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NEW JERSEY

Court of Errors and Appeals

BETWEEN
MARY J. SKED, INDIVIDUALLY AND AS GUARDIAN OF NORMAN S. SKED ET ALS.,
Complainant and Respondent,
and
THE PENNINGTON SPRING WATER COMPANY,
Defendant and Appellant.

On Appeal from Decree of the Court of Chancery

Brief of Frank S. Katzenbach, Jr., and Frederic R. Brace, Jr., for Respondent.

STATEMENT OF FACTS.

In eighteen hundred and ninety-six, one Philip Sked, was seized in fee of a certain farm about two miles north of the village of Pennington, in the county of Mercer, in this state. During that year he entered into an agreement with the appellant by the terms of which Sked granted, bargained and sold to the appellant "the right to enter upon his lands and premises, situate in the township of Hopewell, county of Mercer and State of New Jersey, bounded by lands of John Fleming, Samuel F. Bunn, Charles T. Blackwell and lands of the heirs of Jos. H. Golden, deceased, to dig and build a reservoir at what is known as the 'Middle Spring,' said reservoir not to occupy or cover more than one-half

acre of ground; also may lay pipes from the said reservoir over the lands of the said Philip S. Sked to the main pipe line of the said the Pennington Spring Water Company three feet beneath the surface of the ground and may draw and use all the water from the said reservoir." The agreement contained certain other provisions, but their interpretation is not involved in this case. The appellant forthwith entered upon the said premises and dug and built a reservoir around the said "Middle Spring," but the reservoir when completed did not cover half an acre of ground. In the month of October, nineteen hundred and six, the appellant, finding that the Middle Spring did not furnish a sufficient flow of water to supply its increasing needs, again entered upon these lands with a steam drill and commenced the boring of an artesian well at a point near, but outside of the previously-constructed reservoir. The respondents forthwith filed their bill in the Court of Chancery, asking that the appellant be enjoined from the digging of this well, on the grounds that the said agreement gave the appellant no such license. Upon the final hearing of the case an injunction was ordered. The appellant company has appealed from the decree.

POINT ONE.

The rights of the appellant upon the land in question are in the nature of an easement, or, more strictly (there being no dominant tenement), an easement in gross. By the terms of the agreement, which are clear and unmistakable, the water company is empowered to enter the lands for the purpose of doing two things: 1st, build or dig a reservoir, and 2d, lay certain pipes for the conveyance of water. As a precautionary measure the grantor, Sked, stipulated that the reservoir should not cover more than half an acre of ground. The grant was not for half an acre, but for land sufficient for the reservoir, with a restriction of the extent of territory to be occupied. The water company entered upon the land and constructed the reservoir which was, when completed, less than the maximum area in extent. By so doing, the respondents maintain that the water company, by

its own act and in the exercise of its own discretion, determined and bounded the extent of territory over which it could exercise its easement and waived any rights which it might possibly have acquired over the remainder of that half acre.

In *McCue v. Bellingham Bay Water Company,* reported in 5 *Washington State Reports,* 156, which is a somewhat analagous case, the court said: "The grant to the water company of a fifty-foot right of way through a certain tract of land becomes fixed and certain when the company makes its selection under the deed and goes upon the land and clears and prepares its right of way." On page 160 of the same case, further, "Of course the respondent (the water company) must confine its occupancy to the identical location selected. It is entitled to use that and nothing more."

"Where parties give their contracts a construction the courts will adopt that construction and hold the parties to it." *Frazier v. Meyers,* 132 *Ind.* 71.

"Where the terms of a grant or reservation of an easement are general and ambiguous the contemporaneous acts of the parties giving a practical construction to it will be deemed to be a just exposition of their intent; and after the easement has been located and confirmed by both parties it cannot afterward be shifted at the pleasure or convenience of one of them." *Colt v. Redfield,* 59 *Conn.* 427.

"When the right granted has once been exercised in a fixed and defined course with the full acquiescence and consent of both parties, it cannot be changed at the pleasure of the grantee." *Jennison v. Walker,* 77 *Mass.* 426.

"Where the right to an easement is granted without giving definite location and description to it, the exercise of the easement in a particular course or manner, with the consent of both parties, renders it fixed and certain and the dominant owner has no right afterwards to make changes affecting its location, extent or character." *Am. & Eng. Enc. of L.,* Vol. X, p. 430.

POINT TWO.

The extent and character of the easement having thus been clearly settled between the parties to the agreement, by the act of the water company and the acquiescence of the owner of the land, the attempt on the part of the water company, acting, as it claimed, under this agreement, to drive a well upon a portion of the premises not included in the easement, is an obvious endeavor to alter and enlarge the character of the easement and to increase the burden which rests upon the servient tenement. If the water company has a right to dig one well upon these premises it has the right to dig an indefinite number of them and while the grantor, in his agreement, impliedly assumed (as a natural consequence of the erection of the reservoir) the burden of the water company's presence upon the land for the purpose of caring for the reservoir and piping, yet there is nowhere any indication, once the reservoir was constructed and the pipes laid, that he was willing to have these lands burdened with the presence of the water company's men and machinery for any such additional purpose as the construction, operation and maintenance of an indefinite number of wells, with their attendant pumping machinery. The rights and privileges granted to the water company are clearly and unmistakably set forth, but the rights which the company are now attempting to acquire, are nowhere expressed, cannot be implied and are a direct violation of the rights of the owners of the land.

