

I N D E X

	PAGE
Bill for Injunction .....	1
Order to Show Cause and Restraining Order ..	15
Answering Affidavits .....	17
Affidavit of Samuel Moore, Jr. ....	17
Affidavit of J. Wesley Arthur .....	46
Affidavit of Samuel M. Sheldon .....	49
Notice of Motion to Strike Out Bill of Com- plaint .....	52
Order .....	54
Conclusions .....	56
Notice of Appeal .....	57
Petition of Appeal .....	59
Answer to Petition of Appeal .....	62

**New Jersey State Library**

BILL FOR INJUNCTION.

(Filed April 22, 1927.)

IN CHANCERY OF NEW JERSEY.

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

The complainant, Oscar Morvay, of Millville,  
Cumberland County, New Jersey, respectfully  
shows that: 10

1. On January 26, 1927, Samuel Moore, Jr., of  
Millville, Cumberland County, New Jersey, com-  
menced a suit against complainant in the New Jer-  
sey Supreme Court to eject him from the posses-  
sion of certain lands in said City of Millville, more  
particularly described in the complaint filed in said 20  
cause, to which complaint complainant herein prays  
leave to refer.

2. Said cause is at issue, and has been noticed by  
plaintiff therein for trial at the Cumberland Cir-  
cuit on Tuesday, April 26, 1927, and plaintiff's at-  
torney insists that he intends to move the cause  
when reached on call.

3. Complainant is informed by counsel and, there- 30  
fore, says that he cannot safely go to trial in said  
cause before said court for the reason that he has  
an equitable defense to said ejection suit, which,  
under the rules of common law practice, he will not  
be permitted to present in an action at law, such  
equitable defense being more fully set forth in the  
following statement of facts.

4. On August 25, 1919, Elizabeth T. S. Thompson and Joseph H. Thompson, her husband, conveyed to complainant and one Walter B. Scoble a parcel of land situate on the west side of North High Street, in the City of Millville, New Jersey, known as No. 210 North High Street, said lot having a frontage on said street of 28 feet, by a depth of about 99 feet, and is bounded on the north by lands of Martha E. Champion and on the south by  
10 lands of Samuel Moore, Jr.

5. Said deed was duly recorded in the Clerk's Office of Cumberland County, New Jersey, on September 4, 1919, in Deed Book No. 372, page 552.

6. On August 16, 1920, Walter B. Scoble and wife conveyed to complainant all their undivided interest in said land and premises, which said deed was recorded in the clerk's office aforesaid in Deed  
20 Book No. 382, page 457, on August 20, 1920.

7. Complainant entered into possession of said lands under said conveyances and, except for the acts of the defendant in this suit, he is still in peaceable possession of said lands.

8. At the time of the purchase of said property as aforesaid, the improvements thereon consisted of a brick and frame building used for mercantile and residence purposes; the north wall, being the  
30 wall adjoining the Champion property, was and is a brick wall, extending westward along the property line, and is wholly upon complainant's property.

9. At the time of said purchase there was an

open space about six feet wide between the south side of the structure on complainant's lot and the north wall of the building on the lot owned and occupied by the defendant, Samuel Moore, Jr., which said space was paved with brick and access to which was gained from the street by a gate set in an iron fence, the south post of which fence was set up against the north wall of said Moore's building, and which open space was used by complainant as a part of his property and was within the  
10 limits of the 28 feet wide lot so purchased by him as aforesaid.

10. At the time of said purchase there was a brick sidewalk in front of complainant's property and a cement sidewalk in front of said Moore's property, each of which sidewalks had apparently been in place for many years prior to 1920, and the dividing line between said sidewalks was co-extensive with the north line of the foundation wall  
20 of said Moore's property.

11. In the year 1920, complainant decided to improve his property by raising up the frame part and building a brick store and apartment underneath the same and enlarging the floor space by placing the south wall of the new structure on the south line of his property, and in order to make sure that his new structure was correctly placed and properly built, he engaged the services of Newton  
30 B. Wade, then the city engineer of Millville, New Jersey, and of Clement C. Cassell, a licensed architect, of said city.

12. After the completion of his survey, said Wade and said Cassell informed complainant that the

ing on the west side of High Street in said block, and complainant is, therefore, wholly unable to say with certainty whether his said south wall does or does not encroach on said Moore's property.

20. Complainant says that if his said wall is an encroachment as claimed by defendant, this complainant was misled by defendant into placing said wall as it was placed, and that defendant stood by and permitted complainant to make a large expenditure in improving his land as aforesaid, complainant being under the honest belief that he had a right to do so, and that defendant is, therefore, estopped from now ousting complainant from possession of the lands described in the complaint in the said ejectment suit, even though it should appear that defendant is the legal owner of said land, and that it would be inequitable and unjust for defendant to be placed in a position as the result of a favorable judgment in said action which might result in compelling complainant to tear down and remove said wall.

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

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

2. That the said Samuel Moore, Jr., his counsel, attorneys, solicitors and agents, and each and every of them, may be restrained and enjoined from proceeding further against complainant in the said ejectment suit commenced by defendant against complainant in the New Jersey Supreme Court, and now pending and at issue therein, having for its

object the recovery by plaintiff therein against defendant therein of a strip of land fronting on the west side of North High Street, in the City of Millville, New Jersey, about nine and one-half inches wide, and \$5,000 for damages and mesne profits.

3. 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.

WALTER H. BACON,  
Solicitor for and of Counsel with  
Complainant.

STATE OF NEW JERSEY, }  
COUNTY OF CUMBERLAND, } ss.

OSCAR MORVAY, of full age, being duly sworn, says:

1. I reside in the City of Millville, New Jersey, and am the complainant named in the foregoing bill of complaint. I have read said bill. The facts therein stated are true.

2. Samuel Moore, Jr., has brought an ejectment suit against me in the New Jersey Supreme Court to recover possession of a strip of land on which the south wall of my store and dwelling is erected, on the west side of North High Street in Millville, New Jersey, and also for \$5,000 damages and mesne profits.

3. My attorney informs me that this case is set for trial at the next term of the Cumberland Circuit which opens on April 26, 1927, and that trials are scheduled to commence on May 2, 1927.

4. I own a property at No. 210 North High Street, in Millville. I bought this property in 1919 with Walter B. Scoble, and in 1920 he sold me his half interest. The deed for the property calls for a frontage of 28 feet on High Street. The building now on the lot measures 27 feet 9½ inches from the north side of the north wall to the south side of the south wall.

5. When I first bought this property, there was a brick and frame building on the lot. I wanted a larger building for my store and I engaged Clement C. Cassell, an architect in Millville, to prepare the plans and supervise the construction of the new building, and I also engaged Newton B. Wade, the city engineer of Millville, to give me the property lines.

6. I do not know, of my own knowledge, anything about the lines. I do know that when I bought the property there was a brick sidewalk in front of it and a cement sidewalk in front of the property of my next-door neighbor, Samuel Moore, Jr., and I know that when my new or remodeled store and dwelling was built the south face of the south wall was on the same line as the division line between these two pavements. I also know that there was an open space about 6 feet wide between the building on Moore's lot and the building on my lot. This space was paved with brick. There was an iron fence along the street front of this space and the south post was up against Moore's building.

7. After Mr. Wade had located my south line, I went with Mr. Cassell to see Mr. Moore. He and I were on friendly terms. He lived in the building on his lot. When we went in, Mr. Cassell told him his building was over on my line about 2½ inches and his eave was also over several inches. Mr. Moore said we could cut off the eave and we did so. He was around there continually while the wall was being built. He never made any objection to it. I supposed it was wholly on my lot. If it is not on my lot and is over on his lot, it is his own fault. After Mr. Wade told me where the line was, and after the talk between Mr. Cassell and Mr. Moore in my presence, I assumed I was entirely safe in building the south wall where it now stands. If Mr. Moore had objected, I would have had the matter further investigated before building this wall. He misled me by his acquiescence.

8. Mr. Moore never said anything to me about the wall being on his lot until about four years after it was built, and he then told me one day that a surveyor told him I was 9½ inches over on the Moore lot. He never did anything about it until he brought this suit, more than six years after the wall was built.

9. If what Mr. Moore claims about his line is correct, then I am over on his lot with my wall, but I built the wall relying on the survey made by the city engineer and on Mr. Moore's consent, and I believed and still believe I had a right to do what I did do. It would cost me a large sum of money to tear down this wall and rebuild my store and dwelling.

OSCAR MORVAY.

Subscribed and sworn to this twentieth day of April, A. D. 1927, before me.

JAMES BACON,  
Notary Public of New Jersey.

STATE OF NEW JERSEY, }  
COUNTY OF CUMBERLAND, } ss.

10

CLEMENT C. CASSELL, of full age, being duly sworn, says:

1. I reside in the City of Millville, New Jersey. I am a registered architect in the State of New Jersey and am a graduate of Pratt Institute of Brooklyn and other similar institutions, and have been engaged in the practice of architecture for 25 years last past.

2. In 1920 I was employed by Oscar Morvay to draw plans and specifications for raising and remodeling his frame and brick store and dwelling at No. 210 North High Street, in the City of Millville, New Jersey, and he afterwards employed me as supervising architect in charge of all the work, and I did supervise said work from the survey of the lot and staking up of the building to the completion of the structure, being continuously in and about the premises during the progress of the work.

3. Before I started work on this building, I went to Mr. Newton B. Wade, city engineer of the City of Millville, and requested him to give me the lines. I saw Mr. Wade there at work; in fact, I was there

with him when he made the survey, and Samuel Moore, Jr., was also present at that time.

4. When Wade gave me the location of the south line of Morvay's property, we found that the building of Samuel Moore, Jr., on the south was over on Morvay's lot about 2 inches, according to the survey. We also found that Moore's north eave overhung the Morvay property. I told Mr. Moore about it and he said it was all right to cut off the eave. He seemed to be entirely satisfied to have the south wall constructed where it was constructed. I was in and out of his hardware store, adjoining the Morvay property, several times a day while this wall was being built and the other work being done. I bought hardware, nails and other material from him for this Morvay job. He never made the slightest objection to what we were doing. He never at any time claimed to me that the Morvay building was over on his property. If he had made any protest, we would, of course, have made further investigation.

5. In order to get a proper foundation for this south wall, it was necessary to go so close to Moore's north wall that we were obliged to shore up his wall to prevent caving. He consented to this and went with me on several occasions into the cellar and other parts of the building and saw what was being done and assented to it. He never made any objection at any time to the location of the wall. All he asked was that we save him any expense in the matter, both as to protecting his foundation wall and cutting his eave, and that I agreed to do and did do.

6. This south wall cost about \$2,000. I have read the description in the complaint filed in the ejectment suit brought by said Moore against Morvay. The land claimed by Moore in said suit is wholly covered by this wall. It is a 12-inch wall. To tear down this wall and restore the building to usable condition by putting up a new wall would cost not less than \$5,000.

CLEMENT C. CASSELL.

10

Subscribed and sworn to this twentieth day of April, A. D. 1927, before me.

JAMES BACON,  
Notary Public of New Jersey.

STATE OF NEW JERSEY, }  
COUNTY OF CUMBERLAND, } ss.

20

NEWTON B. WADE, of full age, being duly sworn, says:

1. I reside in the City of Millville, New Jersey, and am a licensed engineer and surveyor. I have been practicing my profession for the past 19 years. After 1908, I was city engineer of the City of Millville, New Jersey, for 15 years. I was such city engineer in 1920, and in that year I was employed by Oscar Morvay, through Clement C. Cassell, to do some surveying for Morvay at No. 210 North High Street, in Millville.

2. In order to make the survey, I used as my beginning point the walls of the Champion and Souder

buildings north of the Morvay property. These walls have been there 30 or 35 years, and perhaps longer. Measuring south from the Souder wall, the 23 feet which is called for in the Champion deed and giving Morvay the frontage of 28 feet called for by his deed, indicated that the building of Samuel Moore, Jr., encroached about 2 1/2 inches on Morvay's lot. Measuring from Pine Street north to the Morvay property, the line would be somewhat different, but I reached the conclusion that the correct measurements were from these long-existing brick walls and, so measured, Morvay would have 27 feet 9 1/2 inches front without disturbing the Moore property, except the eave, and upon examination of Moore's deed, I found that the call for his frontage was 30 feet, more or less, and I, therefore, fixed the line for the south wall at the place where it was afterwards built.

10

3. Mr. Cassell was with me when the survey was made and I staked all the corners for him, and the south line of the south wall of the Morvay building was placed on the line I staked up for him.

20

4. I never heard of any objection to this line until quite some time afterward, when Moore told me another surveyor had told him the line was wrong.

