

I N D E X

	PAGE
Bill for Injunction.....	1
Answer.	6
Replication.	10
Order of Reference.....	11
Designation.	12
COMPLAINANT'S TESTIMONY:	
Russell S. Morton—Direct.....	15
Charles Humphries—Direct	23
Cross.	30
Re-direct.	48
William A. Carpenter—Direct.....	49
Cross.	54
George F. Harvey—Direct.....	63
Cross.	72
Clinton Newell—Direct	79
Cross.	83
Conclusions.	90
Final Decree	93
Notice of Appeal.....	95
Petition of Appeal.....	97
Answer to Petition of Appeal.....	99
Exhibit C1, Will of Francis Miles.....	100
Exhibit C14, Lease of Township Farm.....	105

BILL FOR INJUNCTION.

IN CHANCERY OF NEW JERSEY.

*To the Honorable Edwin Robert Walker, Chancellor
of the State of New Jersey:*

The complainant, the Township Committee of the Township of Lower Penns Neck in the County of Salem, a municipal corporation of the State of New Jersey, respectfully shows that:

1. On February 17, 1768, Francis Miles, then residing at Penns Neck, in the County of Salem and Province of West New Jersey, by his last will and testament dated on that day, did give and devise the profits of the plantation whereon he then lived, with all the land and marsh thereunto belonging, to the magistrates of the Township of Lower Penns Neck to be by them laid out and appropriated towards the education and schooling of the poor children of said Township of Lower Penns Neck, said magistrates to have full power and authority to lease said plantation and receive the rents thereof for the uses of schooling poor children as aforesaid forever. 20

2. Said will was duly probated May 21, 1768, and a copy thereof is duly filed in the surrogate's office of the County of Salem, in box No. 56, to which reference is hereby made. 30

3. The land and premises aforesaid comprises a farm of about 200 acres, which is known as the Guard House Farm.

4. Continuously since the year 1768, the said farm

and plantation has been used exclusively for agricultural purposes and has been managed and leased by the municipal governing body of the said Township of Lower Penns Neck, in their official capacity.

5. On March 25, 1924, complainant leased said farm to Samuel Ecret by an instrument in writing, copy of which is hereto annexed and referred to and made a part hereof and is marked Exhibit No. 1.

10

6. Said farm and plantation was leased by complainant to said Ecret for agricultural purposes only, and said Ecret did in and by said lease covenant and agree to keep the premises in good farm-like manner and upon the expiration of his term to surrender possession of said farm in as good condition as the same was at the beginning of said term.

20

7. Said Ecret entered into possession of said demised premises and farmed the same during the farming season of 1924 and paid the rent reserved for that year.

30

8. During this present farming year of 1925, said Ecret has abandoned the use of said demised premises for farming purposes and either by himself or by other persons has been and now is engaged in the work of altering and changing said premises from farm land into real estate sub-divisions and building lots, and to that end has been and is constructing and grading streets through said premises, placing gravel and other road-making material thereon, digging ditches and drains, and erecting banks, destroying the grass and herbage, and otherwise injuring and depreciating the value of said farm and plantation for the purpose for which it was and is designed, said work being of such character that the soil is

being so disturbed, changed and covered by foreign and deleterious substances that it cannot be restored to its character as farm land and said injury is irreparable.

9. All these acts of said Ecret have been done without the consent of complainant and over the protests of its officers.

10

10. The injury to the farm and plantation for which complainant is trustee as aforesaid is irreparable because it cannot be adequately compensated in damages by reason of the nature of the injury itself and the nature of the property injured, the said tract of land having been devoted to farming purposes for more than 150 years, and complainant being without power, as trustee as aforesaid, to sell or improve the property or to utilize the same for any purposes other than that specified by said Francis Miles in his said last will and testament.

20

11. Complainant is informed and believes and, therefore, says that said Samuel Ecret is of very little financial responsibility, and that if the acts of waste and destruction hereinabove set forth continue, said Ecret can neither perform his covenant to surrender possession of said farm in as good condition as the same was at the beginning of said term nor respond in damages for the failure to perform said covenant at the end of said term, and that unless said acts of waste are restrained and the premises restored to their former condition and state as farm lands, complainant, at the end of said term, will come into possession of a tract of land wholly valueless for the purpose for which it was intended by said testator to be used, and complainant may be held responsible for failure to properly execute the said trust.

30

Complainant is without adequate remedy in the courts of law, and, therefore, prays:

1. That Samuel Ecret, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That the said Samuel Ecret, his agents and all persons claiming under him or acting in the premises under his authority, direction or permission, and each and every of them, may be restrained and enjoined from laying out, constructing and building roads through, across and upon the lands, farm and plantation known as the Guard House Farm in Lower Penns Neck Township, Salem County, New Jersey, leased by complainant to defendant on March 25, 1924, and from placing gravel and other road-making material thereon, and from digging ditches and drains, and from constructing other works thereon, and from altering and changing the character of said demised premises from a farm and plantation into building lots, or town plots or otherwise, and from committing further waste or spoil of any kind or characer on said demised premises or any part thereof.

3. That the said Samuel Ecret may be enjoined and required to forthwith remove from said demised premises all gravel, road-making materials and other foreign and deleterious substances placed thereon by him or by others with his privity during his said term as tenant, and to restore the said premises to their former condition and state as farm land.

4. That complainant may have such other and further relief as may be just.

5. That a writ of subpoena may issue, commanding

said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

F. NEWLIN ACTON,
Solicitor for Complainant.

WALTER H. BACON,
Of Counsel with Complainant.

EXHIBIT NO. 1.

LEASE OF TOWNSHIP FARM.

Pennsville, N. J.
March 25, 1924

This agreement made this 25th day of March between the Township Committee of the Township of Lower Penns Neck of the first part and Samuel Ecret part of the Second part.

Samuel Ecret part of the Second part does hereby agree to pay a yearly rental of \$300.00 to the part of the First part for the year of 1924 with the privilege at a yearly rental of (\$400.00) Four Hundred Dollars, for the years of 1925, 1926, 1927, and 1928, the rent to be paid in the following manner, one third to be paid upon signing of this agreement, one third the 15th day of Aug. and the remaining one third on the 15th day of November.

The part of the Second part agrees to keep the premises in good farm like manner and upon the expiration of this agreement the farm shall be in as good condition as at the beginning.

TOWNSHIP COMMITTEE
CHARLES C. HUMPHREYS
ARTHUR C. BRANDRIFF
GEORGE F. HARVEY
SAMUEL ECRET

Witness JOSEPH L. SNITCHER

ANSWER.
IN CHANCERY OF NEW JERSEY.

10 Between
 THE TOWNSHIP COMMIT-
 TEE OF THE TOWNSHIP
 OF LOWER PENNS NECK
 IN THE COUNTY OF SA-
 LEM,
Complainant,
 and
 SAMUEL ECRET,
Defendant.

On Bill for Injunc-
 tion.
 Answer.

20

The answer of the defendant, Samuel Ecret.
This defendant, Samuel Ecret, answering the bill
of complaint, says that:

1. Paragraphs 1 to 3, inclusive, are admitted.
2. This defendant has no knowledge or informa-
 tion sufficient to form a belief as to the statements in
 30 paragraph 4 except that for the last twenty years the
 said farm has been leased and managed by the
 Township Committee of the Township of Lower
 Penns Neck. Defendant is informed and believes it
 to be true that for many years after the probate of
 the will of the said Francis Miles the property in
 question was managed and operated by the magis-
 trates of the said Township of Lower Penns Neck

and that it was for many years the practice in said
township to elect a special magistrate or other officer
for the purpose of holding and operating the said
farm and plantation.

3. Paragraph 5 is admitted.

4. Further answering, the defendant has been in
 possession of the said Guard House Farm since the
 farm year of 1922-23. The first two years of his 10
 tenure he operated the said farm on a share crop
 basis. Paragraph 6 is denied except that it is ad-
 mitted that the defendant has agreed to keep the said
 Guard House Farm in "good farm-like manner" and
 that upon the expiration of his agreement for the
 possession of the premises the farm should be in as
 good condition as at the beginning of his term under
 said agreement.

5. Paragraph 7 is admitted except that defendant 20
 avers the fact to be that he was in possession of the
 said demised premises prior to March 25th, 1924, and
 continued in said possession under the terms of the
 lease referred to in the bill of complaint. He has
 paid the rent reserved by the said lease for the year
 1924-25.

6. Paragraphs 8, 9, 10 and 11 are denied.

7. No abandonment by defendant of his farming 30
 operations has taken place. During the farm year
 of 1925-26 the defendant had under successful culti-
 vation more acres of land than in any of the preced-
 ing years in which he has been in possession of the
 said Guard House Farm. This property extends be-
 tween nearly parallel lines from the Delaware River
 toward a road in the Township of Lower Penns Neck

known as the Light House Road. A considerable portion of the property is wood land and bush land or low, wet meadow land, none of which land is susceptible of cultivation. All of that portion of the said farm that bounds on the Delaware River, with the exception of a narrow strip of sand consists of meadow or marshland that is flowed by the tide at high water. The Township Committee of the Township of Lower Penns Neck, a number of years ago 10 permitted the bank or dam that protected this portion of the farm from flow by tide to go down and to become so much out of repair that it no longer protected this meadowland, with the result that this land that, when protected from flow by tide is the most productive portion of the farm and amounts to about fifty acres, has not been suitable for cultivation for more than fifteen years last past. It is now grown up in cat tails and other marsh grasses and it is not practical to cultivate it for any farming purpose. 20 If the tide water of the Delaware River be excluded from this land it will be of great benefit to the farm and will enable the defendant to cultivate this fifty acres that he is now unable to put to any agricultural purpose.

8. No alteration in the character of the said premises from farm land into real estate subdivisions and building lots has been made or effected by defendant or by any person or persons, nor has any gravel or other road-making material been placed on the 30 premises. Defendant has, however, procured the erection and construction along the line of the old meadow bank that formerly protected the meadow or marsh that the said Township Committee has allowed to be destroyed as farm land, a new bank, with the result that there is now a sufficient bank, made and constructed on the line and in the location of the

old bank, so that with an additional expenditure on the part of defendant of about thirty (\$30) dollars he will be enabled to put under cultivation during the farm year of 1926-27 this fifty acres of land that has been valueless for agricultural purposes for many years past. In fact the erection of this bank, instead of working any destruction of the premises or any interference with the use of the premises for agricultural purposes will add to the tillable acreage of the farm at least fifty acres, which fifty acres, when 10 placed under cultivation, will be the most productive portion of the property as the said acres were before the said Township Committee permitted the bank in question to be destroyed by tide.

9. No ditches or drains have been dug upon the premises by defendant or by any other person, nor has any grass and herbage been destroyed and the work that defendant has procured to be done upon the premises is of a permanent value to the premises 20 of not less than five thousand (\$5000) dollars and everything that he has done or had done upon the premises has been a benefit thereto, whether the said premises be continued to be operated as a farm or whether same be used for some other purpose.

10. Defendant has offered to pay the rent reserved by his said lease, same having been offered, early in the year 1925 to the chairman of the Township Committee of the Township of Lower Penns Neck, later 30 to another member of the committee and finally tendered to the said Township Committee at one of its regular meetings, in legal tender. The said committee declined to accept defendant's rent, saying that

they declined to receive same on advice of counsel. The defendant is ready to pay his rent at any time.

THOMAS G. HILLIARD,
Solicitor of Defendant,
Samuel Ecret.

[ENDORSED]

10

Consent to filing out of time is hereby entered for the complainant. November 28, 1925.

F. Newlin Acton,
Solicitor of Complainant.

REPLICATION.

IN CHANCERY OF NEW JERSEY.

20

Between
THE TOWNSHIP COMMIT-
TEE OF THE TOWNSHIP
OF LOWER PENNS NECK
IN THE COUNTY OF SA-
LEM,
Complainant,
and
30 SAMUEL ECRET.
Defendant.

59/276.
On Bill for Injunc-
tion.
Replication.

The complainant joins issue on the answer of the defendant.

F. NEWLIN ACTON,
Solicitor for Complainant.

ORDER OF REFERENCE.

(Filed Feb. 15th, 1926.)

IN CHANCERY OF NEW JERSEY.

Between
THE TOWNSHIP COMMIT-
TEE OF THE TOWNSHIP
OF LOWER PENNS NECK
IN THE COUNTY OF SA-
LEM,
Complainant,
and
SAMUEL ECRET,
Defendant.

10

59/276.
On Bill for Injunc-
tion.
Order of Reference.

This matter being opened to the Court by F. Newlin Acton, solicitor for the complainant, and it appearing that Thomas G. Hilliard, Esq., solicitor for the defendant, has consented hereto: 20

It is, on this 15th day of February, A. D. 1926, on motion of F. Newlin Acton, solicitor of the complainant, ordered that the above-entitled cause be referred to Hon. R. H. Ingersoll, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor, and to report thereon to him and to advise what order or decree should be made therein. 30

E. R. WALKER,
C.

I consent to the entry of the foregoing order.

T. G. HILLIARD,
Solicitor for the Defendant.

A true copy,
THOMAS BARBER,
Clerk.

DESIGNATION.

(Filed March 5, 1926.)

IN CHANCERY OF NEW JERSEY.

10

Between
THE TOWNSHIP COMMIT-
TEE OF THE TOWNSHIP
OF LOWER PENNS NECK
IN THE COUNTY OF SA-
LEM,
Complainant,

59/276.
On Bill for Injunc-
tion.
Designation.

20

and
SAMUEL ECRET,
Defendant.

Solicitors for the respective parties consenting hereto,

It is, on this 5th day of March, A. D. 1926, ordered that the 28th day of May, A. D. 1926, at the hour of ten o'clock in the forenoon, at the Court House, in the City of Salem, be designated as the time and place for the hearing of the above entitled cause.

30 R. H. INGERSOLL,
V. C.

We consent to the making of the foregoing order.
F. NEWLIN ACTON,
Solicitor for Complainant.
T. G. HILLIARD,
Solicitor for Defendant.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between
THE TOWNSHIP COMMIT-
TEE OF THE TOWNSHIP
OF LOWER PENNS NECK
IN THE COUNTY OF SA-
LEM,
Complainant,
and
SAMUEL ECRET,
Defendant.

10

On Bill for Injunc-
tion.
Final Hearing.

20

Salem, N. J., May 28th, 1926.

TESTIMONY.

Before HON. R. H. INGERSOLL, Vice-Chancellor.

30

APPEARANCES:

For the complainant, F. NEWLIN ACTON, Esq., and
WALTER H. BACON, Esq.
For the defendant, THOMAS G. HILLIARD, Esq., and
HENRY B. WARE, Esq.

Mr. Bacon: I offer in evidence a certified copy of the last will and testament of Francis Miles, dated February 17, 1768, with a codicil dated February 22, 1768, probated May 21st, 1768, and recorded in the office of the Secretary of State in book 13 of wills, page 397. This copy is certified by Thomas F. Martin, Secretary of State, under the seal of the State Department.

10 (Certified copy admitted in evidence and marked Exhibit C1.)

Mr. Acton: By consent, if your Honor please, we will put in the map showing the location of the pre-

20 mises, the locus in quo for your information. I might say that is the road, and this is the Delaware River, and these are the premises between almost parallel lines excepting for a small piece here, between the farm and road clear to the river. This is the entrance to the farm and this is the location, supposedly, of the river bank.

The Court: Does not run quite to the road?

Mr. Acton: No, sir. Both sides of it are now in the hands of real estators.

The Court: Originally farms?

30 Mr. Acton: Originally farms, and this property, here is the road, this road comes out to the—this is the Salem-Pennsgrove Road, and this road goes out to the government reservation at Fort Mott. As for this portion I understand this is also a part of the farm, the eastern border as it is, Miles Creek.

(Map admitted in evidence and marked Exhibit C2.)

RUSSELL S. MORTON, sworn for the complainant.

Direct examination.

By Mr. Acton:

Q. Mr. Morton, you are a photographer residing in Salem?

A. I am.

Q. On the twenty-second of the instant month, at my instance, you went to a property in the Township of Lower Penns Neck in this county and took some photographs, is that correct? 10

A. Right.

Q. Are these the photographs that I have in my hand?

A. They are.

Q. I show you a photograph here marked number three. That photograph was taken on the northern boundary of the township farm looking in a west or southwesterly direction, is that right? 20

A. Right.

Q. There is a ditch that has been recently cleared out?

A. In the foreground.

Q. You went first to the river road, did you not?

A. Yes.

Q. Then you went easterly along the edge of the farm approximately fifty or seventy-five yards? 30

A. Yes.

Q. And then took this picture of the ditch on the farm of the Township of Lower Penns Neck?

A. Yes.

(Photograph admitted in evidence and marked Exhibit C3.)

Q. Number four was taken next in order at about the corner of the township property and the river road and is looking south or southwest along the easterly bank of the Delaware River?

A. Correct.

Q. And the person standing by the row of piling in that picture is the Mr. William Carpenter, recorder of the township?

A. Correct.

10 Q. Also identified by my picture on the left-hand side of the road?

A. Yes, sir.

(Photograph admitted in evidence and marked Exhibit C4.)

20 Q. Number five was next taken and is on the east bank of the Delaware River on the river road at the farm premises of Lower Penns Neck and looks north along the road and up the river back at the place from which the last preceding photograph was taken and shows Mr. Carpenter, the recorder of the township, standing in the same position with reference to the row of old piling outside of the present roadway as it was when the last preceding picture was taken?

A. That is correct.

30 (Photograph admitted in evidence and marked Exhibit C5.)

Q. Number six is next taken from a point further south along the river road in the Township of Lower Penns Neck at the Guard House Farm and shows you along the road after the bend, and discloses a water course, inside the said bank and road, and shows Mr. Carpenter, the recorder of the town-

ship, standing at the present location of the drain pipe under the road and shows myself standing at the point where the old water course, if continued, would intersect the present road and the site of the old sluice?

A. That is right.

(Photograph admitted in evidence and marked Exhibit C6.)

10 Q. Number seven shows a comprehensive view taken looking north from a point further south along the river bank road and gives a comprehensive view of the bank road and the fences and so forth erected thereon?

A. That is right.

(Photograph admitted in evidence and marked Exhibit C7.)

