

IN CHANCERY OF NEW JERSEY.

Between

RICHARD G. STEVENSON,

Respondent.

and

JOSEPH WILLARD MORGAN,

Appellant.

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ON APPEAL.

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BRIEF FOR APPELLANT.

The bill was filed to compel the appellant (the defendant below) to lower a dam.

A demurrer was filed alleging, first, a remedy at law; second, want of equity.

Rule 209 requires that every demurrer shall distinctly specify the ground or grounds of demurrer. 30

The object of the rule is to give *reasonable notice* to the complainant of the grounds upon which the sufficiency of the bill is to be called in question, to the end that he may prepare to meet the attack which is made, and that he may not waste his time preparing to meet

attacks which are not made. It follows that *under* the old form of demurrer for "want of equity," the demurrant may raise all objections to the complainant's case on the merits as presented in the bill of complaint, which are reasonably apparent upon a perusal of the bill and demurrer. No exact and rigid rule from the nature of the case can be laid down on this subject. It was not the intention of the rule to compel the demurrant to submit

10 to his adversary his brief or any parts of his argument. The purpose was to notify the complainant only of the general subject matter of the argument.

Demarest vs. Terhune, 50 Atl. Rep., 665.

Essex Paper Co. vs. Graecen, 18 Stew., 504.

~~*Curtis vs. Malden*~~
Walden vs. Bishop, 11 Dick., 484.

No motion was made to strike out the demurrer.

Idem, p. 486.

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It is *only when the defect is collateral* to the main case made by the bill that the *specification is necessary*.

Van Houten vs. Van Winkle, 1 Dick., 380, 386.

The complainant was fairly notified by that portion of the demurrer which alleged a want of equity that the bill did not contain statements sufficient to warrant a decree in his favor, or an answer on the part of the defendant.

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We do not deny the general jurisdiction of equity in a case of this class.

Carlisle vs. Cooper, 6 C. E. Gr., 576.

We do claim, as above, that the allegations of the bill are insufficient to warrant an answer, and that they plainly admit a remedy at law.

A demurrer admits only so much as is legally and properly set out in the bill.

We submit that the legal right is not fully shown by the bill.

Hart vs. Leonard, 15 Stew., 416, 419.

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The bill alleges the complainant to be the owner of a farm, along which a water course has from time immemorial been used and accustomed to flow and run *in its natural and accustomed channel*, free and clear of any and all obstructions; *that the natural channel thereof*, where it passes said farm, was of a uniform shallow depth (pages 3 and 4). It further alleges that the defendant has raised the dam by his mill and has thus raised the height of the water in said stream at the point where it passes the complainant's land eighteen inches higher than the bottom has ever been "*to the knowledge of your orator.*" 20

It will be observed that the complainant speaks of the "*natural and accustomed channel,*" but in no instance specifies where it is or was with reference to said farm. The bill is silent as to length of time. It may be that formerly the stream was wider and deeper; that by non-user of the mill in question, and by the decay of the dam incident thereto, the stream has become more shallow and necessarily narrower, and that the defendant had the right to repair the dam and raise the water. 30

The complainant also says that by reason of the dam, as it is at present, the water in said *stream is higher, &c.,*

than the bottom thereof has ever been to the knowledge of your orator.

That, we submit, is not the question. The knowledge of the complainant is of no value unless he shows means of observation, and the length of time thereof. Knowledge is of no value without these aids. The knowledge which the complainant alleges may be mere hearsay.

10 On page 6, the bill alleges that the complainant's father was in the actual and peaceable possession of said farm; that he enjoyed all the rights of said stream; that at no time was it permitted to rise above its *natural height*, and that it in no way disturbed the use and enjoyment of said farm by said father.

20 This allegation is valueless, for the sole question involved therein is, where did the stream run at its natural height? Where was its natural height? We may admit that the complainant's father enjoyed the undisturbed possession of said farm, without let or hindrance from said stream at its *natural height*, but where was its natural height? You may search the bill in vain for any allegation of its actual location.

30 The allegation that the complainant *has been informed* (p. 6) and believes that his father forbade a former owner from interfering with the use and enjoyment of the natural flow of said creek, and compelled the introduction of steam in a factory where the owner of said factory threatened to raise the height of said stream is equally valueless, because it is mere hearsay or gossip; because it does not show where the natural flow was that the former owner of the mill was about to interfere with; because it does not show whether said interference was to be by raising or lowering the water, or by polluting

the stream; and because, as to said factory, it does not show whether the stream which the owner threatened to raise the height of was the stream as it now is or not. There is nothing clear, distinct, explicit and definite as to the natural height and natural flow of said stream.