5. I have made other surveys in this block on North High Street and am familiar with the location of the various properties there and with the descriptions in the deeds for same, which I have copied from the original deeds or from the records in the clerk's office. The deeds held by the several property owners in this block call for about 7 feet more frontage than there actually are in this block. I do not know how to reconcile this differ-

30

ence. The total frontage called for by the several deeds is not there. At the time I gave Morvay the location of his south line, I believed it to be correct and I now believe it to be correct, but if the measurements are taken from Pine Street north and each property owner given the amount of frontage for which his deed calls, this line would not be precisely where I staked it out, unless the frontage given in Moore's deed of "30 feet, more or less" would enable a shifting of Morvay's line to the south.

NEWTON B. WADE.

Subscribed and sworn to this twentieth day of April, A. D. 1927, before me.

JAMES BACON,  
*Notary Public of New Jersey.*

20

[ENDORSED]

I certify this to be a true copy.  
Walter H. Bacon,  
Sol'r. for Complt.

30

ORDER TO SHOW CAUSE AND RESTRAINING ORDER.

(Filed April 22, 1927.)

IN CHANCERY OF NEW JERSEY.

10

Between OSCAR MORVAY, <i>Complainant,</i> and SAMUEL MOORE, JR., <i>Defendant.</i>	}	On Bill for Injunction. Order to Show Cause and Restraining Order.
---	---	--

20

This matter being opened to the Court by Walter H. Bacon, solicitor of the complainant, and the Court having read the bill of complaint in the above-entitled cause and the affidavits thereunto annexed:

It is, on this 22nd day of April, 1927, ordered, that the defendant, Samuel Moore, Jr., show cause before the Chancellor at the Chancery Chambers, in the City of Atlantic City, on Tuesday, May 3rd, 1927, at the hour of ten o'clock in the forenoon, daylight-saving time, or as soon thereafter as counsel can be heard, why the said defendant should not be restrained and enjoined according to the prayer of said bill.

30

It is further ordered, that the said defendant, his counsel, attorneys, solicitors and agents, and each

of them, in the meantime and until the further order of this Court in the premises, desist and refrain from proceeding further against complainant in an action at law commenced by defendant against complainant in the New Jersey Supreme Court, and now pending and at issue therein, having for its object the recovery by plaintiff therein against defendant therein of a strip of land fronting on the west side of North High Street, in the City of Millville, New Jersey, about 9½ inches wide, and \$5,000 for damages and mesne profits.

It is further ordered, that true but uncertified copies of said bill of complaint and affidavits thereunto annexed, and of this order, be served on the defendant, or his attorney in said suit, within five days from the date hereof, which service may be by registered mail.

E. R. WALKER,  
C.  
20 Respectfully advised,  
R. H. INGERSOLL,  
V.-C.

[ENDORSED]

I certify this to be a true copy.  
30 Walter H. Bacon,  
Sol'r. for Complt.

ANSWERING AFFIDAVITS.

(Filed May 3, 1927.)

IN CHANCERY OF NEW JERSEY.

Between  
OSCAR MORVAY,  
Complainant,  
and  
SAMUEL MOORE, JR.,  
Defendant. } On Bill for Injunction. On Order to Show Cause, &c. Answering Affidavits. 10

STATE OF NEW JERSEY, }  
COUNTY OF CUMBERLAND, } ss. 20

SAMUEL MOORE, JR., of full age, being duly sworn according to law, on his oath deposes and says:

I commenced a suit against Oscar Morvay, the complainant in the New Jersey Supreme Court on January twenty-sixth, 1927, to eject him from possession of the following described lands in the City of Millville, with the appurtenances, particularly described as follows, to wit: 30

DESCRIPTION OF LOT OWNED BY  
DEFENDANT SAMUEL MOORE, Jr.

Lot No. 1 begins at now or formerly Orlando Gibbon's corner on the west side of High Street, north of Pine Street: which lot is now owned

by one Zambone, thence along the line of said lot nearly due west one hundred and fifteen feet, more or less, to a corner of formerly William C. Wallace's land; thence along the line of same nearly due north thirty feet; thence nearly due east one hundred and fifteen feet to the west line of High Street aforesaid; thence thereby nearly a due south course thirty feet, more or less to the place of Beginning. 10  
Containing about twelve and three quarter square perches more or less.

Lot No. 2 Begins in the east line of a lot of land conveyed by William C. Wallace, deceased, to Nathaniel Reeves by deed dated April sixteenth, eighteen hundred and sixty nine, eight feet northerly from the northeast corner of a lot conveyed by the said Reeves to Orlando Gibbon, and runs thence along said east line southerly eight and a half feet to the said northeast corner of said Gibbon lot; thence along the North line of the same westerly thirty eight and two thirds feet more or less to the northwest corner of said lot; thence northerly and parallel with the first line seven and a half feet; thence easterly thirty eight and two thirds feet more or less to the Beginning. 20

I became seized of the *locus in quo* by virtue of a deed of conveyance dated January 14th, 1920, made, executed and delivered to me by John W. Anderson and Sarah M. Anderson, his wife, recorded January 16th, 1920, in the office of the Clerk of the County of Cumberland in Book 377 of Deeds, page 179, &c. My lands, as described in that deed, are bounded and described as follows: 30

All those certain lots of land situate in the City of Millville, County of Cumberland, State

of New Jersey, bounded and described as follows:

Lot No. 1. BEGINS at now or formerly Orlando Gibbon's corner on the West side of High Street, North of Pine Street, which lot is now owned by one Zambone, thence along the line of said lot nearly due West one hundred and fifteen feet, more or less, to a corner of formerly William C. Wallace's land; thence along the line of same nearly due North thirty feet; thence nearly due East one hundred and fifteen feet to the West line of High Street aforesaid; thence thereby nearly a due South course thirty feet, more or less to the place of Beginning. 10  
Containing about twelve and three quarter square perches more or less.

Lot No. 2. BEGINS in the East line of a lot of land conveyed by William C. Wallace, deceased, to Nathaniel Reeves by deed dated April sixteenth, eighteen hundred and sixty nine, eight feet northerly from the northeast corner of a lot conveyed by the said Reeves to Orlando Gibbon, and runs thence along said east line southerly eight and a half feet to the said Northeast corner of said Gibbon lot; thence along the north line of the same westerly thirty eight and two thirds feet more or less to the northwest corner of said lot; thence northerly and parallel with the first line seven and a half feet; thence easterly thirty eight and two thirds feet more or less to the Beginning. 20 30

And are the same lots of land which the said John W. Anderson became seized of by deed from William C. Bingham, et ux, dated March 28, 1912, and recorded in the Clerk's Office of Cumberland County in Book No. 321 of Deeds, page 481, etc.

It will be noted that according to my deed, I am entitled to thirty feet on High Street, and that my High Street line begins at now or formerly Orlando Gibbon's corner on the west side of High Street. In the affidavit of Newton B. Wade, civil engineer, attached to the bill of complaint, it is made to appear that my High Street line extends for a distance of thirty feet "more or less;" however, by examination of the title deeds of the Oscar Morvay property it will be discovered that my High Street line runs precisely thirty feet, because the beginning point of the Morvay lot is situate exactly thirty feet north of the northeast corner of the Orlando Gibbons lot. I refer to the two deeds by which Oscar Morvay obtained title to his property, to wit, the first being a deed dated August 25, 1919, given by Elizabeth T. S. Thompson and Joseph H. Thompson, her husband, to Oscar Morvay and Walter Scoble, recorded in the Cumberland County Clerk's office September 4th, 1919, in book 372 of Deeds, page 552, &c.

DESCRIPTION OF THE OSCAR MORVAY  
LOT AS CONTAINED IN THE DEED  
FROM ELIZABETH T. S. THOMP-  
SON ET UX TO WALTER SCOBLE  
AND OSCAR MORVAY.

Beginning at the northeast corner of the Whitaker lot, now belonging to one John W. Anderson on the west side of High Street between Pine and Mulberry Streets, being thirty feet north of formerly Orlando Gibbons lot, and runs from thence along the west side of High Street north fifty minutes west, twenty eight feet to a corner; thence in a westerly direction and at right angles with High Street, fifty one feet to the east line of a brick wall; thence along the east line of said brick wall in

a southerly direction and parallel with High Street, one foot and five inches to a corner of said brick wall; thence along the southern line of said brick wall in a westerly direction forty seven feet and nine inches to a corner five inches east of the east line of another brick wall of Henry A. Dix and Son Company's factory; thence in a southerly direction and parallel with said last mentioned brick wall at the distance of five inches easterly therefrom, a distance of twenty seven feet and nine inches to a corner in the line of the aforesaid John W. Anderson's Whitaker property; thence along the line of said lot north eighty eight degrees and ten minutes east, ninety eight feet and nine inches to the place of beginning. Containing two thousand seven hundred and sixty five square feet of land, be the same more or less.

The second deed by which Oscar Morvay took title to his premises is a deed of conveyance given by Walter B. Scoble and Minnie, his wife, dated August 16th, 1920, recorded in said clerk's office in Book 382 of Deeds, page 457, &c., August 17th, 1920. By that deed his premises are bounded and described as follows:

Beginning at the northeast corner of the Whitaker lot, now or formerly belonging to one John W. Anderson on the west side of High Street, between Pine and Mulberry Streets, being thirty feet north of formerly Orlando Gibbon's lot, and runs thence along the west side of High Street north fifty minutes west, twenty eight feet to a corner; thence in a westerly direction and at right angles to High Street, fifty one feet to the east line of a brick wall; thence along the east line of said brick

wall in a southerly direction and parallel with High Street, one foot and five inches to a corner of said brick wall; thence along the southern line of said brick wall in a westerly direction forty seven feet and nine inches to a corner five inches east of the east line of another brick wall of Henry A. Dix and Son Company's factory; thence in a southerly direction and parallel with said last mentioned brick wall at the distance of five inches easterly therefrom, a distance of twenty seven feet and nine inches to a corner in the line of the aforesaid John W. Anderson's Whitaker property; thence along the line of said lot north eighty eight degrees and ten minutes east, ninety eight feet and nine inches to the place of beginning.

Containing two thousand seven hundred and sixty-five square feet of land, be the same more or less.

Referring to the chain of title to my lot I have procured and have before me as I execute this affidavit certified copies of deeds for my lot back to one Ebenezer Whitaker.

The said Ebenezer Whitaker owned the lands north of the Orlando Gibbon lot for a distance of one hundred fifty feet on High Street, comprising the Morvay lot and so much of my premises as is included in the *locus in quo*. Ebenezer Whitaker took title to his one hundred fifty feet on High Street by a deed executed and delivered by Ephraim T. Dunlap and Annie Dunlap, his wife, to Ebenezer Whitaker, dated November 19th, 1863, and recorded December 1st, 1863, in Book 101 of Deeds page 445, &c. In that deed the one hundred fifty foot lot is founded and described as follows:

#### DESCRIPTION OF THE WHITAKER LOT.

Beginning at the southeast corner of Whitall Tatum & Co., lot on the west side of High Street and runs thence along the west side of High Street nearly a due south course 150 feet more or less to the northeast corner of Orlando Gibbons lot thence along his line nearly due west 115 feet more or less to a corner of William C. Wallace land thence along his line nearly due south 150 feet more or less to a line of said Whitall Tatum & Co. land thence thereby nearly due east 115 feet more or less to the place of beginning. Containing 63 square perches more or less which said lot of land the said Ephraim T. Dunlap became heir at the death of his father Isaiah Dunlap.

On February 26, 1864, Ebenezer Whitaker and Rachel, his wife, conveyed to Hannah Whitaker and Mary Whitaker by deed of that date recorded March 4th, 1864, in the said clerk's office in Book 102 of Deeds, page 172, the same lot of land whereof I am now seized including the *locus in quo*, by the following description.

#### DESCRIPTION OF LOT EBENEZER WHITAKER ET UX TO HANNAH WHITAKER AND MARY WHITAKER.

All the within described lot of land situate in the Village of Millville in the County of Cumberland and State of New Jersey and is bounded as follows:

Beginning Orlando Gibbons corner and runs thence along his line nearly due west one hundred and fifteen feet more or less to a corner of William C. Wallace land thence along his line nearly due north thirty feet thence nearly

due east one hundred and fifteen feet; thence hereby due south course to the place of beginning. Containing about twelve and three quarter square perches more or less, which said lot of land is a part of the lot which said Ebenezer Whitaker bought of Ephraim T. Dunlap, and Annie his wife, as per deed dated 19th day of November, 1863, and recorded in the Clerk's office in the County of Cumberland in the State of New Jersey in Book C. D. of Deeds, page 445 reference thereto will more fully appear.