20 Q. Number eight was taken next in order and is looking south again along the bend of the road along the river bank and shows the erection of a boat landing alongside of the said bank?

A. Yes, that is right.

(Photograph admitted in evidence and marked Exhibit D8.)

30 Q. Number nine is taken next in order from a point probably along the river bank road and shows the view looking eastward up the main water course known as Miles Creek, the southern boundary of the Guard House Farm of the Township of Lower Penns Neck, showing a bridge?

A. That is right.

(Photograph admitted in evidence and marked Exhibit C9.)

Q. Number ten is next taken showing the bridge in the last preceding picture and looks north or northeast, taken from the premises next adjoining on the south, the Guard House Farm, shows the bridge over Miles Creek and the layout of a road running north-easterly across the township farm?

10 A. Right.

(Photograph admitted in evidence and marked Exhibit C10.)

Q. Number eleven is the same view closer up showing more of the water course, and showing the road?

A. That is right.

20 (Photograph admitted in evidence and marked Exhibit C11.)

Q. Number twelve is of the same bridge from the other side showing the corner of the small house shown in the last three pictures and a nearer view of the main water course or division boundary on the south between the township farm and its abutting owner?

A. Right.

30 (Photograph admitted in evidence and marked Exhibit C12.)

Q. In explaining number thirteen, Mr. Morton, this view was taken from the premises next adjoining the township farm on the north and represents the photograph taken looking to the south or southwest

on the same road as shown in the last three preceding photographs as it goes across the farm property of the Township of Lower Penns Neck and the small house on the right in the background of the picture is the same small house on the south shore of Miles Creek which is shown in the last three preceding pictures?

A. It is.

(Photograph offered in evidence.)

10

Mr. Hilliard: This is objected to, if your Honor please, because the statement appears in the stenographer's notes indicates this is a picture of the premises in dispute. You can't see the premises in dispute at all, all you can see is the adjoining farm on the north.

Mr. Acton: It shows the roadway clear across the premises.

20

Mr. Hilliard: I haven't got any reading glasses, I have looked at it with ordinary glasses and I can distinguish no part of the farm in dispute.

Mr. Acton: This is the north line of the township farm. Here is the road clear across. Here is the little summer house on the south bank of Miles Creek shown in the last three pictures. There is the bridge and small house. This is a general view to show how this road goes straight across the farm.

30

Mr. Hilliard: We have no objection whatever to the use of that picture for the purpose of what it shows, but the way the record is now showing a view across there, does not indicate anything of the kind because what you see of the roadway in this line,

which is as far as the vision is clear is on the adjoining farm on the north, does not affect this tract at all.

Mr. Bacon: If your Honor please, it is, of course, conceded by the complainant that the portion of the road shown in the immediate foreground of the exhibit now offered is not any part of the Guard House Farm, but it does show that the roadway across the
 10 Guard House Farm is a continuation of a road that runs through a development on adjoining property, which adjoining property is laid out into building lots, as the stakes shown in that photograph indicate. I am not sure that this point is altogether covered in the bill because I had no idea what the real situation was until I went there two or three weeks ago and looked at it, but I would like to advance this thought in connection with what I saw there and what will appear from the testimony, and that is that the
 20 public are being invited to use this road across this farm, that the building lots are being offered for sale on the property which immediately adjoins it, that purchasers may be led to believe that this road is rightfully across the complainant's farm, and that this defendant and his associates may by this method, be perpetrating a fraud against the gullible purchasers of lots, and be thus led to believe that they do have access across this property to and from these lots which are being sold.

30 The Court: Can counsel show me on the map where this road is?

Mr. Hilliard: I don't believe that can be done in any way except by a surveyor who made the plot.

Mr. Acton: It was struck across here in pencil.

Mr. Bacon: I think that should be on there. I supposed there was. I quite agree with that. I suppose the surveyor should put it on here.

Mr. Hilliard: Nobody in Salem who can do it. This is a sketch. I happened to know about it because I had something to do with ordering it made and it was not made with any effort whatever to put these roads on it. This is not accurate in courses
 10 and distances, the plan, but it is sufficiently accurate for the purpose of—

The Court: A general sketch designating—

Mr. Hilliard: That is it.

The Court: But the road which is shown in this photograph is upon upland upon the meadow?

Mr. Hilliard: Just about between the two. It is
 20 soaked with the tide. That is the reason I feel that it would assist your Honor if you would go and look at the thing, only take a little while.

The Court: I want to avoid that if I can.

Mr. Bacon: I think that road ought to be put on there. Is there any objection to Mr. Keasbey putting it on there if he can?

Mr. Hilliard: He can't put it on. It is barely possible that another map prepared by Keasbey and Sparks might possibly do, but that is nothing but a sketch, a preliminary sketch in the real estate proposition.
 30

The Court: Suppose we go ahead then as far as we can. I may have to go down there.

Mr. Hilliard: I think there are probably witnesses here who can tell your Honor where that road is. On the ground it appears to be in the portion of the land that would be wet by the tide if that bank were down again. I might say we have no objection to that photograph with Mr. Bacon's statement. The state-
10 ment that was made when it was originally offered, that it shows—the broad statement that it shows the township farm.

The Court: I assume that you admitted it on Mr. Bacon's statement.

(Photograph admitted in evidence and marked Exhibit C13.)

20 Mr. Bacon: I offer in evidence lease of township farm dated March 25th, 1924, signed by the then three members of the Township Committee, and by Samuel Ecret which is the original of the lease marked Exhibit Number One in the bill, and I understand that counsel waives the production of the subscribing witnesses and consents it should be offered in evidence.

Mr. Hilliard: Oh, yes, there is no doubt but what
30 that is the lease.

(Lease admitted in evidence and marked Exhibit C14.)

CHARLES HUMPHRIES, sworn for the complainant.

Direct examination.

By Mr. Acton:

Q. Mr. Humphries, where do you live?

A. Lower Penns Neck.

Q. Township?

A. Township, Lower Penns Neck, yes.

Q. Salem County?

A. Yes, sir.

Q. Do you hold any official position in that municipality?

A. Yes, sir, committeeman.

Q. Member of the Township Committee?

A. Yes.

Q. How long have you lived in that township, Mr. Humphries?

A. Practically all my life, forty-three years.

Q. Are you acquainted with the premises in that township, known as the Guard House Farm?

A. Yes, sir.

Q. How long have you been familiar with the premises?

A. Well, ever since I have been in the Committee. I have been in twelve years this fall.

Q. You have been in the Township Committee twelve years?

A. Yes, sir.

Q. The township farm has been managed during your incumbency of office by the Township Committee?

A. Yes, sir, we had a farm justice at first, but for, I don't know how many years back, the Committee has had charge, since Mr. Kennedy died.

Q. Was there a farm justice during your time in office?

A. Yes.

Q. And the last justice was Mr. Kennedy?

A. Yes, sir.

Q. And since that time the Township Committee has handled the affairs of the farm?

A. Yes, sir.

10 Q. In managing this farm you have rented it out for farming purposes from year to year?

A. Yes, sir.

Q. Who is the present tenant?

A. Mr. Samuel Ecret.

Q. When did he go into possession?

A. I think it was in twenty-four, wasn't it?

Q. What has he done with the farm?

A. Well, I guess he has leased it to the Penn Beach concern to build roads, or whatever they might do across there from the river to the house.

20 Q. This farm has a river frontage?

A. Yes, sir.

Q. On both sides of this farm what is going on, if you know?

A. Well, it is laid off for lots for the Philadelphia Record.

Q. I show you Exhibit C9 and ask you if that is the view looking up Miles Creek from the river bank?

A. Yes, sir.

30 Q. And the property on the left is the township farm, is that correct?

A. Yes, that is right.

Q. The bridge shown in that picture up the stream from the township farm to the premises next adjoining on the south, when was that put there?

A. Last spring, it has been in—I couldn't say just when, but somewhere around June or July, somewhere around there.

Q. Was it done by any authority of the Township Committee?

A. No, sir.

Q. I show you Exhibit C11, giving a nearer view of the same bridge and the water course; do you recognize it?

A. Yes, this is the bridge across Miles Creek.

Q. And the road across it?

A. Yes.

Q. Wide enough for vehicular traffic?

A. Yes, sir.

Q. Have you been across the bridge?

A. I have.

Q. How did you go across it?

A. Automobile.

Q. It attaches on the north side to the southern bank of the Guard House Farm, is that right?

A. Yes, sir.

Q. Was it there two years ago?

A. Two years ago? No, sir.

Q. Was there ever a bridge in this location within your memory up until this bridge was put there?

A. No, sir.

Q. Was it done by any authority or sanction of the governing body of this township?

A. No, sir.

Q. The road shown in this photograph goes directly across the Guard House Farm in its narrow dimension?

A. Yes, sir.

Q. On the one side of this picture the adjoining owner on the south, that property is subdivided, is it not?

A. How is that?

Q. Your neighbor on the south to the township farm there, it is cut up into lots, roads and so forth?

A. Sure.

Q. On the north side of this farm it is cut up into lots, and roads, and so forth, is it not?

A. Yes, sir.

Q. The township farm constitutes a strip from the river almost to the lighthouse road, that is a wedge in the middle of this great development of building lots, is it not?

A. Yes, sir, that is right.

10 Q. I show you C10, another view of the same road from a standpoint a little further back, giving a more comprehensive view and ask you if that road is laid across the township farm as described in your answer to the last preceding question?

A. What do you mean, this road?

Q. This is the same road, is it not?

A. Yes, sure.

Q. Looking northeast across the township farm?

A. Yes.

20 Q. Shows the intersecting road this side of it?

A. Yes, sir.

By the Court:

Q. When was the road across the farm built?

A. Well, sometime in the spring, I couldn't tell just when. I will tell you, when we first started these proceedings.

Q. Spring of last year?

A. Yes.

30 Q. Since the lease to Ecret?

A. Yes, sir.

Q. There was no road there before that?

A. No, sir, nothing but farm purposes.

By Mr. Acton:

Q. There never was a road across this farm within your memory in this location?

A. No, sir.

Q. Until after Mr. Ecret came on the property?

A. No, sir. That is right.

Q. Photograph C13 taken from the property next adjoining the township farm on the north and showing the road as going across the township farm in the background, do you recognize this view?

A. That is taken where, did you say?

Q. Looking to the south, southwest.

10

Mr. Hilliard: I object, if your Honor please, if the witness can't recognize it he can't certainly testify in regard to it.

The Court: Yes, the witness does not recognize the photograph.

Q. Do you recognize this photograph?

A. Yes, sure.

Q. Can you see the small house in the background 20 to the right-hand side of the road?

A. There it is right there.

Mr. Hilliard: I object. It seems to me this witness ought to be asked what he sees and then tell the Court.

The Court: Yes, leading.

Q. What do you see?

A. I see the small house down there.

Q. What else?

A. I see some of the—see some stakes around there where it is lotted off.

Q. Where is that property?

A. That is leading across the adjoining Guard House Farm.

30

Q. Shows the development of the property to the north of the Guard House Farm?

A. Sure.

Q. Now are you acquainted with the location of the old river bank on this property?

A. Yes, sir.

Q. I show you Exhibit C4, do you recognize Mr. Carpenter as standing up there by a row of stakes?

A. Yes, sir.

10 Q. And those old piling, do they represent the location of the old river bank where Mr. Carpenter is standing?

A. Yes, sir.

Q. And the new bank is located, since the tenancy of the present tenant is somewhat thirty or forty feet inside of that, is it not?

A. Yes.

20 Q. I show you Exhibit C5, another view of the same scene looking north from the other end; do you recognize Mr. Carpenter standing there?

A. Yes, sir.

Q. And the position that he is standing by the old stumps shows the location of the old river bank?

A. Yes, you can see the stones, looks like it there.

Q. Since the occupancy of the new tenant the new bank and road has been located some thirty feet in-shore of the old location, is that right?

A. Yes, sir.

30 Q. Now, the new bank and road shown in these two pictures, C4 and C5, by whom was that made?

A. Who was it made by?

Q. By whom was it made?

A. I suppose the Penn Beach Company.

Mr. Hilliard: That is objected to.

The Court: Yes, unless he knows.

Q. Do you know who put it up there?

A. A man by the name of King was the engineer.

Q. Was it done with any sanction or authority of the Township Committee?

A. No, sir.

Q. Do you know when it was done? It has been done since Ecret has been on the farm, is that right?

A. Yes, sir, since Ecret, all of it has been done.

Q. Now, I show you a picture C6, can you tell from looking at this picture where the location of the old sluice was? 10

A. What do you mean, that goes across Miles Creek?

Q. No, the old sluice on the river bank to the north of Miles Creek on the township property. Do you recognize the picture.

A. Yes, I recognize the picture of the road.

Q. What is it?

A. But you asked me if I could recognize where the old sluice went through there, didn't you? 20

Q. That is right?

A. I suppose here somewhere. (Indicating).

Q. Do you recognize on this photograph the location where the old sluice was?

A. It ought to be right here somewhere on the turn, where it turns up.

Q. Where is that?

A. Right there, where it turns up, you know.

Q. That is where the drain is now?

A. No, they got the drain right in there. You 30 said where the old one was, didn't you?

Q. Yes, the old sluice?

A. The old one went out and they have got this one clear up here.

Q. That is up in the property, that is in shore?

A. Yes, they have got the new sluice up in the property.

Q. The point where I am standing with the stake is nearer to the river than the point where Mr. Carpenter is standing, is that correct?

A. Yes.

Q. The view is taken looking inshore from the river, is that right?

A. Yes.

Q. The new drain is where Mr. Carpenter is standing, is it not?

10 A. Yes.

Q. And the old sluice is where I was standing, wasn't it?

A. Yes, sir.

Cross-examination.

By Mr. Hilliard:

20 Q. Were you in the Township Committee, Mr. Humphries, when William Kennedy was the farm justice or person in charge of the farm?

A. Yes, sir.

Q. Did Samuel Ecret go into possession of this farm under William Kennedy or under the present Township Committee?

A. Under the Committee.

Q. Witness is shown a paper —

A. Well, just you mean on the renting of this?

30 (Question repeated.)

A. I know, but I have got to understand his question, haven't I?

(Question repeated.)

A. Under William Kennedy when he was putting

it out on shares, but since he has leased it he went under us.

Q. And is it a fact that Sam Ecret was in possession of the farm under a bargain made with William Kennedy when you made the present lease that has been offered in evidence with him?

A. The present lease?

Q. No, this lease where the money rented Mr. Kennedy didn't have anything to do with it.

By the Court:

10

Q. No, but Mr. Ecret was in possession of the farm under an agreement with Kennedy at the time you made a new lease to him by the Township Committee?

A. Yes, sir.

Q. He simply continued in possession under a different agreement?

A. Yes, that is right.

20

By Mr. Hilliard:

Q. Do you know what the bargain was that Ecret had with Kennedy?

Mr. Bacon: Objected to.

The Court: How can that be admissible? Here is the lease.

30

Mr. Hilliard: I will withdraw the question.

A. Do I know what the bargain was?

Q. The question is withdrawn. The only bargain that you had with Ecret is evidenced by that paper that has been offered in evidence, isn't it?

The Court: Which was the lease signed by the Township Committee of which you were one?

A. Yes, that is the only one we have any doings with so far as we are concerned.

Q. Had you inspected the property at the time that you leased it to Ecret under the present lease, made a physical inspection of it?

10 A. Well, I don't know as I had went over every inch of it, but I had been down there different times, yes, sir.

Q. What was then the condition of the property along the river front?

A. Well, the bank had gone down.

Q. By that do you mean that the meadow part of the farm was flowed by the tide?

A. Yes, sir, the tide raised there.

Q. How many breaches did you have in that bank?

20 A. Well, there wasn't any deep breaches, just simply raised over the top of it.

Q. Weren't there three deep breaches?

A. Not on the front.

Mr. Bacon: I object to this line of cross-examination, if the Court pleases, on the ground it is wholly immaterial to the case upon the complainant's theory of the case.

30 The Court: The cross-examination is now, I take it, to endeavor to show that these like conditions existed at the time Mr. Ecret took the farm under this lease.

Mr. Hilliard: We are endeavoring to answer the case made by the complainant's bill. I am not going to try to answer the case that Mr. Bacon has opened to your Honor a few moments ago in offering one of

these pictures, which is apparently the present theory.

The Court: I will permit the question.

Mr. Hilliard: I can't answer that until I have got some pleadings to answer it with.

The Court: I will permit the question.

(Question repeated.)

A. Not on the front bank, there wasn't, no, sir, not to the best of my knowledge, not the back farm.

Q. Is it or is it not a fact that the meadow was flowed by the tide?

A. Yes, it was flowed by tide.

Q. Was it possible to cultivate it as part of the farm and grow crops on it?

A. Not down along the river, no.

Q. Is the meadow anywhere else except along the river?

A. What do you mean, the township?

Q. Is there any meadow on this farm that does not lie along the river?

A. Yes, I suppose there is.

Q. Where is that?

A. Along Miles Creek, you would call that meadow, I guess.

Q. That is protected, isn't it, by this same bank to which you are now objecting?

A. Well, no, there was a cross bank always went across there.

Q. At the time you inspected the premises before Ecret went in there, was the cross bank up that protected the Miles Creek meadow?

A. No, sir, there was two or three small breaches in it.

Q. And the river bank was down also?

A. That is right.

Q. How many breaches were in the river bank?

A. Tom, I can't say that there was any breaches, just simply went over the top of it.

Q. The bank was gone?

A. Yes, it was sand, just simply washed away, that was all.

Q. Wasn't any bank there?

A. No, there wasn't a whole lot, no.

Q. So is your memory far enough back to remember when it was banked to protect it from the tide?

A. No, only what people tells me.

Q. You don't ever remember it when it was protected from the flow of the tide?

A. No, but it was just a short while before I came in, it was all built up.

Q. Do you know whether the portion of the farm that was flowed by tide when you made this bargain with Ecret had at some time before been cultivated and farmed in crops?

