NEW JERSEY

COURT OF

ERRORS AND APPEALS

IN THE LAST RESORT IN ALL CAUSES.

IN CHANCERY OF NEW JERSEY.

Between
EDMUND BREWER, Complainant,
and
DAVID E. MARSHALL and GEORGE CHEESMAN, Defendants.

} On Bill, &c.

A. BROWNING,
Solicitor of complainant.

J. WILSON,
Solicitor of defendant.

TRENTON:
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Chancery Building, State street.

1867.

COURT OF ERRORS AND APPEALS.

Bill of Complaint.

[Filed January 8, 1867.]

IN CHANCERY OF NEW JERSEY.

To the Honorable Abraham O. Zabriskie, Chancellor of the State of New Jersey.

Humbly complaining showeth unto your Honor, your orator, Edmund Brewer, of the township of Gloucester, in the county of Camden and state of New Jersey, that one George Cheesman—being lawfully seized in fee simple to and for his own use, of a certain farm or tract of land, situate in said township of Gloucester, containing about one hundred and twenty acres, and unusually valuable for the extensive deposits of marl under and near the surface, susceptible of being profitably excavated and disposed of for fertilizing purposes—on or about the twenty-third day of February, eighteen hundred and forty-one, by a certain indenture of conveyance of that date, duly made by himself and wife, conveyed, in fee simple, for the sum of five thousand five hundred dollars, by specific metes and bounds, two certain lots or portions thereof, to one James W. Lamb, to and for his own use; one of which portions contains, according to said indenture, forty-eight acres, and the other twelve and a half acres; in and by which indenture the said George Cheesman, for himself, his heirs, and assigns, covenanted with the said James W. Lamb, his heirs and assigns, in substance and to the effect, that he, the said George Cheesman, his heirs and assigns, would not, at any time thereafter, sell any marl by the rood or quantity, from his, the said George Cheesman's lands or premises, which were then adjoining the said portions of his said farm or tract of land which he and his said wife had, by said indenture, conveyed to said

James W. Lamb as aforesaid, as by reference to said indenture, now in the possession of your orator and ready to be produced and proven, will more fully and accurately appear.

And your orator further showeth unto your Honor, that the aforesaid adjoining lands of the said George Cheesman, mentioned and referred to in the said covenant, were all of the residue of the said farm or tract of land which remained to the said George Cheesman after his aforesaid conveyance of said two portions thereof to the said James W. Lamb; and that, before and at the time of the making of said covenant, it had been and was the established custom at and in the neighborhood of said premises, for persons owning or possessing lands underlaid with marl, usually denominated "marl beds," and engaged in the business of excavating and selling marl therefrom, to sell it, either undug by the square rood, with liberty to the purchasers to dig it out for themselves and remove it, or else such owners or possessors would themselves first excavate the marl from the beds and then sell it, thus excavated, by the ton; that this was the then well known and established mode of carrying on such business, and that the true intent and meaning of the said covenant, that the said George Cheesman, his heirs and assigns, would not, at any time thereafter, sell any marl "by the rood or quantity" from the said adjoining lands, was and is, that he and they would not, thereafter, sell or dispose of the marl in the said adjoining lands by the rood or ton, as above explained, or engage in the business of excavating, selling, or otherwise disposing of the marl therefrom, except for fertilizing purposes on his and their own lands; the design and object of said covenant being to protect the said James W. Lamb, his heirs and assigns, from competition in the business of excavating and selling marl from the lands conveyed as aforesaid to him, either by the said George Cheesman or his heirs or assigns, thereafter engaging in a similar business of excavating and selling marl from the said adjoining lands.

And your orator further showeth unto your Honor, and respectfully insists and charges that the said covenant of the said George Cheesman with the said James W. Lamb is a covenant real, running with the said adjoining lands of the

said George Cheesman, and binding not only upon him, personally, but also upon all persons claiming or to claim the said adjoining lands or any part thereof, by, from, or under him, having notice of said covenant; that the execution of said indenture of conveyance containing said covenant, on the aforesaid day of the date thereof, was acknowledged by the said George Cheesman and Priscilla his wife, before an officer authorized by law to take such acknowledgement, who made his certificate thereof in due form under said indenture, which was afterwards, on the third day of March, eighteen hundred and forty-one, within fifteen days after the execution thereof, duly recorded in the clerk's office of the county of Gloucester, at Woodbury, on page 100 of Book Y 3, of Deeds, a book duly provided for the purpose of recording deeds and conveyances of land situate in said county of Gloucester, within which the said farm or tract of land lay at the time of the execution of said indenture of conveyance, and also at the time of the said record thereof; which record, your orator respectfully insists and charges, was and is legal and sufficient notice of the existence of said covenant to all persons thereafter claiming and to claim the said adjoining lands or any part thereof, by, from, or under the said George Cheesman.

And your orator further showeth unto your Honor, that afterwards, on or about the third day of January, eighteen hundred and forty-two, the said George Cheesman, being still lawfully seized in fee simple of the aforesaid residue of said farm or tract of land, by a certain other indenture of conveyance, bearing date the day and year last aforesaid, duly made by himself and wife, conveyed in fee simple, for the further sum of sixteen hundred and fifty dollars, also by specific metes and bounds, two other lots or portions thereof, to said James W. Lamb, to and for his own use; one of which, according to said last mentioned indenture, contains seven acres, and the other one acre; that the said two lots adjoin the aforesaid lot of twelve and a half acres, and, like it, are especially valuable for the deposits of marl at and near their surface; and were purchased, as aforesaid, by the said James W. Lamb, mainly for the purpose of carrying on the business of excavating and selling marl therefrom, as aforesaid.

And your orator further showeth unto your Honor, that at the time the said George Cheesman executed the last said indenture of conveyance to the said James W. Lamb, he also duly made and executed, under his hand and seal, of like date, his bond to the said James, in the penal sum of five thousand dollars, with a condition thereunder written—after reciting, in substance, among other things, the said conveyance, and that the principal value of said lands conveyed thereby consisted in the beds of marl in or upon the same, and that there were similar beds of marl under the residue of said farm, and that the said conveyance was, with the express understanding and agreement between the said parties thereto, that neither the said George Cheesman, his heirs or assigns, nor any other person or persons having or holding the said farm should, within the term of thirty years next ensuing the said date of said bond, dig, sell, or remove off the said farm any part or parcel of marl thereon, except only so much as he or they might dig for the use of said farm, so that the same should not be sold or otherwise brought into competition with the marl of said James W. Lamb; and that for every violation of such covenant, the said George, his heirs, executors, or administrators, should forfeit and pay to the said James W. Lamb, his heirs, executors, administrators, or assigns, the sum of five hundred dollars—that if the said George Cheesman, his heirs, executors, administrators, or assigns, or any other person or persons having or holding said farm, should not, for the said term of thirty years from the date thereof, dig, sell, or remove, or suffer or permit to be dug, sold, or removed from off the said farm, any part or parcel of the said marl then being thereon, except only so much as he or they might dig for the use of said farm, so that the said marl, or any part thereof, should not be sold or otherwise brought into competition with the marl of the said James W. Lamb, his heirs, executors, administrators, or assigns, the sum of five hundred dollars for each and every violation of the said covenant, then said obligation to be void, or else to be and remain in full force and virtue; as by reference to said bond and condition thereof will more fully and accurately appear, and to which, for greater certainty, your orator prays leave to refer.

And your orator further showeth unto your Honor, that at the time of the execution of the last said indenture of conveyance, the said James W. Lamb still held and owned, in fee simple, the aforesaid two lots or portions of said farm or tract of land, the one containing forty-eight acres, and the other twelve and a half acres of land, which had theretofore been conveyed to him, as aforesaid, by the said George Cheesman and wife; and the said George Cheesman then still held and owned, in fee simple, all the residue of said farm or tract of land; and that after the execution of the last said indenture of conveyance, there remained to the said George Cheesman only so much of said farm or tract of land as he had not conveyed as aforesaid to said James W. Lamb, by both of said indentures of conveyance; and the said James W. Lamb then held and owned the said four lots, or portions thereof, which had been so conveyed to him; that the said residue of said farm or tract of land, which so remained to the said George Cheesman was still denominated his "farm," and that the condition of said bond, restraining the said George Cheesman, his heirs and assigns, for thirty years, from digging, selling, or removing, or permitting to be dug, sold, or removed from his said "farm," any marl, except for the use thereof, had reference to so much only of said farm or tract of land as then remained to him, as aforesaid; and that, as the said James W. Lamb then also held and owned, in fee simple, the whole of said four lots or portions of said farm or tract of land which had been conveyed to him as aforesaid, all of which were underlaid with deposits of marl as aforesaid; the true intent and meaning of said bond and condition thereof was to protect the said James W. Lamb, his heirs and assigns, from competition in the business of excavating and selling marl, as well from the two lots or portions of said farm or tract of land first conveyed to him as aforesaid, as from competition in the business of excavating and selling marl from the said two lots subsequently conveyed to him as aforesaid; so that, as to the said two lots or portions first conveyed to him as aforesaid, he and his heirs and assigns were protected from such competition, not only by the said covenant real in the said deed of conveyance thereof, but also by said bond and

by the indenture of mortgage securing a performance of its condition, as hereinafter next stated.

And your orator further showeth unto your Honor, that at the time of the execution of said bond and of like date therewith, the said George Cheesman duly made and executed, under his hand and seal, his indenture of mortgage or defeasible deed of conveyance, reciting the said bond and condition thereof, whereby, in consideration of the said premises and in order to secure to the said James W. Lamb, his heirs, executors, administrators, and assigns, the faithful performance of the condition thereof, and in consideration of the further sum of one dollar to him in hand paid by the said James W. Lamb, he, the said George Cheesman, conveyed unto the said James W. Lamb, his heirs and assigns, all of the aforesaid farm or tract of land which remained after the conveyances of the said four lots or portions thereof, as aforesaid, with the appurtenances, to have and to hold the same unto the said James W. Lamb, his heirs and assigns, to his and their own proper use and behoof forever; but with a proviso or condition therein contained, in substance and to the effect, that if the said George Cheesman, his heirs, executors, administrators, and assigns, and all persons having or holding the said farm under him or any of them, should, at all times thereafter during the period of thirty years, well and faithfully observe, perform, and keep the condition of said bond, and should well and truly pay unto the said James W. Lamb, his heirs, executors, administrators, and assigns, the said sum of five hundred dollars for each and every violation of the said condition, according to the true intent and meaning of the said obligation and condition thereof, that then as well the said indenture of mortgage and the estate thereby granted, as the said obligation and the condition thereof and the covenants therein contained and all agreements relating thereto, should cease, determine, and become void, as by reference to said indenture of mortgage, now in the possession of your orator as the assignee thereof, will more fully and accurately appear, and to which, for greater certainty, your orator prays leave to refer.

And your orator further showeth unto your Honor, that

afterwards, on the day of the date of said indenture of mortgage, the execution thereof was acknowledged by the said George Cheesman before an officer authorized by law to take such acknowledgment, who made his certificate thereof in due form under said indenture of mortgage, which afterwards, on the fifth day of January, eighteen hundred and forty-two, within fifteen days after the execution thereof, was duly recorded in the said clerk's office of the county of Gloucester, at Woodbury, in Book T, of Mortgages, page 82, &c., a book duly provided for the purpose of recording such conveyances of land situate in said county of Gloucester, within which the said lands thereby conveyed as aforesaid lay, both at the time of the execution of said indenture of mortgage and of the said record thereof; which record your orator respectfully insists and charges, was and is legal and sufficient notice of such conveyance to all persons thereafter claiming the said lands conveyed thereby, or any part thereof, by, from, or under the said George Cheesman.