Hannah Whitaker, by will, devised her interest in said lands to Mary Whitaker, her sister. The will is dated January 26, 1876, and was proved before the Surrogate of the County of Cumberland December 17th, 1878, as recorded in Book "G" of Wills, page 92, &c. I have before me a certified copy of the will by the terms of which the testatrix devised all of her property both real and personal wherever situate to Mary S. Whitaker, of Millville, her sister. There is no particular description of the *locus in quo*, which I claim the title to. Hannah S. Whitaker's undivided one-half interest in my land, including the *locus in quo*, was devised by this will to her co-tenant in common, Mary S. Whitaker.

Afterward Mary S. Whitaker died and by her will, proved August 27, 1887, before the Surrogate of Cumberland County, she devised her lands to Abigail S. Newcomb, *et al.* This will is in general terms and describes my lot, and the *locus in quo*, by the following description:

I give devise and bequeath unto my sisters Amanda Whitaker wife of Davis S. Whitaker, Abigail Newcomb, and Maria Whitaker the house and lot and premises where I now reside, situate on the West side of High Street in the

City of Millville to them their heirs and assigns forever, &c.

Afterward Abigail S. Newcomb, Maria C. Whitaker and Milton W. Whitaker, by deed dated January 3rd, 1894, recorded January 5, 1894, in the Cumberland County Clerk's office in Book 221 of Deeds, page 453, &c., conveyed my said lot of land, including the *locus in quo*, to William C. Bingham by the following description:

DESCRIPTION OF SAMUEL MOORE, JR.,  
LOT AS CONTAINED IN DEED ABIGAIL  
S. NEWCOMB ET AL TO WILLIAM C.  
BINGHAM.

Lot No. 1. Begins at Orlando Gibbons corner on the west side of High Street north of Pine Street and runs thence along his line nearly due west one hundred and fifteen feet more or less to a corner of formerly William C. Wallace's land thence along his line nearly due north thirty feet; thence nearly due east one hundred and fifteen feet thence nearly a due south course to the place of beginning. Containing about twelve and three quarter square perches more or less.

Lot No. 2. Begins in the east line of a lot of land conveyed by William C. Wallace, deceased, to Nathaniel Reeves by deed dated April sixteenth eighteen hundred and sixty nine, eight feet northerly from the northeast corner of a lot conveyed by the said Reeves to Orlando Gibbons and runs thence along said east line southerly eight and a half feet to the said northeast corner of said Gibbon lot; thence along the north line of the same westerly thirty eight and two thirds feet more or less to the northwest corner of said lot; thence

northerly and parallel with the first line seven and a half feet; thence easterly thirty eight and two thirds feet more or less to the beginning.

10 Lot No. 1. is the same tract of land that Hannah Whitaker deceased and Mary Whitaker, deceased, became seized of in the life time by deed from Ebenezer W. Whitaker, and wife, dated February 26th, 1864, and recorded in the Clerk's office of Cumberland County in Book C. E. of deeds, page 172.

Lot No. 2. is the same tract of land that Hannah S. Whitaker deceased and Mary S. Whitaker, deceased, became seized of in their life time by deed from Nathaniel Reeves and wife dated September 24th, 1869, and recorded in the Clerk's office of Cumberland County in Book No. 136 of Deeds page 50 &c.

20 And are the same tracts of land that Mary S. Whitaker, Abigail S. Newcomb, Maria C. Whitaker and Amanda Whitaker, became seized as the heirs at law of the one half interest of Hannah S. Whitaker deceased, and are the same tracts of land that Abigail S. Newcomb, Maria C. Whitaker and Amanda Whitaker became seized of under the last will and testament of Mary S. Whitaker, deceased. And the said Milton W. Whitaker became seized of  
30 his interest in and to said lands as the heir at law of said Amanda Whitaker, deceased.

By deed dated March 28th, 1912, recorded in the Cumberland County Clerk's office in Book 321 of Deeds, page 481 (original of said deed being in my possession) William C. Bingham and Jennie, his wife, conveyed to John W. Anderson my lot of

land, including the *locus in quo*, by the following description:

DESCRIPTION OF LANDS CONTAINED  
IN DEED WILLIAM C. BINGHAM TO  
JOHN W. ANDERSON.

Lot No. 1 BEGINS at now or formerly Orlando Gibbon's corner on the west side of High Street, North of Pine Street which lot is now owned by one Zambone and runs from thence  
10 along the line of said lot nearly due west one hundred and fifteen feet, more or less, to a corner of formerly William C. Wallace's land; thence along the line of same nearly due north thirty feet; thence nearly due east one hundred and fifteen feet to the west line of High Street aforesaid; thence thereby nearly a due south course thirty feet, more or less to the place of BEGINNING. Containing about twelve and three quarter square perches more or less.

Lot No. 2. BEGINS in the east line of a lot  
20 of land conveyed by William C. Wallace, deceased, to Nathaniel Reeves by deed dated April sixteenth, eighteen hundred and sixty nine, eight feet northerly from the northeast corner of a lot conveyed by the said Reeves Orlando Gibbon, and runs thence along said east line southerly eight and a half feet to the said northeast corner of said Gibbon lot; thence  
30 along the north line of the same westerly thirty eight and two thirds feet more or less to the northwest corner of said lot; thence northerly and parallel with the first line seven and a half feet; thence easterly thirty eight and two thirds feet more or less to the Beginning.

And are the same lots of land that the said William C. Bingham became seized of by deed from Abigail S. Newcomb, et als. dated Janu-

ary 3, 1894, and recorded in the Clerk's office of Cumberland County in Book No. 221 of Deeds, page 453, etc.

The description contained in the deed John W. Anderson and wife to myself, Samuel Moore, Jr., dated January 14th, 1920, recorded in Book 377 of Deeds, page 179, which is in my possession, conveys my said lot or lots of land to me by the following description, to wit:

10 Lot No. 1. BEGINS at now or formerly Orlando Gibbon's corner on the west side of High Street, north of Pine Street, which lot is now owned by one Zambone, thence along the line of said lot nearly due west one hundred and fifteen feet, more or less, to a corner of formerly William C. Wallace's land; thence along the line of same nearly due north thirty feet; thence nearly due east one hundred and fifteen feet to the west line of High Street aforesaid; thence thereby nearly a due south course thirty feet, more or less to the place of beginning. Containing about twelve and three quarters square perches more or less.

20 Lot No. 2. BEGINS in the east line of a lot of land conveyed by William C. Wallace, deceased, to Nathaniel Reeves by deed dated April sixteenth, eighteen hundred and sixty nine, eight feet Northerly from the northeast corner of a lot conveyed by the said Reeves to Orlando Gibbon, and runs thence along said east line southerly eight and a half feet to the said northeast corner of said Gibbon lot; thence along the north line of the same westerly thirty eight and two thirds feet more or less to the northwest corner of said lot; thence northerly and parallel with the first line seven and a half

30

feet; thence easterly thirty eight and two thirds feet more or less to the Beginning.

And are the same lots of land which the said John W. Anderson became seized of by deed from William C. Bingham, et ux, dated March 28, 1912, and recorded in the Clerk's Office of Cumberland County in Book No. 321 of Deeds, page 481, etc.

Therefore, on the face of the deeds of conveyance carrying the chain of title to my property I claim that I am entitled to thirty feet exactly in frontage on High Street. 10

But, if there be a dispute concerning the exact frontage on High Street to which I am clearly entitled on the fact of my own deed of conveyance and the documents of title thereto derived from Ebenezer Whitaker the point is made clear beyond controversy by the documents of title of Oscar Morvay. I have in my possession copies of all of the deeds respecting his title to which reference is hereinafter made in this affidavit. 20

I have already stated that Ephraim T. Dunlap and wife conveyed to Ebenezer Whitaker the one hundred fifty foot lot on High Street comprising both the Oscar Morvay premises and my own premises.

After Ebenezer Whitaker had conveyed to Hannah and Mary Whitaker the thirty-foot lot now owned by me and which was cut off the sound end of the one hundred fifty foot lot the said Ebenezer Whitaker conveyed to Samuel M. Souder the remaining one hundred twenty feet of land more or less lying to the northward. Ebenezer Whitaker made this conveyance for one hundred twenty feet on High Street to Samuel M. Souder by deed dated March 19th, 1864, recorded April 9, 1864, in the 30

Cumberland County Clerk's office in Book 102 of Deeds, page 439. This one hundred twenty foot lot is described in that deed as follows:

DESCRIPTION OF 120 FOOT LOT CONVEYED BY EBENEZER WHITAKER TO SAMUEL M. SOUDER.

All the within described lot of land situate in the village of Millville, aforesaid and is bounded as follows:

10 Beginning on the west side of High Street thirty feet north from the northeast corner of Orlando Gibbons lot and runs thence nearly due west, and parallel with said Gibbons lot one hundred and fifteen feet more or less to Wm. C. Wallace line, thence thereby nearly due north one hundred and twenty feet more or less to Whitall Tatum's & Co. line, thence thereby nearly due east, one hundred and fifteen feet more or less to High Street aforesaid, thence along High Street nearly due south one hundred and twenty feet more or less to the place of beginning.

20

Although Ebenezer Whitaker had therefore conveyed to Hannah and Mary Whitaker the deed dated February 26th, 1864, recorded in Deed Book 102, page 172, &c., no mention is made of that conveyance in the Souder deed; but the beginning point of the land conveyed to Samuel M. Souder is definitely fixed as follows:

30

"Beginning on the west side of High Street thirty feet north from the northeast corner of Orlando Gibbon's lot."

The point of beginning thus set forth, thirty feet north of the northeast corner of Orlando Gibbon's lot, is a precise point, and is designated in exactly

that way in each of the subsequent documents through which Morvay claims title, according to the records in the Cumberland County Clerk's office as reported to this deponent by Mr. Samuel M. Sheldon, and J. Wesley Arthur, competent men, whom deponent employed for the purpose of making such surveys and for making surveys of the *locus in quo*.

Briefly setting forth the chain of title from Souder to Oscar Morvay it will be seen that the Morvay property begins at the precise point of thirty feet north of Orlando Gibbon's lot. Thus in the deed, Souder to Nathaniel Reeves, dated March 15th, 1867, recorded in Book 114 of Deeds, page 263, in said clerk's office, the Morvay lot is described as follows:

10

DESCRIPTION OF LOT CONVEYED BY SAMUEL M. SOUDER TO NATHANIEL REEVES.

All the within described lot of land, situate in the City of Millville, aforesaid, and is bounded as follows:

20

BEGINNING at the northeast corner of the Whitaker lot on the west side of High Street, thirty feet north from the northeast corner of O. Gibbon's lot and runs thence along the Whitaker line, nearly due west, one hundred and fifteen feet more or less to William C. Wallace's line; thence thereby and nearly due north fifty one feet to a corner; thence thereby nearly due east and parallel to the first line one hundred and fifteen feet more or less to the west side of High Street; thence thereby nearly due south fifty one feet to the beginning. Containing twenty one square perches more or less. Which said lot of land is part of a lot conveyed

30

by Ebenezer W. Whitecar and wife to the said Samuel M. Souder by deed dated March 19, 1864 and recorded in Book C. E. page 439 &c.

Deponent points out that in this deed, made as early as 1867, the Morvay lot is described as beginning at the northeast corner of the Whitaker (deponent's lot) on the west side of High Street thirty feet north from the corner of Orlando Gibbon's lot and runs thence along the Whitaker line nearly due west, &c.

Deponent is advised and claims that this deed specifying the beginning point of the Morvay property accurately fixes, designates and declares the beginning point to be thirty full feet north of the Orlando Gibbon's lot and that this deed also is a recognition and an admission, by document of title, that deponent's lot measures a full thirty feet on High Street.

Nathaniel Reeves conveyed to Rebecca M. Wells, March 25, 1872, the 51-foot lot, comprising the Morvay property, by deed of that date recorded in Book 131 of Deeds, page 632, &c. In that deed the 51-foot lot is described as follows:

DESCRIPTION IN DEED REEVES TO WELLS FOR THE MORVAY LOT INTER ALIA.