The bill should allege affirmatively and negatively every fact necessary to confer jurisdiction, otherwise the complainant should be remitted to his remedy at law. The defendant should not be called upon to answer allegations so vague, uncertain and indefinite. He should be informed of something substantial. The allegations cannot be passed as mere crudities when one alleges that an ancient water-course has been raised; he should be required to apprise the defendant of something definite.

As to the damage, we submit that the bill shows it to have been already irreparable, not that it will be unless the defendant is enjoined. Pools of water have formed, the marl pits are flooded, permanent injury has been done; not is being done, nor is likely to be done. That being true, the complainant can, in an action of trespass, recover damages for such injury, namely, the value of the land destroyed, the corn crop destroyed, the marl pits destroyed. Each of these is the subject of a suit at law. As to the drainage, it is claimed that from time immemorial it has been into this stream, but at the same time the complainant charges that he put the drains in. If the latter is true, how can the former be true? In any event the interference with this drainage depends upon whether the stream into which it ran was the natural bed

or flow thereof, and there is nothing in the bill, as shown above, to indicate this.

The complainant asks this Court to assess damages. His remedy for this is at law. It is good ground for demurrer.

Red Jacket Tribe vs. Hoff, 6 Stew., 441.

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The latter cases do not militate against the view of the Chancellor in the above case.

In *Simmons vs. Paterson*, 15 Dick., 385, 392, the Judge says that a court of equity will, to effectuate justice, settle unliquidated damages, and refers to *Castor* ^{*Castor*} vs. *Monroe*, 1 Gr. Ch., 467, and *Ingersoll vs. Newton*, 15 Dick., 399, in support thereof.

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The former case was one where the defendant claimed a deduction from the amount due upon a mortgage, which was being foreclosed, and the Court held that it could settle the amount. It will be observed that it is entirely different from the case under consideration. The complainant had submitted his suit to the jurisdiction of the Court, had asked that a certain sum of money should be made by a sale of the mortgaged premises. It was eminently proper that the Court should settle the

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amount due. It is useless to comment upon the difference between the two cases. The Court, in *Castor* ^{*Castor*} vs. *Monroe*, does not go so far as the learned Judge in *Simmons vs. Paterson*, 15 Dick., p. 393, would seem to intimate. In the former the language is "in some cases, &c., "a court of equity will, to effectuate justice, settle damages which are unliquidated." In *Ingersoll vs. New-*

ton, and Sparks vs. Newton, 15 Dick., 399, 400, the Court holds that, with the conclusions expressed by Vice Chancellor Pitney in the same cases, 12 Dick., 367, touching the power and the duty of the Court, *on the pleadings and evidence*, to fix the compensation, &c., it agrees. Turning to Vice Chancellor Pitney's opinion, in 12 Dick., 367, 392, we find that he held *that, as both parties had submitted themselves to the jurisdiction of the Court in this respect, and requested that it should determine the amount of compensation*, he felt constrained, by the state of the authorities, to assume that jurisdiction. We do not contend that if we had answered and had submitted to the jurisdiction of the Court in the matter of damages, it could not assess them, but do contend that failing to do so, our demurrer is good, and further, that this is not a case like the foreclosure of a mortgage, where the amount due (to be made by a sale) is a necessary incident. 10 20

Respectfully submitted.

C. V. D. JOLINE,
Counsel for Appellant.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH WILLARD MORGAN,

Appellant,

and

RICHARD G. STEVENSON.

ON APPEAL.

COPY OF OPINION OF VICE-CHANCELLOR
STEVENSON.

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STEVENSON, V. C.

The demurrer is general in form specifying as grounds want of equity and that complainant has an adequate remedy at law for the injuries complained of in his bill. Under Rule 209, promulgated by Chancellor Runyon in 1886, even substantial defects must be specified in the demurrer. The complainant is required to defend the sufficiency of his bill only against objections of which he gets reasonable notice by the specification of the grounds of demurrer. *Essex Paper Co. vs. Greasen*, 18 *Stew.*, 504; *Demarest vs. Terhune*, 50 *Atl. Rep.*, 664.

If a cause of action cognizable in a court of equity and for which there is no adequate remedy at law is presented to the mind by the perusal of this bill of complaint, then the demurrer must be overruled even though the bill may contain large numbers of defects, any one of which would have been fatal had it been pointed out specifically in the demurrer.