And your orator further showeth unto your Honor, that the said James W. Lamb, on or about the eighth day of March, eighteen hundred and forty-seven, by an indenture of conveyance of that date, duly executed by himself and wife, for a full and valuable consideration therein expressed, conveyed to your orator, in fee simple, with the appurtenances, six acres, part of the aforesaid lot of twelve and a half acres, which, with other lands, had been conveyed to him by said George Cheesman and wife, by their indenture of conveyance first above mentioned, bearing date the twenty-third day of February, eighteen hundred and forty-one; and that afterwards, on or about the third day of January, eighteen hundred and forty-eight, by a certain other indenture of that date, also executed by himself (James W. Lamb) and wife, for a full and valuable consideration therein expressed, conveyed to your orator in fee simple, with the appurtenances, all the residue of the said twelve and a half acres; also, all the aforesaid lot of one acre, which the said George Cheesman and wife, by their indenture of conveyance secondly above mentioned, bearing date the third day of January, eighteen hundred and forty-two, had conveyed to said James W. Lamb; and also, about the one-sixth part

of one acre, parcel of the aforesaid lot of seven acres, which the said George Cheesman and wife, by their said last mentioned indenture, also conveyed to the said James W. Lamb as aforesaid; that at the said times of the execution of the said two indentures of conveyance by the said James W. Lamb and wife to your orator, as aforesaid, he, the said James W. Lamb, was still lawfully seized in fee simple of the said lands, conveyed or purporting to be conveyed thereby to your orator; that under and by virtue of said conveyances, your orator became lawfully seized, in fee simple, to and for his own use, of the whole of the said lot of twelve and a half acres; also of the whole of said lot of one acre; and also, of about the one-sixth part of one acre, parcel of said lot of seven acres, with all and singular the appurtenances, and that your orator is still lawfully seized and possessed thereof; that the executions of the said two indentures of conveyance to your orator, were each within fifteen days thereafter, respectively duly acknowledged by the said grantor therein mentioned, before a proper officer, who, in due form, made his certificates of such acknowledgment, and were recorded in the clerk's office of the county of Camden, (within which the said lands then described then lay), the former in Book E, of Deeds, on page 252, &c., and the latter in Book H, of Deeds, page 1, &c., as by reference thereto will more fully and accurately appear, and to which, for greater certainty, your orator prays leave to refer.

And your orator further showeth unto your Honor, that at the same time of the execution of the aforesaid indenture of conveyance by the said James W. Lamb and wife to your orator, for the said one acre lot, and for the part of said seven acre lot, bearing date the third day of January, eighteen hundred and forty-eight, the said James W. Lamb being then still the holder of the aforesaid bond and indenture of mortgage of George Cheesman to him, assigned the same to your orator by two several deeds of assignment, bearing even date with said last mentioned indenture of conveyance, one endorsed on the said bond, assigning it, and the other endorsed on said indenture of mortgage, assigning it and the said mortgaged premises therein described, and delivered said bond and mortgage, so assigned, to your ora-

tor, who still holds and owns the same, as by reference thereto and to said deeds of assignment thereon, will more fully and accurately appear.

And your orator further showeth unto your Honor, that he has been informed and believes it to be true, that after the said George Cheesman and wife had conveyed the said four lots or parcels of his said farm or tract of land to the said James W. Lamb, and the said George had also made and executed said bond and indenture of mortgage to said James, he, the said George Cheesman by one or more deed or deeds of convey- 10 ance, absolute on their face, conveyed, in fee simple, to one David E. Marshall, all or the greater part of the residue of his said farm or tract of land over and above said four lots or parcels thereof, and that said David E. Marshall, since said conveyance or conveyances to him, has been or claimed to be, and now is or claims to be, the tenant in fee simple of all or the greater portion of said residue, holding and claiming the same as the assignee of said George Cheesman, and that, as such tenant in fee, he, the said David E. Marshall, claims the right of excavating and selling at pleasure, in 20 large or small quantities, the marl in and upon the lands so conveyed to him by said George Cheesman ; and that for a long space of time, to wit, for the space of six years last past, as nearly as your orator can state, he, the said David E. Marshall, has been engaged, at intervals and seasons suitable to his own interest and convenience, in excavating and selling, and causing and procuring to be excavated and sold, by the rood and by the ton, and by other large quantity or measure, the marl in and upon the lands so conveyed to him by the said George Cheesman, to any person or persons who 30 would thus purchase the same of him ; and during that time has been thus engaged and is now engaged in the business of excavating and selling marl, at his pleasure, from said lands ; that during the whole of the said period of six years your orator has been also engaged in the business of excavating and selling marl from the lands which were conveyed to him by the said James W. Lamb, as aforesaid, and that the business, carried on as aforesaid by the said David E. Marshall during that period, has been and now is in direct competition with the business of your orator ; that such com- 40

petition has been and is greatly detrimental to the said business of your orator, and has, to a very large amount (but to what amount your orator is unable to state) lessened the profits and gains which your orator would otherwise have made and realized by his said business, and is irreparably injurious to your orator.

And your orator further showeth unto your Honor, that the residue of said farm conveyed by the said George Cheesman to the said David E. Marshall as aforesaid, is the same land from which the said George Cheesman covenanted, as aforesaid, not to sell any marl "by the rood or quantity;" and is, also, the same land conveyed as aforesaid by said George Cheesman to said James W. Lamb in said indenture of mortgage, and is bounded as follows, to wit: beginning at a corner in the middle of the public road leading from Blackwoodtown to Cross Keys, in the line of other lands of said David E. Marshall, and running from thence (1) along the middle of said road, south seventeen degrees and forty minutes east, three chains and thirty links to a corner, at an angle in said road; thence (2) still along the middle of said road, south twenty-six degrees east, sixteen chains and sixty-four links to a corner of Edmund Brewer's land, at the distance of seventy-six links from the corner of Charles Stevenson's farm; thence (3) by said Brewer's land (being the aforesaid lot of one acre owned by your orator) south seventy-three degrees and thirty minutes west, thirteen chains to a corner thereof; thence (4) north twenty degrees and thirty minutes west, eight chains and twelve links to a corner; thence (5) south sixty-nine degrees west, five chains and sixty-two links to a corner; thence (6) south forty-four degrees and fifteen minutes west, three chains and fifty links to the south branch of Great Timber creek; thence (7) down the same, the several courses thereof, to the aforesaid line of said David E. Marshall's other lands; and thence (8) by the same, north seventy-two degrees and thirty minutes east, thirty-five chains and thirty-five links to the place of beginning.

And your orator further showeth unto your Honor, that he is advised by counsel and believes, and therefore charges that the acts and proceedings of the said David E. Marshall,

in excavating and selling marl as aforesaid, are in violation as well of the said covenant real of the said George Cheesman with the said James W. Lamb, as of the condition of the said George Cheesman's bond to the said James W. Lamb, the performance of which was secured as aforesaid by said indenture of mortgage, and constitute breaches of said covenant and of the condition of said bond; and that both the said David E. Marshall and George Cheesman are severally liable, and ought, in equity, account to your orator therefor.

And your orator further showeth unto your Honor, that your orator does not know and has no means, in himself or without the accounts and disclosures, under oath or otherwise of the said David E. Marshall, of ascertaining the number or frequency of his violations of said covenant and of the condition of said bond, as aforesaid; or of the quantity of marl he has excavated and sold, or caused or procured to be excavated and sold as aforesaid; or of his gains and profits in said business, or the losses which your orator has sustained thereby; but your orator believes and therefore charges that the quantity of marl excavated and sold by said David, as aforesaid, is not less than twenty thousand tons; and that his gains and profits therefrom, with interest computed thereon, are not less than six thousand dollars; and that the losses which your orator has sustained by reason of the said David carrying on said business in competition with your orator, as aforesaid, have been and are not less than the said sum of six thousand dollars.

And your orator further showeth unto your Honor, that during the time which the said David E. Marshall has been engaged in said business, your orator has repeatedly and in a friendly manner requested him to desist therefrom; and in the hope that he would ultimately do so without your orator's resorting to legal proceedings against him, your orator has delayed instituting such proceedings until he has now become satisfied that said David has resolved on continuing his said business, and that he will continue it unless restrained by this honorable court.

And your orator further showeth unto your Honor, and expressly charges that—besides the legal or constructive

notice arising from the records of the aforesaid indenture of conveyance of the said George Cheesman and wife to said James W. Lamb, containing said covenant real and of the aforesaid indenture of mortgage or defeasible deed of conveyance of the said George to the said James—he, the said James, at time or times when the said George Cheesman made the aforesaid absolute deed or deeds of conveyance to the said David E. Marshall for all or the greater part of the residue of the aforesaid farm or tract of land, over and above the said four lots or parcels thereof which had been previously conveyed as aforesaid to the said James W. Lamb, not only did the said George Cheesman know and well remember his making and entering into said covenant real and said indenture of mortgage, but that the said David E. Marshall had actual knowledge and notice thereof, so that both he and said George then well knew that the absolute use of the said lands so conveyed by said George to said David was limited and restrained, as well by said covenant real as by said indenture of mortgage; and that since the said conveyance or conveyances to said David, to wit, on or about the fourteenth day of August, eighteen hundred and sixty-five, your orator caused a notice, in writing, signed by himself, to be served personally on the said David, to the effect that the said bond and said indenture of mortgage had been assigned to and were then held by your orator, and requiring the said David to desist from his said business of excavating and selling marl as aforesaid, and to account to your orator for the damages which he had already sustained thereby, but the said David, regardless of said notice and requirement, has since continued his said business, and declined and refused to come to any such account.

And your orator further showeth unto your Honor, that he is advised and believes, and therefore charges that the said George Cheesman is personally liable to your orator, as the assignee as aforesaid of the said James W. Lamb, for the aforesaid violation of said covenant real and of the condition of said bond; that he, the said George, as well as said David, ought to account to your orator for the aforesaid losses and damages which he has sustained thereby; and that by reason of said violation your orator's estate in the said lands, con-

veyed by said indenture of mortgage, has become and is absolute, subject to an equity of redemption in this honorable court.

And your orator well hoped that the said David E. Marshall and George Cheesman would have desisted and refrained from their unjust and unequitable proceedings, and account to your orator for all the damages sustained thereby, and would have otherwise complied with the aforesaid reasonable requests of your orator; but now, so it is, may it please your Honor, that they, the said David and George, defendants, combining and confederating with divers other persons at present unknown to your orator, (but whose names, when discovered, your orator prays may be inserted in this, his bill of complaint, with proper and apt words to charge them as defendants hereto) to injure and aggrieve your orator in the premises, not only refuse to desist from their said unjust proceedings and come to any account with your orator for the damages which he has sustained thereby, and otherwise to comply with the said reasonable requests of your orator, but pretend and deny that they, or either of them, are or is in any wise bound so to do; the contrary of which your orator expressly charges to be true.

All which actings and pretences of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator. In tender consideration whereof, and forasmuch as your orator is without adequate remedy in the premises by the strict rules of the common law, and without the assistance of this honorable court, where matters of this nature are particularly cognizable and relievable.

And to the end, therefore, that the said defendants and their confederates, when discovered, may, upon their several oath and affirmations, full, true, perfect, and distinct answers make to all and every the matters aforesaid, and that as fully as if the same were here again repeated, and they thereto particularly interrogated, and that the said David E. Marshall and all persons acting under him or by his authority, may be restrained from all further selling marl from the said lands conveyed to him by the said George Cheesman as aforesaid, by the rood, ton, or other large quantity or mea-

sure, and from digging, selling, or removing, or suffering or permitting the same to be dug, sold, or removed therefrom, except only so much as may be required for the use of said lands; and that they, the said David E. Marshall and George Cheesman, defendants, may severally be decreed to account with your orator, for all the marl which they or either of them have or hath dug, sold, or removed, or suffered or permitted to be dug, sold, or removed therefrom, except, as aforesaid, since the conveyances of the several lots of land and assignment of said bond and indenture of mortgage by the said James W. Lamb, to your orator as aforesaid, and of their gains and profits, and also of the loss and damage which your orator has sustained thereby, and by reason of any other violation of said covenant and condition of said bond; and that they may be decreed to pay to your orator, at some short day, to be assigned by this honorable court, the full amount of all such loss and damage, and interest thereon from the time and times that the same were occasioned; and in default thereof, that the said defendants, their heirs and assigns, be absolutely and forever barred and foreclosed of and from all equity of redemption of and to said mortgaged premises and every part thereof, and be decreed to surrender the same to your orator, his heirs and assigns, with all deeds and other muniments of title appertaining thereto; or else, if your Honor should think it more equitable and just, that said mortgaged premises be sold and conveyed, or so much thereof as may be necessary to pay and satisfy your orator the full amount of said loss and damage and interest thereon, with your orator's costs and charges in this behalf sustained; and that after such sale and conveyance, the purchasers thereof hold the premises so sold and conveyed free and clear of all equity of redemption in said defendants; and that for the purpose of such accounting as aforesaid, that they be required to produce all their books of account, memoranda, and other books or papers touching or concerning their said business, and necessary to a full and correct statement of such accounts; and that your orator may have such other and full relief in the premises as the nature of the case may require and may be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator not only the state's writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said David E. Marshall, his agents, servants, laborers, and all other persons acting under him or by his authority or direction, restraining them and each of them from selling marl from the aforesaid lands conveyed to him by said George Cheesman, by the rood, ton, or other large quantity or measure, and from digging, selling, or removing, or suffering or permitting the same to be dug, sold, or removed therefrom, except only so much as may be required for the use of said lands; but also the state's writ of subpœna, to be directed to the said David E. Marshall and George Cheesman, therein and thereby commanding them and each of them, at a certain day and under a certain penalty therein to be expressed, personally to be and appear before your Honor in this honorable court, then and there to answer the premises, and to stand to, abide, and perform such decree as to your Honor shall seem meet and agreeable to equity and good conscience.