A. I don't know it to be true. They say it is.

Q. But it was not susceptible of cultivation when you rented it to Ecret?

A. Not that part, no.

Q. Do you know what amount of acreage was flowed and soured by tide when you rented to Ecret?

Mr. Bacon: I object to that, if the Court please, upon this ground: this is not a question of how much actual material damage has been done, if we could measure this damage in dollars, it may be that the place to get redress would be in a court of law. We are not dealing with that feature of it at all. We are dealing with the feature of it, here is a man who

rents a farm for farming purposes and who, without any authority from his landlord, is opening streets through it and throwing it open to public travel across the farm, and that the question of actual money damage is not material to this issue, which is the rather narrow one of the commission of technical waste on this property by changing its character from that of a farm and devoting even a small portion of it to roads fitted for public travel across it, and it is not a question of whether it was capable of cultivation, that has nothing to do with the narrow issue made by this bill filed by these gentlemen who are trustees of the public.

The Court: I think the theory of the trial as suggested by Mr. Bacon is correct, but I will permit the question as descriptive of the locus in quo.

Mr. Hilliard: That is undoubtedly correct as the matter is now being pursued by Mr. Bacon, but it has no reference whatever to the pleadings. There is the bill which charges irreparable damage, charges diversion of agricultural land to other purposes, that it is of so little value that they can get the money damage, enormous as it is, from him, and, while I dislike strictly to be technical, I do want to be permitted to meet a case that is formed by the pleadings. I am ready to meet the other case when that is pled by the pleadings, but not as it made now.

The Court: The pleadings are quite clear, it is alleged roads are being built across this land.

Mr. Hilliard: And that this building of the roads has destroyed the value of the farm for agricultural purposes.

The Court: Yes.

Mr. Hilliard: That issue we are prepared to meet, I think.

The Court: I will permit the present question as descriptive.

(Question repeated.)

10 A. No, sir, I don't know how many acres there was.

Q. Have no idea of the amount?

A. Well, I suppose twenty acres, something like that. There might have been more. I have never just simply went down there and sized it up.

Q. You have been down there at some time recently, haven't you?

A. Yes, sir.

20 Q. And you know where the present bank and roadway is along the river, do you not?

A. Yes, sir.

Q. And this bank is erected in the same general position as the old bank?

A. There is some inside.

Q. How much inside?

A. Well, twenty-five to thirty feet inside.

Q. And the present roadway is wider than the old bank ever was, isn't it?

30 A. Yes.

Q. Is it or is it not an adequate protection to that meadow from the tide?

A. Oh, yes, that is a protection so far as that is concerned.

Q. Do you know that part of that meadow land is under cultivation this year?

A. No, sir, I don't know it.

Q. You haven't been there lately?

A. Haven't I? I was there two or three weeks ago but I didn't see that.

Q. You are not prepared to say that it is not, though, are you?

A. I wouldn't say it wasn't or was, no.

Q. When you were there was the water excluded from that marsh and shut off?

A. There is some water around the ditches.

(Question repeated.)

10

A. I didn't notice that. I noticed it was in the ditches is all, along the bank.

Q. Is the meadow any longer flowed by tide?

A. No, sir.

Q. Is it or is it not adequately banked now so that tide does not flow it any longer?

A. I guess it is, yes, sir.

Q. Is it or is it not a fact that the meadow is so protected from the—so that it can be cleared off and farmed in crops?

A. I couldn't say it could all be farmed in crops that is except the tide.

Q. So if it was farmed in crops years ago when the tide was protected, you think it could now be?

A. They say it was. I don't know.

Q. Has any damage been done to that meadow land by excluding the tide from it?

Mr. Bacon: It is objected to, if the Court please.

30

The Court: Sustain the objection. Isn't the issue narrowed down to the proposition, even by the pleading, to the question whether or not a public road has been put across this land?

Mr. Hilliard: I don't so read the bill.

Mr. Acton: We are entirely willing to have it narrowed down to that proposition, if your Honor please, for this reason, as Mr. Bacon says, the question of the material damage here, while it appears permanently in the pleadings, by reason that we usually follow the old and accepted forms in all matters of this kind, the real issue in this case is, the best I can express it, a matter of protection of right, so far as I can see, the right of the Township Committee is challenged by its own tenant who, permitting others, himself participating, as far as we know, attempts to handle the property in his own way, and in which and to which he derives his entire right by virtue of our grant, in a manner unauthorized, and we feel a manner that is likely to endanger our own possession.

The Court: It has developed so far, and if that is not the issue, then, of course, my suggestion would be of no value, it has been shown so far, and part of it by defendant's cross-examination of the present witness, that there is now a road, apparently a public road, because it connects with the adjoining property, which has been placed there by at least Ecret's permission since his entering into this lease. The township alleges that that is a damage to the property, and Ecret has no right to do or permit the building of this road. Now, are we interested at all except as to the extent of a question of jurisdiction, whether the building of a bank upon which this road passes over, at least a portion, was an advantage? It has been shown by the defendant that this bank is a wider bank than previous, and it has also been testified that this road did not exist before, but it does exist now. In other words, isn't the landlord

of a property in a position to claim waste or something akin to waste if his tenant permits a part of the premises to be used as a public highway against his, the landlord's objection, in the face of a lease which says that they shall keep the premises in good farm-like manner? If that was not in there might be some question whether the tenant would not have a perfect right to do anything he pleased except waste, upon the condition that he should place, at the expiration of his lease, in the same condition it was before, but the Township Committee in this present lease went a step farther and they practically said it should be kept in the same condition during the term of the lease.

Mr. Hilliard: We propose to prove, if your Honor please, and we are in a position to prove, I think beyond question, that all that is necessary to do to put this property back into the condition in which this tenant received it, is to take the stop cut of the sluice and let the water flow over it and spoil this forty or fifty acres again, and put a plow in there and plow up this road. There hasn't been a bit of foreign matter put on there. In less than two hours this alleged road they say is doing irreparable damage to this farm, will look exactly like the rest of the field. All that has been done was to take a plow and run across there and ridge it up and space it. The same soil remains there, we are prepared to prove, where the road exists, and it has not been farmed within the memory of man, because it was not suitable of farming, it is between the meadow and the upland, and the bill that we are called upon to meet charges this thing, that during the farm year abandoned the use of the demised premises for farming purposes. He has abandoned no part of it for farming purposes.

The Court: I am fearful I will have to let you go ahead. Your contention is that you have not built a road there, that you have not opened the road to the public.

Mr. Hilliard: No, there is no invitation to the public.

The Court: How can you say that when you build
10 a bridge or permit a bridge to be built upon these premises and a part of that bridge connecting it with the road in other property, which connection had never existed before?

Mr. Hilliard: I do not desire to be understood as intending that there is any reason why anybody should not drive over these two roads. What I urge to your Honor is that there is not in the situation that exists any of the elements that are charged in
20 this bill as the reason or foundation for invoking the jurisdiction of the Court.

The Court: All right, gentlemen, I will let you proceed.

(Question repeated.)

The Court: I will sustain the objection.

30 Q. You are acquainted with the roadway about which you complain that runs between the bank to which you have just testified and the farm houses, are you, Mr. Humphries?

A. Yes, sir.

Q. What is the character of the land where that roadway is laid out?

Mr. Bacon: That is objected to as irrelevant and immaterial to the issue, the road that adjoins.

The Court: I will permit it.

Mr. Bacon: It is not the road through the farm, but any adjoining roads.

The Court: No, it is the road through the farm
he is questioned on now. 10

Mr. Bacon: If that is so, I will withdraw the objection.

(Question repeated.)

Mr. Bacon: I object to that because there is no complaint about the road that runs to the farm house. This road goes directly across the farm and don't go anywhere near the farm house. 20

The Court: Sustain the objection.

Mr. Hilliard: There is a road that you complain about, isn't there, that runs across this farm on the land between the farm house and the river?

A. Runs the same direction as the bank road, yes.

Q. Across this farm?

A. Across the farm.

Q. You complain that injures the farm for farming purposes, don't you? 30

A. Yes, sir.

Q. You are acquainted with that road?

A. Yes, sir.

Q. You understood that was the road I meant when I questioned you before?

A. I understood it was the second road; yes, sir.

Q. Second road they built?

A. Yes.

By the Court:

Q. How far is that from the bank?

A. I don't know, it is quite a little ways, though.

10 By Mr. Hilliard:

Q. Is that in the edge of the meadow?

A. It might hit the edge of the meadow, but it went through his field, I think he had corn there last year, when they built it, they went right through it.

Q. Do you know that?

A. Yes, sir; I know it.

Q. Went right through a corn field, did it?

20 A. I think it was a corn field; yes, sir.

Q. And now occupies the portion of the place that was last year occupied by a corn field?

A. I think it was a corn field. I wouldn't say sure, but it is the upland from the meadow.

Q. And it is shown along the line between the upland and the meadow, isn't it?

A. Yes, sir; this second road.

Q. Do you allege that there has any cinders or gravel been put on that road?

30 A. I haven't seen any, no.

Q. You have been there and looked at it, haven't you?

A. About three weeks ago I was down there.

Q. At that time there had been no change in the character of the soil worked out there?

A. No, sir.

Q. Isn't it a fact that that road, so-called, would

look like exactly the rest of the field if it were plowed up and harrowed again?

A. It could be made like it, I guess.

Q. When, Mr. Humphries, was it that the bank to which you object and about which you have testified was built?

A. The bank?

Q. Yes.

A. Oh, it has been right smart over a year ago, I couldn't tell just when. 10

Q. It was something over a year ago, when that was built?

A. Yes.

Q. Did you know when it was built?

A. I couldn't tell just when, it has been nearly two years, I guess.

Q. Did you know of the fact that it was being built while it was being built?

A. Yes, sir, and we served a notice on them to quit and leave it be. 20

Q. Who was it you served the notice on, Mr. Humphries?

A. I think the notice was served to you, wasn't it?

Q. I don't know.

A. It was served to Mr. King, and we got a letter from you.

Q. But you knew it as long ago as that, whatever date that was, did you?

A. How is that?

Q. Did you know about the construction of this 30 bank to which you now complain, about which you now complain, as long ago as the time that you served that notice?

A. Yes, sir; the clerk served the notice, I suppose on the Penn Beach concern.

Q. And then you did nothing else with regard to

it until you authorized the bringing of this present pending action?

A. Not until they started this second road.

Q. Then you did not object to the bank, it is only this second road about which you object?

A. I will tell you, we don't want them fooling on there at all, told them to get off.

Q. When did you tell them to get off, was that after you had made a bargain as Township Committeeman, with the predecessor of the Penn Beach concern, leading toward a lease of this place?

Mr. Bacon: I object as immaterial and irrelevant.

Mr. Hilliard: If Mr. Bacon withdraws his statement from the record, the reason for this is the desire on the part of the Township Committee to protect that, generally the public, against an unauthorized use, that they never contemplated to be made of this farm, and that the theory on which he is now attempting to try this case, I am entirely willing to withdraw the question, but it seems to me that I have a right to an answer to that.

The Court: Sustain the objection, not cross-examination.

Q. During the tenancy of Mr. Ecret, Mr. Humphries, did the Township Committee ever enter into negotiations with any person to lease rights of way across that property?

Mr. Bacon: Same objection.

The Court: Sustain the objection.

Q. Is it not a fact, Mr. Humphries, that this action was brought on the part of the Township Committee only after negotiations between the Township Committee and the adjoining land owner for rights of way across the farm had failed?

Mr. Bacon: Same objection on the ground it is not proper cross-examination.

The Court: Sustain the objection.

10

Mr. Hilliard: I understand the objection is sustained on the ground it is not proper cross-examination?

The Court: Yes.

Q. As a matter of fact, Mr. Humphries, there has been nothing done out there that interferes with the value of this farm as a farm, has there?

20

Mr. Bacon: I object to that as having no bearing upon the issue. It is not a question of money damage, it is the question of an improper conversion of this property from a farm into something else, therefore, at least a technical waste.

The Court: I will permit the question.

(Question repeated.)

30

A. Well, I should think it would, that second road through there.

Q. How?

A. How?

Q. Yes.

A. I wouldn't think you would want a farm with

a public road right through it, between the river and road.

Q. Suppose you answer the question.

The Court: He has.

Mr. Hilliard: All right, if your Honor holds that is an answer.

10 Q. If, however, that road occupies no part of the farm that is capable of being cultivated at a profit, has it done the farm any harm as a farm?

Mr. Bacon: I object as purely argumentative.

The Court: Sustain the objection. Witness has said that it does occupy land which was used as a farm, had been heretofore.

20 Q. I understand you to say probably at most a half a day's work with plows would put that roadway about which you complain, in good order?

A. No, I didn't say half a day.

Q. How much time?

A. I said it could be put back.

Q. How much time will it take?

A. You mean just the main road? The second road you are speaking of?

30 Q. I understand you complain about the second road, so-called, as the only thing that damages the farm as a farm, don't you?

A. Take a day or two days.

Q. Couldn't be over three days?

A. According to how much travel, how much packed down and drove over, how hard it is.

Q. No foreign matter been put there to change the character of the soil?

A. No.

Q. You in your judgment, I believe, consider that the bank that has been put across the front has not damaged the farm at least as a farm?

Mr. Bacon: I object to that. The Court sustained the objection to that question.

The Court: Sustain the objection.

10 Q. Is there any other damage that has been done to that farm as a farm in your judgment except by what you call the second road?

Mr. Bacon: I object to that for the same reason.

The Court: I will permit that.

(Question repeated.)

20 A. I haven't seen any myself. There might be some.

Q. What would you think it was?

A. I don't know what they have done.

The Court: Sustain the objection before it is made.

Q. You have been out there and examined the farm looking for damage that was done to it?

30 A. I only drove down that second road, been there this spring once.

Q. Who looks after the farm for the Township Committee? You are the chairman, aren't you?

A. Yes, sir.

Q. Who has it in charge to see that the Township's interests are cared for?

A. The whole three of us has it in charge so far as that is concerned.

Q. You have discharged your duty by going there once this spring?

A. Once this spring I have been there.

Re-direct examination.

By Mr. Acton:

10

Q. Mr. Humphries, can you say whether or not on the second road there has not been a coat of oil just laid or something put on that other road? Have you examined the road?

A. No, I didn't get out and examine it.

Q. You haven't examined it?

A. I just simply drove down the second road and up the river road.

20 Q. I show you exhibits C4 and 5, did I understand you to say that there was on old sluice going out there where the old bank went out, around where these stumps are, and that there was an old sluice that came out at the point where Mr. Carpenter is?

A. Yes, sir.

Q. That has been entirely covered over and filled up by the new bank and road that is put there?

A. Yes.

30 Q. And that is located about thirty or forty feet inside of where the line of the old bank was, is that right?

A. Yes, you mean the sluice?

Q. Yes.

A. Yes.

Q. In the picture C6, where I am standing in the picture, there used to be on old sluice?

A. Yes.

Q. And that is covered up now?

A. Yes, sir.

Q. And the new outlet, the two sluices have been covered up and the new outlet is where the Recorder Carpenter is standing, isn't it?

A. Yes, up in the corner of the bank where it goes down into Miles Creek Meadow, that is right.

Q. And they moved the stone which was on the location of the old bank into its present position as shown in these pictures, where the new bank and road is? 10

A. Yes.

Q. Is that right?

A. Somebody moved them, I suppose.

WILLIAM A. CARPENTER, sworn for the complainant.

Direct examination.

20

By Mr. Acton:

Q. Where do you live, Mr. Carpenter?

A. Pennsville.

Q. How long have you lived there?

A. Thirty-two years.

Q. That is practically all your life, isn't it?

A. Yes.

Q. Were you born there? 30

A. Yes.

Q. What official position, if any, do you occupy in that township?

A. Recorder.

Q. Did you go with Mr. Morton on the 22nd of May, with me, and take some photographs of the Guard House Farm?

A. I did.

Q. That is the Township Farm, is it not?

A. That is.

Q. It is located on the Delaware River south of the village of Pennsville, is it not?

A. It is.

Q. And it lies in a narrow rectangular piece from the River Delaware almost to the lighthouse road?

A. It does.

10 Q. Then it lies like a wedge midway between large tracts being developed on either side by the Penn Beach people?

A. It does.

Mr. Hilliard: Do you mean a wedge, Mr. Acton? Not sharp, no.

Mr. Acton: Not sharp, no, unless might corner out in the river somewhere.

20 Q. I show you Exhibits C4 to 13 inclusive, and ask you if those are the eleven pictures that you took on the day in question, Mr. Morton took?

A. They are.

Q. The individual in white there in C4 and 5 is yourself?

A. It is.

Q. Where you are standing in that picture was alongside of the row of old piling that marked the location of the old bank, is that right?

30 A. That is right.

Q. And at the point where you are standing in both these pictures, is the point where the sluice went under the old bank, is that right?

A. There was a drain out.

Q. From under the old bank at the point where you are standing to the river, was there not?

A. I can't say that I remember when it was there.

Q. I am not asking if you remember when it was—

A. No, I don't remember.

Q. —there, but was it there?

The Court: Was there indication of a drain?

A. Yes, there was indication of a drain. I remember when there was a drain there. 10

Q. The bank was located where these old stumps are, is that right?

A. Yes, sir.

Q. The present road and bank has been moved inside of that some thirty or forty feet, has it, along this road that shows here now?

A. Well, I couldn't tell you the exact number of feet, quite a distance back.

Q. And the stone from the old bank has been taken and banked up against the new road practically inside of this old location? 20

A. Yes.

Q. Now, that old drain has been entirely closed off by the new bank or road, has it not?

A. Yes.

Q. In the photograph C6 was there a sluice at the point in this picture where I am standing?

A. Yes.

Q. It is entirely closed now by the new road and bank, is it not? 30

A. Yes.

Q. The new drain in the picture is a soil pipe run possibly fifty or seventy-five yards away at the point where you are standing in the picture, is that right?

A. That is right.

Q. You are familiar with this ground, are you, Mr. Carpenter?

A. Yes.

Q. And you have gunned over it?

A. Yes.

Q. C10, that is you standing on the bridge in that picture, isn't it?

A. Yes.

Q. And that shows the view of the second road across the Township Farm?

A. It does.

10 Q. And that road is about how far distant from the river bank road, a quarter of a mile, eighth of a mile, five hundred yards or how much?

A. I should say between one-eighth and a quarter of a mile.

Q. Properties on both sides of this farm are laid off into building lots and streets, are they not?

A. Yes.

Q. Has that road been oiled, do you know?

A. I couldn't say.

20 Q. Was there ever any bridge at the location of this bridge in the picture C10, where you are standing?

A. Not in my time.

Q. Never was a bridge there?

Mr. Hilliard: I object, if your Honor please, to that. What the witness said, "Not in my time."