Beginning at the northeast corner of the Whitaker lot on the west side of High Street thirty feet north of Orlando Gibbon's lot and runs thence along the Whitaker line by the true meridian line of Cumberland County 1st, south eighty eight degrees and ten minutes west, one hundred and thirteen feet and eleven inches; thence north fifty minutes west one foot and six inches; thence south eighty nine degrees and fifteen minutes west thirty eight and

two thirds feet thence south one degree and forty minutes west twenty seven feet, thence north thirty five degrees and forty minutes west, twenty two feet and four inches to a stone, thence; northerly forty-nine feet and six inches to the southwest corner of a barn now belonging to William Wallace, thence south eighty seven degrees and fifty five minutes east, fifty two feet and seven inches; thence north fifty minutes west eight feet, thence; north eighty eight degrees and ten minutes east, one hundred thirteen feet and eleven inches to the west line of High Street; thence along the same south fifty minutes east fifty one feet to the beginning.

CONTAINING . . . . .

Being a part of two lots one purchased by the party of the first part of Samuel Souder & wife, by deed dated March 15, 1867 and is recorded in Book C. R. of Deeds, page 263 &c. And a part of the lot said party of the first part purchased of William Wallace & wife by deed dated April 16, 1869 and is recorded in Book . . . . .

Rebecca M. Wells and James M. Wells, her husband by deed dated October 21, 1879, recorded in the Cumberland County Clerk's office in Book 157 of Deeds, page 390, &c., conveyed the 51-foot lot comprising (*inter alia*) the Morvay lot to Reuben Meredith.

In that deed the land is described as follows: DESCRIPTION IN DEED WELLS TO MEREDITH FOR THE MORVAY LOT INTER ALIA.

BEGINNING at the northeasterly corner of lot of ground, now or formerly belonging to

one Miss Whitaker on the west side of High Street, thirty feet north of Orlando Gibbon's lot; and runs thence along the line of Miss Whitaker's land aforesaid, by the true meridian line of Cumberland County 1st, south eighty eight degrees and ten minutes west, one hundred and thirteen feet and eleven inches &c.

- 10 Reuben W. Meredith, by deed dated December 9th, 1886, recorded in said clerk's office in Book 194 of Deeds, page 435, &c., conveyed the fifty-one foot lot aforesaid, *inter alia*, the Morvay lot, to Rebecca M. Wells. The description in that deed is as follows:

DESCRIPTION IN DEED MEREDITH TO  
WELLS FOR THE MORVAY LOT  
INTER ALIA.

- 20 Beginning at the northeast corner of a lot of ground now or formerly belonging to one Miss Whitaker on the west side of High Street, thirty feet north of Orlando Gibbons lot and runs thence along the line of Miss Whitakers land aforesaid by the true meridian line of Cumberland County (1st) south eighty eight degrees and ten minutes west one hundred and thirteen feet and eleven inches &c.

- 30 Rebecca M. Wells, by Ebenezer Whitaker, sheriff, conveyed to Rachel Dickstein, by deed dated April 22, 1893, recorded in Book 219 of Deeds, page 185, the fifty-one foot lot aforesaid, comprising, *inter alia*, the Morvay lot, by a description beginning as follows:

DESCRIPTION IN DEED REBECCA M.  
WELLS, BY EBENEZER WHITAKER,  
SHERIFF, TO RACHEL DICKSTEIN  
FOR THE MORVAY LOT INTER  
ALIA.

Beginning at the northeast corner of the Whitaker lot, on the west side of High Street, thirty feet north of O. Gibbon's lot and runs thence along the Whitaker line (1) south eighty eight degrees and ten minutes west one hundred and thirteen feet and eleven inches &c. 10

Rachel Dickstein and husband, by deed dated January 27th, 1902, and recorded in Book 258 of Deeds, page 618, conveyed the fifty-one foot lot, comprising, *inter alia*, the Morvay premises, to John J. Whitaker. In that deed the fifty-one foot lot is described as follows:

DESCRIPTION IN DEED DICKSTEIN TO  
WHITAKER FOR THE MORVAY LOT 20  
INTER ALIA.

Beginning at the northeast corner of the Whitaker lot, on the west side of High Street, thirty feet north of O. Gibbons lot and runs thence along the Whitaker line (1) south eighty eight degrees and ten minutes west one hundred and thirteen feet and eleven inches &c.

In this deed it is recited Rachel Dickstein had changed her name from Dickstein to Dix by reason 30 of the fact that the husband of the grantor Henry A. Dix had changed his name from Dickstein to Dix.

John J. Whitaker, by deed dated January 27th, 1902, recorded in said clerk's office in Book 258 of Deeds, page 620, &c., conveyed the fifty-one foot lot

comprising, *inter alia*, the Morvay lot, by the following description:

DESCRIPTION IN DEED WHITAKER TO  
DIX FOR THE MORVAY LOT INTER  
ALIA.

10 Beginning at the northeast corner of the Whitaker lot, on the west side of High Street, thirty feet north of O. Gibbons lot and runs thence along the Whitaker line (1) south eighty eight degrees and ten minutes west one hundred and thirteen feet and eleven inches &c.

Henry A. Dix and Rachel Dix, his wife, by deed dated April 26th, 1904, recorded in said clerk's office in Book 273 of Deeds, page 134, &c., conveyed the fifty-one foot lot comprising the Morvay premises, *inter alia*, to Henry A. Dix & Son Co., by the following description:

20 DESCRIPTION IN DEED DIX ET UX TO  
HENRY A. DIX & SON CO. FOR THE  
MORVAY LOT INTER ALIA.

Lot No. 1. Begins at the northeast corner of the Whitaker lot on the west side of High Street thirty feet north of O. Gibbon's lot and runs thence along the Whitaker line (1) south eighty eight degrees and ten minutes west one hundred and thirteen feet and eleven inches &c.

30 Henry A. Dix & Son Co., by deed dated November 16th, 1907, recorded in said clerk's office in Book 293 of Deeds, page 74, &c., conveyed to Phoebe G. McMurray the fifty-one foot lot comprising, *inter alia*, the Morvay premises by the following description:

DESCRIPTION IN DEED HENRY A. DIX &  
SON CO. TO PHOEBE G. McMURRAY  
FOR THE MORVAY LOT INTER  
ALIA.

Beginning at the northeast corner of the Whitaker lot, now belonging to one William C. Bingham, on the west side of High Street, between Pine and Mulberry Streets, thirty feet north of O. Gibbons lot, and runs from thence along the line of said Whitaker lot south eighty eight degrees and ten minutes west ninety eight feet and nine inches to a corner five inches east of the east line of the brick wall of said Henry A. Dix and Son Company's factory; thence in a northerly direction and parallel with said brick wall at the distance of five inches easterly therefrom and by a line running through another portion of said factory a distance of fifty one feet, more or less to a corner in the line of Samuel M. Souder's land; thence along his line of same north eighty eight degrees and ten minutes east, ninety eight feet and nine inches to a corner in the west line of High Street aforesaid; thence along the west line of High Street south fifty minutes east, fifty one feet to the place of beginning.

Containing five thousand and thirty six square feet of land, be the same more or less.

And is part of Lot No. 1 in the deed of conveyance from Henry A. Dix et ux. to Henry A. Dix and Son Company, dated July 26, 1904 and recorded in the Clerk's office of Cumberland County in Book No. 273 of Deeds, page 134 &c.

Phoebe G. McMurray divided the fifty-one foot lot to which she had derived title through Whit-

aker, Souder, Reeves, James M. Wells, Meredith, Rebecca M. Wells, Rachel Dickstein, Whitaker and Henry A. Dix and Henry A. Dix & Son Co. She, Phoebe G. McMurray, by deed dated November 20th, 1907, recorded in Book 292 of Deeds, page 562, conveyed to Elizabeth T. S. Thompson the premises now known as the Morvay lot by the following description:

10 DESCRIPTION IN DEED PHOEBE G. McMURRAY, ET VIR, TO ELIZABETH T. S. THOMPSON, FOR THE MORVAY LOT.

Beginning at the northeast corner of the Whitaker lot, now belonging to one William C. Bingham on the west side of High Street between Pine and Mulberry Streets thirty feet north of O. Gibbon's lot and runs from thence along the west line of High Street north fifty minutes west twenty eight feet to a corner, 20 thence in a westerly direction and at right angles with High Street fifty one feet to the east line of a brick wall, thence along the east line of said brick wall in a southerly direction and parallel with High Street one foot and five inches to a corner of said brick wall, thence along the southern line of said brick wall in a westerly direction forty seven feet and nine inches to a corner five inches east of the east line of another brick wall of Henry A. Dix and Son Company's factory, thence in a southerly 30 direction and parallel with said last mentioned brick wall at the distance of five inches easterly therefrom a distance of twenty seven feet and nine inches to a corner in the line of the aforesaid William C. Bingham's Whitaker lot, thence along the line of said lot north eighty eight degrees and ten minutes east, ninety

eight feet and nine inches to the place of beginning.

Containing two thousand seven hundred and sixty five square feet of land be the same more or less.

Afterward Elizabeth T. S. Thompson conveyed to Morvay and Scoble and subsequently Scoble conveyed his half interest to Morvay by the deeds hereinbefore above particularly mentioned. 10

By reason of the foregoing documents of title this deponent is advised, and claims that his land on High Street begins at the northeast corner of the Orlando Gibbon lot and runs northwardly along High Street for the full width of thirty feet; and that the Morvay lot begins in the west side of High Street at a point precisely thirty feet north of the northeast corner of the Orlando Gibbon lot and runs thence westwardly along the northerly 20 line of deponent's lot.

Referring to the affidavit of Newton B. Wade attached to the bill of complaint, it appears that in attempting to survey the Morvay lot he did not commence his survey by measurements taken from the Orlando Gibbons lot, notwithstanding the Orlando Gibbon lot is named in every one of the deeds of conveyance in the chain of title from Dunlap down to the present holder, Oscar Morvay.

When I bought my lot on High Street from Anderson, January 14th, 1920, I went into possession 30 of that property, but did not have it surveyed. I carry on a hardware store on my High Street property. This store consists of a wooden building with bulk windows. When I purchased my property in 1920 I understood that Scoble and Morvay owned north of the property adjoining mine but the premises then were occupied by William Green-

wood, a printer. There was a space between my building and the Scoble Morvay building of about four feet. There was an iron fence, as I recall, extending from the Morvay building to what I supposed was my line. The sidewalk in front of my property went up to this iron fence. The fence was distant about ten inches from my building, although I did not measure the distance. The north eaves of my building extended along a line running west from the south end of the iron fence. There was an old wooden fence which ran along my north line from a point near my building back for some distance to a chicken coop. This fence line was just about a continuation of the line of the eaves of my building. From the general appearance of my property I supposed my thirty-foot lot was bounded on the north by a line which continued eastwardly from the old fence in the rear.

After Oscar Morvay bought from Scoble his half interest in the property so that Oscar Morvay became the owner of the title, he stated to me that he had caused his premises to be surveyed by Newton B. Wade, then the city engineer of Millville, and who is a licensed civil engineer and a licensed surveyor, and, Morvay said, that according to that survey the eaves of my building were over on his property and that he proposed to erect a new building and objected to the eaves remaining thereon him and requested me to permit him to cut off the eaves so that he could build up to my foundation wall. Mr. Clement C. Cassell was with Mr. Morvay at the time and assured me that what Morvay said was correct, to wit, that Newton B. Wade had made an actual survey and had reported to Mr. Morvay that the eaves of my building were over on the Morvay lot. I was surprised to learn that any part of my building projected over on the Mor-

vay lot, but I knew Newton B. Wade as the city engineer of the City of Millville and presumed that he was well skilled in his position as a civil engineer and land surveyor. Therefore, while I was greatly disturbed at Oscar Morvay's demand I felt that I could not with reason combat the report and findings of Mr. Wade. Hence, I told Mr. Morvay that, relying on the facts as he stated them, I would not make any objection to his erecting his buildings along the line fixed by Mr. Wade, although that would require the cutting off of the north eaves of my property. They said, "You are over on our (the Morvay) lot; we want to build down to the line. Your eaves have got to come off." I said, "That is a surprise to me. If you take the eaves off my house you want to be sure you are right." Morvay said, "I know I am right." I said, "If you know you are right, go ahead." Accordingly, Oscar Morvay did proceed to remodel his building and cut off the north eaves of my premises and ran his south wall westwardly from a point twenty-nine feet two and one-half inches northwardly of the northeast corner of that certain lot of land formerly owned by Orlando Gibbons, hereinbefore mentioned.

The result of this building operation was that Mr. Morvay occupied, with his south wall, a strip of my land on High Street for nine and one-half inches and four inches in width in the rear, of the *locus in quo* described in the ejectment suit.