And your orator will ever pray, &c.

A. BROWNING,

Solicitor for and of counsel of complainant.

State of New Jersey, county of Camden, *ss.*—Edmund Brewer, the complainant mentioned in the above bill of complaint, being of full age, maketh oath and saith—that the acts, matters, and things set forth and contained in said bill of complaint, so far as they relate to his, this defendant's acts and deeds, are true, and that so far as they relate to the acts and deeds of any other person or persons, he, this defendant, believes to be true; and this deponent further saith—that especially is it true that the said George Cheesman made and executed and acknowledged the same deeds of conveyance therein stated to have been made by him, or by him and and his said wife; and also the said indenture of mortgage and bond therein stated to have been made by him; that the said deeds of conveyance and indenture of mortgage were severally recorded (after being each duly acknowledged and certificates of such acknowledgment made

thereon) at the several times and places therein mentioned and set forth; that said bond and indenture of mortgage were each assigned to this deponent at the time and in the manner therein stated, and that he, this deponent, has ever since held the same and now holds them; that the said David E. Marshall, one of the defendant's therein named, has been engaged for the period of six years, as nearly as this deponent can state the time, in excavating and selling marl from the lands therein described, in the manner and as nearly as this deponent can state to the extent therein stated; that this deponent has notified him to desist, but that he has wholly disregarded said notice or notices, and continued to excavate and sell marl in the same manner that he had been so engaged.

EDMUND BREWER.

Sworn and subscribed at Camden, this 22d day of December, A. D. 1866, before me, one of the masters in the Court of Chancery of New Jersey.

PETER L. VOORHEES, *M. C.*

On filing the within bill and affidavit thereto annexed, let an injunction issue according to the prayer of said bill.

Dated January 8, 1867.

A. O. ZABRISKIE, *C.*

Answer.

[Filed February 8, 1867.]

In Chancery of New Jersey.

The joint and several answer of David E. Marshall and George Cheesman, defendants to the bill of complaint of Edmund Brewer, complainant.

These defendants, now and at all times hereafter saving and reserving to themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said bill of complaint contained, for answer thereto or to so much and such parts thereof as these defendants are advised it is material for them to make answer unto, they answer and say—that at or about the time in the complainant's bill in that behalf mentioned, to wit, the twenty-third day of February, in the year eighteen hundred and forty-one, and also for a considerable period prior thereto, this defendant, George Cheesman, was seized in fee to and for his own use of a certain farm or tract of land, situate in the township of Gloucester, in the county of Camden, in this state, containing about one hundred and twenty acres.

And these defendants further say, that the said farm was situate partly upon the easterly side of the turnpike road leading from Blackwoodtown to Cross Keys and partly upon the westerly side thereof; and that that portion of said farm which lies upon the westerly side of said turnpike road does, in part, front upon said road and is bounded thereby, and extends back to and bounds upon a stream of water called the South Branch of Great Timber creek, and upon a pond called Garret Newkirk's mill pond, or the "Good Intent Mill Pond," into which the said stream, in its course, runs or expands itself; that upon that portion of said farm which bounds upon the said South Branch, and which is included within the bounds of what is called the seven acre lot and the twelve and a half acre lot, which are mentioned in the complainant's bill and are hereinafter more particularly re-

ferred to, marl of a good quality and known as the "blue marl," and also other marl called "grey marl," which is much less valuable, has been found and dug in considerable quantities, but only upon the westerly part of said lots near the said stream; and the said blue marl was and is very valuable for fertilizing purposes, but the said grey marl is of so little value that some persons refuse to use it, and it is frequently given away to any one who will haul it away from the land where it is found; and there is also a marl called chocolate marl, which is of so little value that it is seldom if ever used.

And these defendants further say, that the fact of there being marl upon the said seven acre lot and twelve and a half acre lot, which were portions of said farm, did increase the value of said farm; but at the time aforesaid, when this defendant, Cheesman, owned said farm, and at the times when said two lots were severally conveyed by this defendant, George Cheesman, to James W. Lamb, as is herein after mentioned, no marl had been found or dug on said farm, except on said parts of said two lots, nor was it, at the times aforesaid, believed by this defendant, George Cheesman, or by any other person or persons, so far as he knows or believes, that marl could be found upon said farm outside of said seven acre lot and said twelve and a half acre lot, except in a few places and in small quantities, near the said seven acre lot and farther down the said stream or branch; that marl, in that section of country, had then mostly been found upon or near the streams of water, and that where the land sloped towards the stream the marl would generally be found near the surface or in a position to be easily dug out, but farther back from the stream and where the ground was higher, the marl usually was or was supposed to be so far beneath the surface as to be of little, if any value, on account of the expense of digging the same, and both of said lots do slope towards the said stream, and in receding from the stream the ground gradually rises and becomes considerably higher.

And these defendants in further answering admit, that on or about the day and year aforesaid, to wit, the twenty-third day of February, in the year eighteen hundred and forty-one, this defendant, George Cheesman and Priscilla

his wife, did, by deed bearing date on that day and for the consideration of five thousand five hundred dollars, convey in fee simple unto James W. Lamb, in the complainant's bill mentioned, two lots or tracts of land by metes and bounds, the same being portions of said farm, one a lot or tract of forty-eight acres, more or less, and the other the above mentioned lot, containing twelve and a half acres, more or less; and also the privilege to said Lamb, his heirs and assigns, of a road twenty feet wide in the clear, to be made on the land of this defendant, George Cheesman, beginning on the aforesaid road or turnpike from Blackwoodtown to Cross Keys, and to run along the line between said Cheesman and the heirs of Isaac Collins to Garret Newkirk's mill pond, herein before mentioned; that the said forty-eight acre tract lay easterly of said turnpike road, and the said twelve and a half acre lot lay upon the westerly side of said road, not adjoining upon the road, but situate about thirteen chains back from the same, and said twelve and a half acre lot extended to and bounded upon the said stream called the South Branch of Great Timber creek, and also lay immediately adjoining to the seven acre lot herein before and herein after mentioned, the northwestern boundary line of said twelve and and a half acre lot, and the southwestern boundary line of the said seven acre lot being one and the same line; that before and at the time of said conveyance, marl of the best quality and abundant in quantity, had been found or was believed to exist upon both the said twelve and a half acre lot and the said seven acre lot, but no marl, so far as these defendants know or believe, had been found upon said forty-eight acre tract, nor was any supposed to be on the same; that the said twelve and a half acre lot, or a considerable part thereof, is what is properly and usually called "marl land," that is, land which is chiefly or especially valuable on account of marl beds thereon, and the said twelve and a half acre lot is in said deed described as "marl land," but the said forty-eight acre tract is not so described.

And these defendants further say, that in the aforesaid deed of conveyance, immediately after the description therein given of the said twelve and a half acre lot and the grant

of the privilege of the aforesaid road of twenty feet wide, there occurs and is contained the following language and clause, to wit: "also, the said George Cheesman, his heirs and assigns, are not to sell any marl from off his premises adjoining the above property." And these defendants believe that this is the clause or part of said deed which, in the complainant's bill, is called "a covenant real," and whereby, as the complainant claims, though erroneously and unjustly, that this defendant, Cheesman, and his heirs and assigns, covenanted with said Lamb, and his heirs and assigns, not to sell marl from off the farm of said Cheesman.

But these defendants say, that if the said clause is to be taken as properly inserted in and as a part of said deed, that the same is not a covenant or agreement with said Lamb, his heirs or assigns, but with the said Lamb, and that any supposed breach thereof cannot be taken advantage of by the complainant, nor by any other person or persons whatever, except by said Lamb in his lifetime, or by his personal representatives after his decease.

And this defendant, George Cheesman, for himself further saith, that when he sold and conveyed said forty-eight acre lot and said twelve and a half acre lot to said Lamb, that said Lamb wanted him to agree not to sell any marl off said seven acre lot, from which part of his land only this defendant had, up to that time, dug any marl, but this defendant expressly refused to agree and never did agree with him not to do so. And this defendant says, that when he executed said deed he did not, to the best of his recollection and belief, know that the aforesaid clause or any similar clause binding him not to sell any marl off his premises adjoining said property, was inserted in said deed, and if he had known it he would not have signed it, because there was no agreement actually made between him and said Lamb to that effect; and when this defendant was afterwards told that said deed contained such clause, he was surprised and did not believe it; and this defendant says that he ought not, nor ought any other person claiming from or under him, to be bound by said clause. And further this defendant says, that the said Lamb never asked this defendant to agree not to sell any marl from off any of this defendant's lands except the said seven acre lot, from which only he, this defendant,

had been digging marl at that time, and which lay immediately adjoining said twelve and a half acre lot, which was the only marl land sold by this defendant to said Lamb, and which was the only land so sold from which said Lamb expected to obtain and sell marl, and it was only against the sale of marl from said seven and a half acre lot, against which said Lamb desired to be protected.

And these defendants further say, that they are advised and respectfully submit, that even if said clause is to be taken as properly included in said deed, and as having all the force which, by virtue thereof, it is entitled to have, yet that, under the circumstances of this case and also from the reading of said clause and the other parts of said deed, that it was meant and intended to restrain this defendant, Cheesman, his heirs and assigns, from selling marl only from the said seven acre lot, the same being immediately adjoining said twelve and a half acre lot, and being also the only part of the land of this defendant, Cheesman, from which he had before been or at that time was digging or selling marl, and there being no other part of his land from which he then expected or believed that valuable marl, profitable to dig and sell, could be obtained. And these defendants say, that said clause did not and does not apply to any other land whatever, except the said land lying immediately adjoining the said twelve and a half acre lot, to wit, to the said land now known as the seven acre lot.

And this defendant, David E. Marshall, for himself says, that he had not, until after the filing of the complainant's bill in this cause, any notice, in fact, that the aforesaid deed contained the said clause or any clause or agreement of like purport and effect; but whether or not he had notice in law, by reason of the recording of said deed, and if he had, what is the effect of said notice under the facts and circumstances of this case, are questions which he submits to the decision of this honorable court. And he further submits that, whether he had or not such notice in law or in fact, has no bearing upon the merits of this case, because, he says, as is herein before mentioned, that said clause or agreement is no wise one which can enure to the benefit of the complainant, and that the benefit of it and the

right to complain of any supposed breach of it, belong only to said James W. Lamb and his executors or administrators, and not to his heirs or assigns; and these defendants have annexed hereto a certified copy of said deed, and pray that the same may be taken as part of this, their answer, and that for greater certainty they may have leave to refer thereto.