Mr. Acton: That is what I mean.

30 Mr. Hilliard: That is not what your statement on the record was.

Q. Never at any time been any bridge there?

A. Not since I can remember.

Q. And is this bridge capable of sustaining vehicular traffic at the present date?

A. Yes.

Q. It is a substantial bridge, is it not, wooden bridge?

A. Wooden bridge.

Q. How wide is this new bank that has been located there, Mr. Carpenter, on the river?

A. Possibly fifteen feet wide.

Q. Have you been over it?

A. Yes.

Q. How did you go over it?

10

A. I walked over it, and also ridden over it.

Q. Wide enough for two vehicles to pass?

A. In places, yes.

Q. It is in effect a public road, isn't it?

Mr. Hilliard: I object, if your Honor please. That calls for a conclusion.

The Court: Yes, sustain the objection.

Q. It is in fact a public road, is it?

20

The Court: Sustain the objection.

Q. Do people travel over this bank, Mr. Carpenter?

A. Yes.

Q. To get from where to where?

Mr. Hilliard: I object, if your Honor please. That is also a conclusion.

30

The Court: I will permit that.

A. Get from one end of the Penn Beach property to the other.

Q. It does connect, this bank road connects one end of the Penn Beach development with the other?

A. It does.

Cross-examinaion.

By Mr. Hilliard:

10 Q. What is the character of the land, Mr. Carpenter, immediately inshore from the river where this bank roadway to which you have testified is located?

A. It is pumped in meadow.

Q. Meadow that with the tide excluded is fit for cultivation for farm purposes?

A. Very good meadow.

Q. Was it cultivated in your recollection?

A. Yes, sir.

Q. Do you know what kind of crops it raised?

A. Corn and potatoes.

20 Q. And the character of the crops, were they good, bad or indifferent?

A. Very good.

Q. As it is now protected, will it again be susceptible to that cultivation?

A. It would with a sluice.

The Court: Is there a sluice there now?

A. No, sir.

30 Q. How long since you have looked at it?

A. A week ago tomorrow.

Q. Wasn't there a door on that pipe?

A. I didn't see a door.

Q. The water was not—there was no water on the meadow was there?

A. Water in the ditches.

Q. Water in the ditches, but none on the surface of the meadow?

A. None on top, but the meadow was not fit to plow.

Q. Hadn't yet dried out sufficient to plow?

A. No.

Q. Have you been down there since the lower end of the meadow was plowed?

A. No, if it was I didn't notice it. I was out along the river. 10

Q. You were not along the inshore road that is complained of?

A. No.

The Court: Is there any contention now that the building of the bank itself is objectionable, or to the user of it?

Mr. Bacon: It is objectionable for this reason, the bank as constructed is entirely beyond any possible use as a mere protection to the meadow. In 20 other words it is ten times bigger than anybody would have built a bank, who only wanted to protect the meadow on the inside of the bank. It is a roadway.

The Court: If it is not used for any other purpose than as a bank is there any objection to it?

Mr. Bacon: No, if it is not used for any other 30 purpose than a bank, and if it were properly constructed with a sluice, that sluice has been taken out that was there and no new sluice substituted for it, that objection is just as this witness stated, that it is used as a means of communication from one portion of this property to another portion of the property, of other property, to this development com-

pany, across this land. In other words, that the bank that is put there is not a mere protective bank, but is practically put there for a roadway. Aside from that there is no objection to it.

The Court: Then can't we limit the issue then to the question whether the Court has jurisdiction over the user of this bank as a road and of the other road as a road? Regardless of whether the farm
10 meadow, part of the farm has been injured, and only regarding the question of that portion of the second road which encroaches upon the farming land, but after you have put the bank there and the defense alleges that all has become farming land, then whether there is any jurisdiction in this court to prevent the use of these two roads? Isn't that the real issue here now?

Mr. Bacon: I think so.
20

Mr. Hilliard: I don't know what the real issue is here now, but I do know what the bill does is to claim that the defendant has injured the farm and plantation irreparably.

The Court: Counsel now contends or counsel for the complainant admits that their contention is now that they object to the user of these two pieces of property as roads across the land in question.

Mr. Hilliard: The entire inquiry to that is aside
30 from the fact. I can't concede that in the form of the pleadings they have any right to take that position.

The Court: We will adopt the pleadings to the facts if that is the issue between us, let's limit ourselves to that issue.

Mr. Hilliard: We contend if that is the issue they are not in the right court, and they have got no standing here at all in the matter, because if they have got an injury it is cognizable in the law court.

The Court: They are now going further and they want, I take it, they want to restrain you from using this particular property as a highway or a road across this property, that that is not using the farm for farming purposes.
10

Mr. Hilliard: That, of course, is not the prayer of the bill.

The Court: We will allow the prayer of the bill to be amended if that is the issue, if you are surprised.

Mr. Hilliard: I am undoubtedly surprised. I am here to meet an issue that is framed by the pleadings. The pleader in this case is one of the most
20 able astute attorneys with whom I have professional relations. If he missed anything in his pleadings, I am very much surprised. Now I am absolutely surprised, because instead of meeting the case which I am fully prepared to meet, there has been no actual damage, this farm has been benefited five or six thousand dollars.

The Court: Why do you object that he now practically admits all that probably you desire to prove?
30

Mr. Hilliard: I then answer another case I am not prepared to meet.

The Court: Why isn't that a part of the other case regardless?

Mr. Hilliard: Not in the pleadings. Of course, if your Honor directs me to meet a case that has not been pled, I will have to meet it.

The Court: If you say to the Court that you are surprised, unable to answer that part of the case, of course, the Court will rely upon that and give you an opportunity to do it, but how there can be any difference in the proof I cannot see.

10

Mr. Hilliard: I haven't the slightest hesitancy in saying to your Honor that there is. This farm is unfenced from end to end; anybody can cross it anywhere. In two places it is more readily crossed than in others. Those two places are the ones to which these witnesses have testified.

The Court: And on which you have either done yourself or permitted others to make roads there evidently for other people to use.

20

Mr. Hilliard: We haven't objected to building the roads, not at all, but I am not prepared to meet this on that basis. I have just consulted with my associate counsel, that is a highly technical matter, and I felt confident that the complainant had no chance to succeed on the merits, and we are here ready to meet that.

30 Mr. Bacon: Could I just say a word? The statement of the bill has been thoroughly proven, it seems to me, and that is that roads have been opened across this property. Perhaps the language used by the distinguished pleader to which Mr. Hilliard has so referred, could have been a little more elaborate than it might have been, but what I was trying to charge was technical waste. The second prayer of

the bill is that Samuel Ecret, his agent, and all persons claiming under him or acting in the premises under his authority, direction, and each and every of them may be restrained, and enjoined from laying out, constructing roads across and upon and so forth.

I am trying to get an injunction against the general public from going across there. I don't think I could do that, the only man I can get into court is Ecret, the tenant, the man who is misusing this property. He is using it for a purpose other than that for which it was leased to him. Incidentally, it may be to prevent the public from going there, that is what we are after, but I can't bring anybody else in here. If that prayer isn't strong enough we will make another one, but it seems to me that that covers all that we are trying to do.

10

The Court: So far I cannot see that there is any real change in the case as presented, except that the complainant does not now contend that the meadows have been injured by the building of the bank.

20

Mr. Hilliard: Is that the present situation?

Mr. Acton: That is correct.

Mr. Bacon: I don't see how anybody could say anything else, who went and looked at it. I have been there and looked at it. I don't see there is any damage done, if they have a sluice in there and if it is properly protected. I was brought up behind a bank down at Bacon's Neck, and I think I know something about it. I think that bank is all right, but it is as I say ten times bigger than it needs to be for protective purposes and this is an objection to the use to which it is put. It is not put there as a pro-

30

ective bank. Anybody would know that who looks at it. These photographs show it is not a protective bank.

The Court: You may proceed.

Mr. Bacon: Where are we? Counsel says he is very much surprised and alarmed by this change in tactics.

10

The Court: I don't think there is now any change in the course of the trial except the admission by counsel for the complainant that certain element is not insisted upon, that is that that part of the farm which I think we can generally designate as the meadows has not been injured by the building of the bank.

Mr. Hilliard: Do I understand that complainant
20 abandons the prayer for relief in the bill in which he asks that the bank be destroyed at the expense of the defendant?

The Court: I don't think he wants the bank destroyed.

Mr. Hilliard: That is what he asks for. We are embarrassed. We have to try to get some place
30 either by going through this thing or some other matter.

The Court: I take it there is no dispute on the part of the complainant that the bank has practically to be removed. I think the complainant will say that.

Mr. Bacon: That is too obvious to require debate,

if they will fix it so people can't drive over it, make a public road there, put the sluice back, put it in proper condition for drainage purposes, and not make it for a roadway, we are satisfied.

The Court: Therefore it then comes down to just the proposition the Court suggested a few minutes ago, it is the user of these two tracts of land as roadways.

10

Mr. Hilliard: And that all element of damage is waived by the plaintiff, as I understand it, no damage has been done?

Mr. Bacon: We can't recover damages in this court, I have said a half a dozen times it is a technical waste, that is all, if it was damage we would be in a law court.

The Court: I think we all agree on the pleadings
20 now.

Mr. Hilliard: Has the bill been amended?

The Court: As I take it there is nothing to amend, counsel has simply said certain prayers will not be insisted upon.

Mr. Hilliard: Ones that are not be insisted on are
30 that the bank is not be removed.

The Court: The bank as a bank is not to be removed. There is no prayer it shall be removed.

Mr. Hilliard: Do I understand that the bank in its present physical form is not to be removed, is that what you abandon?

Mr. Bacon: I never asked for any such thing as the bank to be removed.

Mr. Hilliard: I can't read that language then: "May be enjoined and required forthwith to remove from said demised premises all gravel, road-making materials and other foreign or deleterious substances placed thereon by him or by others, etc., and to restore the said premises to their former condition and state as farm land." If that prayer of the bill is abandoned it will limit the amount of our examination.

Mr. Bacon: I don't abandon that at all, no thought of such a thing as abandoning it.

The Court: There has been no such suggestion.

Mr. Hilliard: I don't know what has been abandoned then.

The Court: I think, Mr. Hilliard, it is perfectly plain. Counsel has stated and the Court has tried to state two or three times that the only claim is now that the user of part of this land as roadways is the objection which has been made by the complainant in that there may be some question whether a part of the second road, as it has so been called, should not be restored to its use as farm land. I think that succinctly states the issue as it is now presented.

By Mr. Hilliard:

Q. Do you remember, Mr. Carpenter, when it was that the work to which you have just testified was done on this land?

A. Sometime last spring or summer, early summer.

Q. Early in the spring or summer? Was that well known to everybody who was in the community, was the fact that work was being done out there on this farm well known in the community?

A. Yes.

Q. You are interested in some property located not far from the Township Farm, so-called, aren't you?

A. Yes, sir.

Q. During the time that this work was being done, that has resulted in the construction of this bank and these roadways, did you have occasion to, or did you go down on the land and see the work being done?

A. I saw the Record bank being put up.

Q. Did you see any members of the Township Committee down there at any time?

A. No, I can't say that I did.

Q. It was sometime in the early spring or early summer of 1925?

A. Summer, yes.

GEORGE F. HARVEY, sworn for the complainant.

Direct examination.

By Mr. Bacon:

Q. Mr. Harvey, where do you live?

A. Pennsville.

Q. Are you a member of the Township Committee?

A. Yes, sir.

Q. How long have you been a member of the committee?

A. Fourth year.

Q. Were you one of the members who leased this farm to Ecret?

A. Yes, sir.

Q. Are you familiar with the lay of the land there?

A. Yes, sir; I know how it lays.

Q. Has a road been built across that farm between the river bank and the dwelling house?

10 A. Yes, sir.

Q. Does that road go the long way or the short way of the farm?

A. Short way.

Q. Have you been on that road?

A. Yes, sir.

Q. Have you driven over it?

A. Yes, sir.

Q. In what?

A. Machine.

20 Q. How wide is it, how wide is the road?

A. Well, I just never measured, but I should imagine thirty feet, maybe thirty-five.

Q. Of what is the road constructed?

A. Just looks like it has just been plowed and ridged up is all, same kind of soil.

Q. When were you there last?

A. About three weeks ago.

Q. At that time did that road show any signs that people had traveled over it?

30 A. Yes, sir.

Q. From what point to what point does that road lead?

A. That leads from one side of, where they have been selling off building lots to another portion where they sell building lots, on the eastern side of that farm.

Q. How long is this road which has been built

across the farm, I don't mean how long is it across the farm, but what is the length of this road in its entirety?

A. You mean just across the farm?

Q. No, the whole length of the road from where it starts to where it ends?

A. Heavens, I don't know, couple of mile, I reckon.

Q. Was the rest of it built at the same time this was built across the farm? 10

A. The other roads were built first there.

Q. What do you mean by that?

A. I mean the roads were built on either side before they built the road across the farm to it, connected with it.

Q. This piece—

The Court: How much before that is before?

A. Oh, maybe a couple of weeks before. 20

Q. What direction does this road run, north, south, east or west?

A. Why, I don't know, it runs southeast.

Q. Northeast to southwest?

A. I think so.

Q. Now—I just don't know how it lays there, where does it lead to after you get across the farm, does it go to any other place?

A. Goes to Pennsville.

Q. Where does the other end go? 30

A. That goes over to the government line.

Q. Are there building lots laid off on each side of this road for its entire length except across the Township Farm?

A. Yes, sir.

Q. Are there streets and roads that lead across this adjoining property into this road?

- A. Yes, sir.
 Q. Those roads used?
 A. Yes, sir.
 Q. Was one of these side roads being used the day that you were down there last?
 A. Yes, sir.
 Q. By automobiles?
 A. Yes, sir.
 Q. You saw an automobile truck in there that 10 day?
 A. I seen one stuck there.
 Q. Stuck there loaded with household goods?
 A. Yes, sir.
 Q. Do you know when the bridge was built across Miles Creek?
 A. Somewheres near abouts, it was in 1924 in August, sometime, the middle of August or latter part, something like that.
 Q. Do or do not the supports of that bridge rest 20 on the land of the township?
 A. Yes, sir.
 Q. On both ends?
 A. Well, the supports on one end, and then on the other side belong to Miles Creek, is the dividing line.
 Q. Miles Creek is the dividing line?
 A. Yes, sir.
 Q. The supports to the bridge on one side are on the line of the Township Committee?
 30 A. Yes, sir.
 Q. Whose land is that on the other side?
 A. I don't know who owned that on the other side, Penn Beach owns it now.
 Q. That is this improvement company, development company owns it now?
 A. Yes, sir.

- Q. Did you go across that bridge the last time you were down?
 A. Yes, sir.
 Q. Go across in an automobile?
 A. Yes, sir.
 Q. How wide is that bridge?
 A. I suppose fifteen feet, maybe.
 Q. Did the Township Committee give permission to build that bridge?
 A. No, sir. 10
 Q. When you go across this—after you get across this bridge going toward the Government property, as you refer to, is there any way to get from that bridge to the river bank?
 A. Yes, sir.
 Q. How do you get there?
 A. Why, after you go over the bridge there is a street led off there, road of some kind goes right to the river bank road.
 Q. That is, is there a road led from this road that 20 goes across the Township Farm along the bank of Miles Creek to the river?
 A. Yes, sir.
 Q. Did you go over that that day in an automobile?
 A. Yes, sir.
 Q. Now, when you get to the end of that road is that the river bank?
 A. Yes, sir.
 Q. When you went that day, which way did you 30 turn, left or right?
 A. I turned to the right.
 Q. Could you or could you not get up on to this bank that goes across the Township Farm with an automobile?
 A. Could I?
 Q. Did you?

A. Yes, sir.

Q. Did you do it that day?

A. Yes, sir.

Q. Now did you pass over the bank that crosses the Township Farm that day?

A. Yes, sir.

Q. In an automobile?

A. Yes, sir.

Q. What is your business?

10 A. Well, I am in the park, that is about all.

Q. Well, how long have you lived around Pennsville?

A. How long have I lived there?

Q. Yes.

A. Seven years.

Q. You familiar with the banks that are in common use in that neighborhood for the protection of meadows from the encroachment of tides?

A. Yes.

20 Q. You have seen them, have you?

A. Yes.

Q. Is or is not this bank that is across the Township Farm adjoining the river larger than is necessary to protect the meadows on the inside from encroachment by the tide?

A. Yes, sir; it is larger than any need of.

Q. To what extent is it larger?

A. Well, it is a good deal wider than any need of, room enough there for two machines to pass. It is

30 a road.

Q. On the top of the bank?

A. Yes, sir.

Q. Is it customary to have meadow banks built in that way?

A. No, sir.

Q. Now what, if anything, did you see the last time you were there after you got across the Town-

ship Farm going back towards Pennsgrove, what did you see on the river side between the bank and the river in the way of development there, were there any buildings there?

A. Yes.

Mr. Hilliard: I object. There isn't anything in the bill.

The Court: Not on this farm.

10

Mr. Bacon: No, it is not on the farm.

The Court: Sustain the objection.

Q. Do you know where people are traveling from or to where they go across this meadow bank, that is do you know what places they get to?

A. Well, they come over to the club house, across there, over on the other side, where they are building or laying off lots, something like that, I don't know what.

Q. Is there a club house there?

A. Yes, sir.

Q. Do people go to this club house?

A. Yes sir.

Q. To get to and from the club house do they go across this bank?

Mr. Hilliard: I object, if your Honor please. There isn't any charge in the bill with regard to that.

30

The Court: I will sustain the objection.

Q. Did you give, when I say you, I mean as a member of the Township Committee, or did the

Township Committee give Mr. Ecret authority to build this bank the width that he did build it?

A. No, sir.

Mr. Hilliard: I object, if your Honor please, Ecret's authority is shown by his lease, and I don't see that—

Mr. Bacon: I mean express authority.