Notwithstanding this operation of Mr. Morvay I supposed I had a full thirty feet of land on High Street. Afterward, when I commenced negotiations looking toward the erection of a new building for myself on my own lot, a contractor, Jay Veltman, with whom I was talking about the construction of the new building, said he would like to erect a new

building for me and suggested twenty thousand dollars as the price. Whereupon, I said to Veltman that my lot was thirty feet front and that if I could get a suitable building built of that width and reasonable depth I would feel inclined to do so. Whereupon Mr. Veltman said that the lot did not look to be thirty feet to his eye. He then took out a tape measure and measured my lot and found it short of thirty feet. Thereupon I became greatly interested and got a steel tale and measured the lot myself and found it nine and one-half inches short of the full thirty feet, measuring from Morvay's wall down to the post office building now located on the lot formerly known as the Orlando Gibbons lot. When I discovered, in this rough way, that my lot did not measure thirty feet below the Morvay building I then decided to have the premises surveyed on my own account. I first employed for that purpose J. Wesley Arthur, a well-known surveyor, conveyancer and searcher of titles. He made search of my title and of Morvay's title and made a survey and reported to me that Morvay was over on my lot with his south wall nine and one-half inches.

I then was no longer convinced that Mr. Wade's survey of the Morvay property was accurate, and to more thoroughly ascertain the true facts I employed Samuel M. Sheldon, a reliable and well-known surveyor and conveyancer and searcher of titles. Mr. Sheldon, for ten years, was clerk of the county and has had much experience in searching titles to land in the City of Millville and he has been a surveyor and conveyancer all of his business life, and I felt that his determination of the matter would be conclusive. Mr. Sheldon made a search for me and a survey and he reported that the Morvay wall was over on my lot nine and one-half inches in front and four inches in the rear.

Mr. Arthur and Mr. Sheldon reported that as practical surveyors in order to make a practical survey of Oscar Morvay's lot according to his documents of title the beginning point, as described in his deeds, must be taken thirty feet north of the northeast corner of Orlando Gibbon's lot, and they reported, also, that that exact point of beginning was readily to be ascertained from known and well-established monuments. They further reported that they had been informed that Mr. Wade, surveying the Morvay lot, had taken his point of survey from some other line marking a division of the one hundred twenty foot lot formerly owned by Souder, instead of from the point of beginning set forth in Morvay's deeds.

From this information I became informed, some time after Oscar Morvay erected his south wall partly on my land, that the acts and doings of Mr. Morvay in the premises respecting the erection of the wall and the cutting off of the eaves of my building were an imposition upon me and a trespass upon me; and I concluded, and maintained, that these acts and doings of Mr. Morvay, while not inspired by malice, were yet the result of great carelessness and negligence in himself or his servants. Therefore I began my action in ejectment to recover my property and for mense profit and damages.

Referring to the affidavit of Newton B. Wade, the engineer, Mr. Wade says:

"5. I have made other surveys in this block on North High Street and am familiar with the location of the various properties there and with the descriptions in the deeds for same, which I have copied from the original deeds or from the records in the clerk's office. The

deeds held by the several property owners in this block call for about 7 feet more frontage than there actually are in this block. I do not know how to reconcile this difference. The total frontage called for by the several deeds is not there. At the time I gave Morvay the location of his south line, I believed it to be correct and I now believe it to be correct, but if the measurements are taken from Pine Street north and each property owner given the amount of frontage for which his deed calls, this line would not be precisely where I staked it out, unless the frontage given in Moore's deed of '30 feet, more or less' would enable a shifting of Morvay's line to the south."

I criticise this affidavit, because if the engineer had access to all of the deeds comprising the documents of title to the properties in question he must have known that the beginning point of the Morvay property was thirty feet north of the Orlando Gibbon's line, and he must have known that the north line of the Gibbon's property is three rods and nineteen links north of Pine Street, because that is so stated clearly in the deed given by John Trenchard, *et al.*, to Orlando Gibbon for his lot. That deed is dated December 26th, 1862, and is recorded in the Deeds, page 583. In other words, by the very deeds themselves the measurements must be taken from Pine Street north, and there is no justification for assuming as a beginning point the walls of the Cumberland County Clerk's office in Book 99 of Champion and Souder buildings.

The Champion building is located on the north end of the fifty-one foot lot formerly owned by Phoebe G. McMurray and her antecedents in title

back to Samuel M. Souder. Samuel M. Souder himself divided his one hundred twenty foot lot by deeding fifty-one feet to Nathaniel M. Reeves and reserving the sixty-nine feet now vested in him, his heirs or assigns. This division line, self erected by Mr. Souder, holder of the title to the one hundred twenty foot lot, has a point of beginning 30 feet north of the Orlando Gibbon's lot, which must be taken in surveying the one hundred twenty foot lot. The Morvay lot, which is a sub-division of it, has a like point of beginning. To take the division line established between the 51 foot lot and Souder's reserved land as the beginning of the survey in surveying the Morvay premises cannot be justified by good engineering or surveying practice; and I claim that in adopting that point as a place of beginning for the survey Mr. Wade departed from good engineering practice and was guilty of serious negligence, which, being taken advantage of by his employer, resulted in the trespasses complained of to my great damage.

I have a certified copy, also, of the deed of Benjamin Endicott for the lot referred to in the Gibbon's deed. The deed was given by William G. Leake, *et ux* to Benjamin Endicott, dated January 10th, 1835, and a description in the deed is as follows:

Beginning at the northeast corner of High and Pine Street and running thence north five rods thence east six rods thence south five rods to Pine Street thence west six rods to the place of beginning. Containing thirty square rods to be the same more or less.

SAMUEL MOORE, JR.

Sworn to and subscribed before me this 2nd day of May, 1927.

DOROTHY RHUBART PETTIT,  
Commissioner of Deeds  
of N. J.

10 STATE OF NEW JERSEY, }  
COUNTY OF CUMBERLAND, } ss.

J. WESLEY ARTHUR, of full age, being duly sworn according to law, on his oath deposes and says:

20 I am a licensed land surveyor of the State of New Jersey. I have practiced the profession of land surveyor, conveyancing and title searching at the City of Millville for more than ten years last past. I have read the foregoing affidavit of Mr. Samuel Moore, Jr., and the facts therein set forth so far as they relate to the documents of title mentioned in the affidavit and to his transactions with me, are true.

He employed me to make a survey of his premises and of the Morvay premises as well as a search of the title for the purpose of discovering whether or not the south wall of the Oscar Morvay building was erected on part of Mr. Moore's lot located at No. 208 High Street.

30 Accordingly I made a search of the title and made a survey of the premises. In order to make my survey I established the northeast corner of the Orlando Gibbon's lot. That lot is at the northwest corner of High and Pine Streets, the most prominent corner in the City of Millville in my opinion, and is readily established from well-known monuments. The north line of Pine Street is well established and also the west line of High Street is well

established. The northeast corner of the lot of the Orlando Gibbon's lot is found in a deed given by John Trenchard, *et al.*, to Orlando Gibbon, dated December 26th, 1862, and recorded in the Cumberland County Clerk's office in Book 99 of Deeds, page 583. I have seen the record of the deed and also the certified copy of it in Mr. Moore's possession. The northeast corner of the Orlando Gibbon lot is in the west line of High Street three rods and nineteen links north of the north side of Pine Street. I 10 found by Morvay's deed that the beginning point of the description of his lot is in the west side of High Street thirty feet north of the Orlando Gibbon lot above referred to. That point is easily located by established monuments.

From such examination of the documents of title and from my surveys made from them I found that the south wall of the Oscar Morvay premises encroaches on the lands of Mr. Samuel Moore, Jr., for a width of nine and one-half inches on High 20 Street and a width of four inches in the rear. I have examined the description of the *locus in quo* contained in the transcript of the ejectment suit, Samuel Moore, Jr., v. Oscar Morvay, referred to in the bill of complaint in this case. The *locus in quo* is part of the lot of land described in the deed of conveyance given by John W. Anderson to Samuel Moore, Jr., dated January 14th, 1920, recorded in the office of the Clerk of the County of Cumberland in Book 377 of Deeds, page 179, &c. 30

I have examined the affidavit made by Newton B. Wade, civil engineer and surveyor attached to the bill of complaint and note that he says that in making the survey of the Morvay property he used as the point of beginning the walls of the Champion Souder building north of the Morvay building. In

searching the title I found that the Souder property, the Champion property and the Morvay property and the Samuel Moore, Jr., property with an entire frontage on High Street of one hundred fifty feet more or less, was at one time owned by Ebenezer Whitaker to whom it was conveyed by Ephraim T. Dunlap, *et ux*, by deed dated November 19th, 1863, recorded in the office of the Clerk of the County of Cumberland in Book 101 of Deeds, page 445, &c. Afterward Ebenezer Whitaker conveyed thirty feet from the south end of the one hundred fifty foot lot now the premises of Samuel Moore, Jr., to Hannah and Mary Whitaker. This was conveyed February 26, 1864. Afterward Whitaker sold to Souder the remaining one hundred twenty feet and Souder conveyed the fifty-one feet to Nathaniel Reeves, reserving to himself and his heirs sixty-nine feet on the north end of the lot. The beginning point taken by Mr. Wade is the line established by Souder when he deeded this fifty-one foot lot to Nathaniel Reeves. That line, which was created by Mr. Souder, could not, in my opinion, be used as a place of beginning for the survey of the Morvay lot. Further, if it were so used, in order to make up the full fifty-one feet conveyed by Souder to Nathaniel Reeves, through which conveyance Champion and Morvay claim title I do not consider it to be good practice for a surveyor to go outside of Souder's lot to make up the difference, but, if proper at all to piece out the survey it would appear that the additional frontage must be taken from the lands of the grantor Souder rather than from the lands of a stranger to the Souder title.

For these reasons, while I respect Mr. Wade's skill as a civil engineer, I consider that in making this survey of these lands in the manner set forth by him in his affidavit he departed from good sur-

veying practice and, in my opinion, in surveying the property his survey controlled and directed by the courses and distances given in the deeds of conveyances themselves, and that is the only proper practice with respect to the survey of the Morvay property and the Samuel Moore, Jr., property, in my opinion.

J. WESLEY ARTHUR.

Sworn to and subscribed before me this 30th day 10 of April, 1927.

DOROTHY RHUBART PETTIT,  
*Commissioner of Deeds*  
of N. J.

STATE OF NEW JERSEY, }  
COUNTY OF CUMBERLAND, } ss:

SAMUEL M. SHELDON, of full age, being duly sworn according to law, on his oath deposes and says: 20

I am a licensed surveyor of the State of New Jersey and hold the usual certificate as such. I have read the affidavit of Samuel Moore, Jr., hereinbefore set out and the facts therein set forth and declared so far as they relate to the deeds and other documents of title and his transactions with me are true.

I am now sixty-six years of age and have practiced my profession as a land surveyor, conveyancer and surveyor of titles at Millville, New Jersey, for more than forty years last past. I was employed by Mr. Samuel Moore, Jr., to search the title to his premises and the adjoining premises owned by Mr. Morvay and to make a survey of the same for the purpose of determining whether or not the south 30

wall of Oscar Morvay's building located on High Street between Pine and Mulberry Street had been built over on Mr. Samuel Moore, Jr.'s land. I made such a search of title and examined all of the deeds of conveyance referred to in the foregoing affidavit of Mr. Samuel Moore, Jr., and I have seen and inspected the certified copies of those deeds which are in his possession and which he refers to in his affidavit.

10 I have examined the description of the *locus in quo* described in the complaint in the ejectment suit referred to in *Moore v. Morvay*, New Jersey Supreme Court, now noticed for trial at the present term of the Cumberland County courts. I examined the certified transcript in that case.

As a result of my search and my surveys I find that Mr. Oscar Morvay has built his south wall on the lands described in the complaint in the ejectment suit. I reach this conclusion by measuring at the  
20 beginning point of Oscar Morvay's lot from the northeast corner of the Orlando Gibbon's lot; according to the description contained in his own deeds the beginning point of his lot is thirty feet north of the northeast corner of the Orlando Gibbon's lot. The northeast corner of the Orlando Gibbon lot has been heretofore located by me in making previous surveys and years ago I made a mark designating the location of that lot. The building owned by Shekinah Lodge of the Masonic Fraternity is now  
30 located on the Orlando Gibbon's lot and the Orlando Gibbon's lot may be considered, in my opinion it is considered, one of the most prominent and valuable street corners in the City of Millville. The northeast corner of the Orlando Gibbon's lot now owned by the Masonic fraternity is located three rods and nineteen links north of the northwest corner of High and Pine Streets. The north line of

Pine Street is well established and the west line of High Street is well established. Also, through various other monuments in the vicinity of High and Pine Streets I am able to establish and have established the northeast corner of High and Pine Streets and also the northeast corner of the Orlando Gibbon's lot. I have made an actual survey of the *locus in quo* described in the complaint in the ejectment suit. I made this survey from measurements made on the ground, and from monuments well established  
10 and well known to me. I prepared a map showing the *locus in quo* which I can produce. As a result of my survey and as shown by my map, the *locus in quo* described in the ejectment suit is part of the property conveyed to Samuel Moore, Jr., the defendant in this suit, by John W. Anderson and his wife.