And these defendants further say, that it has been the custom in the neighborhood of said premises, for the owners or possessors of marl lands to sell the same, either by the ton or wagon load—a two-horse load being considered a ton—or by the square rod or other larger space of ground; just as the buyer and seller of such marl might see fit to agree at the time. And these defendants do not admit, but deny that the words "by the rood or quantity," used in the aforesaid clause in said deed, have the meaning alleged in the complainant's bill, but on the contrary, they say that if said clause is to have any force or effect, it is to be taken as binding said Cheesman, his heirs and assigns, from selling marl from said seven acre lot by the rod or other larger quantity, measured off on the land, and not as binding him or them from selling the same by the ton or the load, or in small quantities.

And these defendants further say, that afterwards and on or about the fourteenth day of December, in the year eighteen hundred and forty-one, the said James W. Lamb, with Sarah his wife, did, by deed bearing date on that day and in consideration of the sum of three thousand dollars to them paid by this defendant, George Cheesman, reconvey to him, in fee, the aforesaid tract of forty-eight acres, which this defendant had conveyed to said Lamb, with said twelve and a half acre lot; that said last mentioned deed having been duly acknowledged by said Lamb and wife, the same was, on the tenth day of February, eighteen hundred and forty-two, duly recorded in the office of the clerk of said county of Gloucester, as by a duly certified copy of the record of said deed (the original thereof having been, as these defendants believe, lost or mislaid, they not being able, after diligent search, to find the same) now in the custody of these defendants, and to which they pray leave to refer, will more fully appear.

And these defendants in further answering say, that afterwards and on or about the third day of January, in the year eighteen hundred and forty-two, this defendant, George Cheesman, being still seized in fee of his said farm, (except the said twelve and a half acre lot which he had conveyed to said Lamb as before mentioned) did, together with his wife, by deed duly executed by them, dated on the day and year last aforesaid, in consideration of the sum of sixteen hundred and fifty dollars, sell and convey in fee simple unto the said James W. Lamb, by metes and bounds, the aforesaid seven acre lot, part of his said farm, and also another lot or parcel of said farm, containing one acre or thereabouts; and these defendants believe that said deed was acknowledged and recorded as in the complainant's bill is mentioned, but for greater certainty they pray leave to refer thereto.

And these defendants further say, in regard to said seven acre lot, that the same was especially valuable for the marl thereon, which, on a considerable part of said lot, was at or near the surface and could be readily dug and taken out, and they believe that said Lamb purchased said lot entirely or mainly for the purpose of excavating and selling said marl. And in regard to said lot or parcel of one acre, these defendants say that the same was a strip of land of about fifty feet wide and about thirteen chains in length, and that it was only a lane, road, or passage-way between said seven acre lot and the aforesaid turnpike road, and that it took in and included the ground, or a part thereof, over which the aforesaid road of twenty feet in width, the use of which had been granted as aforesaid to the complainant, ran between the said lot and said turnpike road.

And these defendants believe and say, that the strip or parcel of land of one acre was purchased by said Lamb solely and only for such passage-way, and in order to have one wider and more convenient than the said road of twenty feet, of which he had only the use and was not the owner in fee; and that said lane or passage-way was not marl land, nor had any marl, so far as they know or believe, been found thereon or was believed to exist thereon at that time, unless it might be at such distance below the surface as to make it of no value, on account of the labor and expense of taking

it out; that said Lamb, as they believe and say, did not buy the same as marl land nor with any expectation or desire to dig marl from the same, but only in order to have a more wide and convenient road for himself and his customers in carting marl from his said seven acre lot, and also from the said twelve and a half acre lot, which two lots lay immediately adjoining each other; that said road was in the most direct line from said seven acre lot to said turnpike, and without the same or a similar passage-way the said Lamb could not get the marl from said lot to market, and the same, ever since said Lamb purchased it, has been and still is used for the purpose of a road or passage-way, and for no other purpose whatever.

And these defendants admit, that said last mentioned deed was duly acknowledged by said Cheesman and wife, and they believe that the same was recorded as in the complainant's bill is mentioned, but for greater certainty they pray leave to refer thereto when produced.

And these defendants further say, that when this defendant, George Cheesman, sold and conveyed the said seven acre lot to said Lamb, he at the same time made an agreement with said Lamb which was meant and intended to prevent, for the period of thirty years, any marl being sold from the said farm or the residue thereof then owned by him, so as to be brought into competition in the market with the marl which said Lamb might dig or allow others to dig upon said seven acre lot, and this defendant, George Cheesman, at that time made and executed to said Lamb, as in the complainant's bill is stated, a bond in the penal sum of five thousand dollars, in order to secure the performance of said agreement, and also, together with his wife, executed to said Lamb a mortgage upon his said farm to secure the said bond, and the said agreement is stated and recited in the condition of said bond and also in said mortgage, and the condition of said bond is also recited in said mortgage, and is as follows, to wit: "Whereas, the above named George Cheesman and Priscilla his wife, by indenture bearing even date herewith, in consideration of the sum of sixteen hundred and fifty dollars, did grant and convey unto the said James W. Lamb, his heirs and assigns, all that certain lot of land

situate at or near Blackwoodtown, in the county and state aforesaid, containing seven acres, be the same more or less, being part of the farm the said George Cheesman purchased of John Swope and wife, by indenture bearing date the thirtieth day of November, in the year of our Lord one thousand eight hundred and thirty-nine, and recorded in the clerk's office of Gloucester county, in Book V 3, of Deeds, page 534; and whereas, the principal value of the said lot of land consists in the valuable beds of marl in or upon the same; and whereas, there are also divers beds of marl on the said farm purchased by the said George Cheesman of the said John Swope and wife, the quality of which is similar to that on the lot purchased by the said James W. Lamb as aforesaid; and whereas, the above mentioned sum of sixteen hundred and fifty dollars was given not only as a consideration for the said lot of land, but also for and upon the express understanding and agreement by and between the parties, that neither the said George Cheesman, his heirs or assigns, nor any other person or persons having or holding the said farm, should, within the term of thirty years next ensuing the date hereof, dig, sell, or remove, or suffer or permit to be dug, sold, or removed from off the said farm, any part or parcel of the said marl now being thereon, except only so much as he or they might dig for the use of the said farm, so that the said marl or any part thereof should not be sold or otherwise brought into competition with the marl of the said James W. Lamb; and upon the further understanding and agreement, that for every violation of the above mentioned covenant by the said George Cheesman, his heirs, executors, administrators, or assigns, or other person or persons having or holding said farm under him or under them, he, the said George Cheesman, his heirs, executors, or administrators, should forfeit and pay to the said James W. Lamb, his heirs, executors, administrators, or assigns, the sum of five hundred dollars."

And these defendants believe that said bond and mortgage were dated as in the complainant's bill is mentioned, and that said mortgage was acknowledged and recorded as therein stated, but for greater certainty they pray leave to refer thereto when produced.

And these defendants have annexed hereto a certified copy of the record of said mortgage, containing a recital of the aforesaid condition of said bond in which the said agreement is stated and recited, and they pray that the same may be taken as part of this their answer.

And this defendant, George Cheesman, further says that, according to the best of his recollection and belief, the said agreement between him and said Lamb was not otherwise reduced to writing than by stating the same in the condition of said bond and in the said mortgage, which, to the best of his knowledge and belief, are the only written evidence of the said agreement; and said bond and mortgage are stated in the complainant's bill to have been assigned to him, the said complainant, by the said Lamb; but these defendants say that they are ignorant whether the same have been so assigned or not.

And these defendants further say, that the aforesaid agreement between this defendant, George Cheesman, and the said Lamb, made at the time when he conveyed to said Lamb the said seven acre lot, and which is set forth in the condition to the aforesaid bond, was meant and intended by the parties thereto to prevent any marl which might be dug upon the lands of this defendant, George Cheesman, by him or others under him, from being sold or brought into competition in the market with the marl of said Lamb from the said seven acre lot only, and had no reference and did not extend to any marl which said Lamb might obtain from any other land or premises whatsoever; that not only was such the intent and meaning of the parties to said agreement, but as these defendants respectfully submit, it so appears from the very terms of the agreement itself, as set forth and contained in the condition of said bond and in the said mortgage. And they further submit, that the allegation of the complainant, in his bill, to the effect that said agreement extended or applied, or was by the parties to said agreement intended to extend or apply, to any other land or marl of said Lamb than the said seven acre lot and the marl obtained or to be obtained therefrom, is entirely unfounded and unjust.

And these defendants deny the allegation contained in said

bill, that at the time of the making of said agreement the said Lamb still owned the aforesaid forty-eight acre tract and twelve and a half acre lot; and on the contrary these defendants say that the said Lamb did not then own the said forty-eight acre lot, but had reconveyed the same to this defendant, George Cheesman, on the fourteenth day of December, eighteen hundred and forty-one, as is herein before mentioned, whereas the said agreement between said Cheesman and said Lamb was not made until on or about the third day of January, eighteen hundred and forty-two.

And these defendants further say, that afterwards, to wit, on or about the sixth day of September, eighteen hundred and forty-two, the said James W. Lamb agreed with this defendant, George Cheesman, to sell and reconvey to him the said seven acre lot for the sum of fifteen hundred dollars, and was about to execute a deed to this defendant, Cheesman, for that purpose, but that in running out the courses and bounds of said lot, or in examining the same, the said Lamb thought that it would be desirable for him to retain a small piece of ground in the southeast corner of said lot, inasmuch as the aforesaid lane or passage-way from said turnpike struck said lot at that place, and he, the said Lamb, wished to retain said corner piece in order to get from said lane to his said twelve and a half acre lot, and without which piece of land or some other additional land, he could not pass between said turnpike and his aforesaid lot of twelve and a half acres; that said corner piece which he wished so to retain is small and of but little value in itself, and is in shape nearly or quite a right angled triangle, the shorter leg of the same being next to said lane and about fifty feet in length, and the longer leg thereof being about twice as long, and being also a part of the line between said seven acre lot and the said twelve and a half acre lot; that said triangular piece of ground contains about one-tenth of an acre (and not one-sixth of an acre, as stated in the complainant's bill); that it is not marl land, and no marl has ever been dug or found thereon, and as these defendants believe if there is any marl beneath the surface thereof it lies so far down that it is of no value, and that the labor and expense of taking it out would exceed its value when so ob-

tained; that the said Lamb desired to retain the same merely as an addition to or extension of his said lane or passage-way to and from said turnpike, and he and those under him, including the complainant, have always so used it since the reconveyance of said seven acre lot to this defendant, Cheesman, as herein stated, and since the complainant has become the owner of said triangular piece he has built a house upon a part of the same, as herein after more fully stated.

And these defendants further say, that this defendant, Cheesman, consented that said Lamb should retain said triangular piece, and that said Lamb, with his wife, by deed dated on the day and year last aforesaid, to wit, the sixth day of September, eighteen hundred and forty-two, in consideration of the sum last aforesaid, conveyed unto this defendant, George Cheesman, in fee, the said seven acre lot (except said small piece), together with the appurtenances thereof and all the rights and privileges thereto belonging; and said deed having been duly acknowledged according to law by said grantors, the same was, on the seventeenth day of September, in the year last aforesaid, recorded in the office of the clerk of said county of Gloucester, in Book B 4, of Deeds, page 4, &c., as by said deed or a duly certified copy thereof will fully appear; and these defendants have annexed hereto a duly certified copy of said deed, and pray that the same may be taken as part of their answer, and that they may have leave to refer thereto.

And these defendants are advised and respectfully submit, that the clause or covenant contained in the deed first above mentioned, (if the same is to be taken as having been duly and properly inserted therein) was merged in and annulled by the agreement so as aforesaid made and entered into between this defendant, Cheesman, and said Lamb, which is set forth and stated in the condition of the aforesaid bond, and that by virtue of the reconveyance of said seven acre lot to this defendant, Cheesman, by said Lamb, the said last mentioned agreement, and also the said bond and the said mortgage given to secure the same, was annulled and made void, and that from and after said reconveyance of said lot to this defendant, neither the said clause nor the said agreement or the said bond and mortgage had any binding force

or validity as against him, or his heirs, executors, administrators, or assigns, or against any other person or persons who might hold said farm or any part thereof under him.

