a Highway.)

"If a way is one over which the public have a general right of passage, it is, in legal contemplation, a highway, whether it be one owned by a private corporation, or one owned by the Government, or a governmental corporation, and whether it be situated in a town or in a city. No matter whether it is established by prescription, or by dedication, or under the right of eminent domain, it is a highway if there is a general right to use it for travel." *Elliott on Roads and Streets*, 2nd Ed., §3.

(Alleys.)

"Where the term 'alley' is used in a plat or in a statute concerning towns or cities, it will be taken to mean a public way, unless the word private is prefixed or the context requires that a different meaning be assigned to the term. Whatever may be the dimensions of a way, if it be open to the free use of the public, it is a highway; nor is its character determined by the number of persons who actually use it for passage. The right of the public to use the way, and not the size of the way or the number of persons who choose to exercise that right, determines its character. An alley of small dimensions actually used by only a limited number of persons, but which the public have a general right to use, therefore, may be regarded as a public way." *Ibid*, §24.

(Cul De Sac.)

"It is not essential to a public highway that it be a thoroughfare. It may be a *cul de sac*. If,

in fact, it be common to the public, it is a public highway, without regard to the place of its termination. (Authorities cited.) A road may be lawfully laid out or dedicated to public use as a highway, though it have, at one end, no outlet, or abut on private property." *State, Atkinson, pros., v. Bishop*, 10 Vr., 226, 228. See also *Elliott on Roads and Streets*, 2nd Ed., §2.

FIRST.

MATTER OF JURISDICTION.

(1). There is in this case no substantial dispute in respect to legal rights in land. In order to take such a case out of the jurisdiction of a court of equity on the ground that it involves legal rights in land, there must be a substantial dispute about such legal rights. *Redrow v. Sparks*, 5 Buch. 395, 398; *Imperial Realty Co. v. West Jersey, &c., Co.*, 9 Buch., 168, 169; *Board of Trustees of Rutherford Park v. West Shore R. Co.*, 82 Atl. Rep., 319, 320,

The respondent's claim that the alley proper is confined to the said 12-foot strip is, so far as appears from the answer, based entirely upon an alleged establishment thereof by one James Van Blarcom, and the alleged reference to the alley in deeds from the said James Van Blarcom and his heirs. Case, p. 27.

The answer does not give the date, even approximately, of said alleged establishment of the alley, or of any of said alleged deeds.

Admitting what the answer thus says about the said establishment of the alley and such deeds to be true, our claim that the alley was actually used for at least 60 years last past would not be thereby affected in the least; and such actual use would

override James Van Blarcom's said alleged plan and said alleged deeds in determining the width of the alley.

Recent deeds are of much the most importance on this subject; and it appears that the deed of the appellant of his said Hamilton Avenue property, made in 1892, describes one of the tracts thereby conveyed as extending to an alley 20 feet wide, and describes the other tract thereby conveyed as extending to an alley 25 feet wide (Case, p. 2, ll. 5 &c.).

On account of the different views of the appellant and respondent in respect to what constitutes the alley, each means a different thing when he speaks of the alley.

When the appellant speaks of the alley he means this entire piece of land, about 20 feet in width; but when the respondent speaks of the alley he means the 12-foot strip, leaving the 8-foot strip outside of the alley.

Thus, when the appellant says in his bill that the respondent has erected on a part of his said land fronting on Hamilton Avenue, a brick mill building, the southerly wall of which is erected along the northerly line of the alley; that a part of the said land of the respondent is vacant and has been enclosed by a fence extending along the northerly line of the alley; and that the remainder of the said land of the respondent is occupied by old buildings, one of which is built so that the most southerly side thereof indicates the northerly line of the alley (Case, p. 4, ll. 32 &c.), he, in speaking of the line of the alley, refers to the alley as meant by him as aforesaid; but when the respondent, in response to these statements, denies that the southerly boundary of said mill marks the northerly boundary of said alley; denies that the

said last-named fence is on the northerly line of the said alley; and denies that the southerly boundary of said old building mentioned by the appellant marks the northerly boundary of said alley (Case, p. 30, ll. 15 &c.), he refers, in his use of the word "alley," the said 12-foot strip.

This fence, the existence of which is not denied, is the only fence besides the one recently erected by the respondent, mentioned in the case; and it had been there a long time (Case, p. 68, ll. 21 &c.).

If, as the bill alleges, and the answer does not deny, this fence and that old building are on the northerly line of the alley as we claim the alley to be, and the respondent erected his mill on the same line, the presumption is very strong that the northerly line of the alley is indicated thereby.

There is no room for doubt that what we claim to be the alley has been open to its full width of about 20 feet for a period of at least 60 years last past; nor is there any room for doubt that during that period the name "McPherson's Alley" has been applied to the whole alley as we claim it to be.

The bill alleges, in substance, that the whole alley as we claim it to be, has not only been open to use as a public highway to its full width of about 20 feet, but has actually been used as a public highway to that width during that period (Case, pp. 2, 3 and 4).

The respondent does not deny that the 12-foot strip has been open and been so used for that length of time; all the denial he makes upon this point relates solely to the 8-foot strip (Case, p. 29, l. 4; p. 33, ll. 10 and 11).

He must, therefore, be treated as having admitted that the 12-foot strip has been open and been so used for that length of time.

It will thus be seen that the question of legal

rights or legal title relates only to the 8-foot strip; and this strip the respondent claims to own.

All that is presented in the case in support of the respondent's alleged title to this 8-foot strip, is his bare assertion that he owns it in fee, and his statements that for 12 years he had leased to certain persons the right to let their wagons stand on a part of this strip, and that he had occasionally placed on a part of the strip certain materials that were used in his adjacent mill, and let them remain there for a brief period before putting them into the mill.

It is not entirely clear whether he makes these statements for the purpose of showing title by adverse possession, or for the purpose of rebutting our claim that the entire 20 feet in width of that piece of land had been used as a public highway.

The leasing of such a privilege of storing wagons, without its appearing that the public had any knowledge or notice of such leases, and without its being shown to what extent the land in question had been actually occupied by the wagons under the leases, cannot give any aid to the establishment of title by adverse possession.

Besides, under our view of the case, the rights of the public in this land accrued long before the beginning of these 12 years, and, to say the least, it would take 20 years' adverse possession to oust the public from these rights.

And it is perfectly clear that the occasional placing of materials on the side of a street adjoining one's mill or other business building for temporary purposes, cannot contribute in the least to the establishment of adverse possession.

Then I think it is well settled that when a highway has once been established, it cannot be destroyed by adverse possessions.

As to the matter of rebutting our claim of user by these statements, it is enough to say that it does not appear that the use of the alley, as we claim the alley to be, has been materially obstructed by the storage of such wagons on the disputed strip, or by the use the respondent says he has made of the strip.

It does not appear that there was any unusual storage of wagons there, for a street like that, or that the respondent made any uncommon use of the land adjoining his mill.

These statements, therefore, do not afford any basis for the claim of title set up by the respondent.

This alleged title, consequently, stands upon the respondent's bare assertion that he owns the land in fee.