SAMUEL M. SHELDON.

Sworn to and subscribed before me this 30 day of April, 1927.

(Seal.) DOROTHY RHUBART PETTIT,  
Commissioner of Deeds of N. J.

20

30

NOTICE OF MOTION TO STRIKE OUT  
BILL OF COMPLAINT.

(Filed May 3, 1927.)

10 IN CHANCERY OF NEW JERSEY.

Between  
OSCAR MORVAY,  
Complainant,  
and  
SAMUEL MOORE, JR.,  
Defendant. } On Bill for  
Injunction.  
Notice of Motion to  
Strike Out Bill of  
Complaint.

20

To WALTER H. BACON, ESQUIRE, Solicitor of Com-  
plainant:

30 Please take notice that, on Tuesday, May third,  
1927, at ten o'clock in the forenoon, daylight-saving  
time, or as soon thereafter as counsel can be heard  
thereon, at the Chancery Chambers, in the City of  
Atlantic City; I will apply to the Chancellor for an  
order striking out the bill of complaint filed in the  
above stated cause, for the following reasons:

1. There is no equity in the bill.
2. The bill discloses no cause of action against  
the defendant.

3. The bill of complaint discloses on its face that  
the action at law sought to be enjoined is an eject-  
ment suit, where defendant seeks to recover lands in  
complainant's possession; wherefore, the issues are  
purely of a legal nature not cognizable in this court.

4. The bill charges that complainant occupied the  
lands by carelessness of the agents employed by  
him, and not by fraud or imposition on the part of 10  
the defendant.

5. Complainant's liability in the action at law is  
the result of pure carelessness by himself and his  
agents.

6. Complainant's liability at law is the result of  
his own attempt at imposition and fraud upon de-  
fendant.

7. Complainant had equal facilities with defen- 20  
dant for obtaining information concerning the title  
to the *locus in quo*.

8. According to the charges contained in the bill  
defendant did not know the facts concerning the  
title to the *locus in quo*.

9. The defendant did not know the facts concern- 30  
ing the true state of the title to the *locus in quo* when  
complainant took possession of the *locus in quo*.

10. The equities pretended to be set up in the bill  
ought not be considered until and unless defendant  
obtains judgment in the ejectment suit.

11. Complainant is not entitled to sue in equity until and unless defendant prevails in his action in ejection.

LOUIS H. MILLER,  
*Solicitor of Defendant.*

Dated April 25th, 1927.

10

ORDER.

(Filed Dec. 13, 1927.)

IN CHANCERY OF NEW JERSEY.

20

Between OSCAR MORVAY, <i>Complainant,</i> and SAMUEL MOORE, JR., <i>Defendant.</i>	}	On Complainant's Order to Show Cause and Defendant's Mo- tion to Strike Out Bill of Complaint. Order.
---	---	--

30

The complainant's order to show cause herein and defendant's motion to strike out the bill of complaint coming on to be heard, together, in the presence of Walter H. Bacon, Esquire, of counsel with complainant, and Louis H. Miller, of counsel with defendant; and the Court having read the bill of complaint and the affidavits filed herein by the respective parties, as well as the notice of motion to strike out the bill of complaint; and the argument of counsel thereon having been heard and considered; and it appearing to the Court that the said motion to

strike out the bill of complaint ought to be dismissed and that said order to show cause ought be made absolute, and no good cause being shown or appearing to the contrary:

It is, therefore, on this 13th day of December, nineteen hundred and twenty-seven, on motion of Walter H. Bacon, solicitor of complainant, ordered; that the said motion to strike out complainant's bill of complaint be, and the same hereby is, denied, with costs to complainant on said motion, to be taxed.

10

And it is further ordered that said rule to show cause be, and the same hereby is, made absolute, with costs, and that said defendant, Samuel Moore, Jr., his counsel, attorneys, solicitors and agents be, and they are each and every one of them hereby enjoined and commanded to desist and refrain from proceeding further against complainant in an action at law commenced by defendant against complainant in the New Jersey Supreme Court, and now pending and at issue therein, having for its object the recovery by plaintiff therein against defendant therein of a strip of land fronting on the west side of North High Street, in the City of Millville, New Jersey, about 9½ inches wide, and \$5,000 for damages and mesne profits, until the further order of this Court.

20

Respectfully advised,

R. H. INGERSOLL,  
V. C.  
E. R. WALKER,  
C.

30



one-half inches wide, and \$5,000 for mense profits and damages, until the further order of the Court; and from the whole and every part of said order or decree to the Court of Errors and Appeals to the last resort in all causes.

Dated Millville, New Jersey, December 20th, 1927.

LOUIS H. MILLER,  
*Solicitor for and of Counsel  
with Defendant.*

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

LOUIS H. MILLER,  
*Of Counsel with Defendant.*

20

30

PETITION OF APPEAL.

(Filed Dec. 22, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

	—		10
OSCAR MORVAY, <i>Complainant- Respondent,</i> and SAMUEL MOORE, JR., <i>Defendant- Appellant.</i>	}	On Bill for Injunction. On Appeal from Order Denying De- fendant's Motion to Dismiss Complain- ant's Bill of Com- plaint and Allowing Preliminary Injunc- tion. Petition of Appeal.	20

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

The petition of Samuel Moore, Jr., defendant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a certain order made in the above stated cause bearing date December thirteenth, 1927, by his Honor, the Chancellor, filed in the Court of Chancery on that date, in these respects, to wit: 30

That the said order or decree orders (a) that defendant's motion that the bill of complaint be

stricken out be denied, with costs, and (b) that said defendant, Samuel Moore, Jr., his counsel, attorneys, solicitors and agents be enjoined and commanded to desist and refrain from proceeding further against complainant in an action at law commenced by defendant against complainant in the New Jersey Supreme Court and now pending and at issue therein, having for its object the recovery by complainant therein against defendant therein of a strip  
 10 of land fronting on the west side of North High Street in the City of Millville, New Jersey, about nine and one-half inches wide and \$5,000 for mense profits until the further order of said Court of Chancery.

And your petitioner humbly appeals from the whole and every part of said decretal order on the ground that the same is erroneous for the reasons following, to wit:

20

I. The said order decrees that defendant's motion to strike out defendant's bill of complaint be denied, with costs, whereas the learned Chancellor should have decreed that the said motion to strike out complainant's bill of complaint be allowed and the said bill of complaint be stricken out.

30

II. The learned Chancellor ordered that the rule to show cause by a preliminary injunction should not issue against defendant be made absolute, with costs, and that the defendant, Samuel Moore, Jr., his counsel, attorneys, solicitors and agents be enjoined and commanded to desist and refrain from proceeding further against complainant in an action at law commenced by defendant against complainant in the New Jersey Supreme Court and now

pending and at issue therein, having for its object the recovery by complainant therein against defendant therein of a strip of land fronting on the west side of North High Street in the City of Millville, New Jersey, about nine and one-half inches wide and five thousand dollars mense profits and damages until the further order of said Court of Chancery, whereas the learned Chancellor should have decreed that the said order to show cause be dismissed, and that said preliminary injunction be  
 10 denied.

And your petitioner humbly appeals from the whole and every part of said decretal order on the ground that the same is erroneous for the reasons hereinbefore set out.

Your petitioner therefore prays that said decretal order may be in all respects reversed, set aside and for nothing holden and that your petitioner may have such relief in the premises as to this Honorable Court may seem meet. 20

Dated Millville, New Jersey, December 20th, 1927.

LOUIS H. MILLER,  
*Solicitor for and of Counsel with  
 Defendant-Appellant.*

30

ANSWER TO PETITION OF APPEAL.

(Filed Dec. 24, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

10

<p>Between OSCAR MORVAY,     <i>Complainant- Respondent,</i> and SAMUEL MOORE, JR.,     <i>Defendant- Appellant.</i></p>	}	<p>On Appeal from Court of Chancery. Answer to Petition of Appeal.</p>
--	---	--

20

The answer of Oscar Morvay, the above-named respondent, to the petition of appeal of Samuel Moore, Jr., the above-named appellant:

This respondent, not admitting the truth of any or all of the matters in said petition of appeal contained, for answer thereto, nevertheless, admits that an order was on December 13, 1927, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said order, this respondent begs leave to refer thereto when the same shall be produced.

30

This respondent is advised and believes that the said order is agreeable to equity, and prays that the same may be affirmed with costs to be taxed in favor of this respondent.

WALTER H. BACON,  
*Solicitor for and of Counsel with  
Respondent, Oscar Morvay.*

10

20

30

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

---

Between  
OSCAR MORVAY,  
*Complainant-Respondent,*  
and  
SAMUEL MOORE, JR.,  
*Defendant-Appellant.*

---

ON BILL FOR INJUNCTION.

---

ON APPEAL FROM ORDER ALLOWING PRELIMINARY IN-  
JUNCTION AND DISMISSING DEFENDANT'S MOTION  
TO STRIKE OUT BILL OF COMPLAINT.

---

BRIEF OF DEFENDANT-APPELLANT.

---

This is an appeal from an order allowing a preliminary injunction and dismissing defendant's motion to strike out the bill of complaint.

From the bill and affidavits it appears that Samuel Moore, Jr., the defendant-appellant, has commenced an action of ejectment in the New Jersey Supreme Court against Oscar Morvay, the complainant, to re-

cover a strip of land at Millville, Cumberland County, New Jersey, having a frontage on High Street of  $9\frac{1}{2}$  inches and a width in the rear of four inches on which Morvay, in 1920, erected the south wall of a remodeled building.

Before the remodeled Morvay building was erected the north eaves of Moore's building projected over the *locus in quo*.

Morvay, when preparing to remodel his building, employed a licensed surveyor, Newton B. Wade, to survey the premises. Wade did not, however, make any survey from the documents of title of Morvay and Moore. Had he done so he would, inevitably, have located the dividing line between the Moore and Morvay properties at a definite point beginning thirty feet northwardly of the northeast corner of a lot known as the Orlando Gibbon's lot, where the Post Office is located, a well-established monument. Instead of taking the measurements from the monument fixed by the documents of title, Wade made a survey from some other point, not called for by any documents of title, and from that survey he reported to Morvay that Moore's building was over on his, Morvay's, a distance of  $4\frac{1}{2}$  inches.

Morvay notified Moore that Wade had made a survey of the *locus in quo*, and had found Moore's building over on his, Morvay's, lot  $4\frac{1}{2}$  inches, and announced to Moore that the eaves of Moore's building would have to come off down to his, Morvay's, line.

Believing that Wade, a licensed surveyor, had actually made the survey from the documents of title, Moore assented to Morvay cutting off the eaves of his building down to the supposed line established by the Wade pretended survey. Morvay accordingly did cut off the eaves of Moore's building down to the

line so fixed by Wade, and erected on the *locus in quo* a new wall at considerable expense. This was in 1920.

Afterward, several years later, Moore was led to doubt the correctness of the so-called Wade survey, and himself caused a survey to be made. Then, for the first time, he learned that the so-called Wade survey could not have been made from the documents of title, that it was not a correct survey, that the eaves of his building never did project over Morvay's lot, and that, in fact, the new south wall of Morvay's building was over on his, Moore's lot,  $9\frac{1}{2}$  inches in front on High Street and 4 inches in the rear. Thereupon, he commenced the action of ejectment; and Morvay then filed his bill for injunction to restrain Moore from proceeding with the action of ejectment, and an order to show cause why a preliminary restraint should not issue was allowed.

On the coming in of the order to show cause Moore filed responsive affidavits, and he filed, also, a motion to strike out the bill of complaint.

The learned Vice-Chancellor advised and the Chancellor allowed an order that the preliminary restraint be granted and the motion to strike out be dismissed. From that order this appeal is taken.

---

POINTS.

A. The bill of complaint should be stricken out, on the following grounds:

1. The bill is without equity.
2. The bill is vague and uncertain.

3. The bill presents for determination of the Court of Equity a single question, to wit, whether the south wall of the Morvay building is over on Moore's land, a pure question of law, to be adjudicated only in the courts of law.

4. The bill, instead of setting up a good cause of action for complainant, declares facts which would be good grounds for a counter-claim by defendant if defendant's title to the *locus in quo* is once established at law.