And these defendants further say, that they have heard and believe it to be true that the said James W. Lamb afterwards, and on or about the eighth day of March, in the year eighteen hundred and forty-seven, sold and conveyed a part of said twelve and a half acre lot to the complainant, being the southeasterly part thereof, and containing five or six acres, and that subsequently and on or about the third day of January, in the year eighteen hundred and forty-eight, the said Lamb sold and conveyed to said complainant the residue of said lot, being the northwesterly part thereof, and did also at the same time sell and convey to said complainant the aforesaid lane or passage-way, containing about one acre, and also the aforesaid triangular piece of ground which was excepted and reserved to the said Lamb out of said seven acre lot when he reconveyed the same to this defendant, George Cheesman, so that by virtue of said conveyances the complainant became the owner of the whole of said twelve and a half acre lot, and also the owner of said lane or passage-way and of said triangular piece of ground, which said lane and triangular piece of ground, together formed a direct and convenient road or way between said twelve and a half acre lot and said turnpike road; but as to the date and other particulars of the contents of said conveyances from said Lamb to the complainant, these defendants pray leave to refer thereto when the same shall be produced.

And these defendants state and charge the truth to be, that the said conveyances from said Lamb to the complainant of the said lots or parcels of land, were all made long after the said Lamb had, as above set forth, reconveyed to this defendant, George Cheesman, the said seven acre lot (excepting said triangular piece) and long after the deed by which said Lamb reconveyed the same to this defendant, Cheesman, had been recorded in the office of the clerk of said county; and that the complainant, before and at the time when he bought and received a conveyance of the said twelve and a half acre lot and other parcels of land aforesaid from said Lamb, had notice, both in law and in fact, that said

Lamb had reconveyed said seven acre lot (except said small corner piece) to this defendant, George Cheesman, and that the complainant also knew or might and ought to have known that by such reconveyance the said bond and mortgage, executed by this defendant, Cheesman, to said Lamb, and also the agreement therein recited and contained, had become null and void, and had no longer any binding force or validity against this defendant or any other person whatever.

And these defendants further say, that they have no knowledge, except from rumor and the statements in the complainant's bill, whether or not the said James W. Lamb assigned the said bond and mortgage to the complainant, as in the bill of complaint is set forth; but these defendants respectfully submit that such assignments, if made, were made long after the said Lamb had reconveyed said seven acre lot to this defendant, George Cheesman, and long after said bond and mortgage and the agreement therein stated and recited had, by reason of the matters herein stated, become void and inoperative, and that the complainant had notice thereof when he took the said assignments. And these defendants further submit, that the complainant has no right or claim against these defendants, or either of them, under said bond and mortgage and agreement, or either of them.

And these defendants further say, that they are advised that the said bond and mortgage ought properly to have been delivered up by said Lamb to be cancelled when he reconveyed said seven acre lot to this defendant, George Cheesman, but this defendant either did not think of it at the time or did not deem it necessary, believing that the said reconveyance of said lot effectually annulled said bond and mortgage and agreement; and the said Lamb, as these defendants have been lately informed and as they believe, very shortly after such reconveyance of said seven acre lot had been made and executed, said that he believed that this defendant, George Cheesman, had forgotten to call on him at the time of such reconveyance to deliver up said bond and mortgage to be cancelled.

And these defendants further say, that shortly after the deed for said reconveyance had been executed, this defendant,

George Cheesman, met the said Lamb and told him that he ought to give up said bond and mortgage to be cancelled, because the same, in consequence of such reconveyance, were no longer of any force or effect, and that he, this defendant, ought to have them; that the said Lamb replied that he wished to retain them until this defendant took up or paid off a mortgage which he had given to John Swope upon his aforesaid farm, before this defendant conveyed to the said Lamb the aforesaid twelve and a half acre lot, which mortgage embraced the said twelve and a half acre lot, which was a part of said farm at the time it was given, he, the said Lamb, then asserting to this defendant that the said bond and mortgage which this defendant wished to be given up to be cancelled as aforesaid, was so drawn as to give him, the said Lamb, a right to hold the same until the said Swope mortgage was paid off and discharged, because it covered, with other lands, his said twelve and a half acre lot; that this defendant, Cheesman, not then recollecting fully the particulars of said bond and mortgage, but supposing that it might be true, as said Lamb then stated that on account of some language or clause therein he had a right to retain them as security against said Swope mortgage until the same was paid off, said no more upon the subject at that time, but he has since become satisfied that such allegation on the part of said Lamb was entirely erroneous; but said Lamb did not then pretend or say that he had any right or wish to retain said bond and mortgage for any purpose, except, as he stated, to make himself secure until the said Swope mortgage was paid off.

And these defendants further say, that said Swope mortgage was not paid off while this defendant, Cheesman, owned his said farm, or the residue thereof not conveyed to said Lamb, but that the same was paid off by this defendant, David E. Marshall, after he purchased said land of said Cheesman, to wit, on the fifteenth day of April, in the year eighteen hundred and fifty-six.

And this defendant, George Cheesman, says, that immediately after the said Lamb reconveyed said seven acre lot (except said triangular piece) to him he took possession thereof as owner in fee, and as such continued to hold and

own the same until he sold and conveyed it to this defendant, David E. Marshall, as herein after stated.

And these defendants further say, that on or about the thirtieth day of March, eighteen hundred and forty-two, this defendant, George Cheesman, with Priscilla his wife, by deed dated on that day, for the sum of one thousand and fifty dollars, conveyed in fee unto this defendant, David E. Marshall, a part of the said lot of forty-eight acres, to wit, seventeen acres thereof, more or less, by metes and bounds in said deed stated, and that on the next day, to wit, the thirty-first day of March, in the year last aforesaid, this defendant, Cheesman, and his said wife, by deed dated on that day, in consideration of the sum of five hundred dollars, conveyed to this defendant, David E. Marshall, in fee, another portion, to wit, nine and a half acres of said forty-eight acre lot; which said two deeds having been duly acknowledged by said grantors, were, on the thirty-first day of March, in the year last aforesaid, recorded in the office of the clerk of the county of Gloucester, in Book Y 3, of Deeds, pages 281 and 282. That afterwards, on the eleventh day of November, eighteen hundred and forty-seven, this defendant, Cheesman, with his wife, did, by deed dated on that day, in consideration of the sum of four thousand dollars, sell and convey unto this defendant, David E. Marshall, in fee, all the residue of the said forty-eight acre lot, and the greater part, to wit, about two-thirds of the aforesaid seven acre lot (not including the aforesaid triangular piece), and also a portion of the residue of said farm; said lands so conveyed containing, together, twenty-six acres and a half, more or less, and said last mentioned deed having been duly acknowledged by the said grantors, was, on the fourth day of December, in the year eighteen hundred and forty-seven, recorded in the office of the clerk of the county of Gloucester, in Book E, of Deeds, page 456, &c.

And afterwards, to wit, on the twenty-sixth day of March, eighteen hundred and forty-nine, this defendant, George Cheesman and his wife, by deed dated on that day, for the sum of six thousand dollars, did sell and convey in fee unto this defendant, David E. Marshall, all the remainder of said farm and all the remainder of the said seven acre lot (excepting

the aforesaid triangular piece) not conveyed by or included in the above mentioned last three deeds and conveyances, containing fifty-four acres and forty hundredths of an acre, more or less, which said last mentioned deed having been duly acknowledged by the said grantors, was, on the first day of May, eighteen hundred and forty-nine, recorded in the office of the clerk of said county of Gloucester, in Book I, of Deeds, page 440. All which four deeds last above mentioned are in the custody of this defendant, David E. Marshall, and ready to be produced as this court shall direct, and to which, for greater certainty, these defendants pray leave to refer. And by virtue of said deeds this defendant, David E. Marshall, became seized in fee of the said forty-eight acre lot and the said seven acre lot (excepting said triangular piece), and all the remainder of said farm, excepting so much as had been before conveyed to said James W. Lamb, and which he had not reconveyed to this defendant, George Cheesman, as above mentioned.

And this defendant, David E. Marshall, for himself says, that when said parcels of land were conveyed to him as aforesaid, he took possession of the same, and being so seized and possessed thereof in fee, he had, as he believed and still believes, and as he respectfully submits to this court, full right and power to use the same and every part thereof, and to dig, sell, and use, and to permit others to dig and use the marl upon the same and every part thereof at his pleasure; and that he did, accordingly, at various times thereafter dig marl upon the said seven acre lot for his own use, and also sold portions thereof to other persons; and that part of what he sold was dug out by his laborers and afterwards sold by the load, and other portions was sold as it lay on the said lot, and was dug out by the persons to whom the same was sold, or under their directions.

And this defendant, David E. Marshall, further says, that the greater part of the marl which has been so dug and taken out by him or his laborers, and by the persons to whom he sold the same as aforesaid, was upon the said seven acre lot, and that after a while the said digging, as it was carried forward in its regular course, extended beyond the boundary of said lot and to the northwest of said lot, said boundary being

at that place only an imaginary line; that the marl which was so dug and taken from said lot, and the marl which was dug and taken outside of the bounds thereof, was often taken out and dug together or thrown together, and this defendant kept no account of how much was dug or taken out within the bounds of said lot, and how much was dug or taken out outside of said bounds, or how much was taken out altogether, and that he is not able to answer what quantity was so dug and taken out outside of said bounds or within the same, or what profits accrued to him therefrom; nor is this defendant able to answer at how many times such diggings have been made since he became the owner of said property, by his laborers or by persons acting under his permission or by his authority, either within or without the bounds of said seven acre lot.

And these defendants further say, that they believe and charge the truth to be, that the selling of marl as aforesaid, by this defendant, David E. Marshall, from his said premises, has in no wise interfered with the business of the complainant, or with his selling marl from his said lands; that the demand for marl at that place has been and is greater than the complainant has supplied, and as these defendants believe and charge, the complainant has not sold any less quantity of marl than he would have sold if no marl whatever had been sold by this defendant, Marshall, from his said premises; but these defendants submit that even if said Marshall's selling said marl has had the effect to diminish the sales of the complainant, yet that said Marshall was pursuing a lawful business in a lawful manner, and that the complainant had no just ground to complain thereof.

And these defendants further say, that they are advised and respectfully submit that even if it were true, as in the complainant's bill is unjustly alleged, that these defendants are bound by the agreements in said bill mentioned not to dig or sell, or permit to be dug or sold, any marl upon said lands, except such as is necessary for the use of said premises and intended to be used thereon, and even if these defendants or either of them, have violated said agreements, and the complainant has, on that account, a claim against them, (which these defendants do not admit, but deny,) yet that it

is a claim for damages and is strictly a legal claim, and that his proper remedy is by suit in a court of law and not in this court, and that the pretended injury to him is not irreparable, as in his bill is alleged. And these defendants say, that they are and each of them is able to pay all damages which the complainant may recover at law by reason of any alleged violation of said agreements, or either of them. And these defendants, therefore, further submit, that the complainant's bill should, for these reasons, be dismissed from this court and he should be left to his remedy at law, and they pray that they may have the same benefit and advantage of this objection, as if the same had been taken by way of plea or demurrer to said bill of complaint.

And this defendant, David E. Marshall, further answering for himself says, that after the complainant claimed to have received from said Lamb a conveyance of said twelve and a half acre lot, but at what particular time this defendant does not recollect, the complainant stated to this defendant verbally, that he, the complainant, believed that this defendant had no right to sell any marl from his said premises outside of said seven acre lot, and that this defendant was prevented from doing so under the agreement so as aforesaid made between said Cheesman and Lamb, which is stated in the condition to the aforesaid bond, and also in the mortgage accompanying said bond, but this defendant did not admit, but on the contrary denied to the complainant that he was so prevented by said agreement. And this defendant afterwards consulted counsel learned in the law touching his rights as owner of said lands and his right to sell marl from the same, who advised this defendant that said agreement was not binding upon him and that he had full right to sell said marl at his pleasure. And this defendant, relying upon such advice of his counsel which he respectfully submits was correct, believed and still believes that, as owner in fee of said premises, he had and has full right to dig, use, and sell the marl upon the same as he may see fit, and he has used said premises accordingly, and has from time to time sold marl therefrom as he deemed proper, until he was restrained by the injunction issued in this cause.