What notice to the mind of the reasonably learned and reasonably skillful counsel is conveyed, or ought to be conveyed by the phrase "want of equity" or any of the phraseology frequently employed in a demurrer may sometimes be difficult to determine. Perhaps few if any general rules can be laid down in regard to this matter. But it is plain that Rule 209 greatly modified the theory and practice of courts of equity in dealing with demurrers. Notwithstanding the old rule of pleading that words are to be taken *fortius contra proferentem* it is probably safe to say that when the general subject matter of the complaint is manifestly of equitable cognizance if the demurrant stands on sharp points relating to the form of language used to convey the complaint rather than the substance of the complaint itself, he should be required to specify distinctly all the imperfections of that class upon which he intends to rely.

While this bill may be open to criticism it sets forth it seems to me, a familiar case for relief in a court of equity. The complainant's farm is injured, his lands and marl pits are flooded and kept flooded continuously from day to day by the damming up of an ancient water course by the defendant. The bill was filed soon after the dam was raised, and it alleges that for many years the stream has flowed at a level below that at which the dam as raised now keeps it. It does not appear that the defendant will deny that his conduct has been illegal or injurious to the complaint. The injury is continuous, constitutes a private nuisance and can not be adequately redressed by an action at law for damages.

The case seems to be directly within the principles laid down in *Carlisle vs. Cooper*, 6 C. E. G., 576, and in a large number of other cases in this and other States.

The demurrer will be overruled.

IN CHANCERY OF NEW JERSEY.

BETWEEN

RICHARD G. STEVENSON,

Complainant,

AND

JOSEPH WILLARD MORGAN,

Defendant.

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BILL FOR RELIEF.

To the Honorable William J. Magie, Chancellor of the 20
State of New Jersey.

Humbly complaining, shows unto your Honor, your orator, Richard G. Stevenson, of the Township of Gloucester, in the County of Camden, and State of New Jersey, is the owner, in fee simple, and occupier of a certain farm and tract of land, described as follows:—BEGINNING at a corner in the road leading from Blackwood to Cross Keys, being corner to lands formerly of Martha Hedgers; thence south seventy-two degrees fifteen minutes, west thirteen chains to a stone 30 corner to land formerly of Joseph Hedgers and now or late of James W. Lamb; thence along said land south seventeen degrees forty-five minutes, east eleven chains and seventy links to a stone; thence still along the same south seventy degrees, west fifteen chains and fifty links

to the south branch of Timber Creek ; thence up said branch the several courses thereof to a corner of land formerly of Joseph Hedgers and now or late of Daniel Turner; thence along same south eighty-nine degrees, east about fifteen chains and fifty links to another corner of said lands ; thence south fourteen and three-quarter degrees, east ten chains and sixty-four links to a corner in the road leading to the County House, and thence along said road north seventy-five and a quarter degrees, east
10 eleven chains and five links to a corner to line of lands now or late of James W. Lamb ; thence north fourteen and three-quarter degrees, west seven chains and fifty-eight links to a stone for a corner, and the beginning corner of a tract of land conveyed by said Charles Stevenson and wife to Isaac C. Stevenson ; thence south eighty-nine degrees, east seven chains and fifty links to a corner in the middle of the said road leading from Blackwood to Cross Keys ; thence along the middle of said road north twenty-six degrees forty minutes,
20 west thirty-four chains and seventy-one links, more or less, to the place of beginning. Containing eighty-three acres of land be the same more or less ; and also of a certain other tract of land, described as follows :—
BEGINNING at a stone in the middle of the public road leading from Blackwoodtown to the Cross Keys, and corner to Charles Stevenson's land ; thence by his land, south seventy-two degrees and a half, west thirteen chains to a stone corner to Stevenson ; thence (2) by the same south seventeen degrees and thirty-five minutes,
30 east eleven chains and seventy links to a corner, to John E. Marshall's meadow lot, also corner to Stevenson ; thence (3) by Marshall, south seventy-two degrees and twenty-five minutes, west fourteen chains and forty links, to the middle of the south branch of Great Timber Creek ; thence (4) down said Creek the several

courses thereof to a corner of David E. Marshall's land ;
 thence (5) by said Marshall's line north seventy-two and
 a half degrees, east five chains to a corner ; thence (6)
 by the same north fifty-five and a quarter degrees, east
 two chains and fifty links to a stone ; thence (7) still by
 the same north seventy-two and a half degrees, east
 thirteen chains to the middle of the aforesaid road ;
 thence (8) along the middle of said road south twenty-
 six and a half degrees, east seventy-six links to the place
 of beginning. Containing thirteen and one half acres 10
 of land, be the same more or less, and that said several
 tracts of land were conveyed to your orator by two sev-
 eral deeds, the first by a certain deed, bearing date the
 twenty-ninth day of December, in the year one thous-
 and eight hundred and eighty-four, and made by
 Charles Stevenson (the father of your orator) and Sarah
 G., his wife, and of record in the office of the Register
 of Deeds, in and for the County of Camden, in book
 No. 115 of deeds, page 461, &c., and the other by a deed,
 bearing date the sixteenth day of October, in the year 20
 one thousand eight hundred and ninety-seven, and
 made by Robert Montgomery, and others, Trustees ; to
 which several deeds, in the possession of your orator and
 ready to be produced, your orator craves leave to refer
 when and where this honorable Court shall direct.