Whether he does or does not claim under a paper title, the bill, in effect, called upon him to show it; for it says: "And your orator further shows that he is informed that the said Isaac A. Hall claims to be the owner of all of said alley on the north side of said fence under and by virtue of certain deeds purporting to convey land to a 12-foot alley, or something of the kind, adding, after stating that the validity of said claim was not thereby admitted, matters of user and estoppel relied on by the appellant (Case, p. 11, ll. 5 &c.).

The respondent answered said part of the bill as follows: "Defendant admits that he does claim to be the owner of all of said lands and premises sought to be enclosed by said fence, and says that he is the true and lawful owner thereof in fee"; adding something in response to said statements in the bill of matters of user and estoppel.

This was a clear and manifestly intended evasion of said statements in the bill, to which he should have fully responded.

If the respondent bases his assertion of title upon anything else than the statements he made as aforesaid about leasing wagon-storage privileges and about the use he had occasionally made of the land in question, he should have set the same up in his answer, and not having done so, he could not, "in strictness," avail himself of it even at the hearing of the case, although it might appear in his proofs. *New Jersey Building Loan and Investment Co. v. Lord*, 21 Dick. Ch., 344, 352.

There is nothing in the testimony taken to support the respondent's claim of title.

It indeed appears that Mr. Ferguson, the surveyor, was furnished by somebody with a description from the "Hall deed," as it was called, but it does not appear whether or not such description covered or affected in any way this 8-foot strip (Case, p. 36, ll. 21 &c.), and Mr. Ferguson in making his survey and map followed the lines of the buildings and fences as they were on the ground (Case, p. 36, ll. 21 &c.; p. 40, ll. 30 &c.).

Mr. Ferguson's original survey was made in August, 1903, and was revised in 1911 (Case, p. 36, ll. 4 and 5); and the original survey was made for the respondent himself, and his map was made at that time (Case, p. 47, ll. 30 &c.).

It is true the Vice-Chancellor who advised the order complained of says: "As I view the controversy the paper title is in the defendant" (Case, p. 135).

I do not know of any authority or precedent for a court to take judicial notice, or to assume the existence of, a written instrument, or of the record of such an instrument, not put in evidence or set up in the pleadings.

As to the matter of user the position of the respondent seems to be, that people in passing and

repassing through the alley, either on foot or with horses and vehicles, had confined themselves to the 12-foot strip, and had not used the 8-foot strip even when two vehicles could not pass each other without one of them going over on to that strip.

Therefore, when two vehicles had met in the alley one of them must have backed out so that the other could pass out; there must have been a backing out, for a vehicle could not have turned around in the alley so as to drive out without trespassing on the sacred 8 feet of land.

That the public in using this alley have made any such discrimination between the two strips of land is too absurd for consideration.

I will add, however, that this position of the respondent is shown by the evidence taken to be without the slightest foundation, as will appear from the testimony of the witnesses, a digest of which is appended hereto.

Attention should also be called to the fact that the answer is not under oath.

The bill prayed for an answer without oath, and the answer was put in without oath.

It is, therefore, no evidence in the case for the respondent, although it is evidence against him. *Symmes v. Strong*, 1 *Stew. Eq.*, 131.

It is evidence against him, not because the statements therein contained are to be taken as true, but because having been made by him in response to the bill of complaint, he is bound by them.

That no weight should be allowed such an answer in a matter of this kind appears from *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 2 *Stew. Eq.*, 299, 305 and 306.

It would seem, therefore, that it must be taken for granted, for present purposes, that the whole of the piece of land in question, about 20 feet wide,

has constituted and been used as a public highway, as alleged in the bill.

MATTER OF DEDICATION.

The answer says that neither the respondent nor his predecessors in title have ever dedicated said lands and premises so sought to be enclosed, to the use of the public at large or the appellant in particular (Case, p. 29, ll. 33 &c.).

The matter of dedication to the use of the appellant in particular need not be noticed here; but as to dedication to the use of the public it may be remarked, that the use of land by the public as a highway or street for more than 20 years, and the acquiescence of the owners in that use, is conclusive proof of dedication. *Holmes v. Jersey City*, 1 *Beas.*, 299, 308; *Stuyvesant v. Woodruff*, 1 *Zab.*, 133, 147; *Smith v. The State*, 3 *Zab.*, 130; *Elliott on Roads and Streets*, 2nd Ed., § 159.

And there may be an implied dedication without a 20-years' user. *Elliott on Roads and Streets*, 2nd Ed., § 162.

See also upon this subject of user *Central R. R. Co. ads. The State*, 3 *Vr.*, 220, 221 and 222.

The respondent claims that he has not acquiesced (Case, p. 29; p. 32, ll. 26 &c.; p. 33, § 10).

In order for his failure to acquiesce, if he has not acquiesced, to have any effect, the respondent must have become the owner of the fenced-off strip before the dedication had become complete; and if he did, and relies upon that fact as a defense to appellant's claim, he should have set it up in his answer; not having done so, such fact will not be presumed, and cannot avail him here. *New Jersey Building Loan and Investment Co. v. Lord*, 21 *Dick. Ch.*, 344, 352.

ACCEPTANCE BY THE CITY.

The answer says this alley has never been ordained as a public street by any ordinance passed by the governing bodies of the City of Paterson, but said city did in the year 1908 pave and sewer said alley, thereby accepting the same as a public street (Case, p. 28, ll. 23 &c.).

This, taking it literally, would seem to be conclusive against the respondent; but to be fair with him I will say he no doubt intended to confine such dedication to the 12-foot strip, for, in continuing, he says that strip only was paved.

He does not say in what part of the alley the sewer was laid.

This sewer was laid about 18 years ago instead of in 1908 as stated in the answer (Case, p. 47, ll. 4 &c.).

The sewer runs through approximately the center of the alley, taking the buildings for the line of the alley (Case, p. 38, ll. 14 &c.).

And one of the man-holes and one of the catch-basins to the sewer are within the fenced-off strip (Case, p. 38, ll. 24 &c.) ; bottom of p. 46 and top of p. 47).

The answer admits that this sewer was laid by the City of Paterson, as already shown, and that such is the case appears from the petition for the same and assessment made therefor (Case, p. 107).

The respondent himself was one of the petitioners for this sewer, and he was assessed \$40 for the building thereof (Case, p. 107).

The laying of this sewer by the city constituted an acceptance of the alley by the city as a public highway, if it had not been accepted before; the entire alley, and not merely 12 feet of it. *Arnold v. City of Orange*, 3 Buch., 280, 283.

And the respondent, having been one of the petitioners for the sewer, is thereby estopped from the effect of the laying out of the same upon the matter of acceptance.

The paving of a street has the same effect. *People's Traction Co. v. Atlantic City Ry. Co.*, 42 Vr., 134, 135.

If for some reason or other only 12 feet of the alley was paved, that would not operate to reduce the entire alley, then already accepted, to the width of 12 feet.

But the fact is that the 12 feet of paving extended only part way; for at quite a distance from the beginning of the alley, out by the respondent's mill, the alley is paved all the way across the alley 20 feet in width (Case, p. 75, ll. 1-11; p. 89, ll. 17 &c.).