And this defendant further says, that it is true that a notice

in writing, signed or purporting to be signed by said complainant, and dated the second day of February, eighteen hundred and sixty-five, was served upon this defendant on or about the fourteenth day of August in the same year, which notice is as follows, to wit:

"To David E. Marshall, esquire.

"Sir—You will please take notice that you are hereby requested to desist from digging, selling, or removing, and from suffering or permitting to be dug, sold, or removed, any marl now being on or in any part or parcel of that certain farm situate in the township of Gloucester, in the county of Camden, and state of New Jersey, which was conveyed to you by a certain deed of conveyance of George Cheesman and wife, bearing date the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and forty-nine, except for the use of said farm, according to the condition of a certain bond of the said George Cheesman to James W. Lamb, esquire, in the penal sum of five thousand dollars, bearing date the third day of January, eighteen hundred and forty-two, and conditioned, among other things, that he, the said George Cheesman, his heirs or assigns, shall not, within thirty years next after the date of said bond, dig, sell, or remove, or suffer or permit to be dug, sold, or removed from off said farm, any marl then thereon, except for the use of said farm; the performance of the condition of said bond by the said George Cheesman, his heirs and assigns, being secured by a certain indenture of mortgage on said farm of like date with said bond, made by the said George Cheesman to the said James W. Lamb, and of record in the clerk's office of the county of Gloucester, at Woodbury, in Book T, of Mortgages, on page 82, &c., of which bond and mortgage I am the lawful holder as the assignee of the said James W. Lamb; and you will please further take notice, that I do hereby also require you to account for and pay to me all damages which I have already sustained by reason of your having heretofore dug, sold, and removed, and suffered and permitted to be dug, sold, and removed from off said farm, marl other than for the use thereof, in violation of the said condition of said bond. Dated February 2d, 1865.

"EDMUND BREWER."

As in and by said notice, now in the custody of this defendant and ready to be produced, and to which he refers, will fully appear.

And this defendant further saith, that after the service of said notice he did, under the advice of his counsel, continue to dig, use, and sell said marl from time to time, as he respectfully submits he had the right to do.

And this defendant, David E. Marshall, further saith, that at the time of the aforesaid conversation between the complainant and this defendant, he the complainant, did not allege or pretend that this defendant was bound by any covenant or clause whatever, contained in the first above mentioned deed from said Cheesman and wife to said Lamb, not to sell any marl from the lands purchased by this defendant from said Cheesman, and so far as this defendant, David E. Marshall, knows or believes, the said complainant never did, before he filed his bill of complaint in this cause, set up or pretend that any covenant or agreement whatever which had been made between said Cheesman and said Lamb, operated upon this defendant, David E. Marshall, so as to bind him not to sell marl from the lands purchased by this defendant of said Cheesman, except only the agreement which was made and entered into when said Cheesman sold and conveyed to said Lamb the said seven acre lot.

And these defendants further say, that not only is the aforesaid triangular piece of ground, which was excepted out and retained by said Lamb when he reconveyed the said seven acre lot to this defendant, George Cheesman, not what is usually and properly called "marl land," (though there may be deposits of marl far beneath the same, and too deep down to be dug to any profit) but neither this defendant, George Cheesman, while he owned the same, nor the said Lamb, while he owned it, nor the said complainant, since he became the owner thereof, ever dug or attempted to dig any marl therefrom, so far as these defendants know or believe; and since the said complainant became the owner thereof, and as nearly as these defendants can recollect, about eighteen years ago, the said complainant erected a substantial two story dwelling-house upon the same, and said house is still standing thereon, and is occupied by the complainant or his tenant.

And these defendants further say, that the courses and distances set forth in the complainant's bill as the bounds of what in said bill is called "the residue of said farm conveyed by the said George Cheesman to the said David E. Marshall," and as being the same land from which the said Cheesman covenanted not to sell any marl by the rood or quantity, as is alleged in said bill, and also as being the same land conveyed by said Cheesman to said Lamb in and by the aforesaid mortgage, are not correctly set forth and are not the true bounds of said lands, but are erroneous in important particulars, as these defendants believe and as will appear by the aforesaid deeds and by said mortgage when the same shall be produced, and to which these defendants, for greater certainty, refer.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are charged in and by the said bill, without this, that there is any other matter, cause, or thing in the said bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, and avoided, traversed or denied, is true to the knowledge or belief of these defendants. All which matters and things these defendants are ready to maintain and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

J. WILSON,

Solicitor for and counsel with defendants.

State of New Jersey, *ss.*—David E. Marshall and George Cheesman, the defendants named in the foregoing answer, severally alleging themselves to be conscientiously scrupulous of taking an oath, and being severally duly affirmed upon their respective affirmations say, that the facts, matters, and things in the foregoing answer set forth and contained, so far as they relate to their respective acts and deeds, are true, and so far as they relate to the acts or deeds of any other person or persons they believe the same to be true.

DAVID E. MARSHALL,
GEORGE CHEESMAN.

Affirmed and subscribed, this fourth day of February, A. D. 1867, before me.

F. KINGMAN, *M. C.*

An abstract of a mortgage from George Cheesman, of Blackwoodtown, in the county of Gloucester, and state of New Jersey, to James W. Lamb, esquire, of the same place, dated the third day of January, in the year of our Lord one thousand eight hundred and forty-two.

Whereas, the said George Cheesman, in and by one certain obligation or writing obligatory under his hand and seal, duly executed and bearing even date herewith, doth stand bound unto the said James W. Lamb, esquire, in the sum of five thousand dollars, current lawful money of the United States, with a condition thereunder written as follows: "Whereas, the above named George Cheesman and Priscilla his wife, by indenture bearing even date herewith, in consideration of the sum of sixteen hundred and fifty dollars, did grant and convey unto the said James W. Lamb, his heirs and assigns, all that certain lot of land situate at or near Blackwoodtown, in the county and state aforesaid, containing seven acres, be the same more or less, being part of the farm the said George Cheesman purchased of John Swope and wife, by indenture bearing date the thirtieth day of November, in the year of our Lord one thousand eight hundred and thirty-nine, and recorded in the clerk's office of Gloucester county, in Book V 3, of Deeds, page 534; and whereas, the principal value of the said lot of land consists in the valuable beds of marl in or upon the same; and whereas, there are also divers beds of marl on the said farm purchased by the said George Cheesman of the said John Swope and wife, the quality of which is similar to that on the lot purchased by the said James W. Lamb as aforesaid; and whereas, the above mentioned sum of sixteen hundred and fifty dollars was given not only as a consideration for the said lot of land, but also for and upon the express understanding and agreement by and between the parties, that neither the said George Cheesman, his heirs or assigns, nor

any other person or persons having or holding the said farm should, within the term of thirty years next ensuing the date hereof, dig, sell, or remove, or suffer or permit to be dug, sold, or removed from off the said farm, any part or parcel of the said marl now being thereon, except only so much as he or they might dig for the use of the said farm, so that the said marl or any part thereof should not be sold or otherwise brought into competition with the marl of the said James W. Lamb; and upon the further understanding and agreement, that for every violation of the above mentioned covenant by the said George Cheesman, his heirs, executors, administrators, or assigns, or other person or persons having or holding the said farm under him or under them, he, the said George Cheesman, his heirs, executors, or administrators, should forfeit and pay to the said James W. Lamb, his heirs, executors, administrators, or assigns, the sum of five hundred dollars. Now therefore the condition of the above obligation is such, that if the above bound George Cheesman, his heirs, executors, administrators, or assigns, or other person or persons having or holding the said farm, shall not, for the said term of thirty years from the date hereof, dig, sell, or remove, or suffer or permit to be dug, sold, or removed from off the said farm any part or parcel of the said marl now being thereon, except only so much as he or they may dig for the use of the said farm, so that the said marl or any part thereof shall not be sold or otherwise brought into competition with the marl of the said James W. Lamb, and shall also pay to the said James W. Lamb, his heirs, executors, administrators, or assigns, the sum of five hundred dollars for each and every violation of the above written covenant, then the above obligation to be void, otherwise to be and remain in full force and virtue." As by the said obligation and condition thereof, reference being thereunto had, will more fully appear. Now this indenture witnesseth, that the said George Cheesman, in consideration of the premises and in order to secure to the said James W. Lamb, his heirs, executors, administrators, and assigns, the faithful performance and fulfilment of the above written covenants and agreements, and in consideration of the sum of one dollar to him in hand paid by the said James

W. Lamb at or before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, release, convey, and confirm unto the said James W. Lamb, his heirs and assigns, all that certain plantation and tract or piece of land and premises situate at or near Blackwoodtown, in the county and state aforesaid, whereon the said George Cheesman now lives, consisting of three several tracts or pieces of land, one containing ninety acres, with allowance for highways, one other containing twelve acres, one rood and twenty perches, strict measure, and the other containing sixteen acres, three roods and three perches, be the same more or less; being the same plantation and premises that the said George Cheesman purchased of the said John Swope and wife, by the deed herein before mentioned, excepting out of this mortgage such parts of the said plantation as has been heretofore conveyed by the said George Cheesman, together, &c., to have, &c., provided, &c.

Recorded January 5th, A. D. 1842.

HENRY BRADSHAW, *Clerk.*

State of New Jersey, Gloucester county, *ss.*—I, Josiah S. Franklin, clerk of the county of Gloucester aforesaid, do hereby certify the foregoing to be a true copy of the abstract of mortgage between the parties therein named, as of record in my office in Book T, of Mortgages, page 82, &c.

Witness my hand and official seal, this twenty-fifth day of January, A. D. eighteen hundred and sixty-seven.

[L. S.] J. S. FRANKLIN, *Clerk.*

This indenture, made the sixth day of September, in the year of our Lord one thousand eight hundred and forty-two (1842), between James W. Lamb, of Blackwoodtown, in the township and county of Gloucester, and state of New Jersey, and Sarah G. his wife, of the first part, and George Cheesman of the same township, county, and state aforesaid, of the second part, witnesseth, that the said party of the first part,

for and in consideration of the sum of one thousand five hundred dollars, lawful money well and truly paid by the said party of the second part to the said party of the first part, at or before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, convey, and confirm unto the said party of the second part and to his heirs and assigns, all the following described tract or piece of land, situate in the township of Gloucester, in the county of Gloucester, and state of New Jersey, and is bounded as follows: beginning at a stake, corner to the said George Cheesman's land and standing in the course of south twenty degrees and thirty minutes east, fifty feet from a stone corner to Charles Stevenson and the said James W. Lamb, thence (1) by said Cheesman's land north twenty degrees and thirty minutes west, eight chains and twelve links to a stake, corner to said Cheesman; thence (2) south sixty-nine degrees west, five chains and sixty-two links to a corner; thence (3) still by said Cheesman south thirty degrees and thirty minutes west, four chains more or less to Garret Newkirk's mill pond; thence (4) up the said mill pond the several courses thereof to a corner in the pond formerly corner to lot No. 1 in the division of the Hedger property, being the same lot which was assigned to Joseph Hedger in said division; thence (5) by the said James W. Lamb's other land north seventy degrees east, five chains; thence (6) north fifty-five degrees east, three chains to the place of beginning, containing seven acres of land, be the same more or less, being a part of the same piece of land which the said George Cheesman and wife conveyed to the said James W. Lamb, by deed dated January 5th, 1842. Recorded at Woodbury, in the clerk's office of said county, Liber Y 3, of Deeds, page 100. Reference to the same being had will fully appear. Together with all and singular the buildings, improvements, rights, liberties, privileges, hereditaments, and appurtenances to the same belonging or in anywise appertaining, and the reversions and remainders, rents, issues, and profits thereof, and of every part and parcel thereof; and also all the estate, right, title, interest, property, possession, claim, and demand

whatsoever, both in law and equity of the said party of the first part, of, in, and to the said premises, with the appurtenances; to have and to hold the said premises, with all and singular the appurtenances unto the said party of the second part, his heirs and assigns, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns forever; and the said party of the first part, for themselves, their heirs, executors, and administrators, do hereby covenant, grant, and agree to and with the said party of the second part, his heirs and assigns, that they now have good right, full power, lawful and absolute authority to grant and bargain and sell the said premises to the said party of the second part, as an absolute and indefeasible estate of inheritance in fee simple, and that it shall and may be lawful for the said party of the second part, his heirs and assigns, at all times forever hereafter peaceably and quietly to have, hold, use, occupy, possess, and enjoy the said premises, with all and singular the appurtenances, without the lawful let, suit, trouble, denial, molestation, or interruption of the said party of the first part, their heirs or assigns, or any other person or persons whatsoever lawfully claiming the same; and that free and clear and freely and clearly acquitted and discharged of and from all mortgages, judgments, executions, and of and from all other encumbrances whatsoever, the said party of the first part, their heirs, executors, and administrators, the said premises, with all and singular the appurtenances, unto the said party of the second part, his heirs and assigns, against the claim and demand of all and all manner of persons whatsoever claiming the same, will warrant and forever defend by these presents. In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

JAMES W. LAMB. [L.S.]
SARAH G. LAMB. [L.S.]