10 The Court: I will permit it as now stated, express authority.

Q. Did he ask you for permission to do it?

A. No, sir.

Q. Did he ask you for permission to build this road that is between the bank and the house?

A. No, sir.

20 Q. Did he ask you for permission to build the bridge across Miles Creek?

A. No, sir.

Q. Did you ever have any conversation with him about it?

A. With who?

Q. Ecret?

A. What, in regards to the—

Q. About these roads and the bank being built this side?

30 A. Yes, I asked him if he ever gave the Penn Beach Corporation any authority to go across there.

Q. What did he say?

A. He said no, and I believed it, that is the reason I didn't bother down there no more.

Q. Did you find out afterwards that he had given them permission?

A. I did.

Q. How did you find that out?

A. Well, I understood that there was—

Mr. Hilliard: I object, if your Honor please, to something this witness understands.

The Court: Yes, sustain the objection.

Q. You have to state what you know about it if you know anything about it. 10

A. He was building the road there and I called the other—

Mr. Hilliard: Who was building the road?

A. Or building the bridge, King.

Mr. Bacon: This was elicited by Mr. Hilliard's own cross-examination of the previous witness.

The Court: I will permit it so far. 20

A. When the committee of three of us went down there Mr. King was there, and we asked him the question who gave him the authority to build the bridge, he said he got his authority—

Mr. Hilliard: I object to any statement made by King.

The Court: I will sustain the objection. 30

Mr. Bacon: I will agree with that.

Q. Was Ecret there?

A. No, sir.

Q. What I want to know if you did ascertain that

Eeret had given anybody permission, how you found it out?

A. I found it out from our attorney.

Q. Did you ever have any communication with Mr. Hilliard about it or get any communication from him?

A. No, we got our communications through our attorney, Mr. Acton, he went and saw Mr. Hilliard while we were in the office.

10

Cross-examination.

By Mr. Hilliard:

Q. So that all you know about who was building these roads came to you from your counsel?

A. No, I started to tell you that King told us that he got his authority from you.

20 Mr. Hilliard: I object to what King may have told you.

The Court: Yes.

By the Court:

Q. You knew that King was building the roads?

A. Yes.

30 Q. And you received information through your attorney as to what authority King had?

A. Yes, sir.

By Mr. Hilliard:

Q. And when was this, Mr. Harvey?

A. That was some time in August, 1924, middle of August, something like that.

Q. You and the other members of the Township Committee went down there and looked over the ground and saw what was being done?

A. Yes, sir.

Q. The work that has been done there, Mr. Harvey, has not damaged that place at all as a farm, has it?

Mr. Bacon: That is objected to, if the Court please, in view of your Honor's ruling.

10

The Court: I will limit it to the second road only.

Mr. Bacon: That is to the road over the dam?

The Court: No, the other road, the road over the dam it is admitted that the dam has done, or the bank—

Mr. Bacon: You confine the testimony to the second road? 20

The Court: Second road, yes.

Mr. Hilliard: I understand your Honor feels any question of damage is eliminated from the first road, the dam?

The Court: Yes, of the bank road, is that what you call it? 30

Q. Do you know of any damage that is done to the farm as a farm by the second road, so-called?

A. Well, just what damage I can see it has done there is divided the field, the upland field that was

a corn field, and the road runs right through where the corn field was.

Q. Was there any part of the corn field west of the road?

A. West of it?

Q. Yes, between the road and the river?

A. Well, some of it, I think.

Q. Do you know some of it anyhow?

A. Ran right down the corn rows.

10 Q. At the edge of the meadow, wasn't it?

A. I just couldn't say whether right to the edge of it, but right close to it, I suppose.

Q. And what damage to the farm does that do, what is the damage it does, Mr. Harvey?

A. I don't know as it does any real bad damage, any more than hadn't any right to put any road through there, you know.

Q. Your objection is that the Township Committee did not authorize this road to be there, isn't it?

20 A. That is it.

Q. And that is what you bring this suit about?

A. Well, they hadn't any right to put a road there, sure, that is what we got a suit there for, yes.

Q. But no damage has been done?

A. No real damage done, no.

Q. Your rent has been either paid or offered to the Township Committee, hasn't it, under this lease?

30 A. It was offered, yes, but it was, by our attorney, we did what he said, he said, "If they offer you the rent, you bring it to me," and that is what we did, that is what we done.

Q. Are you bringing the \$400, or whatever it is, \$200, whatever it was, in gold offered you?

A. How is that?

Q. You returned that to me, didn't you, when I offered it?

A. Told you to give it to him, they don't all know

about it, but afterwards you said, he said give that rent to him, or told you to come to him with the rent, if I understand it.

Q. The rent has all been tendered by the tenant as it came due, hasn't it, and you haven't taken it under advice of your counsel, that is right, isn't it, Mr. Harvey?

Mr. Bacon: Objected to.

The Court: I will permit it.

10

A. He didn't pay the rent when it was agreed to be paid, you know.

Q. When was it agreed to be paid according to your notion?

A. A portion of it was to be paid on March 25th.

Q. What year?

A. 1923 that was then.

Q. Wasn't it?

20

A. No, it wasn't paid then.

Q. How far has the rent been paid for this farm? Didn't you get all of the 1923 rent and all of the 1924 rent?

A. I don't know anything about nothing but the 1924 rent, we got all the 1923 rent and to the last of the season.

Q. And you have got all of the 1924 so far as you know, haven't you?

A. So far as I know.

30

Q. And I offered you all the rest of the rent as fast as it came due, didn't I?

A. I don't know anything about that.

Q. You were there at the Township Committee?

A. Yes, but I—

Q. I brought you the rent in gold?

A. That is all true, too, but you didn't bring them

there in March, that is when it was supposed to be paid, a portion of it.

Q. Wasn't an offer of the rent made to you by Ecret at one time after the season of 1925?

A. No.

Q. Did he never offer you the rent or any part of it?

A. Not that I know of.

Q. You don't remember?

10 A. No.

Q. You wouldn't say, however, that he didn't offer it to you?

A. He didn't offer it to me. I couldn't say about some of the rest of the committee, whether he did or not.

Q. You didn't have any offer made to you about it?

A. No. The first year that he was there he paid it all to me.

20 Q. You got it all the first year?

A. The first year, yes.

Q. So that at least for that year you know of your own knowledge he paid all the rent?

Mr. Bacon: If the Court pleases, I can say, I don't want to be captious, but I don't see any use wasting time about that, spending ten perfectly good minutes here.

30 The Court: I think it is admitted you have offered the rent.

Mr. Hilliard: Long as the Court understands it. I don't know what we are going to be asked to do.

Mr. Bacon: Nothing in the bill about the rent.

We have not said a thing about the rent. We are perfectly willing to concede—

The Court: I will sustain the objection.

Q. Did you ever give anybody any permission, Mr. Harvey, to construct a road across that farm?

A. No, sir.

Q. Did the Township Committee enter into an agreement with one Ludwig B. Frudenthal with 10 reference to such a right?

Mr. Bacon: That is objected to, if the Court please, not set up in the answer. I don't know anything about it.

Mr. Hilliard: Cross-examination, if the Court please. Mr. Bacon asked this witness on direct examination whether he made any arrangement or agreement with Ecret to permit these roads to be 20 built. I am examining him along the same line, asking him whether they made any agreement with anybody else to build them.

The Court: If they made any agreement I will permit the question, if that is the question.

Mr. Hilliard: I don't know actually what the witness will say in answer to these questions.

The Court: Sustain the objection. 30

Q. Did the Township Committee make any agreement with—

The Court: I will permit any testimony to show

such a right had been granted, but in reference to is too broad a statement.

Q. Did the Township Committee make any agreement with Ludwig B. Frudenthal granting him any right in these premises that would enable him to construct roads across them?

Mr. Bacon: I object to that, if the Court please.
10 Counsel apparently has a paper in his hand, if he is asking about some sort of an instrument, the instrument ought to be offered and shown the witness.

The Court: I will permit this preliminary question.

Mr. Bacon: I object to it on the ground immaterial. Your Honor already overruled it when the
20 previous witness was on the stand.

The Court: I will permit the question.

(Question repeated.)

A. No, sir.

Q. Witness is shown paper bearing on it what purports to be the following signatures: Charles C. Humphries, George F. Harvey, Clinton F. Newell,
30 Ludwig B. Frudenthal by Charles C. Cavanah, and he is asked is the signature "George F. Harvey" your signature, the words "George F. Harvey" written at the bottom your signature?

A. What was that for?

The Court: You are asked if the name Harvey on the paper is your signature?

A. I don't know what it is for. That is my signature.

Q. Your answer is yes?

A. I don't understand what that was.

The Court: Is that your signature?

A. Yes.

10

CLINTON NEWELL, sworn for the complainant.

Direct examination.

By Mr. Acton:

Q. You are one of the members of the Township Committee of Lower Penns Neck?

A. Yes, sir.

Q. Are you acquainted with the premises known
20 as the Township Farm?

A. Some little, yes, sir.

Q. Or the Guard House Farm?

A. Yes, sir.

Q. This farm runs from the Delaware River and is surrounded by other premises that are now being sub-divided into building lots?

A. Yes, sir.

Q. All this property around the farm is divided
30 into building lots?

A. There are streets and roads laid out all around it.

Q. When was the last time you were down to the Township Farm?

A. Last week.

Q. There has been practically a road constructed on it, on the farm along the river, has there not?

A. Well, it undertakes to be a bank or road, but I shouldn't call that either, hardly, because it does not protect water from coming over.

Q. Does not protect water?

A. No, sir.

Q. Is it located where the old bank was?

A. No, sir; it is inside, I should imagine twenty
10 feet.

Q. Where the old sluices were, how many sluices were covered up?

A. One that I know of been removed.

Q. Changed the location of a drain of another one, didn't it, covered up three?

A. Yes.

Q. Or is that the one you are speaking of?

Mr. Hilliard: I object.

20

The Court: Sustain the objection. Very leading.

Mr. Hilliard: And that is not the ground of objection. I understand the element of damage to this farm by virtue of construction of this front road was eliminated, only thing this testimony can possibly show to be used arguing from it that damage. Your Honor has ruled that element is still in the case?

30

Mr. Bacon: No, that is not the situation. The situation is that this is not a structure which is a tide bank, is not built to be a tide bank, was not intended to be a tide bank, and don't serve the purpose of a tide bank, already testified no sluices in it, that is all this is for, to show it is not a tide bank.

The Court: I will permit it.

(Question repeated.)

A. The one that is covered?

Q. I show you two photographs, C4 and 5. You see Mr. Carpenter standing in both of them?

A. Yes.

Q. See him standing here?

A. Yes.

10

Q. Do you know whether or not there used to be an old sluice or drain there?

A. Right close by there, it may not be exactly in that spot, but right close by there.

Q. That is covered up by the new bank and road, is it not?

A. Yes, quite much so; yes, sir.

Q. And the old bank used to go where this line of piling stubs shows there?

A. Yes, many a time I have been over it.

20

Q. I show you C6, around the corner from C4, around the corner to the left, you recognize the premises there?

A. Yes.

Q. At the point where I am standing, in the picture there was an old sluice, was there not?

A. Right there.

Q. Where Mr. Carpenter is standing is where?

A. The new sluice.

Q. The new drain has been opened of some kind? 30

A. Not exactly a sluice, I should call it just a drain, I shouldn't call it a sluice.

Q. It is not set down deep enough to be a sluice, is it?

A. No.

Q. Now the road shown in pictures C11 and 13 is the second road parallel to the river bank road, but

in shore around one-eighth or a quarter of a mile, is it not?

A. Yes, sir, quarter of a mile, I should imagine, every bit.

Q. Where does that road go from end to end?

A. Well, from end to end it leads from one side of Penn Beach Realty Company to the other side of the company.

Q. Does it go as far as Pennsville on the north?

10 A. Not direct, no.

Q. How far does it go on the south?

A. On the south as far as Penn Beach Company, on the lower side of the creek.

Q. To the Government reservation?

A. By making a turn, not directly, by making a turn, it takes you to the Government station.

Q. On both side of this road except that portion of it which lies in and crossing the Township Farm is laid out in lots and so forth, isn't it, with inter-

20 secting streets and roads?

A. Yes, sir, sub-divisions.

Q. There is a development all around this Township Farm?

A. Yes, sir.

Q. And since you have been on the Township Committee, did you—were you consulted by Mr. Ecret as to permitting any road to be laid out across this property?

A. No, sir.

30 Q. And you never give him any authority to do so?

A. No, sir.

Cross-examination.

By Mr. Hilliard:

Q. How long have you been a member of the Township Committee?

A. About a year and a half.

Q. Did you know this property before you became a member of the Township Committee?

A. Yes, sir.

Q. Has any damage been done to the property by the alleged roads and bank?

A. Well, you can't exactly say that there has been any damage, but I can't see where there has been much improvement, that bridge would be, to my idea, would be this, it is opened up to foreign people, and public, to traffic which is objected quite much so, not only by the committee, but the whole township, near as I can find out, the way they are riding you. 20

Q. Where does the right of way lie across that farm?

A. Where?

Q. Where is the right of way across that farm? You know there is a right of way across that farm to the adjoining property to the south?

A. No, sir. There used to be but I will object to it now, I don't know any, it is just merely an open field.

Q. Isn't it a fact there was a right of way went 30 across Miles Creek, and general public used?

A. Years ago, I have been across it.

Q. A bridge across Miles Creek?

A. Several years ago.

Q. And this bridge that is presently across it, gives access to that same territory that old long-used right of way did?

A. Well, not quite.

Q. When you cross this bridge and turn to your left, don't you come out right where the old bridge was, about a hundred yards or two hundred?

A. Oh, you have got to go quite a distance, old bridge was low down in the old meadow, used to go across by the old house, old barn, right by that orchard.

Q. The general public had a right over it, everybody used it?

A. Quite a few on each side of the farm land.

Mr. Acton: I object. When I object to the question don't answer it until it is stated.

The Court: Yes, I will sustain the objection to that.

Q. The present bridge to which you have testified joins the same tract of land that that old bridge joined, does it not?

Mr. Action: Objected to.

The Court: I will permit that.

Q. That is the lands that lie south and lands that lie north of Miles Creek, that is right, isn't it?

A. Yes.

Q. Your answer is yes, is it?

Mr. Acton: We will admit there was an old bridge across Miles Creek.

Q. And that the present bridge gives access to the same lands on the north and south that the old

bridge did to the same lands on the south side of the old bridge?

Mr. Acton: That is objected to. It is not in evidence what lands were connected by the old bridge.

Mr. Hilliard: This witness says he knows.

Q. I understand your answer to be yes?

A. Yes, same lands.

Q. So that it is a fact, isn't it, that the present work constitutes no greater burden on this land than the old road did?

Mr. Acton: That is objected to.

The Court: Sustain the objection.

Q. The old bridge is no longer in existence, is it?

A. No longer.

Q. There is only one bridge over Miles Creek, isn't there?

A. At the present time.

Q. Just the same number that there used to be on this farm, one bridge?

A. Yes.

Q. And there is but one road across the farm proper, isn't there? That one that leads to the bridge?

A. Looks to me like that.

Q. There is a road across the bank down at the river?

A. Yes.

Q. And there is also one road across the edge of the upland, in the edge of the upland and meadow that leads to this bridge, isn't there?

A. Yes.

Q. That is all, isn't it?

A. So far as I know on upland.

Q. So that there is not now any more road across there than there was years ago.?

Mr. Bacon: Objected to.

The Court: I will permit that.

10 Mr. Acton: How many years ago?

Mr. Hilliard: When that public right of way was last used there was one road across the farm, wasn't there, with a bridge over Miles Creek?

Mr. Acton: I object.

A. So far as I know.

20 The Court: Sustain the objection.

Q. There is now across the upland one road, isn't there?

A. One road.

Q. And one bridge over Miles Creek?

A. Yes, sir.

30 Q. Witness is shown paper bearing the words "Charles C. Humphries, George F. Harvey, Clinton Newell, Ludwig B. Frudenthal, by Charles C. Cavanaugh," being the paper shown to Mr. Harvey, and identified by him, and he is asked are the words "Clinton Newell" on that paper written by you?

A. Looks like it.

Q. Did you write them?

A. Yes.

Q. What was this for?

The Court: Question is did you write your name?

A. Yes, sir.

Q. Question is is that your name or not?

A. Yes, sir.

Q. Did you write it?

A. Yes.

Q. Did you give any permission to anybody else but Mr. Ecret to go on that land for any purpose? 10

A. No, sir.

Q. Have you any other agreement with Mr. Ecret in reference to the land than that contained in the lease that he has, the money rent lease?

A. No, sir.

Q. That is the only agreement you have with him, is it?

A. I don't understand you.

(Question repeated.)

20

A. Yes, sir.

COMPLAINANT RESTS.

Recess taken until 1.30 o'clock, P. M.

30

AFTERNOON SESSION.

Trial of the cause resumed at 1.30 P. M.

DEFENDANT RESTS.

10 Mr. Acton: If your Honor please, in the noon recess I was talking with Mr. Bacon, and I wonder if it is clearly understood; there has been some considerable discussion about abandoning the claim of damage in regard to the bank road. I wish to make it clear that we do abandon any claim of damage to the adjoining meadow land from the protection of the bank but, as far as abandoning any claim of damage or that our rights have not been derogated by
20 the location of the bank road where it is, which is not where it formerly stood, and by the stopping of two sluices, that we do not abandon.

Mr. Hilliard: Do you claim that the land which was drained by this sluice is damaged by the fact that they have been stopped?

30 Mr. Acton: Ne, we make no claim of damage to the land by reason of the erection of the bank, that is the adjoining meadow land from the keeping of the water from it, that we do not claim, it stands to reason that, the bank having been erected, and the places where the sluices were filled in, that that is a damage, if new sluices were decided to be put in on the site of the old ones, it may or may not be the proper location for them, it would entail added

expense and labor to the Township to put in those sluices there.

The Court: But even in that issue, I think I will be prepared to say now that so far as this case is concerned, there has been at this time no proof of any damage by reason of the change of twenty or thirty feet and at the present time there is no testimony to show that there has been any damage by stoppage of sufficient sluiceways. 10

Then I think, gentlemen, if necessary, I will find that as a fact because I think the testimony as it now stands is that way.

Gentlemen, the only question is a question of law whether or not this Court can, under the testimony as it is presented, restrain the defendant from the use of these particular tracts of land as roadways, and also whether I can compel him to replace that part of the farm which is occupied by what we have termed the second road to its original condition as
20 a part of the farm. Isn't that simply a legal proposition that I want to hear from you gentlemen on?