"One of the principal indications of acceptance is that of improving or repairing the road or street. In one case it was held that digging a public well in the way was evidence of acceptance, and we have no doubt of the soundness of this decision; for no matter what the particular act is, if it be one which can only be rightfully done upon a highway, it should be regarded as evidence of acceptance." *Elliott on Roads and Streets*, 2nd Ed., §153.

Unquestionably, therefore, this alley, at its entire width of 20 feet, is a public highway, and was a public highway when the respondent began to erect his fence.

This is a case, therefore, of a man erecting a fence and proposing to erect a building on an unquestionable highway under the claim that he owns the land he is thus attempting to appropriate.

If he owns the land, proof of which he has neither produced or stated, he owns it subject to the

public easement therein as a part of a public highway.

It seems very clear that there is not in this case any substantial dispute about the legal title to this 8-foot strip of land.

A substantial dispute must be a dispute that has substance in it, and there does not seem to be any substance to the claim of title to that strip set up by the respondent.

It is not enough to merely assert a title to land in question in an equity suit in order to take the case out of the jurisdiction of the court.

An attempt was made in the case of *Burgin v. Rutherford*, 11 Dick. Ch., 666, to oust the jurisdiction of the Court of Chancery in that way, but it failed.

It seems clear, therefore, that the Court of Chancery has jurisdiction of this case, irrespective of the questions of irreparable injury, want of adequate remedy at law, and equitable estoppel.

(2). There is in this case what is considered irreparable injury and want of adequate remedy at law.

An obstruction to a public street is a public nuisance. *Morris Canal & Banking Co. v. Fagan*, 3 C. E. Gr., 215; 1 *Wood on Nuisances*, 3rd Ed., p. 300, §248.

There is no doubt of the power of the Court of Chancery to prevent and remove such nuisances. *Morris Canal & Banking Co. v. Fagan*, *supra*; *Elliott on Roads and Streets*, 2nd Ed., §§664 and 665; 3 *Pomeroy Eq. Jur.*, § 1349.

A private individual who suffers special injury from such a nuisance will be granted an injunction if his special injury is such as is considered irreparable. *Jersey City v. Bergen R. R. Co.*, 2 *Beas.*,

314; *Perkins v. Morristown & Camden Turnpike Co.*, 18 *Stew. Eq.*, 24; *Elliott on Roads and Streets*, 2nd Ed., § 665; 2 *Wood on Nuisances*, 3rd Ed., § 786, note 2; *Pomeroy Eq. Jur.*, §1349.

And that in such a case of irreparable injury equity will grant relief, even if title to land is involved therein, is clear. *Hart v. Leonard*, 15 *Stew. Eq.*, 416, 420; *Hodge v. Giese*, 16 *Stew. Eq.*, 342, 350.

By the special injury that must be received by an individual to entitle him to an injunction in the case of a public nuisance, is meant an injury distinct in kind from that received by the rest of the public. *Roessler & Hasslacher Chemical Co. v. Doyle*, 64 *Atl. Rep.*, 156.

The injury received and to be received by the "rest of the public" in this case, is the interference by the respondent's obstructions with the passage through the alley, or any part thereof, by its individual members, or such of them as have or may have occasion to so use the same.

Any injury, therefore, that the appellant suffers or may suffer on account of such obstructions in merely passing, as an individual member of the public, through the street, or any part thereof, does not and will not constitute such special injury.

But we contend that the appellant received and will receive other injuries than those so suffered or to be suffered by the general public, including himself, from such obstructions.

(a) There is the difficulty and consequent extra labor and expense in driving the appellant's wagons and trucks from his stable and factory into the alley, and from the alley into his stable and factory, resulting from the narrowing of the alley by the respondent, mentioned on page 8 of the case.

(b) There is the hindrance and difficulty and consequent extra labor and expense attending the loading and unloading of appellant's wagons and trucks on the part of the alley in front of his factory, resulting from the same cause, mentioned at bottom of page 8 and top of page 9 of the case.

(c) There is the hindrance and inconvenience in the carrying on of the appellant's business located on the alley, and injury to such business, resulting from the alley being made so narrow by the respondent's fence that two wagons cannot pass therein, mentioned on page 9 of the case.

This business injury is distinct in kind from the injury to the rest of the public from such obstructions.

(d) There is the increased danger from fires and consequent increased rates of insurance against fires, and the diminution in volume of light and air from the alley, that will result from the appropriation of the 8-foot strip by the respondent and the buildings that may be erected thereon.

(e) There is the general injury to the appellant's business and to his lands and buildings employed in his business as business properties, along which said fence stands, including and in addition to any matters above mentioned resulting from such encroachments on the alley.

I have not mentioned the matter of the depreciation in the value of the appellant's lands and premises on the alley, considered as unconnected with his business, for the reason that there is, to say the least, some question whether such depreciation can be regarded as special injury, although it will be very great if the respondent's obstructions are permitted to remain.

But there can be no doubt that all of the above specified injuries, being distinct in kind from those

affecting the public at large, come under the head of special injuries.

And they are all what are called "irreparable injuries."

The term "irreparable injury" does not mean injury that is absolutely irreparable, according to what would naturally be the common understanding of the term.

In the case of *Jersey City v. Bergen R. R. Co.*, *supra*, the term used in connection with this subject, as above expressed, is, "if his special injury is such *as is considered* irreparable."

Wood in his work on Nuisances gives this definition of irreparable injury:

"By irreparable injury is not meant such injury as is beyond possibility of repair, or beyond compensation in damages, nor necessarily great injury, or great damage; but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and which, because it is so large on the one hand, or so small on the other, is of such constant and frequent occurrence that no fair or reasonable redress can be had therefor in a court of law." Vol. 2, §778, on page 1126.

See also *Elliott on Roads and Streets*, 2nd Ed., §665, on page 714.

In *Hodge v. Giese*, 16 *Stew. Eq.*, 342, Vice-Chancellor Van Fleet, in speaking of the term "irreparable injury," says: "All that is meant by that phrase is that the injury shall be a material one, and of such a nature as cannot be adequately redressed by pecuniary damages." Page 350.

In *Hart v. Leonard*, *supra*, "irreparable injury" is defined substantially as want of adequate remedy at law.

Want of adequate remedy at law is the main element, to say the least, of irreparable injury;

and when the term "irreparable injury" is used it clearly involves want of adequate remedy at law.

As the matter of adequate remedy at law, or the want of it, is very frequently used in this connection, it may be well to see what it really means.

Mr. High in his work on Injunctions says:

"The mere existence, however, of a remedy at law, is not in itself sufficient ground for refusing relief in equity by injunction; nor does the existence or non-existence of a remedy at law afford a test as to the right to relief in equity. To deprive a plaintiff of the aid of equity by injunction, it must also appear that the remedy at law is plain and adequate; in other words, that it is as practicable and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity. And unless this is shown a court of equity may lend it extraordinary aid by injunction, notwithstanding the existence of a remedy at law." Vol. 1, 3rd Ed., §30, beginning on page 29.

There is no adequate remedy at law for an injury done a party by a nuisance unless damages for all of such injury can be recovered, and the injured party thus put *in statu quo*, in one suit at one time.