Sealed and delivered in the presence of

EDWARD TURNER.

Before me, the subscriber, one of the commissioners for taking the acknowledgments and proof of deeds, &c., of the

county of Gloucester, in the state of New Jersey, personally appeared James W. Lamb and Sarah G. his wife, the grantors named in the above conveyance, and did acknowledge that they signed, sealed, and delivered the same as their voluntary act and deed, the contents thereof having been first made known to them by me, and I being satisfied that they are the grantors mentioned in the said deed; and the said Sarah G. Lamb, on a private examination apart from her husband, acknowledged that she signed, sealed, and delivered the same as her voluntary act and deed freely, without any fear, threats, or compulsion of her said husband. Acknowledged before me this sixth day of September, anno domini 1842.

EDWARD TURNER.

Recorded September 17th, 1842.

BRADSHAW, *Clerk.*

State of New Jersey, Gloucester county, *ss.*—I, Josiah S. Franklin, clerk of the county aforesaid, do certify the foregoing to be a true copy of the deed between the parties therein named, as of record in my office in Book B 4, of Deeds, page 4, &c.

Witness my hand and official seal, this 23d day of January, A. D. 1867.

J. S. FRANKLIN, *Clerk*

Affidavits.

[Filed April 30, 1867.]

State of New Jersey, Camden county, *ss.*—Edward Turner, of Blackwoodtown, in said county, being of full age, alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, on his solemn affirmation saith—that he, this affirmant, is now and for many years last past has been a practical surveyor and scrivener, and drew the indenture of conveyance of George Cheesman and Priscilla his wife to James W. Lamb, for two tracts or pieces of land, one of forty-eight acres, and the other of twelve and a half acres, situate in the township of Gloucester, in said county, bearing date the twenty-third day of February, eighteen hundred and forty-one, mentioned in the bill of complaint in the above stated cause, and is the sole subscribing witness thereto; and that after the execution of said indenture and on the same day of the date thereof, he, this affirmant, as commissioner for taking acknowledgment and proof of deeds, took the acknowledgment of the execution thereof by the said grantors, and made and subscribed a certificate of such acknowledgment at the foot of said indenture, as by reference thereto (the same being now before this affirmant) will more fully appear; that he, this affirmant, well remembers the drawing and execution of said indenture, and was then and ever since has been well acquainted with the lands described therein and conveyed thereby; that preparatory thereto, and as this affirmant believes, on the same day of the date thereof, he surveyed the said tract or piece of forty-eight acres, but not that of twelve and a half acres; that this affirmant drew the said indenture of conveyance in the store-house of this affirmant, in the presence of both the said George Cheesman and James W. Lamb, and in consultation with them in the drawing thereof, and well remembers that the clause in said deed in the following words, "also the said George Cheesman, his heirs or assigns, are not to sell any marl by the rood or quantity from off his premises adjoining the above property," was inserted therein by the express

agreement of the said George and James, in the presence and hearing of this affirmant and by their express direction after such agreement, and that both the said George and James then well knew that said clause was inserted in said indenture, and the same was executed by said George with a full knowledge thereof; that at the time of the execution of said indenture and for a long time before, the said George was and had been engaged in excavating and selling marl on his adjoining lands, northwardly of the said twelve and a half acre tract or piece, and within a lot of seven acres subsequently conveyed by said George and wife to said James, by deed bearing date the third day of January, eighteen hundred and forty-two, which was also drawn, witnessed, and acknowledged by and before this affirmant, and that although the said covenant or agreement not to sell marl "by the rood or quantity" contained in said indenture, had reference to all the adjoining lands of the said George, as this affirmant understood, yet that said covenant had special reference to that part of said lands where the said George had been engaged in excavating and selling marl as aforesaid, not then enclosed, but forming, generally, a part of said adjoining lands—and was especially intended to prohibit a continuance of such excavation and sale except in small quantities, as this affirmant well knows from a recollection of the conversations and agreements between the said George and James in the presence and hearing of this affirmant, at the time this affirmant drew said indenture as aforesaid, and at the time of the execution thereof.

And this affirmant further saith, that he is well acquainted with the small triangular piece of land, part of said seven acre lot, which in said bill of complaint is said to contain about the one-sixth part of an acre, and in the answer thereto is said to contain only about the one-tenth part of an acre, and on several occasions have surveyed the same; that it does contain only about the one-tenth of an acre as stated in said answer, that the same is underlaid with marl, having only about six or seven feet of soil above it; that the said marl can be very profitably excavated, and that said lot is valuable for the marl so contained in it; that as evidence of this fact, this deponent, about three or four years ago, drew

a lease for about three-fourths of an acre of land immediately adjoining the said lot on the northerly side thereof, whereby said David E. Marshall, in consideration of one thousand dollars, leased said three-fourths of an acre to Joseph Coles for seventy years, with the privilege of digging and removing the marl therefrom, and afterwards this affirmant witnessed the execution of said lease by said David to said Joseph; and that since the execution of said lease the said Joseph has been engaged and is now engaged in the excavation and sale of marl therefrom in large quantities; and has excavated the same up to and about one-third of the way along said northerly line, from the westerly end thereof; and that, in the opinion of this affirmant, the said lot of one-tenth of an acre is equally valuable for marl alone, in the ratio of its size, as the said lot of three-fourths of an acre.

EDWARD TURNER.

Affirmed and subscribed at Camden, this twenty-fifth day of March, A. D. 1867, before me, one of the masters in chancery of New Jersey.

PETER L. VOORHEES, *M. C.*

[Filed April 30, 1867.]

State of New Jersey, Camden county, *ss.*—Edward Turner, of Blackwoodtown, in said county of Camden, being of full age, and alleging himself to be conscientiously scrupulous of taking an oath, and being duly affirmed, on his solemn affirmation saith—that he is the same Edward Turner who made an affidavit in the above stated cause on the twenty-fifth day of March last, before Peter L. Voorhees, esquire, one of the masters in chancery of New Jersey; that since making the said affidavit, and on or about the first day of this present month of April, at the request of Abraham Browning, counsel of the complainant in said cause, he, this affirmant, in part from actual survey and in part from the deeds of conveyance mentioned and referred to in the bill

and answer in said cause, (copies of which, with said deeds, were loaned to this affirmant for that purpose by said counsel) made a map of the lands mentioned and referred to in said bill and answer, on which map, for the purpose of identifying the same, this affirmant has written as follows, *viz.*: "Map mentioned in my affidavit, made the sixth day of April, A. D. 1867," and subscribed the name of this affirmant thereto; that the said map, with the notes and memoranda thereon in the handwriting of this affirmant—the writing of no other person than of this affirmant being thereon—with substantial accuracy represents said lands. And this affirmant further saith, that the line thereon painted blue represents the marl bank up to which the excavations of marl have already been made from the southward and westward of said line.

And this affirmant further saith, that from a long and intimate knowledge of said lands, derived from surveying them, and residence in the immediate neighborhood, this affirmant well knows that in the month of January, eighteen hundred and forty-two, when the deed for seven acres (called in said pleadings the seven acre lot) was made by George Cheesman and wife to James Lamb, and also when the bond and mortgage mentioned in said pleadings were also made by said George to said James, there was no fence or visible boundary to said lot to distinguish it from the adjacent lands, except on the south side thereof; nor is there now any such visible fence or other boundary, and so far as this affirmant knows and believes, there never has been.

And this affirmant further saith, that he has no doubt the whole farm of one hundred and twenty acres mentioned in said pleadings, called the "Swope farm," is underlaid with marl, lying from one to ten feet below the surface, and that most if not all of said marl can be advantageously and profitably excavated and sold; that the line of excavation has already, in two places, approached very nearly to the eastwardly boundaries of the said seven acre and the twelve and a half acre lots mentioned in said pleadings, and will, apparently, soon be extended over those boundaries into the residue of said farm, the land of which, as to marl, as far as this affirmant can judge from appearances, is about the same

at said boundaries—the marl, perhaps, lying somewhat deeper below the surface.

EDWARD TURNER.

Affirmed and subscribed at Camden, this sixth day of April, A. D. 1867, before me, one of the masters in chancery of New Jersey.

JAMES B. DAYTON, *M. C.*

Opinion.

The injunction in this case restrains the defendant, Marshall, from selling or removing from the farm conveyed to him by the defendant, Cheesman, known as the Swope farm, any marl, and from digging any marl on it except for the use of the farm. The defendants have filed their answer and move to dissolve the injunction.

The defendant, Cheesman, was, in 1841, seized of a farm in the county of Gloucester, known as the Swope farm, on which there was valuable beds of marl. On the 23d of February, in that year, he conveyed to James W. Lamb two tracts of that farm, one a tract of forty-eight acres, lying east of the Cross Keys road which divided the farm, and another of twelve and a half acres, lying west of the road on Great Timber creek, and which, in the deed, is described as "twelve acres and a half of marl land." The deed grants a right of way over a strip twenty feet in width from the road to the creek along the marl lot, and contains, in the description of the premises after the description of the way, these words: "Also the said George Cheesman, his heirs or assigns, are not to sell any marl, by the rood or quantity, from off his premises adjoining the above property."

On the fourteenth of December, in the same year, Lamb conveyed back to Cheesman the forty-eight acre lot. On the third of January, 1842, Cheesman conveyed to Lamb another part of the Swope farm, in two lots. One was a lot of seven acres adjoining the creek and north of and adjoining the twelve and a half acre lot. The other was a strip of one

acre, leading from the seven acre lot eastwardly to the road, and including the land over which the right of way had before been granted. On the same day Cheesman executed to Lamb a bond in the penalty of five thousand dollars, secured by a mortgage on part of the Swope farm not conveyed; the conditions of the bond and mortgage (which were both in the same words), contained this recital: That Cheesman, in consideration of one thousand six hundred and fifty dollars, had, by deed of the same date, conveyed to Lamb a lot of seven acres, part of the Swope farm. That the principal value of said lot consisted in the valuable beds of marl upon it. That there were divers like beds of marl upon the residue of the Swope farm; that said sum was paid not only as the consideration for said lot, but upon the express agreement between the parties that neither Cheesman, his heirs or assigns, nor any other person holding said farm, should, within thirty years from the date, dig, sell, remove, or suffer to be dug, sold, or removed from off the said farm, any part or parcel of the marl thereon except for the use of the farm, so that the said marl, or any part thereof, should not be sold or otherwise brought into competition with the marl of the said James W. Lamb;" and upon the further agreement that for any violation of said covenant by the said Cheesman, his heirs, executors, administrators, or assigns, or other persons holding said farm under him or them, said Cheesman, his heirs, executors, or administrators, should pay to said Lamb, his heirs, executors, administrators, or assigns, the sum of five hundred dollars. The condition was, that if they did not so dig or sell, and if they paid up such penalties the obligation and mortgage should be void.

On the sixth of September, 1842, Lamb conveyed back to Cheesman the seven acre lot, except a triangular part containing about one-tenth of an acre, retained to give access from the one acre strip (used as a way) to the twelve and a half acre lot, this being the means of communication from that lot to the Cross Keys road.