TESTIMONY CLOSED.

Briefs to be furnished.

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

10 Between
 THE TOWNSHIP COMMIT-
 TEE OF THE TOWNSHIP
 OF LOWER PENNS NECK,
 IN THE COUNTY OF
 SALEM,
Complainant,
 and
 SAMUEL ECRET,
Defendant.

On Bill for Injunction.
 On Final Hearing.
 Conclusions.

20

Mr. F. NEWLIN ACTON, for the complainant.
 Mr. T. G. HILLIARD and Mr. H. B. WARE, for the
 defendant.

INGERSOLL, V. C.:

30 By a will which was probated May 21st, 1768,
 Francis Miles gave and devised the land and prem-
 ises described in the bill to the Township of Lower
 Penns Neck, in the County of Salem, the income
 thereof to be appropriated toward the education and
 schooling of the poor children of said township.
 Since said time the premises have been leased by the
 township to various tenants.

On March 25th, 1924, the Township Committee en-
 tered into an agreement with the defendant, Samuel
 Ecret, wherein they leased said premises to Ecret
 for the years, 1925, 1926, 1927 and 1928, at a rental
 therein named.

In said agreement was the following clause:

“The party of the second part agrees to keep
 the premises in good farm like manner, and
 upon the expiration of this agreement the farm
 shall be in as good condition as at the begin- 10
 ning.”

This farm is practically a parallelogram extend-
 ing from the main road leading from Salem to
 Pennsville, westwardly to the Delaware River.

At one time there existed along the river edge a
 bank with sluices so built and arranged to exclude
 the tidal waters from flowing over and upon the
 meadows along that portion of the farm. At the
 time of the lease or agreement, this bank did not 20
 exist, it having previously been permitted to be
 washed away.

Since the occupancy of said Ecret, he has caused
 or permitted to be erected a bank without sluices,
 along the rivers edge; approximately, but not
 exactly, in the location of the old bank—in some
 places at least twenty or thirty feet from the old
 location. This bank was evidently built not for the
 sole purpose of excluding the tidal waters, but for
 use as a roadway, it having been built much wider 30
 than the usual bank, and of sufficient width to per-
 mit the passing of automobiles.

After consideration, I find no reason to change my
 views as expressed at the hearing, *i. e.*, that there
 was no proof of damage in the building of this bank,
 I so find.

In addition to the building of the bank, Ecret caused or permitted a road to be laid out across the farm, along the meadow edge of the upland, in some places along and across the tillable land—at others along the meadow.

This roadway was a passage way over the farm, no gravel or other surface materials (other than the soil over which it passed was used, and it can be plowed over and replaced with no substantial difficulty.

It is evident that no irreparable damage has been done to the farm, and that the use of that portion of the farm as a roadway is not a waste.

There is, however, one further question to be considered.

Upon each side of the farm there are real estate developments, and no highway exists leading from one to the other. The main highway above referred to being the only available passage from one to the other.

The contention of the complainant is, that these roads, one upon the river bank and the other along the meadow edge, connects with the streets of the real estate developments, the latter by way of a bridge erected across a creek along the side of the farm in question, that persons who buy lots on either side of this farm may and probably will do so in the belief that they have the right to use these roads for the purpose of access to their prospective homes, and that by reason thereof the defendant is fraudulently deceiving the public.

It is unnecessary to determine whether such a use of the land would constitute a deception and fraud upon the public sufficient to justify this Court in granting relief, as there is no proof that any one has been deceived or that any attempt has been made to so deceive. Nor is there any proof that said roads

are being generally used by the public, although there is no doubt that they could be so used.

The bill must be dismissed.

Determined: September 16th, 1926.

FINAL DECREE.

(Filed Oct. 21, 1926.)

10

IN CHANCERY OF NEW JERSEY.

Between
THE TOWNSHIP COMMIT-
TEE OF THE TOWNSHIP
OF LOWER PENNS NECK,
IN THE COUNTY OF
SALEM,

Complainant,

v.
SAMUEL ECRET,

Defendant.

On Bill for Injunction.

20

Final Decree.

This cause coming on to be heard in the presence of F. Newlin Acton, solicitor of the complainant, and Thomas G. Hilliard and Henry Burt Ware, solicitors of the defendant, and the Court having examined the pleadings, and having taken proofs orally and in open court and heard and considered the arguments of counsel thereon.

And it appearing to the satisfaction of the Court that the complainant is not entitled to the relief

sought and prayed by it in its bill of complaint: It is, on this twenty-first day of October, one thousand nine hundred and twenty-six, ordered, adjudged and decreed that the complainant's bill be and the same is hereby dismissed, with costs.

And it is further ordered that the said complainant pay to the defendant the costs of this suit to be taxed, which is hereby allowed to the said defendant, and that execution issue therefor according to the practice of this court.

10 Respectfully advised,
E. R. WALKER,
C.
R. H. INGERSOLL,
V. C.

A true copy.
THOMAS BARBER,
Clerk.

20

30

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between
THE TOWNSHIP COMMIT-
TEE OF THE TOWNSHIP
OF LOWER PENNS NECK,
IN THE COUNTY OF
SALEM,
Complainant,
and
SAMUEL ECRET,
Defendant.

10
On Bill for Injunction.
Notice of Appeal.

20

The complainant, The Township Committee of the Township of Lower Penns Neck in the County of Salem, hereby appeals from the final decree, advised by Honorable Robert H. Ingersoll, Vice-Chancellor, and made by the Chancellor, in the above-entitled cause on October 21, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated March 5th, 1927.

30

F. NEWLIN ACTON,
Solicitor for and of Counsel
with Complainant.

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

WALTER H. BACON,
Of Counsel with Complainant.

[ENDORSED]

10

Service of within notice is hereby acknowledged this 9th day of March, 1927.

T. G. Hilliard,
Attorney of Defendant.

20

30

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF LOWER PENNS NECK, IN THE COUNTY OF SALEM,	10
	<i>Complainant-Appellant,</i>	
	and	
	SAMUEL ECRET,	20
	<i>Defendant-Respondent.</i>	

} On Appeal from the Court of Chancery.
Petition of Appeal.

To the Honorable, the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of The Township Committee of the Township of Lower Penns Neck in the County of Salem, the appellant in the above entitled cause, respectfully shows that: 30

1. Petitioner finds itself aggrieved by a final decree advised by Honorable Robert H. Ingersoll, Vice-Chancellor, and made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date October 21,

1926, in a certain cause in said Court of Chancery wherein the said The Township Committee of the Township of Lower Penns Neck in the County of Salem was complainant and the said Samuel Ecret was defendant, in this respect, to wit, that the said decree adjudges that the complainant's bill be dismissed with costs.

10 2. Petitioner appeals from the decree of the Chancellor which dismissed the complainant's said bill as aforesaid, upon the ground that the same is erroneous, in that the said bill should not have been dismissed but should have been retained, and complainant should have been granted the relief prayed for in its said bill of complaint, and that an injunction should have issued against the said defendant according to the prayer of said bill.

20 Petitioner, therefore, prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

F. NEWLIN ACTON,
*Solicitor for and of Counsel
with Appellant.*

[ENDORSED]

30 Service of within petition of appeal is hereby acknowledged this 9th day of March, 1927.

T. G. Hilliard,
Attorney of Defendant.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between

THE TOWNSHIP COMMIT-
TEE OF THE TOWNSHIP
OF LOWER PENNS NECK,
IN THE COUNTY OF
SALEM,

*Complainant-
Appellant,*

and

SAMUEL ECRET,

*Defendant-
Respondent.*

10
On Appeal from the
Court of Chancery.
of Appeal.
Answer to Petition

20

The answer of Samuel Ecret, the above named appellee, to the petition of appeal of The Township Committee of the Township of Lower Penns Neck, in the County of Salem, the above named appellant.

30 This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless, admits that a decree was, on the twenty-first day of October, 1926, made and entered in the Court of Chancery of New Jersey, in the above entitled cause for the purposes in said petition of appeal mentioned and as

therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer there-to when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

T. G. HILLIARD,
Solicitor for and of Counsel
with Appellee.

10

EXHIBIT C1.
5/28/26L

Francis Miles Will Inventory L 903:
10.2½.

20 IN THE NAME OF GOD AMEN I Francis Miles of Penns Neck in the County of Salem and province of West New Jersey Esqr being Sick and weak of Body but of a Sound Disposing mind and Memory Thanks be Given to God, therefor Do make and ordain this my last Will and Testament in manner and form Following Viz 1:

30 IMPRIMIS I Give and Devise unto my Loving wife Ann Miles the Sum of two Hundred and fifty pounds Current Lawfull Money to be levied and paid out of my moveable Estate in Case She Relinquishes her Right of Dower to all my Lands Except the Planfation whereon I now Life which Plan-tation with all the Marsh and Land thereunto belong-ing I Give and Devise unto my Said Wife Ann as aforesaid so long as She shall Remain my Widow and further my Will *Will* is that my Wife Shall have the uses of all my Negroes During her Widowhood as aforesaid and in Case my Wife Should Marry

that then my Negroe woman named Phillix to be free and my will further is that after my Wifes Marriage my two Young Negroes the Little boy and Girl to be Sold untill they shall Arrive to the ages of thirty Years Each and then to be free and my Negroe man Named Plato to be free at the age of forty Years in Case my wife as afforsd Should then have Seased to be my widow and my will father is that after my wifes Marriage the Sole Prophets of the Plantation whereon I now live with all the Land And marsh thereunto belonging Saving to wife her Right of Dower of said Plantation Shall be Taken and Received by the Majestrates of the Township of Lower Penns Neck to be by them Laid out and Appropriated towards the Education and Schooling of the Poor Children of said township of Lower pens Neck which said Majestrates Shall have full Power and Authority to lease Said Plantation and receive the Rents thereof for the uses of School- ing poor Children as aforesaid forever and my will further is that all the Rest of my Lands be Sold by my Executors herein after named to the best ad- vantage who I give full power and Authority to dispose of and Convey the Same in fee as Soon as the Same Can Conveniently be Done after my Decease and the Monies arising from such Sales with all the remainder of my Personal Estate Ex- cept a Debt due to me from my Sister Catharine Williams which I Remit and Release to her to be Equally Divided between all the Children of my two Sisters Catharine Williams and Sarah Sinnick- son Namely obbert Bilderback, William Bilderback, Isaac Bilderback, Suranah Bilderback and Nance Bilderback Children of my Sister Catharine Wil- liams and to Thomas Sinnickson, Elenor Mecum, Mary Trenchard, Andrew Sinnickson, Rebecka Sin- nickson, Sarah Sinnickson and John Sinnickson

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20

30

Children of my Sister Sarah Sinnickson to be Equally Divided between them by my Executors Share and Share alike after the payment of my Just Debts and funeral Charges and I Do appoint my Trusty friends Andrew Sinnickson Senr and William Bilderback Executors of this my last Will and Testament Utterly Revokeing and Disannulling all former wills by me maid Ratefying and Confirming this as my Last Will and Testament Signed Sealed
 10 published and pronounced as my last will and Testament this Seventeenth Day of February anno Domini one Thousand Seven Hundred and Sixty Eight.

Francis Miles (SEAL)

In the presence of
 Daniel Garrison

her

Hester X Garrison
 mark

20

her

Ann X Damelson
 mark

BE IT KNOWN unto all men by these presents that whereas I Francis Miles of Penns Neck in the County of Salem and province of New Jersey Esqr have made and Declared my Last Will and Testament in writing bearing Date the Seventeenth Day of February 1768 I the said Francis Miles do by
 30 this Present Codicil Confirm and Ratify my Said Last Will and Testament and I do by this my Codicil further Give unto Loving Wife fifty Bushels of the Grain that is now growing in the ground when the same shall be reaped and I do Give and Release unto John Owen a Debt Due from him to me and further I Do Order and Appoint that my Executors in my Will Named shall after my decease get or

procure to be gotten three Grave Stones to be one at the Head of my farthers Grave another at the head of my Mothers grave and one at the head of my own grave and my will and Meaning is that this Codicil be and be adjudged to be part and parcel of my Last Will and Testament and that all things herein Contained and Mentioned be faithfully and truly performed and as fully and amply in Every Respect as if the same were so Declared and Set
 10 Down in my Last Will and Testament in witness whereof I have hereunto Set my Hand and Seal this 22d of February 1768.

Francis Miles (SEAL)

his

Sam: Dick, Michael M Butler, Daniel Garrison
 mark

son, Esther Garrison and Ann Damelson the witnesses to the foregoing Will being duly Sworn on the Holy Evangelists of Almighty God did Depose
 20 that they Saw Francis Miles Esqr the Testator therein Named Sign and Seal the Same and heard him Publish pronounce and declare the foregoing Instrument to be his last will and Testament and that at the doing thereof the said Testator was of Sound and Disposing mind and Memory as far as the Deponents know and as they verily believe and that they Signed thier Names as Witnesses to the Said in the Presence of the Said Testator.

Daniel Garrison

30

her

Esther X Garrison
 mark

her

Ann O Danielson
 mark

Sworn at Salem the
twenty first Day of
May Anno Dom: 1768
before me

G. Trenchard
Surg:

10 Samuel Dick one of the Witnesses to the Codicil
to the foregoing Will being Duly Sworn on the Holy
Evangelists of Almighty God Did Depose That he
Saw Francis Miles Esqr the Testator therein Named
Sign and Seal the Same and Heard him publish pro-
nounce and Declare the foregoing instrument as a
Codicil to his last will and Testament and that at
the Doing thereof the said Testator was of Sound
and Disposing Mind and Memory as far as these
Deponents know and as they Verily believes and that
Michael Butler the other Subscribing Witness was
20 present and Signed his name as a Witness to the
said Codicil together with this deponent in the pres-
ence of the Said Testator.

Sam Dick

Sworn at Salem the 21st Day
of May A Dom 1768 before me
G. Trenchard.

The foregoing will being proved probate was
granted by his Excellency Governor Franklin unto
Andrew Sinnickson Esqr and William Bilderback
30 Execur in the Said Will named being first Sworn
truly to perform the Same to Exhibit a true Inven-
tory & render a true account when Required.

Given under the prerogative Seal at Burlington
the Day and Year aforesaid.
Recorded in Liber 13 of Wills, Folio 397.

STATE OF NEW JERSEY.
DEPARTMENT OF STATE.

I THOMAS F. MARTIN, Secretary of State of
the State of New Jersey, DO HEREBY CERTIFY
that the foregoing is a true copy of THE LAST
WILL AND TESTAMENT and CODICIL THERE-
TO of FRANCIS MILES, DECD. proved MAY 21st,
1768. as the same is taken from and compared with
the original RECORDED IN LIBER 13 OF WILLS,
FOLIO 397. and now remaining on file and of rec- 10
ord in my office.

IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed my Official Seal at Trenton,
this Twenty-fifth day of May, A. D., 1926.

THOMAS F. MARTIN,
Secretary of State.

(Seal)

CERTIFIED COPY
of
THE LAST WILL AND TESTAMENT
AND CODICIL 20
of
FRANCIS MILES, DECD.

EXHIBIT C14.
5/28/26L

Lease of Township Farm,

Pennsville, N. J. 30
March 25, 1924.

This agreement made this 25th day of March be-
tween the Township Committee of the Township
of Lower Penns Neck of the first part and Samuel
Ecret part of the Second part,

Samuel Ecret part of the second part does hereby
agree to pay a yearly rental of \$300.00 to the part

of the First part for the year of 1924 with the privilege at a yearly rental of (\$400.00) Four Hundred Dollars, for the years of 1925, 1926, 1927, and 1928, The rent to be paid in the following manner, one third to be paid upon signing of this agreement, one third the 15th day of Aug, and the remaining one third on the 15th day of November.

The part of the Second part agrees to keep the premises in good farm like manner and upon the expiration of this agreement the farm shall be in
10 as good condition as at the beginning.

Charles C. Humphreys
Arthur C. Brandriff
George F. Harvey

Township Committee
Samuel Ecret.

Witness:

Joseph L. Snitcher.

20

30

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF
LOWER PENNS NECK IN THE COUNTY OF SALEM,
Complainant-Appellant,
and
SAMUEL ECRET,
Defendant-Respondent.

ON BILL FOR INJUNCTION.

ON APPEAL FROM COURT OF CHANCERY.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Bill in this case was filed by the Township Committee of the Township of Lower Penns Neck in the County of Salem, landlord, against Samuel Ecret, farm tenant, to enjoin and restrain him, among other things, from laying out, constructing and building roads through, across and upon the lands, farm and

plantation known as the Guard House Farm, leased by complainant to defendant on March 25, 1924, and from committing further waste and spoil thereon, and requiring him to restore the said premises to their former condition and state as farm lands. (State of Case, pg. 4.)

After hearing before Vice-Chancellor Ingersoll, the bill was dismissed. (State of Case, pg. 93.)

The appeal is from the whole of the order of dismissal (State of Case, pg. 95), on the ground that the relief prayed for should have been granted.

STATEMENT OF FACTS.

The facts are not in dispute. Defendant did not offer any testimony at the hearing.

By the will of Francis Miles, probated May 21, 1768, the profits of the Guard House Farm were devised to the Magistrates of the Township of Lower Penns Neck,

“To be by them laid out and appropriated towards the education and schooling of the poor children of said Township of Lower Penns Neck, which said Magistrates shall have full power and authority to lease said plantation and receive the rents thereof for the uses of schooling poor children as aforesaid forever” (pg. 101).

For more than 150 years this farm, containing about 200 acres, has been devoted solely to agricultural use.

On March 25, 1924, complainant leased the farm to defendant for a money rent by a lease containing the following covenant:

“The part of the second part agrees to keep the premises in good farmlike manner and upon the expiration of this agreement the farm shall be in as good condition as at the beginning” (pg. 105).

During the farming season of 1925, defendant, either by himself or by others, constructed a road across the farm, built a bridge over Miles Creek, and reconstructed the tide bank along the Delaware River in a new location.

The photographs offered in evidence and the testimony before the Court demonstrated that these acts did not have any connection whatever with the use of the land for agricultural purposes, but were done in furtherance of a plan to aid a so-called development company in giving access to its lands lying on each side of the demised premises.