And your orator further shows, that the said farm or
 tracts of land, is bounded by an ancient water course,
 called the South Branch of Timber Creek, and which
 from time immemorial has been used and accustomed to
 flow and run, and of right out to have flowed and run, 30
 by and along the said farm in its natural and accus-
 tomed channel, free and clear of any and all obstruc-
 tions whatsoever, and that the natural channel thereof,
 where it passes said farm, was of a uniform shallow
 depth, and that a portion of said farm, bordering on said

South Branch of Timber Creek, comprising about eight acres thereof, is very level and low and of very great natural fertility, and is excellent meadow land and very productive, and that your orator has been in the habit of mowing the same every year for a great many years and also pasturing cattle thereon, for some years, and that a large portion of said farm comprising some thirteen acres, bordering on the said South Branch of Timber Creek, is very rich and productive in marl, and that
 10 your orator has large pits therein, and has for a number of years past, dug marl from the said pits, and that the said marl was very productive, and that the surface of said pasture lands and bottom of said marl pits, was, on an average, about one foot and a half or two feet above the level of the water in the said Creek in its original stages.

And your orator further shows, that about a mile or a mile and a half above said farm and north thereof, there is an ancient mill on said Creek, now owned by one
 20 Joseph Willard Morgan, and commonly called the Good Intent Mills, which mill is partly driven by the water of a pond, made by a dam thrown across said Creek, at the place where the mill is situate, and that said mill prior to the first day of January in the year one thousand nine hundred and one, in no wise affected, obstructed or retarded the flow of said Creek, at any point along said farm, to the knowledge or belief of your orator.

And your orator further shows, that sometime prior
 30 to the fore part of June in the year one thousand nine hundred and one, the said Joseph Willard Morgan, made an addition to his mill dam and thereby increased the height thereof, and that your orator does not know and cannot state the exact amount of said increase of height, but believes and charges the truth to be, that it

was at least two feet, and that the portion of said dam that regulates the height of water in said pond is, at this time and has been ever since the said fore part of June, last past, higher than the bottom of said Creek, at every point along said farm and is from eighteen inches to two feet higher than the bottom thereof has ever been to the knowledge of your orator, and that when said pond and dam is filled with water, in its present condition, it has the effect of damming and penning back the waters of said Creek, upon said farm, and of obstructing the course of said Creek along said farm, and of deepening the waters in the bank of said Creek for the whole length of said farm, and completely filling said banks and entirely overflowing the pasture lands, meadow and low lands, and likewise the marl pits, and forming over them large pools which form an uninterrupted sheet of water.

And your orator further shows, that the raising and filling of said dam with water, in its present condition, has had the effect of entirely destroying the value of said meadow and pasture lands and marl pits, and that previous to the filling of said pond with water, in its present condition, the said meadow was worth to your orator several hundred dollars per year, and would be worth at this time that amount of money, if said dam and stream were in the same condition prior to the month aforesaid, and for a very long period of years prior thereto, and that in their present condition the said meadow and pasture lands are entirely worthless and incapable of improvement.

And your orator further shows, that by the raising and filling of said dam with water, about two acres of rich and fertile low lands, upon which corn was growing, has been entirely destroyed, and the corn in its

present condition is entirely worthless and of no value by reason thereof.

And your orator further shows, that for the purpose of the better cultivation of your orator's farm, your orator caused a large tract thereof to be underdrained, and the outlets of said drain were in or on the border of the said South Branch of Timber Creek, and that from time immemorial the natural drainage of said lands was in the said Creek, but that by reason of the wrongful
 10 acts and deeds of the said Joseph Willard Morgan, the said drains are now completely filled with the waters of said Creek and rendered useless by the raising and filling of said dam, and your orator believes, that if the said stream of water is permitted to remain in its present condition, some twenty acres or more of the lands of your orator's farm will be rendered worthless and incapable of cultivation.