If the injury is such as is sometimes described as "continuous in its character," as in *Hodge v. Giese, supra* (16 Stw. Eq., 342, 350), and sometimes described as "of constant and frequent occurrence," as in Wood's definition of irreparable injury, above given, and is sometimes mentioned as "producing a constantly recurring grievance," as in *Demarest v. Hardham*, 7 Stw. Eq., 469, 476, and so requires successive suits at law, as successive damages accrue, to recover compensation therefor, the remedy at law is not adequate.

It is not, as said by Mr. High in his remarks on the subject above given, "as practical and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity."

Under the legal remedy in such cases, the injured party would have to bring successive suits at law for the injury, as he suffered from the results of it from time to time, at considerable expense, while the remedy in equity would put an end to the whole business at once.

These words of Vice-Chancellor Van Fleet in *Hodge v. Giese*, *supra*, sets the matter in its proper light:

"Successive suits at law, in which only pecuniary damages could be awarded, or give the plaintiff neither the full measure of his rights, nor justice, but would permit the defendant to deprive the plaintiff of his rights for such compensation as a jury might see fit to award." 16 *Stew. Eq.*, 342, 350.

Let us now take in view these special injuries suffered by the appellant as above stated.

Every time the appellant takes a wagon or truck from his stable or factory into the alley, he suffers an actionable injury from the respondent's encroachment; and every time he takes a wagon or truck from the alley into his stable or factory, he suffers such an injury; and every time his loading and unloading of wagons or trucks in front of his factory is interfered with by or in consequence of such encroachment, he suffers such an injury; and every time he encounters any of the other inconveniences to his business mentioned above on account of such encroachment, he suffers such an injury; and so on through the list.

If he had brought a suit at law for damages for one, or more, of all of these injuries, instead of applying to the Court of Chancery for an injunc-

tion, he could have sued only for the damages that had accrued up to the time of the commencement of the suit.

If he should have prevailed in the suit, the case might have been brought to this Court; and if he should have been finally successful, his costs would have very likely eaten up his damages, and he would still have been deprived of his rights in the land by the respondent.

And then again, after further damages had accrued, he might have brought another suit for the same with a like result; and so on indefinitely.

In such a case a poor man would have a poor chance against the rich one.

Then it must be remembered that the ascertainment of such damages would be very difficult, if not impossible.

How could it be shown to and determined by a jury, just what compensation the appellant should receive for such injuries? How should the appellant keep and render an account of, for instance, all the particular damages done by the respondent's obstructions every time he should drive his wagons and trucks from his stable and factory into the alley, and from the alley into his stable and factory?

Such a thing would be utterly impracticable.

The case of *Feigenspan v. Nizolek*, 1 *Buch.*, 382, is applicable here.

In that case a party had agreed to sell the beer of another party and broke the agreement, and a suit was brought in the Court of Chancery to compel specific performance of agreement, and the defendant set up as a defense that the Court of Chancery should not take jurisdiction of the case, but leave the plaintiff to his remedy at law.

Vice-Chancellor Pitney, before whom the case was heard, in his opinion therein, said:

"The necessity and propriety of bringing a multitude of actions in the present case, seems to me to be too plain for argument. The injury is a continuing one and liable to be such for a period of five years. To say that the plaintiff must not only accomplish the very difficult, if not hopeless, task of keeping account and preserving the proof of the amount of beer used by the defendant for that period, or even for one year or two years, and then sue to recover his damages, seems to me to be a mockery. The continuing character of this injury seems to me to be of itself, according to well-settled principles, a sufficient ground for the interference of the court." Page 401.

The decision in that case was affirmed by this Court. 2 *Buch.*, 959.

See also the similar case of *People's Brewing Co. v. Levin*, 81 *Atl. Rep.*, 1114, 1115.

See also, upon this subject of irreparable injury, *Holsman v. Borling Springs Bleaching Co.*, 1 *McC.*, 335, 343 (pollution of a stream of water); 3 *Pomeroy's Eq. Jur.*, §1351 (disturbance or destruction of easements and servitudes); 2 *Story's Eq. Jur.*, §926, beginning on page 229 (building so near a house as to darken the windows in the house).

In the last reference the author says: "The injury is material and operates daily to destroy or diminish the comfort and use of the neighboring house; and the remedy, by a multiplicity of actions for the continuance of it, would furnish no substantial compensation."

See also as to obstructing by a building light and air from a street, prospect and ventilation, see *Barnett v. Johnson*, 2 *McC.*, 481, 487, &c.; *Dill v. Board of Education*, 2 *Dick. Ch.*, 421, 433.

In *Demarest v. Hardham*, 7 *Stew. Eq.*, 469, Vice-Chancellor Van Fleet said: "Equity takes cognizance of a nuisance which is permanent in its

character, or *which produces a constantly recurring grievance*, more readily than any other." Page 476.

There is no question that the Court of Chancery has jurisdiction of all cases of irreparable injury; nor is there any question that when a court of equity once takes jurisdiction of a cause on account of its involving irreparable injury, or any other matter of equitable cognizance, it will determine all matters embraced therein, although some of them may be such as do not, by themselves alone, come within the jurisdiction of the court, not even excepting legal rights in land, or legal titles to land.

If, therefore, this case is a case of irreparable injury, as we claim it to be, it is a case of which the Court of Chancery has jurisdiction, notwithstanding the questions of legal rights in land or legal title to land therein involved, and it can and should determine and settle those questions so far as it may be necessary so to do.

The noted case of *Hart v. Leonard* related exclusively to mere "private legal rights in land." *15 Stew. Eq.*, page 421, lines 4 &c.

This is not a case of mere "private legal rights in land"; it involves public as well as private legal rights in land.

Of course, whenever, under the rules laid down in that case, the Court of Chancery would take jurisdiction of a mere private legal right in land, it would take jurisdiction of a public legal right in land.

To that extent the rules so laid down are applicable to cases of public legal rights in land, but no further.

Whether the Court of Chancery will take jurisdiction of a public legal right in land when it will not of a private legal right in land, does not appear to have been directly adjudicated.

But it seems quite clear that the court should be moved to interfere by injunction in a case of irreparable injury more readily when the injury is caused by a public nuisance, such as the obstruction of a public street, than when the injury is caused by a private nuisance, such as the obstruction of a private way; and such would seem to be the inference from a comparison of §1349 with §1350 of Pomeroy's Equity Jurisprudence, Vol. 3.

The cases relied on in support of the no-jurisdiction claim will be found to be those in which irreparable injury, or want of adequate remedy at law, are not involved, or are held not to exist, and none of them have an equitable estoppel or any other matter of equitable cognizance embraced in them.

We submit that this is clearly a case of irreparable injury and want of adequate remedy at law.

"The fact is," the Vice-Chancellor who advised the order complained of says, "that the plaintiff in this case, after he has maintained his right in a suit at law, can apply to the court [meaning the Court of Chancery] for an injunction against the defendant and thus avoid any further litigation in the law courts." Case, pages 135 &c.

This is a clear admission that there is in this case no adequate remedy at law; for after a court of law had exhausted its power in the matter, we would have to go back to the Court of Chancery in order to obtain complete or effectual relief; and no remedy is adequate which does not afford such relief.