The road across the farm was laid through a then existing corn field. It is plowed, graded, and wide enough for two automobiles to pass. It is an essential part of a road more than a mile and a half long extending through property of the development company. The bridge is built strong enough for automobile traffic. The size of the tide bank is greatly beyond any possible necessity as a mere protection against flooding of the meadow by the tide water of the Delaware River.

This bank is wide enough for two automobiles to pass. It has been graded for use and is being used for automobile traffic. Guard rails have been erected on each side as a matter of protection to vehicles using it.

Persons desiring to gain access to the land of the development company lying beyond the demised premises from Pennsville do so by passing over either of these roads and by using the bridge.

Exhibits C4, C5, C6, C7 and C8, being photographs, show the location of the enlarged tide bank made by Ecret or by others with his consent, and without the consent of complainant.

The width, the guard rails, the location, the absence of sluices and other unusual features, clearly show that this bank was not erected by this tenant for any purpose connected with the use of the Guard House Farm for agricultural purposes, but that it was erected as a road or driveway across the property, for use by the public.

Exhibits C9, C10, C11 and C12 show the bridge across Miles Creek, strong enough for automobile traffic, and the road laid out through what was a corn field.

Exhibit C13 shows, in the foreground, the road laid out through property of other persons, with stakes indicating lot corners, and in the background, beyond the fringe of bushes, the road as laid out and constructed across the corn field on the Guard House Farm, leading to and across the new bridge over Miles Creek shown in the other photographs, and likewise obviously intended for use by the public.

ARGUMENT.

Complainants are trustees. They are out of possession and cannot maintain trespass. (*New Jersey Midland Ry. Co. v. VanSyckle*, 37 N. J. L. 496.)

Certainly it is their duty to make some effective protest against this unauthorized use of the trust estate. Persons who buy lots on either side of this farm may and probably will do so in the belief that they have the right to use these roads for the purpose of access to their prospective homes.

Being out of possession, complainants cannot fence off these roads, nor erect trespass signs, nor in any other manner prevent this unauthorized use of the property except by the method here sought.

For them to stand idly by and see men and women misled in this manner would not only be discreditable to them, but might subject them to severe criticism, to say the least, if it be true that these prospective purchasers are not informed that their privilege to use these means of travel across the Guard House Farm would be terminated at the end of Ecret's lease, thus cutting them off from access to their properties.

The Township Committee feel that it is their duty to cause this property to be restored to its former condition, at least to such an extent as will prevent further public travel across the road and the bridge and the enlarged tide bank. This can be done without destruction of the tide bank by the erection of barriers.

If complainants remain silent and permit these alterations in the character of the property to continue, at the termination of the lease the property may be handed back to them by the tenant entirely destroyed for the only use which the complainants have any right to make of it.

The conclusion reached by the learned Vice-Chancellor was that no damage had been done to the land by reason of the construction of these roads, and that the question of the possible fraud on the public could not be considered because there was no evidence that anyone had been deceived or that any attempt had been made to so deceive, nor any proof that said roads are being generally used by the public "although there is no doubt that they could be so used" (pg. 92, 93).

We respectfully insist that the testimony and exhibits demonstrate that defendant has committed or

permitted acts which are a serious change of, and destructive to the property physically and in the character in which it has been held and enjoyed; that these acts were unauthorized by the landlord and are in violation of the lease covenant by the tenant; that they are a waste or spoil of the reversion; that the purpose of the construction of these roads is so obvious that testimony concerning the actual deception of particular individuals was and is unnecessary, and that such injury is irreparable.

In *Roseberg v. American Hotel & Garden Co., et al.*, 121 Atl. Rep. 9, Vice-Chancellor Ingersoll said, at page 13:

“The characteristics certainly marking an injury as irreparable are:

(1) That the injury is an act which is a serious change of, or is destructive to, the property it affects either physically or in the character in which it has been held and enjoyed.

(2) That the property must have some peculiar quality or use such that its pecuniary value, as estimated by a jury, will not fairly recompense the owner for the loss of it.”

Numerous authorities are cited in support of this definition of “irreparable injury” and the decree was unanimously affirmed, 95 N. J. E. 640, on an opinion by the Chief Justice, in which he said:

“We fully concur in the views expressed by the learned Vice-Chancellor in the opinion filed by him, and affirm the order upon that opinion.”

In *Fortescue v. Bowler*, 38 Atl. Rep. 445, Vice-Chancellor Grey said:

“Here the rights of the parties have been definitely ascertained, and it is shown that the

proposed waste will be absolutely destructive of the premises for the uses for which they are most valuable. I speak now of their condition when the back building is removed, and without giving any weight to the defendant's statement that he intends to repair the damage he means to do, by restoring the building to the condition it was in when he came into possession, which cannot be considered. Lord Hardwicke in *Farrant v. Lovel*, 3 Atk. 723, held that waste in an under-lessee being shown, the ground landlord had the same equity as in other cases of injunctions to stay waste. In *Ware v. Ware*, 6 N. J. Eq. 117, a tenant by the courtesy was restrained from cutting timber at the instance of the owner of the fee. Chancellor Kent in *Douglass v. Wiggins*, 1 Johns Ch. 435, allowed an injunction to restrain a tenant of a dwelling house from converting it into a store. These allowances of the writ, I think, quite justify what is asked in this case. The tenant is put into possession by the landlord, and thereby obtains control of the demised premises. His possession is that of his landlord. It is inequitable that he should be permitted so to use his possession as to destroy the landlord's reversion, leaving him to an action of law for his remedy. On the question, then, of jurisdiction, the question presented is simply this: Has the Court of Chancery power to enjoin a tenant in possession from removing a portion of the real estate off the demised premises, and thereby destroying them for their accustomed use? I do not think there ought to be any question that this Court has in such cases full jurisdiction, and that the Court ought, under such conditions, to issue a writ, and restrain the removal.”

The jurisdiction of equity to stay the commission of waste at the suit of the owner of the reversion against a tenant for years is well established and rests upon the inadequacy of the remedy at law.

“Waste” is variously defined as follows:

“Any unauthorized act of a tenant for a freehold estate not of inheritance, or for any lesser interest, which tends to the destruction of the tenement, or otherwise to the injury of the inheritance.”

Poll. Torts, 327.

“Any unreasonable or improper use, abuse, mismanagement or omission of duty touching real estate by one rightfully in possession which results in its substantial injury.”

Delano v. Smith, 206 Mass. 365, 92 N. E. 500, 30 L. R. A. (N. S.) 474.

“Waste is a spoil or destruction in lands, houses, trees or other corporeal hereditaments committed or permitted by a tenant under certain tenures, to the disherison of him who has the remainder or reversion.”

Archibald's Pl., 11 and 12; 2 Seldon 335.

“Waste is the destruction or improper deterioration or material alteration of things forming an essential part of the inheritance, done or suffered by a person rightfully in possession by virtue of a temporary or partial estate—as, for example, a tenant for life or for years. The rightful possession of the wrongdoer is essential, and constitutes a material distinction between waste and trespass. The remedy by injunction is fully established, and has not only virtually

superseded the old common law action of waste, but has to a great extent taken the place of the action on the case for damages. An injunction will be granted in all cases where a legal action would lie to recover possession of the land wasted, or to recover damages.”

Pom. Equity Juris., Vol. IV, 3rd Ed., Sec. 1348.

In *Woolworth Company v. Nelson*, 204 Ala. 172, 13 A. L. R. 820, an injunction was issued to prevent the alteration of a leased building. In affirming the injunction order, the Court said, among other things:

“It is, in general, no justification for an action of waste that a party will, at some future time, put the premises in the same condition as they were when the lease was made. The question is whether the tenant, at the time the wrongful act was done, caused an injury which then affected the plaintiff as to his reversion. How can it be known, as a matter of law, that a tenant will retrace his steps and repair an injury which he has deliberately caused? The landlord has a right to a continuance of the state of things as they existed when the injury was done. The tenant has no right to exercise an act of ownership.”

In *Krich v. Zemel*, 96 N. J. E. 208, it was held that where an injury is irreparable the Court of Chancery will enjoin continuous trespass and will by mandatory injunction restrain the continuance of encroachments, which, unremoved, cast a cloud on the marketable title of the property.

In *Klie v. Von Broock*, 56 N. J. E. 18, it was held that the test is not alone whether a material injury is done by the tenant but whether the alteration or

change is to an extent beyond what is fairly implied from the terms of the original contract of letting. In that case, the lease was for a building, but the same rule would seem to be applicable to the facts in the case at bar.

That the Court of Chancery has full power on final hearing to issue a mandatory injunction seems clear.

Pomeroy's Eq. Juris., Sec. 1359.

Hirschberg v. Flusser, 87 N. J. E. 588.

We respectfully submit that the decree below should be reversed to the end that a decree be entered granting, in some measure at least, the relief prayed for by complainants, who are acting in this matter without personal interest and wholly in an effort to perform what seems to be their duty as public officials in the management of the trust imposed under the Miles will for the benefit of the public school fund of the township.

May Term, 1927.

F. NEWLIN ACTON,
*Solicitor for and of Counsel
with Appellant.*

WALTER H. BACON,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF
LOWER PENNS NECK IN THE COUNTY OF SALEM,
Complainant-Appellant,

and

SAMUEL ECRET,
Defendant-Respondent.

ON BILL FOR INJUNCTION.

ON APPEAL FROM COURT OF CHANCERY.

BRIEF FOR RESPONDENT.

The complainant by the bill filed in this cause seeks a permanent injunction against the defendant:

(a) To restrain and enjoin him from laying out, contracting and building roads through, across and upon the farm leased by complainant to the defendant;

(b) From placing gravel and road building material thereon;

(c) From digging ditches and drains and constructing other works thereon;

(d) From altering and changing the character of the premises from a farm into building lots;

(e) From committing further waste or spoil of any kind on the premises;

(f) To forthwith remove from the premises all gravel, and road-making materials placed on said farm by defendant;

(g) To restore the premises to their former condition as farm land and,

(h) To award complainant such other and further relief as may be just. (Case, p. 4, lines 11 to 35.)

The cause was heard by Vice-Chancellor Ingersoll, who held there was no proof of irreparable injury, and such other lack of proofs as to disentitle the appellant to the relief sought, and directed that its bill be dismissed. (Case, pp. 90 to 93.) From the decree dismissing the bill, we appeal to this Court asking for a renewal of the decree. We feel there should be an affirmance of the decree.

FACTS.

Testimony was taken before Vice-Chancellor Ingersoll, by the complainant, defendant submitting

none, and from the complainant's testimony, the following constitute the pertinent facts in the controversy.

By the will of Francis Miles (Exhibit C1, Case, pp. 100 to 103) probated May 21, 1768, and recorded in the office of the Secretary of the State, at Trenton, in book No. 13 of wills, page 397, there was devised to the Township of Lower Penns Neck, in the County of Salem, a certain farm or plantation, situate along the Delaware River, the income of which was to be used as a fund for free schools for the inhabitants of the township. At this point the following observations might be made, first, that it would seem that the carrying out of the trust in Miles' will, was not contingent upon the lands being operated as a farm, but that the same could be leased for building operations with a charge as ground rents placed thereon, as witness the carrying out of the trust in the Girard will. And secondly, the purpose of the will to provide a fund for the schooling of poor children of that township, has by force of the New Jersey system of education been rendered obsolete and unnecessary, and it thereby would appear that the complainant who asks relief by this proceeding to preserve the estate of Miles, comes into this Court, derelict in the carrying out of the trust under the will in question.

This farm was in the year 1924 rented by the complainant to the defendant on a strict money rental, and the only evidence of the nature of the letting is contained in the last clause of the lease, whereby it is set forth in language crude and non-technical that the defendant was "to keep the premises in good farm like manner, and upon the expiration of said agreement the farm shall be in as good condition as at the beginning." (Case, pp. 105 to 106.)

It is admitted that the defendant is in lawful possession of the premises, and has paid or tendered in legal tender to the complainant the rent as the same came due. At the time of the execution of the lease in March, 1924, that portion of the farm bounding and fronting on the Delaware River was exposed to the incursions of the tide, rendering its use for any purpose, agricultural or otherwise, impossible. It is generally known that in this part of the State, lands bounding on the Delaware River, except where the same are arbitrarily converted into shooting preserves, are, on account of the constant inroad of the water, necessarily required to be protected by banks. Such had been an incident to this farm prior to defendant's tenancy, but the same had become broken by the natural elements, and apparently the complainant did not care to incur the expense of rebuilding the bank. During the defendant's tenancy, about July, 1924, a strong bank had been placed along the western side of the farm along the Delaware, which had effectively protected the farm from the tide. This bank is of such a character and nature that it can be used as a roadway, and has been used by the public to reach lands on the other side of the complainant's farm. Further, a road has been made through the farm, which has been used also by the public, to reach properties on the other side of the farm, which road is of such a nature that it could be destroyed in a few hours by being plowed up; and which road is connected with these other properties by a bridge over Miles Creek, which stream separates the township farm from the other properties. No testimony was offered who built these roads, or as a matter of fact, the bridge, the supports of which rest on the one side on the township farm, and on the other side on lands not belonging to the com-

plainant. Further, it was not shown that the defendant has invited the general public to make use of these roads. Moreover, during the period of the building of the same, complainant did nothing to prevent their building. (Case, pp. 30 to 48.) The testimony of Newell, one of the Township Committee (Case, pages 83 to 85), admits that a right of way had formerly existed over that part of the farm where the present road had been constructed, and that formerly an old bridge had existed across Miles Creek, which had been used by the public. There was no evidence offered to the effect that the farm has in any way been injured, or that its character had been changed from that of a farm to some other nature during the defendant's tenancy.

Has the complainant a right to a permanent injunction against the defendant under the testimony and its prayer for relief?

The prayer for relief is of a six-fold nature in reference to the present, as we have heretofore set out. And in answer to the same, there has been no testimony that the defendant, or his agent, or persons claiming under him or acting under his authority or permission, are laying out and building roads through and across the farm; or

(2) are placing gravel or other road-making material thereon; or

(3) are digging ditches or drains; or

(4) are constructing other works thereon; or

(5) changing the character of the farm into building lots; or

(6) are committing waste or spoil of any kind on the same.

An injunction would properly lie for the commission of any of these acts if there was any testimony to warrant it but such is not the case. The other two-fold injunctory prayers

(1) That the defendant remove gravel, road-making materials and other substances placed thereon and

(2) To restore the premises to their former condition,

should be denied as having no basis in fact. No proof of any kind was offered to the effect that any gravel or injurious substances were placed upon the farm in the building of the bank or the road, and that the lands are and ever have been, since the beginning of the defendant's tenancy, operated as a farm and as a farm only, is fully warranted by the testimony. In the course of the hearing it became apparent that the elaborate prayer for relief in behalf of the complainant was abandoned, and that in lieu and substitution therefor, a prayer to restrain the defendant from the commission of waste in the building of the road, bank and bridge, whereby the public were to be barred as users of the bank, road and bridge, was to constitute the present status of complainant's relief. It is admitted that the bank as a protection of the farm from the invasion of the tide is a benefit to and an improvement to the farm from the standpoint of an agricultural enterprise. (Case, pp. 88 to 89.) The road through the farm represents no great physical effort, and could be

wholly destroyed and effaced from the general topography of the farm by plowing up the same which would require a few hours' effort. In the case of the bridge, to destroy the same, would be to injure property, not being or remaining wholly in the lands of the complainant. Furthermore, to proceed against the defendant, for the acts of others not acting under his command or permission is something hardly compatible with equity. If a person not connected with the defendant in any capacity and without his command or permission, commits a trespass on the farm, it would seem a somewhat monstrous doctrine that the stranger's act is that of the defendant, and the latter should answer for the trespass. Furthermore, nothing has been shown to connect the building and construction, the acts complained of, with the defendant in any way, and if acts of waste, how can they be imported to the defendant, particularly so when the Township Committee stood idly by, saw the same built and constructed, used the same, in the same way they say the public did, and then after an interim of two years, they appear in court and ask for relief.

Are the acts of waste complained of, of such a nature as to entitle complainant to relief in this court?

In considering the acts complained of it must be borne in mind that in respect to the bank along the river, the situation of the farm requires it to be protected from the incursion of the tide waters of the Delaware River. The fact that a bank formerly occupied the same site for the purpose of protecting the farm, is evidence in itself of its necessity as a protection for the farm. Breaches were made in it,

it was not repaired and the lands thereby became exposed to the flow of the tide whereby a considerable portion of the farm was rendered unfit for cultivation. Furthermore, if a condition like this is not checked, in the course of time, the daily pounding of the tides will so batter down the natural defenses, that the whole farm will become a marsh fit only for the shooting of web-footed fowl, and the abode of amphibious animals. The actions of the complainant in allowing this condition to continue would evince a purpose to change the character of the premises, and their fear of the doings of the defendant in this respect partakes somewhat of the ludicrous. The placing of the new bank along that portion of the farm bounding on the Delaware River despite the fact that it may be used by the public to travel thereon, if technically an act of waste, is of great and lasting value to the premises as a farm, and in no wise has changed its character. As to the road across the farm, as we have heretofore said, its physical nature considered strictly is of no more permanent nature as a change of topographical character, than is the building of a temporary fence, a field of corn, or any other innovation that one may do, which merely the act of plowing may convert the same to the former condition. As to the bridge, it is contended that the same being over Miles Creek, which is the dividing line between the locus in question and lands of other persons, only the supports of the bridge which rest on the farm of the complainant, can in any way enter into this controversy, and that, therefore, if the building of this bridge be technically an act of waste, it cannot be imputed to the defendant. (Testimony of Harvey, Case, p. 74.)

To give equity jurisdiction, an injunction to re-

strain waste, it must be shown that the injury is irreparable, or the defendant insolvent, or an injunction must be necessary to avoid multiplicity of suits. In enjoining acts of pure waste by a tenant, courts of equity interfere on the ground of irreparable injury to the inheritance and ordinarily will not afford injunctive relief if the damage be slight. (Beach on Injunctions, 1170.)