And your orator further shows, that for over forty years prior to the conveyance to your orator of the large
 20 tract of land first above described, the father of your orator was in the actual and peaceable possession of said farm and enjoyed all the rights, privileges and immunities of said stream of water, and at no time was the said stream permitted to rise above its natural height, and in no way disturbed the use and enjoyment of said farm by the father of your orator. And your orator is informed and believes it to be true, that the said Charles Stevenson, forbid and prohibited, the former owner of the said Good Intent Mills, from in any way interfering with
 30 the use and enjoyment of the said natural flow of said Creek, and compelled the introduction of steam in a factory at Good Intent, when the owner or proprietor of said factory threatened to raise the height of said stream, and that at no time thereafter was the said stream raised above its natural flowage in front of the lands of your

orator, until the same were raised by the said Joseph Willard Morgan.

And your orator further shows, that for a long number of years prior to the raising and filling of said dam with water, in its present condition, your orator worked the said marl pits with great profit to himself, and that at no time prior thereto was your orator unable to work said marl pits, and that your orator derived therefrom a revenue of several hundred dollars per year, and was also, in addition thereto, able to use said marl on the 10 remaining portion of his farm under cultivation; that your orator had planks placed in and along the bottom of said pits for the purpose of working the same and that prior to the month of June, last past, said pits were at no time, within the knowledge of your orator incapable of being worked and used, but that since the raising and filling of said dam with water, in its present condition, the said marl pits have been overflowed and are so filled with water that they are entirely worthless and incapable of being worked to your orator's great 20 annoyance and damage.

And your orator further shows that your orator has suffered very considerable pecuniary damage, from the flowage and destruction of his said meadow and pasture lands, marl pits and corn field, and which your orator estimates to be at least five hundred dollars, and your orator further shows, that said injuries to said meadow and pasture lands, and marl pits and to the farm adjacent to the Creek, and to the bed of said Creek along the farm are of a permanent character and will result in the com- 30 plete destruction of said meadow and pasture lands, marl pits and low farming lands, unless restrained by this honorable Court, and that the great expense attending trials of actions at law for damages, incurred by said raising and filling of said dam with water, and of

entirely destroying the value of your orator's said premises, affords no adequate remedy for your orator in the premises.

And your orator further shows, that he has frequently and in a friendly manner applied to the said Joseph Willard Morgan, and requested him to reduce the height of his said dam to the point from which he had caused it to be raised, as above mentioned, and to refrain from filling the said dam so full of water as to
 10 overflow the premises of your orator, and to permit the water at said dam to run off so that it shall not raise any higher at said dam than it was accustomed to do previous thereto, but the said Joseph Willard Morgan, has always refused to comply with such reasonable requests, and still continues to maintain his said dam at the increased height above mentioned, and to keep the same filled with water and to thereby injure your orator's said farm and meadow and pasture lands and marl pits, as above mentioned, and refuses to abate the
 20 said dam or to permit the said stream of water to run and flow as it was accustomed to do prior to the year one thousand nine hundred and one, and maintains and claims that he has a lawful right to maintain said dam at its increased and present height and keep the same filled with water.

In consideration whereof, and forasmuch as your orator is without adequate remedy at the common law and to the end that the said Joseph Willard Morgan, may, without oath, true, full and perfect answer make
 30 to all and singular the premises, and that he may be perpetually enjoined by the order and decree of this honorable Court, from further obstructing and impeding the flow of water in the said Creek along your orator's said farm, and from penning and damming back said water and overflowing the same, and that the exact amount of

said increased height may be ascertained by this honorable Court, and that the said Joseph Willard Morgan, may be ordered and decreed, by this Court, to abate said dam and reduce it to its original height, as it was prior to the year one thousand nine hundred and one, and remove the obstructions caused thereby, to the natural flow of said Creek, or that the same may be abated and reduced in height under the direction of this Court, and that he may pay unto your orator such reasonable sum of money for the damages suffered and 10 sustained by your orator as may be decreed, and that your orator may have such other and further relief, as may be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator the state's writ of subpoena, issuing out of and under the seal of this honorable Court, to be directed to the said Joseph Willard Morgan, commanding him, on a certain day and under a certain penalty therein to be expressed, to be and appear in this honorable Court, then and there to answer all and 20 singular the premises, and to stand to, abide by and perform such decree therein, as to your Honor shall seem meet.

And your orator, as in duty bound, will ever pray, &c.

H. M. SNYDER,

Solicitor for and of Counsel with Complainant.

IN CHANCERY OF NEW JERSEY.

10 BETWEEN

RICHARD G. STEVENSON,

Complainant.

AND

JOSEPH WILLARD MORGAN,

Defendant.

ON BILL, &c.

DEMURRER.