The question here is a question of jurisdiction; the Court of Chancery has directed us to proceed in a court of law on the ground that said court has no jurisdiction; if, therefore, it has jurisdiction, as we claim it has, the order containing such direc-

tion is manifestly erroneous and should be reversed.

(3). The case involves an equitable estoppel in favor of the appellant against the respondent and his predecessors in title.

This is intended to apply whether the alley shall be held to be a public highway or a mere private way.

The facts creating such an estoppel as stated on pages 7-12 of the case.

That those facts are sufficient to estop the respondent from setting up his alleged title in this case is so plain, upon well-established principles, that it hardly requires any citation of authorities; and I will, therefore, only refer to the case of *Central R. R. Co. v. The State*, 3 Vr., 220, as completely covering the ground.

According to *Dun v. Baldwin*, 1 Zab., 395, and *Cobb v. Davenport*, 3 Vr., 369, bottom of page 392, and top of page 393, an equitable estoppel is not available in a court of law so far as relates to real estate.

The case of *Ruckelchaus v. Ochme*, 3 Dick. Ch., 436, affirmed, 4 Dick. Ch., 340, proceeds upon the same doctrine.

It seemed to me at first that the case of *Central R. R. Co. v. The State*, *supra*, squinted the other way, that is to say, in favor of the cognizance by a court of law of equitable estoppels in respect to real estate; but further examination of the case convinces me that it does not really do so.

Besides, the opinion in that case was delivered by Chief Justice Beasley, at the June Term, 1867, of the Supreme Court, and the case of *Cobb v. Davenport*, *supra*, was argued before the same Chief Justice and Justices Depue and Bedle, and was

decided at the next term of the same court; the opinion of the Court being delivered by Justice Depue and concurred by the Chief Justice and Justice Bedle.

There is no doubt, however, that a court of equity will take cognizance of an equitable estoppel and enforce the same, even in respect to real estate.

A court of equity, in such a case, does not try or determine a title to real estate; it merely prevents the owner from setting up his title, or enforcing the same, or availing himself thereof, for the reason that it would be inequitable for him to do so.

Of course, the respondent denies that there is in this case any such estoppel; but such denial does not oust the jurisdiction of the Court; it merely presents an issue to be determined by the Court upon a hearing of the case.

SECOND.

The order in question was improvidently made.

That such is the case clearly appears from what has already been said, which I do not purpose to repeat, even briefly, here.

There are, however, a few points to which it seems proper to direct particular attention.

(a). The respondent's claim of title to the strip of land in question rests entirely upon an unsworn answer, which cannot be treated as evidence in his behalf for any purpose whatever.

It cannot be possible that a complainant can be virtually turned out of court upon the strength of such unsworn statements, for the making of which, if untrue, the party making them would not be liable either civilly or criminally.

If a complainant can be so turned out of court, a most meritorious equity case might be sent to a court of law upon false statements in an answer.

No imputation upon the statements in the respondent's answer is intended here; I am dealing now with general principles only.

(b). The Vice-Chancellor who advised the order complained of was evidently influenced largely in so doing by the idea he in some way imbibed that the respondent has the paper title to this land, whereas there was not the slightest evidence produced, or even claim made of the answer, that he had such title.

(c). The said Vice-Chancellor, in advising said order, entirely disregarded the testimony of the witnesses, which fully sustained the appellant's claim in respect to said land, and showed conclusively that the respondent's claim in respect thereto is without the slightest foundation in fact.

It is sometimes necessary, in order to determine the question of jurisdiction in a case like this, to have the case go to a final hearing. *Redrow v. Sparks*, 5 *Buch.*, 396, 398.

And when that is done that question is, of course, determined upon the case as it stands upon the hearing, in respect to both pleadings and proofs.

And when, as in this case, the Court sees fit to halt the case during the trial, and raise and decide the question of jurisdiction, that decision must be based on the case as it then stands, in respect to both pleadings and proofs; and it is perfectly clear that in this case such proofs were not considered in the making of such decision.

(d). The said Vice-Chancellor advised said order sending the case to a court of law, upon the ground of want of jurisdiction, whereas the Court had unquestionable jurisdiction of the case on the ground, not to mention any others, of the matter of equitable estoppel therein involved, of which a court of law, to which the appellant was thus sent, would not have jurisdiction.

THIRD.

The Court of Chancery should have exercised its jurisdiction in the case and continued the hearing thereof to its conclusion.

This is so obvious that I will confine myself here to some objections to our being sent to a court of law.

(1) While there we would be outside the injunctive power of the Court of Chancery, which might be needed to protect us; and as the suit would no doubt be kept in contest until it reached a decision by this Court, we might remain there a long time.

(2) In a suit at law we would be subjected to a jury trial and there is no question that such a trial of such a difficult and complicated case as this one is would not be as reliable as a trial before an equity judge.

Generally speaking, (without intending any imputations upon the respondent or his counsel), those only who have bad cases and hope to bamboozle the jury, prefer a jury trial.

(3) Some of the witnesses that have been examined in the case are very old, and may by death be rendered unavailable in another trial.

(4) If the case should now be tried in a court of law, the testimony already taken in the Court of Chancery would be useless, and the labor and expense attending the taking of it would be wasted.

If the case was to be sent to a court of law at all it should have been done before that testimony was taken.

CONCLUSION.

1. If the case involves irreparable injury, or, what is about the same thing, want of adequate

remedy at law, the Court of Chancery has jurisdiction thereof whether legal title to land is involved therein or not.

2. If the case involves legal title to land, but that title is not in substantial dispute, the Court of Chancery has jurisdiction thereof even if it does not involve irreparable injury or want of adequate remedy at law.

3. If the case involves an equitable estoppel as claimed, the Court of Chancery has jurisdiction even if the case does involve legal title to land without irreparable injury or want of adequate remedy at law.

4. If that court has jurisdiction, it should proceed with the case and decide it, and the order appealed from should be reversed.

Respectfully submitted,

GEO. S. HILTON,
Of Counsel with Appellant.

Brief Digest of the Testimony of the Witnesses, excepting Ferguson, the surveyor, who was the first witness.

HAY OWER, 82 years old.

Brook formerly the northerly boundary of the alley. p. 50, ll. 20 &c.

Remembers the building on the north side of the alley at Washington Street since 40 years ago. p. 51, ll. 12 &c.

No change in the width of the alley except Hall's fence and a building encroachment. p. 54, ll. 17 &c.

General use was made of the alley by everybody. p. 55, ll. 24 &c.

ALBERT DOREMUS, 73 years old.

Can remember the alley as long as he can remember anything. p. 57, ll. 35 &c.

Speaks of the use made of the alley. p. 57, ll. 38 &c.

There was a brick wall on each side of the brook. p. 59, ll. 4 &c.

Known the old fence along the northerly line of the alley to have been there about 60 years. p. 63, ll. 12 &c.

PETER DOREMUS, 84 years old.

Has known the alley for fifty years. p. 65, l. 6.

During that time the alley has been used for general purposes. p. 64, last line &c.

No appreciable change in the width of the alley during that time. p. 65, ll. 22 &c.

The brook ran along the north side of the alley. p. 66, ll. 13 &c.

The brook was turned into the sewer 20 or 25 years ago. p. 67, ll. 5 &c.