Nothing in the pleadings or in the testimony is indicative of the financial status of the defendant, or that the aid of this Court is sought, to avoid multiplicity of suits, and assuming therefore that it is based on the theory that the injury from the alleged acts of waste are irreparable is their nature, we do not feel that they come within the characteristics laid down by Ingersoll, V. C., in *Roseberg v. American Hotel, &c.*, 121 Atl. 9, wherein it is held that the characteristics of irreparable injury are that the injury is an act which is a serious change of, or is destructive to, the property it affects, either physically or in the character in which it has been held and enjoyed, and that its use or quality is such, that its pecuniary value as estimated by a jury will not fairly recompense the owner for its loss. We rather think that the acts in question, if constituting waste, are of an ameliorating nature, beneficial to the estate, and as such are not actionable against the defendant.

It has been held that in order to obtain an injunction against a tenant, the landlord must show that what the tenant is doing is injurious to the inheritance; that if it improves it, it is not waste. Thus where a lessee converted a farm into a market garden, and at the trial it was proved that other farms in the vicinity had been changed into such gardens, that being found to be the most profitable mode of

cultivation, it was held that the lessee had not violated his covenant to manage the farm according to the best rules of husbandry practised in the neighborhood, and that the conversion of the farm into a market garden was not actionable waste.

Meux v. Cobley, 2 Ch. D. 253;

Jones v. Chappell, L. R. 20 Eq. 539.

In *Doherty v. Allman*, L. R. 3 App. C. 209, Lord Cairns, speaking to the House of Lords, said:

“There is no doubt the Court of Chancery exercises a jurisdiction in restraining waste, and where waste is committed, in requiring an account of the waste for the purpose of recompensing the person who has suffered, but I apprehend it is perfectly clear that the Court of Chancery, acting under that case in advance of the common law right, will in the first place consider whether there is, or is not, any substantial damage which would accrue, and which is sought to be prevented, and will make that inquiry. And I doubt further, whether it must not be taken as clear from the evidence here, that any jury or any tribunal judging upon the question of fact, would not say that, if there be technically what in the eye of the common law is called waste, still it is that *ameliorating waste* which so far from doing an injury to the inheritance, improves the inheritance.”

(The proofs in this case were that the tenant tore down old buildings and converted them into dwelling houses which would increase their value.)

In *Jones v. Chappell*, *supra*, Sir George Jessell, sitting as Master of the Rolls, said:

“As I understand the law the erection of buildings upon land which improve the value of the land is not waste. In order to prove waste you must prove an injury to the inheritance.”

Equity will not enjoin ameliorating waste, which is any act that though technically waste, yet in fact improves the inheritance.

5 Pomeroy's Eq. Jur. Sec. 485;

Jackson v. Tibbetts, 3 Wend (N. Y.) 341;

Winship v. Pitts, 3 Paige (N. Y.) 259.

Where an adequate remedy exists at law the right to enforce the rights of complainant should be denied.

No proposition has been more the subject of affirmance by the equity and appellate courts than that despite the fact that proof of the violation of the rights of the complainant by the defendant, is clear, yet if an adequate remedy is given by law where compensation for the injury may be had by pecuniary damages, the right to invoke the remedy by injunction will be denied. The redress of private injuries by injunction is in itself an extraordinary remedy, and the equity courts while asserting the right to invoke this remedy, yet are chary in its use unless the complainant's right is clear and beyond dispute. Particularly is this true in cases where the injury or trespass to the real estate is slight, and where there is nothing in the proofs that shows a recurrence of the trespass. Only in case of irreparable injury to the inheritance, if the nature of the wrong sounds in that of waste, can the writ be awarded. It is submitted that under the proofs in this case there has been a failure on the complainant's part to make

proof of the allegations contained in the eighth and eleventh paragraphs of the bill of complaint. The eighth section specifically charges and avers that the defendant has abandoned farming the lands, and is "now engaged" in changing the premises from farm land into building lots and making streets, digging ditches or drains, destroying the grass and herbage and placing gravel and other material thereon. It will be noted that the charge in the eighth paragraph refers to the present, as if the actions complained of were in the act of being committed or of a continuing nature. If such had been the case, the situation would have admitted of the right to invoke the remedy by injunction. But this is not borne out by the proofs, which are to the effect that aside from the building of the bank, the road through the farm, and the attachment of the bridge over Miles Creek to the farm of the complainant, the premises are being adequately and properly farmed by the defendant. A reading of the eleventh paragraph would seem to indicate that the basis of the prayer for injunction is predicated on the theory that the defendant is not of "financial responsibility" to answer in damages, and will therefore be unable to put the premises back in the same condition at the end of his term as same were at the time of the letting. There is no claim that the premises are being trespassed upon or the freehold injured by other persons, as would seem to be the theory of the complainant at the hearing. It is submitted that the bill of complainant being drawn in accordance with the present chancery act, the issues must be in accordance with the charges in the bill and its prayer for relief, in conjunction with the answer made by the defendant.

It is submitted that the proofs as to the injuries complained of, together with the status of the same

as it now appears before this Court, does not show such injuries as are termed irreparable, and as are defined in *Roseberg v. American Hotel, &c., Co.*, 121 Atl. 9, and in the *Moss Case*, 120 Miss. 596, 92 Southern 689.

The general rule that an injunction will not be awarded where there is an adequate remedy at law, has been applied where there is an adequate remedy by ejectment, trespass or an action for damages. (32 C. J., Sec. 39.)

If such damages will constitute an adequate compensation for the injury threatened or inflicted, equity will not interfere by injunction. Ibid Sec. 40—citing: *Paterson & East Jersey Water Co.*, 74 N. J. Eq. 49; *Morris Canal Co. v. N. J. Central R. R. Co.*, 16 Eq. 419; and *Warner v. Morris Canal Co.*, 5 Eq. 410.

Moreover to seek to prevent trespasses by the public or persons unknown to complainant, by attempting to enjoin the defendant, would seem to be without basis in injunctive proceedings. An injunction operates *in personam*, and it will not issue against one without the jurisdiction of the Court. 32 C. J., Sec. 69.

The inadequacy of the remedy at law is the basis of the jurisdiction in cases of trespass, and it is elementary law that equity will not interfere to prevent the commission of a trespass or the continuing of trespasses, where full and ample relief can be obtained at law, 32 C. J., Sec. 176, citing *German Evangelical Lutheran Church v. Mastof*, 10 N. J. Eq. 57.

Equity will not restrain a non-continuing trespass where the injury does not appear to be irremedial and destructive to the estate, and where there is an adequate remedy at law. *Lamphear v. Subers*, 84 N. J. Eq. 391.

Mere tortious taking and holding of complainant's real property will not alone afford a ground for injunctive relief, in the absence of threatened irreparable injury. *Walper v. Kelly*, 83 N. J. Eq. 474.

Aside from an action for damages, complainant has an adequate remedy by the statute in such case made and provided, i. e., by an action of waste provided by the statute "An act for the prevention of waste." 4 C. S., p. 5789.

As to trespass on the bank lying on the western side of the farm, protecting it from the tidal water of the Delaware River, it is submitted that under this Court's decision in *Simpson v. Moorhead*, 65 N. J. Eq. 623, where the Court held that "wherever the line of the bank of the reclaimed land is, that is the line of private ownership," that the bank is no part of the farm but merely a protection to it, and that the public may use the same as a thorofare.

An injunction cannot lie to restrain the doing of an act already completed.

Under the proofs in this case, it would seem that there are three several acts which are the basis of complainant's prayer for injunctive relief, viz: the building of the bank on the western side of the farm, the roadway through the farm, and the attachment of the bridge across Miles Creek to the farm on that side of the same on which it rests. There are no proofs of any acts being done by the defendant, or in the act of consummation, for which the complainant asks for an injunction. As to these three acts in question, it is urged that the same having been done and fully consummated, the same cannot be restrained, as the province of an injunction is to restrain and prevent the performance of an act that

is an invasion of the complainant's rights. While the eighth paragraph of the bill of complaint does charge that the defendant is "now engaged" in doing acts injurious to the complainant, no proof was made of the same, as we have pointed out before. So, it would appear that the question is whether the complainant is entitled to an injunction where the wrongful acts have all been consummated. We do not think so.

Since the purpose of an injunction is not to afford any remedy for what is, past but to prevent future mischief, not being used for the purpose of punishment to compel persons to do right, but merely to prevent them from doing wrong, rights already lost and wrongs already perpetrated cannot be corrected by injunction and the party aggrieved must seek some other form of action for redress, ordinarily, in this case, as an action at law for damages.

32 C. J., Sec. 24, p. 45, citing:

Society, &c., v. Morris Canal Co., 1 N. J. Eq. 157;

United N. J. R. R. & Canal Co. v. Standard Oil Co., 33 Ibid 123;

Rogers Locomotive, &c., v. Erie R. R., E 20 Ibid 379;

Salassogove v. Chapers, 144 U. S. 119;

Shaw's Jewelry Shop, Inc., v. N. Y. Herald Co., 156 N. Y. S. 651.

The purpose of this jurisdiction (i. e., waste) is to prevent future acts of waste, and also, although rarely, to restore things to their former condition, hence, in general an injunction will not be granted after the acts complained of are finished. 5 Pomeroy's Eq. Juris., Sec., 484, quoting *Owen v. Ford*, 49 Mo. 436, and *Southerd v. Morris Canal Co.*, 1 N. J. Eq. 519.

Ordinarily, a court of equity will interfere to stay future waste, and only under special circumstances will it grant an injunction where waste has been committed. The reason for this is that the ground for coming into chancery is to stay waste, and not for satisfaction for the damages. The commission of waste is a tort, and the remedy lies at law.

27 R. C. Law, Sec. 39, citing:

Martin v. Brown, 137 Ga. 338, L. R. A. (N. S.) 16;

Watson v. Hunter, 5 Johns. Chan. 169;

Northcraft v. Blumaner, 53 Wash. 243.

An injunction is for the most part preventive, and cannot ordinarily be employed to correct a wrong already done or restore to a party rights of which he has been deprived. Beach on Injunctions, Sec. 41, p. 49.

In the case of *Society for Establishing Useful Manufacture v. Morris Canal and Banking Co.*, 1 N. J. Eq. 157, Chancellor Vroom said:

“If, however, injuries are sustained by the complainant at the particular times charged, those past injuries are in themselves no ground for an injunction. The province of an injunction is not to afford a remedy for what is past, but to prevent future mischief. The effect of the injunction is preventive. If the injuries were continued, ‘the right to continue them set up and persisted in, the Court would, if the facts were properly established, interfere, &c.’ ”

Complainant asked for a preliminary injunction to restrain the defendant, a foreign corporation, from “interfering or in any way attempting to interfere with the complainant, by laying any pipe, either

on or over or under the railroad bridge over the Hackensack River, &c. The Chancellor held that ‘The Oil Company is, as before stated, a foreign corporation. It appears to have acted in laying the pipe in the river entirely without authority. Indeed, it does not pretend to have had any. In the case presented the complainants do not appear to be entitled to the injunction. In the first place the piping was already laid when the bill was filed, and there is therefore no ground for an injunction to restrain the defendant from laying it.’ ”

United N. J. R. R. Canal Co. v. Standard Oil Co., 33 N. J. Eq. 123.

In *Attorney-General v. N. J. Railroad Co.*, 3 N. J. Eq. 136, Chancellor Vroom said:

“The injunction is a preventive remedy. It interposes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ can have no application for it cannot be applied correctively, so as to remove it.”

In *Anonymous*, 1 Vesey, Jr. 140, Lord Hardwicke, restrained the further digging of a ditch, but refused to order the part dug to be filled up.

In *Blackman v. Glamorganshire Canal Co.*, 1 Myl. & Keane, 154, Lord Brougham said that “he had never known an order to pull down on motion and but rarely by decree,” and refused so much of the injunction as directed the defendant to fill up a part.

Lastly it urged that the complainant by its laches, making no effort to prevent the consummation of the works now complained of and with full knowledge thereof, is barred from obtaining injunctive relief at this time.

The *locus in quo* is situate near Pennsville, in the Township of Lower Penns Neck. The complainants all reside in the municipality. They had full knowledge of what was taking place on the premises. Under their right as landlords, they had ingress and egress at all times to inspect the premises. Furthermore, they seemed to have been present on the premises on many occasions when the bank, the road and the bridge were being built, during the spring and summer of 1924, and in no way did anything to interfere with or prevent these operations. That they had full knowledge of this appears by their own testimony in conversations had with workmen, and also to read between the lines, they were privy thereto. They made no move to stop these acts they now complain of until a long while after their completion, and it would seem that all through the doing of this work, they impliedly consented, and made no dissent whatever. (Case, 72-73.) What prompted them at this late day in filing the bill of complaint, no man can say, but he cannot help but think something that is not in the testimony. Whatever it may be, it would seem that the complainants' laches in this regard should bar them from the relief prayed. While the road through the farm possibly was built in a short while, as evidenced by the fact it could be destroyed in a few hours work with a plow, the building of the bank was a work of some magnitude, and must have required a long time to build.

A suitor who by laches has made it impossible for a court to enjoin his adversary without inflicting great injury upon him will be left to pursue his ordinary legal remedy. A court of equity will not grant relief by injunction against the defendant in the completion of his undertaking, or the use thereof, when completed, where the party asking it, being

cognizant of his rights, and the invasion thereof, does not take those steps to assert them which are open to him, but lies by and suffers his adversary to incur expenses and enter into burdensome engagements.

32 C. J., Sec. 56, p. 72, citing:

Bowman v. Northern Pacific R. R., Fed. 328;

Winslow v. Newcomb, 87 N. J. Eq. 480;

Traphagen v. Jersey City, 29 N. J. Eq. 206;

Bridgewater v. Ocean City Asso., 85 Ibid. 379;

Dobleman v. Gately Co., 64 Ibid. 223;

Levi v. Schoenthal, 57 Ibid. 244;

Erie R. R. Co. v. Del. L. & W. Co., 21 Ibid. 283;

Trout v. Lucas, 54 Ibid. 361;

Liebition v. Newark, 24 Ibid. 200;

Higbie v. Camden, 20 Ibid. 435;

Hulme v. Shreve, 4 Ibid. 116.

A party may forfeit his right to an injunction by sleeping on his rights, and allowing a grievance to continue for a long time. An injunction will be refused to a complainant who has delayed his application until he has obtained an inequitable advantage of the defendant. Thus where plaintiff's grantors stood by and permitted the defendant to build on an adjoining lot in violation of a restriction to his deed, an injunction to restrain the further maintenance of the building was denied to plaintiff and he was left to his remedy at law.

Orne v. Friedenberg, 143 Pa. St. 483.

And, as, where the owner of the fee of a highway and of abutting lots, permitted a railroad to be con-

structed thereon, at great expense, without doing more than object to it, it was held by the Supreme Court of Missouri that he should at once have taken positive action against injury of which he complained, and not have waited until the road was completed, and that by his long acquiescence he had forfeited his right to an injunction.

Planet Co. v. St. Louis & San Francisco R. Co., 22 S. W. 616;
Beach on Injunction, Sec. 42, p. 51.

In *Traphagen v. Jersey City*, 29 N. J. Eq. 206, the Court said:

"It is undisputed that the complainants have permitted the authorities to oust them and to take possession of the land they now claim, and to expend in preparing it for use as a public street, a large amount of public funds, and that since it has been so prepared, they have stood by quietly and permitted it to be constantly appropriated for the purpose of a public highway. Under these circumstances they have so far sanctioned the action of the public authorities as to divest themselves of the right to demand that a court of equity shall now by its interdiction deprive the public, even temporarily, of the benefit of its expenditures. *Morris & Co. v. Prudden*, 20 N. J. Eq. 530. *Easton v. N. Y. & L. B. R. R. Co.*, 24 *Ibid.* 149."

The rule is well established, independent of any statute of limitations, though the Court may in some cases act in analogy thereto, that if a party is guilty of laches, unreasonable delay in applying for an injunction, he may thereby forfeit his claim, to that special form of remedy. And when in such

ease by his laches he has made it impossible or very difficult for the Court to enjoin his adversary, without inflicting great injury thereby, an injunction should be refused and the party left to his remedy at law.

14 R. C. Law, Sec. 62, citing:
Wehrman v. Conklin, 155 U. S. 314, *et seq.*

Nor will the Chancellor interfere by way of mandatory injunction, even though the injury be clearly established, where there has been a long-continued delay in asserting the right, and a remedy exists at law. Thus one standing by and permitting the erection of a stable, in alleged violation of a restrictive covenant in a deed, and having a right to prevent it, cannot invoke the aid of the Court to enforce a remedy in equity for its removal. *Whitney v. Union R. R. Co.*, II Gray (Mass.) 359, 71 Am. Dec. 715. The same situation also exists in the case of acquiescence, distinguished in some instances, but apparently with little real ground for the distinction, from laches.

14 R. C. L., &c., 62.

It is contrary to equity and good conscience to suffer a person to lie by and see acts involving risk and expense by others, and then permit him to enforce his rights, and thereby inflict loss and damage on others. In such cases a prompt assertion of right is essential to a just claim for relief in equity.

14 R. C. Lar. & C. 63.

In *Kirch v. Zernel*, 96 N. J. E. 208, and *Klie v. VanBroock*, 56 *Ibid.* 18, being cases of continuing trespass, and relied on by complainant, they have one vital feature that renders them inapplicable to this controversy, i. e., before the wrongful acts were

completed or while it was claimed the defendant was in the act of perpetrating the same, the complainant promptly made application for injunctive relief.

A mere objection or protest, or a mere threat to take legal proceedings is not sufficient to exclude the consequences of laches or acquiescence in such a case as the present.

Easton, &c., v. N. Y. & L. B. R. R. Co., 24 N. J. Eq. 49.

The decree of Vice-Chancellor Ingersoll should be in all things affirmed.

May Term, 1927.

THOMAS G. HILLIARD,
*Solicitor for and of Counsel
with Respondent.*
HENRY BURT WARE,
Of Counsel.

INDEX

Notice of Appeal.....	1
Grounds of Appeal.....	2
Summons.....	3
Complaint.....	4
Answer to Complaint.....	5
Reply.....	6
Process.....	7
Judgment.....	8
Testimony.....	9
Defendant's Motion for Non-Suit.....	10
Defendant's Motion for Dismissal of a Part of the Bill.....	11
Charge to Jury.....	12
Defendant's Request to Charge.....	13
Witnesses for Plaintiff	
Henry S. Puder.....	14
Witnesses for Defendant	
King A. Barvin.....	15