20 The demurrer of J. Willard Morgan to the bill of complaint of Richard G. Stevenson, complainant.

This defendant by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto; and for cause of demurrer shows that the complainant hath not in and by his said bill made out such a case as entitles him in a court of equity to
30 any relief against this defendant as to the matters contained in said bill or any of such matters; and because the complainant hath a full, complete and adequate remedy in a court of law for the injury complained of in said bill of complaint.

And for divers other causes of demurrer appearing in

said bill, this defendant doth demur thereto ; and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

C. V. D. JOLINE,
Solicitor of Defendant.

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

J. Willard Morgan, of full age, being duly sworn according to law, saith, that the foregoing demurrer is not interposed for delay, but in good faith for the causes therein set forth.

J. WILLARD MORGAN.

Sworn and subscribed before me this twenty-sixth 20 day of November, nineteen hundred and one.

THOMAS P. CURLEY,
M. C. C. of N. J.

I certify that I have perused the complainant's bill in the above stated cause, and that the above demurrer is well founded in point of law.

E. V. D. JOLINE,
Counsel.

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IN CHANCERY OF NEW JERSEY.

BETWEEN 10 RICHARD G. STEVENSON, Complainant, AND JOSEPH WILLARD MORGAN, Defendant.	}	ON BILL, &c. ORDER OVERRULING DEMURRER.
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This cause coming on to be heard at the regular term
 20 of this court in the presence of Henry M. Snyder, Jr.,
 of counsel with the complainant, and Charles V. D.
 Joline, of counsel with the defendant, and the argu-
 ments of the counsel of the respective parties on the
 demurrer filed in the above stated cause having been
 heard, it is on this eighteenth day of February, in the
 year of our Lord one thousand nine hundred and two,
 ordered that the said demurrer be overruled with costs,
 and that the defendant answer the complainant's bill
 within twenty days, and that if he fail so to do the
 30 complainant's bill be taken as confessed against him.

W. J. MAGIE,
 C.

Respectfully advised,
 EUGENE STEVENSON,
 V. C

IN CHANCERY OF NEW JERSEY.

BETWEEN

RICHARD G. STEVENSON,

Complainant,

AND

JOSEPH WILLARD MORGAN,

Defendant.

10

ON BILL, &C.

APPEAL.

The complainant hereby appeals from the order made on the eighteenth day of February, in the year nineteen hundred and two, that the demurrer filed by the defendant in the above stated cause be overruled with costs, and that the defendant answer the complainant's bill within twenty days, and that if he fails so to do the complainant's bill be taken as confessed against him, and from the whole and from every part thereof to the Court of Errors and Appeals in the last resort in all cases.

Dated February 26, 1902.

C. V. D. JOLINE,

Solicitor and of Counsel with the Complainant. 30

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

C. V. D. JOLINE,

Of Counsel with Complainant.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

BETWEEN	}	
10 RICHARD G. STEVENSON,		ON BILL, &C.
Complainant,		PETITION OF
AND		APPEAL.
JOSEPH WILLARD MORGAN,	}	
Defendant.		

The petition of Joseph Willard Morgan, the appellant
20 in the above stated cause, respectfully shows that your
petitioner finds himself aggrieved by an order made in
the Court of Chancery, by the Honorable William J.
Magie, Chancellor of New Jersey, as advised by Eugene
Stevenson, Vice Chancellor, bearing date on the eigh-
teenth day of February, in the year nineteen hundred
and two, wherein the said Richard G. Stevenson was
complainant, and the said Joseph Willard Morgan was
defendant, in this respect, to wit: that the said order
adjudged that the demurrer of the defendant be over-
30 ruled with costs, and that the defendant answer the
complainant's bill within twenty days, and that if he
fail so to do, the complainant's bill be taken as con-
fessed against him.

And your petitioner humbly appeals from the whole
and every part of said order of the Chancellor, which

orders as aforesaid, upon the ground that the same is erroneous, for that the complainant had and has a full, complete and adequate remedy in a court of law for the injury complained of in said bill of complaint, and for divers other causes of demurrer appearing in said bill.

And your petitioner therefore prays that the said order of the said Chancellor may in the particulars aforesaid be reversed, set aside and for nothing holding; and that your petitioner may have such relief in the premises as to this court shall seem meet.

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C. V. D. JOLINE,

Solicitor and of Counsel with Petitioner.

Endorsed :

"Filed Mar. 11, 1902.

GEORGE WURTS,

Clerk."

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

BETWEEN		}	
	RICHARD G. STEVENSON,		
	Complainant,		ON APPEAL.
10	AND		ANSWER.
	JOSEPH WILLARD MORGAN,	}	
	Defendant.		