5. Complainant, by his bill, does not offer to do equity.

B. The order to show cause why a preliminary restraint should not issue should have been dismissed on the answering affidavits.

C. The order appealed from, in unqualified terms, takes appellant's property for private use without compensation.

## 1.

## THE BILL IS WITHOUT EQUITY.

See *Graham v. Berryman*, 4 C. E. Green, at p. 35, citing *Story's Equity Jurisprudence*, p. 152; *Ibid.*, par. 146. *Deare v. Carr*, 3 N. J. Eq. 513. *Nicholson v. Janeway*, 16 N. J. Eq. 285.

Relief will not be afforded in equity on the ground of mistake, when the defendant's liability is the result of pure carelessness. *Voorhis v. Murphy*, 26 N. J. Eq. 434.

Miscalculation \* \* \* the result of carelessness \* \* \* cannot be regarded in equity as a mistake. *Serrell v. Rothstein*, 49 Eq. 386.

Oversight will not excuse. *Aikenburg v. Lakeside, &c. Ass'n*, 56 Eq. p. 109, and cases there cited.

As a rule equity will refuse to rectify a mistake which occurred through the inexcusable negligence of the party who asks to be relieved from the effect of the mistake. *Institute, &c. Ass'n. v. Edwards*, 81 Eq. 365, citing *Haggerty v. McCanna*, 25 Eq. 48.

*Dillet v. Kemble*, 25 Equity 66;

*Voorhis v. Murphy, supra.*

The rule has been applied when the negligence was that of counsel.

*Dillet v. Kemble*, 25 Eq. at p. 67.

Equity will not apply doctrine of mistake where there is negligence upon the part of him who seeks its application. *Murray v. Dorsay*, 131 At. Rep. 122 (4).

See, also, *DuPont Chemical Co. v. Buckley*, 96 E. 465, 126 At. 674.

## 2.

## THE BILL IS VAGUE AND UNCERTAIN.

The true title of the parties, as shown by their respective deeds and other documents of title, would make it clearly appear that, if the surveyor, Wade, made an error, it was a gross and inexcusable one, because the point of beginning is, in fact, a very definite point, to wit, a point in the west side of High Street, 30 feet north of the northeast corner

of the Orlando Gibbon's lot. However, that is not declared in the bill, and it does not appear by the bill itself that, in fact, the wall is located on the defendant's land at all. *It is asserted that it is a matter of dispute, whether the wall of Morvay's building is, in fact, over on Moore's lot.* But the whole gist of the bill, and the evident intendment of it, is that, by Wade's error, Morvay erected his wall over on Moore's land, and he fears that, unless the ejectment suit be restrained, judgment in that action may go against him. But the bill falls short of charging, in direct terms, that a mistake has occurred at all, and the true effect of it is to try out the ejectment suit in the Court of Equity. For that reason the bill is bad for want of certainty and should be stricken out.

2. In order that the Court may know whether the mistake, if there was one, was or was not excusable, the bill should set up sufficient facts to make it appear that the mistake occurred after all means of information that suggest themselves to a man of ordinary care and prudence had been exhausted. *Williams v. McKay*, 46 Eq. 25. The first resort of a competent surveyor in surveying land, in order to obtain a description of it, would be the title deeds. Had they been set up in the bill it would appear that there could be no difficulty in locating the beginning point of the Morvay survey, to wit, in the west line of High Street 30 feet north of the northeast corner of the Orlando Gibbon's lot. Wade's affidavit explains how he made his survey, to wit, from a point, between the Souder's and Champion properties, which procedure was wholly unjustified by the title deeds. However, the deeds and descriptions contained therein are not contained in the bill, and, hence, it is not sufficiently made to appear that (a)

there was a mistake which (b) occurred after all means of information that would suggest themselves to a man of ordinary care and prudence had been exhausted. Hence the bill is bad for uncertainty and should be stricken. Otherwise a litigant is more favored by a vague and uncertain bill than by one fairly framed.

## 3.

THE BILL PRESENTS FOR DETERMINATION OF THE COURT OF EQUITY A SINGLE QUESTION, TO WIT, WHETHER THE SOUTH WALL OF THE MORVAY BUILDING IS OVER ON MOORE'S LAND, A QUESTION OF LAW, MERELY, TO BE ADJUDICATED IN THE COURTS OF LAW.

Equity will not entertain jurisdiction where there is an adequate remedy at law.

N. J. Digest, title "Equity," Col. 4488 (a).

Equity will not determine disputed titles to land.

*Waddell v. Beach*, 9 N. J. Eq. 793;

*Obert v. Obert*, 10 N. J. Eq. 98.

Primary jurisdiction over controverted legal titles is at law, and when doubt as to title shall arise on face of bill or at final hearing equity does not adjudicate it. *Coombs v. Atlantic City R. R. Co.*, 124 At. 606, 96 Eq. 709.

A Court of Chancery will frequently deliver possession of real estate as auxiliary to other relief, but a bill for possession alone cannot be maintained under any circumstances, as the remedy at law is adequate.

*Mead v. Canfield*, 11 Eq. 38;  
*Long Branch &c. R. Co. v. Sneden*, 26 Eq.  
 539;  
*Lincoln Furniture Co. v. Bornstein*, 135 At.  
 Rep. 83.

In *Hart v. Leonard*, 42 Eq. 416, Justice Dixon said, at p. 421: "Outside of these classes (*i. e.*, classes of cases enumerated by the Justice where equity has jurisdiction) there is no jurisdiction in a Court of Equity over the invasion of mere private legal rights in land. The appropriate remedy is by suit at law."

The case in hand does not come within any of the classes.

## 4.

THE BILL, INSTEAD OF SETTING UP A GOOD CAUSE OF ACTION FOR COMPLAINANT, DECLARES FACTS WHICH WOULD BE GOOD GROUNDS FOR A COUNTER-CLAIM BY DEFENDANT IF DEFENDANT'S TITLE TO THE LOCUS IN QUO IS ONCE ESTABLISHED AT LAW.

If defendant prevails in his ejectment suit he then will be entitled to cause to be filed his bill against Morvay to cause him to remove the wall.

Encroachments of an adjoining owner consisting of using his neighbor's wall and projecting his roof, beams, &c., over the neighbor's marketable title create irreparable damage, not easily ascertainable at law, justifying a mandatory injunction compelling removal.

*Krich v. Zemel*, 96 Eq. 208, 124 At. Rep.  
 449;  
*Hirschburg v. Flusser*, 87 Eq. 588, 101 At.  
 Rep. 191;  
*Capone v. Ranzuli*, 134 At. 553.

According to the charges contained in the bill, after the engineer reported to Morvay his findings that Moore's building encroached on Morvay's lot, Morvay notified Moore to that effect, and stated that he, Morvay, wished to cut off the eaves of Moore's property so far as they encroached, and that on those representations Moore made no objection while the eaves were cut off and the wall built. From this complainant claims, no doubt, that the defendant acquiesced in the cutting off of the eaves and the erection of the Morvay wall on the *locus in quo*. But the bill does not charge that Moore acquiesced, knowing the *locus in quo*, claimed by Morvay was not in fact Morvay's, but on the contrary was Moore's own land. He believed what Wade reported was the truth. The complainant cannot take advantage of his own wrong. See, on this point, *Capone v. Ranzulli*, 134 At. 553, where a similar claim of acquiescence is discussed.

## 5.

COMPLAINANT HAS NOT OFFERED TO DO EQUITY.

The learned Vice-Chancellor rested his decision that the preliminary injunction should go and the motion to strike out should be dismissed on the principles declared by the Court of Errors in *Magnolia*

*Construction Company v. McQuillan*, 94 N. J. E. 736, 121 At. 734. In that case Mr. Justice Bergen speaking for the Court of Errors, said:

“Equity under the facts of this case, required that defendant should be restrained from prosecuting his ejectment suit and decreed to release to complainant the land in dispute on payment to him by complainant its market value, to be ascertained by the Court of Chancery.”

The bill of complaint in this case is defective because the complainant does not offer to pay to defendant the value of the lands taken and the damages that resulted from the removal of the eaves of his building.

The bill seeks to take defendant's property, for private use, without compensation, this is in derogation of the guarantee of the right to possess private property declared in Article I, Sec. 1, of the State Constitution.

B.

THE ORDER TO SHOW CAUSE WHY A PRELIMINARY RESTRAINT SHOULD NOT ISSUE SHOULD HAVE BEEN DISMISSED ON THE ANSWERING AFFIDAVITS.

(1)

*The affidavits disclose that the engineer, Wade, was negligent in running his survey from the wall between the Souder and Champion buildings.*

The point of beginning of his survey was clearly set forth in Morvay's deeds and the antecedent documents of his title. That point of beginning is in the

west side of High Street, 30 feet north of the northeast corner of the Orlando Gibbon's lot. The Gibbon lot is located at the northwest corner of Pine and High Streets. Mr. Wade admits in his affidavit that “If the measurements are taken from Pine Street north and each property owner given the amount of frontage for which his deed calls, this line would not be precisely where I staked it out, unless the frontage given in Moore's deed of ‘30 feet more or less’ would enable a *shifting* of Morvay's line to the south.”

1. This is not a frank concession by Mr. Wade. He cannot deny that the measurement *must* be made from Pine Street, because the deeds call for that.

2. Morvay's point of beginning is fixed. It is 30 feet north of the Orlando Gibbon's lot. See the references to all the deeds carrying his title back to Souder. *ALL* these deeds fix Morvay's point of beginning at the definite point.

3. While it is true Moore's deed gives his frontage as 30 feet more or less, yet his north line is definitely fixed by the deeds of Morvay and his antecedents in title back as far as the deed from Souder to Nathaniel Reeves, as well as by Moore's own deed.

The deed to Reeves, dated March 15, 1867, conveys the Morvay lot (*inter alia*): “Beginning at the northeast corner of the (Mary and Hannah) Whitecar lot on the west side of High Street thirty feet north from the northeast corner of O. Gibbon's lot and runs thence *along the Whitecar line nearly due west,*” &c. The lot had a frontage of 51 feet.

Reeves deeded the 51-foot lot to Rebecca M. Wells,

"Beginning at the northeast corner of the Whitecar lot on the west side of High Street thirty feet north of Orlando Gibbon's lot and runs thence along the Whitecar line by the true meridian standard of Cumberland County 1st south 88 degrees ten minutes west, &c, &c."

Rebecca M. Wells deeded the 51-foot lot to Meredith October 1, 1872: "Beginning at the northeasterly corner of lot of ground now or formerly belonging to one Miss Whitaker on the west side of High Street, thirty feet north of Orlando Gibbon's lot, and runs from thence along the line of Miss Whitaker's land aforesaid &c. south 88 degrees ten minutes west," &c.

Meredith conveyed back to Rebecca M. Wells Dec. 9, 1886, the 51-foot lot: "Beginning at the northeast corner of a lot of ground now or formerly belonging to one Miss Whitaker on the west side of High Street, thirty feet north of Orlando Gibbon's lot and runs thence along the line of Miss Whitaker's land aforesaid, &c., &c., west," &c.

Rebecca M. Wells, by Sheriff, April 22, 1893, conveyed the 51-foot lot to Rachel Dickstein: "Beginning at the northeast corner of the Whitaker lot on the west side of High Street thirty feet north of O. Gibbon's lot and runs thence along the Whitaker line &c., &c., west, &c."

Rachel Dickstein (name changed by legal proceedings to Rachel Dix) conveyed the 51-foot lot Jan. 27, 1902, to John J. Whitaker; and John J. Whitaker on the same day conveyed the same to Henry A. Dix; and, Dix, on July 26, 1904, conveyed the same to the H. A. Dix & Son Company, by the same description last mentioned.

The H. A. Dix & Son Co., November 16, 1907, conveyed the 51-foot lot to McMurray: "Beginning at

the northeast corner of the Whitaker lot, now belonging to one William C. Bingham, on the west side of High Street, between Pine and Mulberry Streets, thirty feet north of O. Gibbon's lot, and runs from thence along the line of said Whitaker lot &c. west," &c.

McMurray, November 20, 1907, conveyed to Thompson: "Beginning at the northeast corner of the Whitaker lot now belonging to one William C. Bingham on the west side of High Street between Pine and Mulberry Streets, thirty feet north of O. Gibbon's lot, and runs from thence along the west line of High Street north 50 minutes west twenty-eight feet to a corner, thence in a westerly direction and at right angles with High Street, fifty-one feet, &c."

NOTE: Here was the division, made by Mrs. McMurray, of the 51-foot lot; she reserved 23 feet. If there was any necessity to eke out Morvay's 28 feet of full frontage it should be taken from the reserved lands of McMurray, now owned by Champion. It cannot be taken from Moore.