GEORGE YOUNG, 56 years old.

The old fence ran 60 or 70 feet from the old corner building p. 68, ll. 22, &c.

That fence was there as long ago as he can remember. p. 68, ll. 27 &c.

No material change in the width of the alley until Hall built his fence there. p. 68, ll. 33 &c.

Free and general use of the alley as long as he can remember. p. 70, ll. 10 &c.

The brook was closed up between 30 and 35 years ago. p. 71, ll. 3 &c.

The northerly side of the alley was indicated by the brook and the southerly side by buildings. p. 71, ll. 13 &c.

The alley was from 18 to 20 feet wide. p. 71, ll. 16 &c.

No appreciable change in the width of the alley except by building encroachments. p. 71, ll. 25 &c.

As to the former use of the alley. p. 74, ll. 28, &c.

Cannot be so used now on account of Hall's fence. p. 74, bottom.

A part of the paving runs up to Hall's mill. p. 75, ll. 1 &c.

CHARLES CUTHBERT, 53 years old.

As to the use of the alley; whole alley used. p. 76, ll. 15 &c.; p. 77, ll. 3 &c.

No change in the width of the alley excepting Hall's fence. p. 76, ll. 32 &c.

Two wagons could pass one another but cannot now. p. 77, ll. 35 &c.

Inconveniences to Mr. Swinley caused by Hall's fence mentioned. p. 78, ll. 79 &c.

JAMES LANGSTAFF, 64 years old.

No change in the width of the alley except by some encroachments and Hall's fence. p. 81, ll. 22 &c.

Alley always open; use not confined to any part. p. 82, ll. 7 &c.

ROBERT OWENS, 65 years old.

As to the use of the alley. p. 86, ll. 12 &c.; p. 88, ll. 14 &c.

The paving runs up to Hall's mill. p. 89, ll. 25 &c.

GEORGE W. POLLITT.

Has known the alley since 1858. p. 93, l. 9.

Only change in the width of the westerly end of the alley is Hall's fence. p. 94, ll. 30 &c.

Alley used by the public generally ever since he has known it. p. 95, ll. 35 &c.; p. 11, ll. 24 &c.

Brook filled in about 1872. p. 97, ll. 8 &c.

HALMAGH POST, 76 years old.

No change in the width of the alley except by Hall's fence. p. 103, ll. 5 &c.

No restriction in the use of the alley. p. 103, ll. 12 &c., and 23 &c.

HIRAM WOODRUFF.

Result of the narrowing of the alley by Hall's fence. p. 110, ll. 8 &c.; p. 111, ll. 17 &c.

How Swinley's wagons are got into the barn. p. 112, ll. 1 &c.

GEORGE A. MEYER.

Has known the alley since some time in the early 80's. p. 113, ll. 23 &c.

No change in the width of the alley except by Hall's fence. p. 114, ll. 34 &c.

As to the use made of the alley. p. 115, ll. 11 &c.

WILLIAM T. SUTTLE.

As to use made of the alley. p. 116, bottom; p. 117, ll. 1 &c.

ALBERT A. PIAGET, 80 years old.

As to use made of the alley. p. 119, ll. 17 &c.; p. 122.

Alley not changed in width since he has known it except by some building encroachment. p. 121, ll. 23 &c.; p. 122, ll. 32 &c.

The width between the two houses on the corner was approximately the width of the alley. p. 121, ll. 35 &c.

The alley was open and free. p. 125, ll. 33 &c.

It was a common thing for all the people in the alley to let their wagons stand out there. p. 126, ll. 9 &c.

NELSON STICKLE.

How Swinley's wagons have to be taken in and out on account of Hall's fence. p. 127, ll. 31 &c.; p. 128, ll. 1 &c.; p. 130, ll. 30 &c.

As to the general use of the alley before and after Hall's fence was put up. pp. 129, 130 and 131.

HENRY PEHNKE.

As to the use of the alley by Swinley before and after Hall's fence was put up. p. 132.

Inconveniences arising from that fence being there. pp. 132 and 133.

New Jersey Court of Errors and Appeals

BETWEEN

ROBERT SWINLEY, *Appellant*,

AND

ISAAC A. HALL, *Respondent*.

*On Appeal from
Court of Chancery.*

BRIEF FOR RESPONDENT

The statement of the case is quite fully set out by counsel for appellant in his introduction, so that it is unnecessary for us to outline the facts other than as they touch upon the points which we make hereafter.

The only claim which appellant makes to this strip of land lying north of the twelve foot alley is that he in common with the public at large, has an easement therein permitting him to go upon this strip while using this alley as a public highway.

A right of easement such as he claims is purely a legal interest in lands.

Hart vs. Leonard, 42 N. J. E. 419;
Mason vs. Ross, 77 N. J. E. 527.

The Court of Chancery did not oust the appellant from that court, but simply retained his bill until he should have established his right in a court of law. As the court below viewed it, the strip of ground enclosed by the fence and lying on the northerly side of said twelve foot alley was owned by the respondent in fee, and he disputed the legal right which the appellant claimed to have ingress to and egress from his property

over this strip, and in that posture of affairs the appellant, in order to obtain the injunctive relief of the court below, was bound first to establish such legal right in a court of law. Counsel for the appellant expressed wonder at the source from which the court found, as it said in its memoranda, that the paper title was in the respondent. Aside from the allegations of the answer, the court also obtained this information from the admissions and concessions of counsel for the appellant upon the argument of the case before the court below. The brief for the appellant is the first intimation we had that it was not conceded that the respondent was the owner in fee of the property enclosed by the fence.

The concluding paragraph of the answer of the respondent, P. 33, denies that the appellant had any right of way or easement in the lands, and submits that the matters and issues are those which may and should be tried and determined at law, etc., and prays for the benefit thereof, as if he had interposed a demurrer. This was necessary in order to set up facts in the answer, which would show that appellant was bound first to resort to a court of law.

The appellant is not in a position to object to the alleged encroachment of the respondent over the alleged boundaries of this alley for he has not come into equity with clean hands.

A reference to the map offered in evidence by the appellant will show that the appellant himself encroaches himself on the southerly side, directly across the alley from the alleged encroachment of respondent. Mr. Ferguson, the engineer of the appellant, who made the map says, that on the westerly side toward Washington street, he encroaches six inches, and on the westerly side eighteen inches, P. 43, L. 20-30, and P. 39, L. 8-20; that on one end of Mr. Swinley's property, it is ten feet nine inches to the fence, the erection of which

is sought to be enjoined, and on the other end, twelve feet two inches, so that if the appellant did not encroach upon this alley himself, he would have about one and one-half feet more, which could be devoted to his own uses.

We do not understand how a complainant can come into court and complain of an encroachment of his neighbor when he himself is admittedly doing the same thing. The question of the extent of the encroachment is immaterial. We think, therefore, that he is estopped from complaining of the conduct of the respondent, and therefore is not aggrieved by an order permitting him to establish his rights in a court of law. This encroachment is set up in the answer, P. 25, paragraph 1.

See 16 Cyc, 144, 148 and 149.

Township of Hamilton vs. Wainwright.
52 N. J. E. 419.