The answer of Richard G. Stevenson, the respondent to the petition of appeal of Joseph Willard Morgan, appellant :

This respondent, not acknowledging any or all of the matters, which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits, that a decree was, on the eighteenth day of February last past, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated ; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said order is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged, to this respondent.

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H. M. SNYDER, JR.,

Solicitor and of Counsel with Respondent.

Endorsed :

" Filed Mar. 20, 1902.

GEORGE WURTS,

Clerk."

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

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RICHARD G. STEVENSON,
Complainant and Respondent,
and

JOSEPH WILLARD MORGAN,
Defendant and Appellant.

ON BILL FOR RELIEF.

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ARGUMENT OF RESPONDENT.

The bill in this cause alleges that the respondent is the owner, in fee simple, and the occupier of certain farm lands therein described, one tract containing eighty-three acres and the other thirteen and one-half acres, and that the respondent became seized of the former tract in 1884, and of the latter tract in 1897; that the several tracts of land are bounded by an ancient water course, called the South Branch of Timber Creek, which flowed and ran free and clear of any and all obstructions in its natural and accustomed channel, until the commission of the nuisance here-

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- inafter set forth; that the larger tract of farm lands adjoining the creek is low and level and of great natural fertility and is excellent meadow land, and has been used for a great many years for pasture, and that the smaller tract of land has large marl pits therein, which for many years have been very productive. The appellant is the owner of a mill, called the Good Intent Mills, situate about one mile above or to the north of said farm, and the mill is
- 10 driven by the water of a pond, made by a dam thrown across said creek, and that prior to the first day of January, nineteen hundred and one, the dam in nowise affected, obstructed or retarded the flow of the creek at any point along said farm; that during the month of June, nineteen hundred and one, the appellant made an addition to his dam, increasing the height, and by reason thereof the creek has been raised from eighteen inches to two feet higher than it has been to to the knowledge of the respondent, and
- 20 has the effect of damming and penning back the waters of said creek upon respondent's farm and entirely overflowing the pasture, meadow and low lands and the marl pits, and forming over them large pools which form an uninterrupted sheet of water; that this raising and filling of said dam has had the effect of entirely destroying the value of the pasture, meadow and low lands and marl pits; it also had the effect of entirely injuring and rendering of no value about two acres of low lands, which contained grow-
- 30 ing corn and which by reason of this nuisance has been entirely destroyed. The respondent, for the better cultivation of his farms, had caused large portions thereof to be underdrained, which underdrains emptied into said creek, and that from time immemorial the creek was the natural drainage of said lands; that the action of the appellant in

raising his dam and flooding the respondent's lands, has rendered useless some twenty acres of the farm lands, by causing the underdrains to be backed up and filled with water and rendered incapable of any service. That the respondent's father for over forty years prior to the conveyance to the respondent was in the actual and peaceable possession of the larger tract of land and enjoyed the stream of water in its natural and unobstructed course; the respondent for some years prior to the aforesaid nuisance worked the marl pits and derived considerable revenue therefrom, and also used the marl in the cultivation of his farm. That the planks that he had placed in the bottom of said marl pits were at all times high and dry until the raising of said dam, and by reason of such act the marl pits are overflowed and filled with water and are worthless and incapable of being worked. The respondent alleges that he has suffered considerable pecuniary damage from the flowage and destruction of his pasture, meadow and low lands, marl pits and corn fields, which he estimates at five hundred dollars. 10 20

The object of the bill is to enjoin the appellant from further obstructing and impeding the flow of the water in said creek along respondent's farm, and from penning and damming back the water and overflowing his lands, and that the exact amount of said increased height may be ascertained and the appellant ordered to abate said dam and reduce it to its height as it was prior to the year nineteen hundred and one, and remove the obstructions to the natural flow of said creek, or that the Court may abate and direct the reduction in height thereof, and that the appellant pay what damages the respondent has suffered and sustained, as the Court may decree. 30

The appellant demurred to the bill, assigning for cause (1) that the respondent has failed to make out such a case as entitled him to any relief against the appellant, as to the matters in the bill contained, and (2) because the respondent has a full, complete and adequate remedy in a court of law for the injury complained of in said bill.

- The object of this suit is to abate the injury or nuisance in overflowing the lands of the respondent by back water, 10 occasioned by the dam of the appellant, and to ascertain and settle the height at which the appellant is entitled to maintain his dam, or to back the waters therefrom upon respondent's lands; and as a relief incidental thereto, that he may be paid any damages suffered by him for the injury occasioned by the defendant.