Thompson conveyed the 28-foot lot to Scoble and Morvay August 25, 1919: "Beginning at the northeast corner of the Whitaker lot, now belonging to one John W. Anderson, on the west side of High Street between Pine and Mulberry Streets, being thirty feet north of formerly Orlando Gibbon's lot and runs from thence along the west side of High Street north fifty minutes west twenty-eight feet to a corner," &c.

Scoble, August 16, 1920, conveyed his one-half interest in the 28-foot lot to Morvay by the following description: "Beginning at the northeast corner of the Whitaker lot, now or formerly belonging to one John W. Anderson on the west side of High

Street, between Pine and Mulberry Streets, being thirty feet north of formerly Orlando Gibbon's lot and runs thence along the west side of High Street north fifty minutes west twenty-eight feet to a corner, &c."

Thus, in a straight line of deeds of conveyance running back to the Reeves deed March 15, 1867, the southeast corner, the beginning, of Morvay's lot, is precisely fixed; and, moreover, by the same deeds that same corner established and fixed Moore's northeast corner as a monument from which the line dividing their lands runs. It makes no difference to Moore what Morvay's frontage is, and it makes no difference to Morvay what Moore's frontage is, the point 30 feet north of Orlando Gibbon's lot establishes the dividing line between *their* property. Hence the efforts of engineer Wade to eke out a 28-foot frontage for Morvay by taking nine and one-half inches off of Moore's lot was futile, and not good land surveying. From his error the serious mistake and resultant damage ensued.

Morvay's case, therefore, is not strengthened by Mr. Wade's affidavit (1) because the point of division between the Moore and Morvay lot is precisely fixed by the deeds and must be measured from Pine Street; (2) if Morvay is entitled to additional land it must come from McMurray and her successors in title, as shown by the documents of title laid before the Court.

(2)

*There is no estoppel, as will appear from the facts disclosed in Mr. Moore's affidavit.*

*"Acquiescence is where a person who knows that he is entitled to impeach a transaction or*

*enforce a right* neglects to do so for such a length of time that under the circumstances of the case the other party may fairly infer that he has waived or abandoned his right."

1 Am. & Eng. (2nd Ed.) 570, and cases cited in note 2.

From Mr. Moore's affidavit it will be seen that complainant's trespasses were not opposed by Moore because he was deceived by the false representations made by Morvay, who was, it seems, misled by his own surveyor, Wade.

Acquiescence and waiver are always questions of fact. There can be neither without knowledge. \* \* \* One cannot waive or acquiesce in a wrong while ignorant that it is being committed. Current suspicion and rumor are not enough. There must be knowledge of facts which enable the party to take effectual action. *Ibid* citing:

*Pence v. Langdon*, 99 U. S. 578, 581. and other cases.

(3)

The positive statements of Morvay that he knew the location of the line to be where he claimed, amounted to actual fraud and takes the case out of the rule declared in *Magnolia Construction Co. v. McQuillan*, 121 At. 734, 94 N. J. E. 736.

(a)

The affidavit of Mr. Moore states:

"After Oscar Morvay bought from Scoble his half-interest in the property so that Oscar Morvay became the owner of the title he stated

to me that he had caused his premises to be surveyed by Newton B. Wade, then the city engineer of Millville and who is a licensed civil engineer of Millville and a licensed surveyor, and, Morvay said, that according to that survey the eaves of my building were over on his property and that he proposed to erect a new building and objected to the eaves remaining there on him and requested me to permit him to cut off the eaves so that he could build up to my foundation wall. Mr. Clement C. Cassell was with Mr. Morvay at the time and assured me that what Morvay said was correct, to wit, that Newton B. Wade had made an actual survey and had reported to Mr. Morvay that the eaves of my building were over on the Morvay lot. I was surprised to learn that any part of my building was projected over on the Morvay lot, but I knew Newton B. Wade as the city engineer of the City of Millville and presumed that he was well skilled in his position as a civil engineer and land surveyor. Therefore, while I was greatly disturbed at Oscar Morvay's demand I felt that I could not with reason combat the report and findings of Mr. Wade. Hence I told Mr. Morvay that relying on the facts as he stated them, I would not make any objection to his erecting his buildings along the line fixed by Mr. Wade, although that would require the cutting off of the north eaves of my property. They said: 'You are over on our (the Morvay) lot; we want to build down to the line.' 'Your eaves have got to come off.' I said: 'That is a surprise to me. If you take the eaves off my house you want to be sure you are right.' Either Morvay himself or Cassell, in the pres-

ence and hearing of Morvay, said: 'We know we are right.' Accordingly, Oscar Morvay did proceed to remodel his building and cut off the north eaves of my premises and ran his south wall westwardly from a point twenty-nine feet two and one-half inches northwardly of the northeast corner of that certain lot of land formerly owned by Orlando Gibbon's, hereinbefore mentioned."

Here, then, was a statement of fact, coupled with the declaration by Morvay that he knew the fact so stated to be true. This was a false assumption of knowledge and amounted to a fraud on Morvay's part.

"To the general rule that knowledge of the falsity of a representation is necessary to render the representation *fraudulent*, there is an apparent exception in this: If a person makes a statement with the affirmation, express or implied, *that he knew it to be true*, or that he makes it of his own knowledge, and the statement is in fact false, he is guilty of a fraudulent representation if he knows that his affirmation of knowledge is false; *and in such case it can make no difference that he does not know that the statement is false or even that he believes it to be true.*"

*Thompson v. Koewing*, 79 L. 246;

14 Am. & Eng. (2nd Ed.) 99, citing many cases including *Cowley v. Smith*, 46 N. J. L. 380;

*State v. Cass*, 52 N. J. L. 77;

35 Cyc. 64;

48 A. L. R. 548, n.

If a person makes a positive and unqualified false statement of a fact which is susceptible of knowledge, an affirmation of knowledge is implied from the positive character of the statement, *and if he has no knowledge he is guilty of actual fraud.*

14 Am. & Eng. (2nd Ed.) 99, citing many cases, including *Snyder v. Findly*, 1 N. J. L. 92;

*Thompson v. Koewing*, 79 L. 246.

If a person represents a material fact to be true to his personal knowledge, when he does not know whether it is true or not, instead of merely expressing an opinion or belief, and the representation is in fact untrue, he is guilty of falsehood, and fraud, even though he may think it to be true. *Ibid.*, p. 101, and cases in note 2.

In *Crosby v. Wells*, 73 N. J. L., at top of page 801, the Court of Errors says:

"Further, it is to be remembered that fraud in representations of fact may be, either in the knowledge of their falsity, or without knowledge of their falsity, or without knowledge of their truth or falsity, in coupling the representations with an express or implied affirmation of personal knowledge their truth." 73 L. top p. 801.

See, also, *Thompson v. Koewing*, *supra*.

On this principle, therefore, the case sounds in Morvay's fraud. It is not a case of mutual mistake, merely, as in *Magnolia Const. Co. v. McQuillan*, 94 E. 736, 121 At. 734. In that case there was a mutual mistake without fraud or imposition. "It is not pretended (said Mr. Justice Bergen) that complainant was guilty of any fraud." Therefore the decree

below, which the Vice-Chancellor advised on the principle declared in the *McQuillan* case, is wrong.

C.

THE ORDER, IN UNQUALIFIED TERMS, TAKES APPELLANT'S PROPERTY FOR PRIVATE USE, AND WITHOUT COMPENSATION.

(1) The learned Vice-Chancellor founds his advice upon the basic principles laid down in *Magnolia Construction Co. v. McQuillan*, 94 E. 736, 121 At. 734. But in the *McQuillan* case it was distinctly declared that the owner of the legal title ought not be restrained, merely, but that he should be decreed to convey the land on payment of its market value. Here there is a decree for injunction, as prayed for in the bill, without terms; and the bill itself is wholly devoid of equity in that (1) it disputes the defendant's title and (2) does not offer to do equity by tendering compensation if a deed be awarded.

The effect of the decree is to deprive appellant of his property for private use, without tender of compensation. This is in violation of the property right guaranteed by Art. I, Section 1 of the State Constitution.

(2) The bill is defective also, and should be stricken out on this ground as has been argued (A, 5), for it prays for an injunction, without offer of equity, and, in effect, seeks to take appellant's property without compensation.

The order appealed from should be reversed, and the bill stricken out and the order to show cause discharged.

Respectfully submitted,

LOUIS H. MILLER,

*Of Counsel with Defendant-Appellant.*

January 4, 1928.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

---

Between  
OSCAR MORVAY,  
*Complainant-Respondent,*  
and  
SAMUEL MOORE, JR.,  
*Defendant-Appellant.*

---

ON BILL FOR INJUNCTION.

---

ON APPEAL FROM ORDER, ETC.

---

BRIEF FOR RESPONDENT.

---

Moore commenced an action of ejectment against Morvay to recover possession of a strip of land about 9½ inches wide which is covered by a brick wall forming part of a store and dwelling owned and occupied by Morvay on the west side of High Street, in Millville.

Morvay filed his bill to restrain this action, pending a hearing in the Court of Chancery, and set up, among other things, the following stated facts:

- (a) That the ejectment suit was at issue.
- (b) That he had an equitable defense which he could not present in said action.
- (c) That he owned a property in Millville, New Jersey, and in 1920 he desired to improve it, and, in order to be sure that his new structure was correctly placed and properly built, he engaged the services of the city engineer of Millville and of a licensed architect of said city.
- (d) That said engineer and the architect ran his south line and found that Moore's building encroached on Morvay's lot; Moore was present when the survey was made and assented to the result. He gave his consent to the cutting of his over-hanging eaves and stood by, without dissent, while the wall was erected.
- (e) That about six years after the wall was erected he commenced the ejectment suit.

Moore denies some of the allegations of the bill and supporting affidavits, and attacks the accuracy of the survey made by Wade, the city engineer, but the Vice-Chancellor concluded that there was enough in the bill to warrant a hearing in the Court of Chancery.

It would seem to be a denial of justice and of due process of law to say that a complainant who sets up such a state of facts, supported by ample proof, could not be permitted to go to a hearing.

The Vice-Chancellor has not decided the case. He has not deprived the defendant of any property right. The restraint is only *pendente lite*.

In *Sayre & Fisher Land Co. v. R. U. Rue Co.*, 2 N. J. Misc. Rep. 1081, Vice-Chancellor Buchanan said:

"On the question of restraint *pendente lite*, it would seem that the principles must needs be the same, whether the intermediate litigation, during the pendency of which restraint is sought, is in this court or some other court. The ground upon which the Court acts in ordering such *interim* restraint is the preservation of the property, the preservation of the *status quo*, and the prevention of irreparable injury." (Citing *McCran v. Public Service Railway Co.*, 122 Atl. Rep. 205, and *McCran v. Western Union Telegraph Co.*, 94 N. J. E. 281.)

That is all the order in this case attempts to do.

The case as made by the bill and supporting affidavits seems to be quite within the decision of this Court in *Magnolia Construction Co. v. McQuillan*, 94 N. J. E. 736, cited by Vice-Chancellor Ingersoll.

Furthermore, the files of the Court of Chancery will show that since this appeal was taken the defendant has filed an answer, and has voluntarily consented to an order of reference, which is certainly a waiver of his motion to strike the bill.

As to the alleged failure of complainant to offer to do equity by paying for the land covered by the wall, it is perhaps sufficient to say that this question was raised on the argument before the Vice-Chancellor and counsel for complainant stated at that time that he understood the rule to be that he who asks equity must do equity, and such statement is here repeated.

If this statement should have been made in the bill, motion is hereby made to amend the bill in that respect.

As to the claim that the sole remedy is at law see *Man v. Vockroth*, 94 N. J. E. 511, at p. 514.

As to the claim of defendant that the Court of Errors and Appeals should determine the facts on review of an order granting or refusing a preliminary injunction, and should pass on the accuracy of the survey made by the city engineer, see to the contrary, *City of Hammond v. Schappi Bus Line*, U. S. Supreme Court Adv. Opinions (72 L. Ed.) December 1, 1927, p. 56, and *City of Hammond v. Farina Bus Line & Transportation Co.*, U. S. Supreme Court Adv. Opinions (72 L. Ed.) December 1, 1927, p. 59.

For these reasons, it is respectfully submitted, the order of the Court of Chancery should be affirmed and the matters in controversy between the parties be litigated in the Court of Chancery on final hearing, where the claims of the respective parties can be fully heard and determined.

February Term, 1928.

*Counsel for Respondent.*  
WALTER H. BACON,