There is such a dispute in this cause concerning a legal title to an easement in lands, that the right of the appellant should have first been established at law to justify the interference of a court of equity.

The appellant recognized the well settled rule that courts of equity will not determine legal estates in lands, but alleges that this cause comes within the exceptions under which that rule does not obtain.

Counsel for appellant claims that it could not be determined whether there is a substantial dispute with respect to legal rights, until the matter had proceeded to a complete hearing of the entire evidence in the case, and that the court has no right to rely upon the allegations of the answer as to this dispute. In a matter of this character, we do not think that the court ought to be compelled to proceed to a complete final hearing of the matter involving all the evidence in the case in

order thereupon solemnly to adjudge that there is a dispute, and that therefore, the court has no jurisdiction.

We do not think this is in accordance with sound sense and jurisprudence.

We think *Outcalt vs. Helme*, 42 N. J. E., 665, is authority to the contrary.

Speaking for the Court of Errors in reversing the Court of Chancery, which had made a decree and declaring that the Court of Chancery had no jurisdiction in the matter, Justice Dixon, after reciting in brief the allegations of the bill, and the allegations of the answer, and without reference to the evidence, says on page 675:

"The answer also insists that the complainant is not entitled to the aid of a Court of Equity, and prays the same benefit of this defense as if it had been made by plea or demurrer. It is evident that *the issues raised by these pleadings are such as should be tried at law*. The ground of suit is an alleged invasion of complainant's legal estate of land by means of a structure said to be unlawfully on the defendant's land."

We think, therefore, that where the question of jurisdiction depends upon whether there is a dispute as to the legal estate, unless it be conceded by the defendant, or has previously been established by a court of law, the court is justified in declining to take jurisdiction over the matter where the question of jurisdiction is raised in the answer, as in the case at bar, and as in the case just above mentioned. In that case, the bill was not retained, but was dismissed, because they had set up lack of jurisdiction in their answer.

That if there is such a dispute, the court has not jurisdiction until the question of the legal estate is determined by a court of law, is not only conceded by counsel for appellant, but is established by the causes cited by them on page 8, of their revised brief. There is, however, one case bearing upon that subject omitted by counsel in their brief, which is *Mayor, etc. of South*

Amboy vs. Pennsylvania Railroad, 77 N. J. E., 242, which was a case where the Court of Chancery undertook to determine the boundary of a highway, and upon and over which the railroad was enjoined from encroaching, and which decree was reversed by this court in the opinion above referred to, in which the court says:

"We are of the opinion, moreover, that the proper forum for settling the width of the highway is a Court of law, and the proper tribunal for its correct determination is a trial by jury."

See also Attorney General vs. Heishon, 18 N. J. E., 412.

The Court, in the South Amboy cases aforesaid, pointed out the difficulties which confronted the Court of Chancery in determining the boundary of the highway. We point out the same difficulty which would confront the Court of Chancery in this case, and in connection therewith, call the Court's attention to the *uncertainty of the boundary of the alley* as set forth in the bill of complaint and affidavits attached, in which it is always referred to as "*about twenty feet in width.*" We do not see how a Court of Chancery is going to determine where "*about twenty feet*" is going to locate this fence. The prayer of the bill is that the respondent may be enjoined from erecting or maintaining the aforesaid building and fence, or either of them or either part of either of them, in said street or alley at its width of "*about twenty feet,*" and from erecting or maintaining any other buildings or fence, or any part thereof in said street or alley at its width of "*about twenty feet,*" and from encroaching upon, or obstructing in any way whatsoever, the said street or alley at its said width of "*about twenty feet,*" and from depriving your orator of the free and proper use of said street or alley at its width of "*about twenty feet.*"
P. 13, lines 20-35.

The vagueness and uncertainty of this boundary, even in the mind of the appellant, is therefore at once apparent.

How far back would the Court of Chancery have to order this fence removed in order to be "*about twenty feet*" from the southerly line. When would that pass from the realm of the jurisdiction of the Court of Chancery by injunction and enter the domain of a court of law where an action at law would have to be brought? These are questions upon which we would like to have counsel for the appellant enlighten the court.

The uncertainty of this boundary is also further evidenced by the testimony in the cause, sketches of which are attached to the brief of the appellant. Its boundary has never been definitely fixed, as far as the testimony of these witnesses are concerned. Originally the territory north of this alley was a field, and there was a brook which flowed along somewhere near its supposed north boundary, which has for many years been filled up and built over, so that there has never, at any time, been a distinct boundary line fixed, and no one in the evidence has undertaken to fix that boundary. This accounts in a large measure for the allegations in the bill for the width of this alley "*about twenty feet.*" The city only paved twelve feet, which is the twelve feet which the respondent claims is the legal width of the alley, and which comprises the alley. We do not think that the paving of twelve feet is any evidence that the alley is "*about twenty feet*" in width. The cobblestones referred to as extending to the respondent's mill further on, are not in the portion enclosed by this fence. They are further east than the fence extends. That this "*about twenty feet*" is the necessary width of the alley is negatived by the fact that in the easterly boundary of the alley where the appellant has other property, and where the fence does not exist, it is only thirteen and one half feet. P. 37, lines 1-10.

Even the deed of the complainant to property fronting on Hamilton Avenue extending back to the alley describes the alley as twelve feet in width, p. 26, lines 1-20. The tract was originally owned, according to the answer, by the Van Blarcoms, who acquired the same in the year 1813, when the alley was established as twelve feet in width by their conveyance, p. 26, lines 20-30. Both the dedication and the adverse users are denied by the answer. The complainant, as a member of the public, could not obtain any right by prescription, as that never runs to the public.

Albright vs. Cortwright, 64 N. J. L., 330.

There has been no acceptance of a twenty foot alley by the city. The city paved only twelve feet as set forth in the answer and admitted by the testimony of Ferguson, the engineer of the complainant. There appears to be a manhole outside of this twelve feet, but assuming that that was evidence that the boundary exceeded the twelve feet, still it is no evidence as to the width of the alley, which is essential to be established at law before appellant can have relief in equity.

In this case there is no irreparable injury or want of adequate remedy at the law to remove the matter from the jurisdiction of a court of law.

This is one of the exceptions under which equity may take jurisdiction. The strong arm of equity by way of injunction is to be used with discretion and put forth only in cases plainly within the injunctive power.

There is no irreparable injury in this case, such as gives the equity court jurisdiction. The only thing from which appellant alleges he is suffering is some inconvenience in driving his wagons into his place of business. If he suffered this inconvenience, there is no reason why a jury may not award him proper compensation. Neither his inheritance nor any other of

his property is being destroyed, and there is no necessity such as sometimes arises, for the interposition of a court of equity to preserve the subject matter of the litigation pending a determination of the rights between the parties. There is no necessity for the multiplicity of suits, which counsel for appellant conceives would have to be brought. One suit would test the legal right of the appellant in the lands whose right to possession is disputed, and then that having been determined, the court of equity would at once enjoin a repetition of the trespasses, and probably coupling with it any compensation for any damages, which the appellant might have suffered from the time of the determination of the action at law to the issuing of the injunction.