- The leading case in this State, in which the object sought to be obtained by this suit is adjudicated, is *Carlisle vs. Cooper*, 4 C. E. Gr., 256; affirmed 6 Id., 576 20 The object thereby sought was to abate an injury or nuisance in overflowing the lands of the complainant by back water, occasioned by a dam of the defendant; also to ascertain and settle the height at which the defendant is entitled to maintain his dam, or back the water upon the lands of the complainant. An examination of this case will show, that with the exception of the prayer for damages, the above recited case has been followed in this case, and, as to the relief to which the respondent in this suit is entitled 30 (except the question of damages) is *res adjudicata*.

Another case is *Holsman vs. Boiling Spring Bleaching Company*, 1 McCarter, 335, and approved by this Court in the case of *Carlisle vs. Cooper*. The bill in this case was filed by the complainants to restrain the defendants from polluting the stream of water which ran through the com-

plainants' land, by emptying into it the chemicals and other substances used by the defendants for bleaching purposes. The Court held that every owner of land, through which a stream of water flows, is entitled to the use and enjoyment of the water and to have the same flow in its natural and accustomed course, without obstruction, diversion or corruption; and that it is a familiar exercise of the power of the Court of Chancery to prevent, by injunction, injury to water courses by obstruction or diversion; that either a disturbance or deprivation of a riparian owner to the use and enjoyment of a stream of water in its natural state is an irreparable injury for which an injunction will issue; and that where the complainant seeks protection in the enjoyment of a natural water course upon his lands, the right will ordinarily be regarded as clear. 10

The case of *Beach vs. Sterling Iron and Zinc Company*, 9 Dick. 65; affirmed 10 Id. 824, is a more recent decision, in which the object was to permanently restrain what was alleged to be a nuisance, caused by the pollution of a natural water course. In this case it was suggested by the defendant that no injunction be ordered, but the complainant should be left to his action at law for damages, but as the decision of the Court was in favor of the complainant's equity and the views of the learned Vice-Chancellor are pertinent to the case in question, I quote his language: "It must now be considered as settled law in this State that the maintenance of a nuisance of the kind here in question is in effect a taking of property." *Pennsylvania Railroad Company vs. Angel*, 14 Stew. Eq., 316 (at p. 329), where Judge Dixon, speaking for the Court of Errors and Appeals, says: "This principle rests upon the express terms of the Constitution. In declaring that private property 20 30

shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has

10 the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense; of course, mere statutory authority will not avail for such an interference with private property. This doctrine has been frequently enforced in our courts," and he proceeds to cite previous authorities in the same court.

20 "If this be so, then the Legislature has no power to authorize the maintenance of a nuisance for the promotion of private objects, even upon terms of making compensation. For no authority is necessary for the position that the Legislature is powerless to enact a law declaring that defendant may have complainants' mill and water-power upon terms of paying them what a court may ascertain it is worth. And I am unable to distinguish such action and that of leaving complainants to the remedy of repeated ac-

30 tions at law to recover damages as often as they are suffered. The result of my consideration is, that there is no principle which will sustain a court of equity in refusing an injunction against the maintenance of an established continuing nuisance and leaving the injured party to his remedy at law. To do so is, in effect, to permit a party to take his neighbor's land for his own use upon terms of

making such compensation as a jury shall assess. This is inadmissible."

In the case of *Acquackanonk Water Company vs. Watson*, 2 Stewart, 366, the learned Chancellor held: "That the silence of complainant during the erection of the water-works constitutes no equitable estoppel, because he had a right to presume that defendants' use of the stream would not exceed its legitimate use."

The appellant's acts are a nuisance and continued trespass. The effect of which is a confiscation of respondent's pasture and meadow lands and the destruction of his marl pits, depriving him of his lawful and proper enjoyment of property, and the respondent is entitled to the relief sought for by him in this case. 10

As to the question of damages, which the respondent asks the Court of Chancery to liquidate, the rule is very tersely stated in this Court by VAN SYCKEL, J., in the case of *Attorney General ex rel. Simmon vs. Paterson*, 15 20 Dick. Ch., on page 393, as follows: "A court of equity will, to effectuate justice, settle unliquidated damages." See also

Coster vs. Monroe Mfg. Co., 1 Gr. Ch., 467.

Conse vs. Boyle, 3 Id., 212.

Ingersoll vs. Town of Newton, 15 Dick. Ch., 399.

Cooper vs. Wells, Sax., 10.

Berry vs. Van Winkle, 1 Gr. Ch., 269.

1 Stew. Dig., p. 374, title Equity, ss. 27, 45 and 47. 30

HENRY M. SNYDER, JR.,
Of Counsel with Respondent.