Lamb conveyed the twelve and a half acre lot, the one acre used for a way, and the tenth of an acre reserved from the seven acre lot to the complainant, Brewer, by two deeds, one dated March 3d, 1847, the other dated January 3d, 1848;

the last deed conveyed the one acre used as a road, and the tenth of an acre reserved from the seven acre lot, and on the same day Lamb assigned to Brewer the bond and mortgage given to him by Cheesman.

Cheesman, by four deeds made at different times, conveyed to the defendant, Marshall, the rest of the Swope farm not conveyed to Brewer.

Both the defendants have at different times dug, removed, and sold from the seven acre tract and other parts of the Swope farm, marl by the ton and measured quantity, since 1842, and the defendant, Marshall, was continuing to do so until the injunction.

These facts appear by the bill and are admitted by the answer.

The complainant insists that the clause in the deed of 1841, and the agreement recited in the bond and mortgage from Cheesman to Lamb, are real covenants running with the land. That he, as the assignee of Lamb and the owner of the lands conveyed to him, is entitled to the benefit of these covenants, and that Marshall, as the assignee of the land to which they relate, held by Cheesman at the making of them, holds that land subject to the burthen of these covenants and is bound to observe them.

Upon the correctness of these positions the whole question of the injunction depends. If the covenants do not run with the land conveyed to Brewer, he, as assignee, cannot have the advantage of them. And if the burthen of them does not run with the land conveyed to Marshall, he is not bound by them. In either case the injunction against Marshall ought not to be retained.

There has been much discussion in the courts as to what covenants or agreements are real covenants and run with the land, so that the assignee or heir of the land can take advantage of them; and as to what covenants run with the the land burthened by them, so that the assignee or heir takes the land subject to the burthen.

Both of the covenants in this case are valid as personal covenants. Lamb could maintain a suit against Cheesman for their violation and could recover his damages. For the purpose of this motion we may admit that the mortgage is valid as

against Marshall, he took title subject to it, and his lands are liable, in case of forfeiture, by breach of condition. But the injunction does not depend upon that question; for such damage, Brewer, as assignee, must look to a foreclosure and sale. The injunction can only be maintained on the ground that the agreement in the recital is a covenant real, running with the land.

The leading case on this subject is Spencer's case, reported in 5 *Rep.* 16, and printed and commented on in 1 *Smith's Lead. Cases* 115. There Spencer demised a house and lot to S. for years. S. covenanted for himself, his executors, and administrators, that he, his executors, administrators, or assigns, would build a brick wall on part of the land demised. S. assigned the term to J. and J. to Clark. Spencer sued Clark for a breach of the covenant to build the wall. The court, by the first resolve, held that a covenant only bound the assignee when it was concerning a thing *in esse*, parcel of the demise, not when it related to a wall to be built. By the second resolve, they held that if the covenant had bound the assigns by express words that it would have bound the assignee, although it was for a thing to be newly made, as it was to be, upon the thing demised. But that if the covenant was for a thing to be done collateral to the land, and did not touch or concern the thing demised in any sort, as if it were to build a house upon other lands of the lessor, the assignee should not be charged, although the covenant was for the covenantor and his assigns.

The two principles thus settled have always been acknowledged as law, that the assignee, when not named, is not bound by a covenant, except it relates to a thing *in esse* at the time, and that when named he is not bound by a collateral to the land, but only for things to be done on or concerning the land.

The case of *The Mayor of Congleton* v. *Pattison*, 10 *East.* 130, confirms these positions. In that case the plaintiffs demised to Clayton, mills in Congleton; he covenanted for himself and assigns to hire no one to work in the mills but inhabitants of Congleton. Clayton assigned to Pattison, who was sued on the covenant. Although the thing to be done was on the premises demised, yet as it did not affect

the use of them, but only the value of other lands of the lessors in Congleton by relieving them of an increase of poor rates, the court held the assignee was not bound. To the same effect is *Keppell* v. *Bailey*, 1 *Mylne & Keene* 517; *Hurd* v. *Curtis*, 19 *Pick.* 459, and many other cases that will be found in the notes to Spencer's case in *Smith's Leading Cases.* In this case the covenant, though not to be performed on the twelve acre lot, is yet alleged to be touching or concerning it, and therefore may be held to pass to the assignee of that lot. It is true that selling marl from the rest of the Swope farm would not affect the twelve acre lot or its use or enjoyment, but it might affect the market value of the marl dug from it.

The application of the rule in Spencer's case naturally divides itself into two classes of cases. One, when the premises conveyed or demised are sold or assigned by the covenantee, and the question is, whether the covenant passes to such assignee as running with the land. The other class is, when the covenantor sells or assigns his interest in the lands, and the question is, whether the burthen of the covenants is impressed upon the land and passes with it and binds the assignee of the covenantor. And although in this case it may be held that the covenant of Cheesman runs with the land sold to Lamb and passed to Brewer, so that he is entitled to sue Cheesman for a breach, yet it is a very different question whether the burthen of it is impressed upon the land retained and sold to Marshall, and the obligation of it assumed by him on the purchase of the land from Cheesman.

The result of their review of the authorities and cases on this point is stated by the English and American editors of Smith's Leading Cases in their notes on Spencer's case, and I think give scorrectly the law upon it. The English editor says, on page 123, "By the common law, except in the case of landlord and tenant, the burthen of covenants does not run with the lands, though the benefit does." And again, on page 125 "With respect to covenants entered into by the owners of the land, great doubt exists whether these, in any case, run with the land so as to bind the assignees of the covenanter." And on page 133, "Upon the whole there appears to be no

authority for saying that the burthen of a covenant will run with the land in any case, except that of landlord and tenant." The American editors say, on page 144, "On the whole, therefore, we may infer that the burthen of covenants charging land made by the owner with an entire stranger to the land so charged, will not run with the land at law, nor rest upon the parties taking it by assignment, even where the covenantee takes, by virtue of the deed containing the covenant, an estate in other and distinct land belonging to the covenantor."

This rule does not apply to the liability of the assignee of a term to pay the rent reserved; rent, by its definition, issues out of the land, and it is made a charge upon it by the lease, without any covenant to pay it, and does not depend upon the covenant. But it has been held to apply to an after made covenant to pay the rent free from taxes. In *Brewster* v. *Kitchell*, 12 *Mod.* 166, Lord Holt said "that if it was a grant of the rent it would be another matter, but it is here only a covenant and no words amounting to a grant, and therefore there could be no relief against the terre-tenant." The other judges held that the covenant being in the nature of a grant might charge the land, and decided the cause on that ground.

To charge land with the burthen of a covenant there must be some privity of estate between the covenantee and the assignee of the lands so burthened, or he will not be charged with the covenant. This was so laid down by the court in delivering their opinion in *Bally* v. *Wells*, 3 *Wils.* 29. "There must be always a privity between the plaintiff and defendant to make the defendant liable to an article of covenant." The reasoning of Lord Brougham in *Keppel* v. *Baily*, in 2 *Mylne & Keene*, *p.* 534 to 537, is founded upon and illustrates this principle. The decision of the Supreme Court of Massachusetts, in *Hurd* v. *Curtis*, 19 *Pick.* 462, is expressly placed upon the ground that there is no privity of estate between the plaintiff and defendant. The covenant was between the owners of mills on the same stream as to the use of the water in their respective mills; it was drawn to bind their assigns. The defendant was assignee of the mill of one of the covenantors. It was held that he was not bound, as there was no privity of estate between him and plaintiff. See also *Plymouth* v. *Carver*, 16 *Pick.* 183.

In the case before me it is clear that there is no privity of contract or of estate between Brewer and Marshall; and if such privity is necessary to that object, Marshall is not bound by the covenant.

The authorities that seem to hold a different doctrine are chiefly those in which the agreements or covenants made by the person then owning the land burthened, are of such a nature that they may be held to impress on the land burthened a servitude or easement in favor of some other property of the covenantee.

Such was the case of *Tulk* v. *Moxhay*, 2 *Phil.* 774, decided by Lord Cottenham; and the cases of *Whatman* v. *Gibson*, 9 *Sim.* 196, and *Schreibner* v. *Creed*, 10 *Sim.* 35, decided by Vice Chancellor Shadwell. It was in those cases stated that the question was not whether the covenants run with the land, but whether there was not "an equity attached to the property." The remarks of Chancellor Williamson in *Woodruff* v. *The Water Power Company*, 2 *Stockt.* 505, are based upon this principle; he says "the grantor reserved to himself a right of way on the main raceway, and also a convenient landing place on the river. The right of way, as well as the landing place, was an interest in the thing granted, and would pass as appurtenant to the grantor's farm." In the cases of *Hills* v. *Miller*, 3 *Paige* 254, of *Watertown* v. *Cowan*, 4 *Paige* 510, and of *Burrow* v. *Richard*, 8 *Paige* 350, the covenant or agreement created an easement either by reservation in the land granted, or by grant in other lands of the grantor. The right to light and air without obstruction from buildings on the adjoining lands is a well known species of easement, and the right to enjoy the pure air without being laden with odors or dust, or disturbed by disagreeable sounds, is of the like nature. They are easements that may be attached to one parcel of land and the burthen of not erecting anything that would disturb such enjoyment is a servitude that may be impressed upon another. But the exclusive right of carrying on a trade upon one lot is not an easement, and although a covenant not to carry on such trade upon his adjoining property may bind the covenanter, he cannot make it a servitude upon that property, so as to burthen it in the hands of purchasers.

The conclusion is that neither the covenant or agreement in the deed of February 23d, 1841, or in the recitals in the bond and mortgage of January 3d, 1842, are covenants that run with the land conveyed to Marshall, nor can they be considered as grants of an easement or servitude upon it in favor of the land sold to Lamb and held by Brewer.

No opinion is intended to be given on the questions of an action at law against Cheesman by Brewer, or of the validity of the mortgage in the hands of Brewer. The motion to dissolve the injunction has nothing to do with either.

I am of opinion that the injunction should be dissolved.

Order to Dissolve Injunction.

[Filed May 22, 1867.]

The defendants having filed their answer to the complainant's bill, and having moved to dissolve the injunction granted in this cause upon the prayer of the complainant, and the said motion having been argued by the counsel for the respective parties, and the Chancellor having duly considered the same, it is thereupon, on this twenty-second day of May, in the year eighteen hundred and sixty-seven, on motion of James Wilson, of counsel with the defendants, ordered and directed, that the said injunction be and the same is hereby dissolved, with costs to be taxed.

A. O. ZABRISKIE, *C.*

Petition of Appeal.

[Filed June 14, 1867.]

Between
EDMUND BREWER, *appellant*,
and
DAVID E. MARSHALL *and* GEORGE CHEESMAN, *appellees*.
} *On Bill, &c.*

To the Honorable the Court of Errors and Appeals in the last resort in all causes of law.

The humble petition of Edmund Brewer, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by the order made in the Court of Chancery by his Honor, Abraham O. Zabriskie, Chancellor of New Jersey, bearing date the twenty-second day of May, eighteen hundred and sixty-seven, wherein your petitioner was complainant and David E. Marshall and George Cheesman were defendants, in this respect, to wit, that the said order dissolved an injunction mentioned in said order, which had been theretofore allowed by said Chancellor; and your petitioner humbly appeals from the said order on the ground that the same is erroneous, for that the said injunction ought not to have been dissolved, but continued, and the motion to dissolve the same denied with costs to complainant.

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

A. BROWNING,
Solicitor for and of counsel with appellant.

Dated June 12, 1867.

Answer.

[Filed June 20, 1867.]

The answer of David E. Marshall and George Cheesman, appellees, to the petition of appeal of Edward Brewer, appellant.

These appellees not confessing all or any of the matters to be true, as in and by the said petition are mentioned and set forth, for answer thereto, say, that such order as is complained of, was made by the Court of Chancery, as in said petition is mentioned, but as to the date, substance, and extent thereof, these appellees pray leave to refer thereto, when the same shall be produced.

And these appellees are advised that said order is agreeable to equity and justice, and they therefore pray that the same may be affirmed, and that said appeal may be dismissed with costs.

Dated June 20th, 1867.

J. WILSON,
Solicitor of appellees.