In *Pruden vs. Lindsley*, 28 N. J. E., 378-383, the damages there were held by the Chancellor not to be irreparable, although it was alleged that that highway had been used for over forty years; that the barn was on the complainant's land when he bought it; that more than twenty years before he had built the shop fronting on the alleged highway, where it has ever since remained; that more than twenty-five years before he built an addition to the barn, and that the barn and addition had together a frontage of fifty feet on the highway, and all the doors, except the back barn door were upon this highway, and that the land in the rear of the building was low and swampy. This case was later reversed by the Court of Errors upon another point.

See also, *Morris & Essex R. R. vs. Pruden*, 20 N. J. E., 530, for a case which caused greater inconvenience than is caused to the appellant in the case at bar.

Counsel for appellant in their brief rely upon *Feigenspan vs. Nizolek*, 71 N. J. E., 382, but that is not a parallel case. In that case, the rights of the parties were fixed by a contract in writing, and the only question before the court, having construed the writing, was whether equity should enforce a negative

covenant in that contract, and the Court of Chancery decided to enforce it upon four grounds, to wit,

First: That the evidence as to the amount of beer the defendant would sell would be all in the hands of the defendant. (In the case at bar, the evidence of the damages is all in the hands of the appellant.)

Second: The difficulty of estimating the profits.

Third: It would require a multiplicity of suits. (Here one would be sufficient, as hereinbefore set forth.)

Fourth: On account of the uncertainty of the pecuniary responsibility of the defendant. (In the case at bar, this is not alleged, and, of course, could not be successfully alleged, as the respondent is a man of large means.)

One of the controlling elements in that case was, "that the policy of the law should be to prevent a man from breaking his contract, rather than to leave the injured party to his damages at law."

This case dealt with an unconscionable breach of a written contract where the rights of the parties were fixed and determined, and not with a legal estate in lands, which right was disputed.

We think that counsel for the appellant have failed to distinguish between a case where the facts are admitted and the legal effect denied, or in other words between a case which is for relief in and of a legal right, and, as in the case at bar, where the suit is brought for the purpose of establishing a legal right.

On page 27 of their brief, counsel assert that the leave given them by the order appealed from to establish their rights at law and then apply for an injunction is a clear admission that there is in this case no adequate remedy at law. If their logic were correct, then this court committed the same error and made the same admission in outlining the policy to be pursued, in its opinion in *Mason vs. Ross*, 77 N. J. E., 527, and *Todd vs. Statts*, 60 N. J. E., 512. We do not think counsel are serious in this contention.

The equitable estoppel sought to be set up by appellant in his bill is not sufficient to give the court of equity jurisdiction.

As a preliminary matter, we think that the *appellant is estopped from relying upon his alleged estoppel*, because he himself has not done equity, and does not come into court with clean hands, because of his admitted encroachment upon the alley himself.

A court of equity will not interpose to protect a wrong-doer in his legal rights. *Carson vs. Coleman*, 11 N. J. E., 106-109.

We also think that *the supposed equitable estoppel is not sufficiently alleged in the bill* to create an estoppel under the circumstances, even if true.

The appellant claims that the respondent is estopped from setting up a claim to this strip of land, because, as is set out in his bill, p. 23, lines 20 to 40, the respondent and his predecessors in title had knowledge that appellant erected his factory and stables on said alley "with a view to the use of said street or alley at its width of about twenty feet," and never objected to the erection thereof or gave notice of their claim.

The respondent cannot be charged with any knowledge which his predecessors in title had, and of which he had no notice.

16 Cyc, 778 b (1).

In order to work an estoppel, it must be alleged and proved that the conduct of the respondent was intended to influence the conduct of the appellant, or that he had reason to believe that it would influence his conduct.

Kuhl vs. Jersey City, 23 N. J. E., 84.

This principle was approved by this court in *Musconetcong Iron Works vs. D., L. & W. R. R. Company*, 78 N. J. L., 717.

The respondent must have wilfully intended that the silence and conduct on his part should lead to action on the part of the appellant.

Turner vs. Coffin, 12 Allen, 401; Pierce vs. Andrews, 6 Kush, 4, both of which cases are cited in Kuhl vs. Jersey City, Ibid.

In the complaint, there is no allegation that the appellant acted upon any silence or conduct of the respondent. It does not appear that there were any relations between the parties which made it incumbent upon the respondent to speak, or that his keeping silence was any fraud upon the appellant. It does not say by whom, when or under what circumstances or conditions, these facts came to the respondent, whether before or after the erection of the buildings, or whether it was communicated to him by the appellant, or through some other medium. It simply says that the respondent alleged that these buildings "were erected with a view to the use of said street or alley at its width of about twenty feet." This is an insufficient allegation upon which to base an equitable estoppel.

The question of equitable estoppel is as available to the appellant in a court of law, as in a court of equity.

Counsel for respondent claim that their allegations of equitable estoppel is sufficient to prevent the matter going to a court of law, because that defense would be closed to them in that court, and they cite the two cases in our early reports as authority for that proposition, and further say that on first reading, it appeared to them that in the case of Central Railroad Company vs. State, 32 N. J. L., 220, the court "squinted the other way." Since the rendering of those opinions, the court, if it did then only "squint," has since turned a full view and about face upon this proposition, and Vice Chancellor Stevenson, in Kronson vs. Lipschitz, 68 N. J. E., 367, says, "It is well settled in this State

that courts of law will recognize and enforce equitable estoppel in reference to both personal and real property," and in that opinion, he refers to the case of *Runkelchaus vs. Ochme*, 49 N. J. E., 340, cited by counsel for the appellant as additional authority for their proposition, but that was a case in which the defense of equitable estoppel had been rejected by a law court, and the defendant had not taken a writ of error, but had come into a court of equity for protection, which was granted.

The same Vice Chancellor reiterates the same doctrine in *Monmouth Electric Company vs. Eatontown Township*, 74 N. J. E., 578.

In *Kronson vs. Lipschitz*, *Ibid*, he pointed out that the field of litigation in the courts of law has continuously widened, so that now there is no doubt as to the availability of equitable estoppel in an action at law.

The appellant, therefore, can lose none of his rights by first establishing his right at law.

If the bare allegation of equitable estoppel were sufficient of itself to prevent the requirement of establishing legal rights at law before coming into equity, it would be sufficient to insert such an allegation in all bills, so that in reality ejectment suits could be tried in the court of equity.

Under the title "third," page 31, counsel laid down four reasons why the court should retain jurisdiction. to wit,

First: It is true that while they are bringing their action at law they would be outside the injunctive power of the Court of Chancery, but they are outside now, having brought their action in a Court of Chancery, a preliminary injunction having been denied them by Vice Chancellor Stevenson.

Second: It is no answer to say that a jury might not give them the same legal rights as they might obtain in a trial before a judge.

Third: The evidence of any dead witnesses could be used in an action involving the same issues. Chamberlayne on Evidence, Sections 1619, 1633, 1652, 1660.

Berney vs. Mitchell, 34 N. J. L., 337.

Fourth: The fact that the testimony taken would be useless, of course, was their own look-out, when they started the suit in Chancery.

The case, therefore, is devoid of any elements which give the Court of Equity jurisdiction, and the appeal should be dismissed therefore.

Respectfully submitted,

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Of Counsel With Respondent.