The contention that such wells are necessary or accessory to the purposes for which the company entered upon the land is not a valid one. In the Massachusetts case of *Jennison v. Walker,* above cited, an easement was granted permitting the construction of a reservoir and the laying of an aqueduct. The latter was temporarily abandoned. When the grantee attempted to resume the use of the aqueduct, however, its former use was found to have been rendered impossible because of a railroad line which had been constructed in the meantime and the grantee attempted to obtain the same results by laying the aqueduct in another direction. But the court said: "Where an easement in land

is granted in general terms, without giving definite location and description to it, so that the part of the land over which the right is exercised cannot be definitely ascertained, the grantee does not thereby acquire a right to use the servient estate without limitation as to the place or mode in which the easement is to be enjoyed."

Also in a case decided in the Court of Chancery in this State on February 1st, 1904, entitled *Oliphant et al. v. Richman,* and reported in 59 *Atlantic Reporter,* page 241, the circumstances were that the complainant leased to the defendant a piece of land for the term of ten years, with the privilege of renewal, for the purpose of building and maintaining an ice house. It was stipulated in the lease that the building was not to be used for any other purpose than as an ice house, and if used for any other purpose the lease was to be void. The land upon which the ice house was to be erected was at the edge of the mill pond of the lessor and for a number of years the lessee had filled his ice house from the mill pond. The lessor made objection to the lessee gathering ice from the mill pond and filed a bill to enjoin him. The lease expressed no grant of any right to cut ice from the mill pond, yet there would have been no reason why the lessee should have erected an ice house if it were not to fill it with ice from the millpond. Nevertheless, Vice Chancellor Grey held that the terms of the lease were clear that the lease granted a piece of land at the edge of the mill pond, but did not include any part of the mill pond and that the meaning and extent of the words used in the lease could be given no greater effect and that the lessee had no right to cut ice from the mill pond and could be enjoined.

POINT THREE.

As to the propriety of the remedy by injunction, it is well settled that "the ground of jurisdiction of a court of equity is its ability to afford more complete remedies than a court of law can afford—thereby preventing irreparable injuries, preventing a multiplicity of suits and avoiding vexatious litigation." (*Am. & Eng. Enc. of Law,* Vol. 16, p. 353.) If, therefore, these conditions are shown to face the plaintiffs

in this case, their right to the injunction prayed for may be considered as settled.

In the first place it is very difficult to discover what ground would exist for an action of ejectment. Of the six affidavits annexed to the complainants' bill, five locate the well as "near" the said reservoir, and the remaining affidavit says it is "at a distance of about twenty-five feet from the fence enclosing said reservoir." The right in the water company to go upon this land for certain purposes necessary to the maintenance of the reservoir and pipe lines is a necessary adjunct to the agreement. An action of ejectment which sought to prevent the water company from going upon the lands to dig this well would also, in effect, deprive it of rights acquired under the agreement and could, without doubt, be successfully opposed by the water company. Hence this remedy is closed to the complainants.

While the damages suffered by these complainants would not be represented by a very large amount of money, none the less it is clearly within the term "irreparable damage." No remedy will be adequate which does not prevent a repetition of the injury and no remedy at law can do that. The injury consists in depriving the complainants of the quiet enjoyment of a part of their premises and that not once or twice but continuously. Successive suits at law would give complainants periodical amounts of damages, varying according to the ideas of successive juries and the net result would be a permission for the defendant to deprive the complainants of their possession of the land for an indefinite period and for such uncertain compensation as different juries might see fit to award. Mere inconvenience, resulting in but slight damage, may, in consequence of its peculiar character, constitute an injury so irreparable in its nature as to be the proper subject of redress by injunction.

Kerr on Injunctions, 199-200.

"Injury is irreparable and a ground for injunction when the only remedy at law is by a large number of suits for damages, which, by reason of their number and cost, will produce no substantial results." *Nashville, &c., R. Co. v. McConnell,* 82 *Fed. Rep.* 65.

"It is now well settled that where an injury committed by one against another is continuous or is being constantly repeated, so that the complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction. Especially is this true where the injury complained of constitutes a valid invasion of the complainant's rights." 22 *Cyc.* 768.

In the case of *Shimer v. Morris Canal Company,* reported in 12 *C. E. Green,* page 364, the court, speaking of the continued invasion of a water right, concerning which a valid contract existed, said: 'It is clear that the complainants have not an adequate remedy at law. The injury complained of is, in its nature, a continuing one. The remedy at law must therefore be by successive suits if the defendants persist in inflicting the injury. It is therefore in this respect, wholly inadequate for the protection of the complainants' rights, and it, obviously, will not answer the purposes of justice."

Hodge v. Giese, 16 *Stew.* 342.

Western Union Tel. Co. v. Rogers, 15 *Stew.* 314.

We respectfully submit that the decree of the Court of Chancery should be affirmed.

FRANK S. KATZENBACH, JR.,
FREDERIC R. BRACE, JR.

FRANK SMITH, Printer, 25 East State Street, Trenton N. J.

New Jersey Court of Errors and Appeals

Between

Mary J. Sked, Individually, etc.,

Respondent,

and

Pennington Spring Water Company,

Appellant.

} On Appeal.

Points and authorities of J. Lefferts Conard, ~~Solicitor~~ Counsel for Appellant.

POINT I.

FINAL HEARING ON BILL AND ANSWER.

Philip S. Sked, in his lifetime, sold and granted, for one dollar and other good and sufficient considerations, to Pennington Spring Water Company (Appellant) the right to enter upon his lands and to enter upon and use a half-acre part thereof, for the purpose of digging and building a reservoir, the latter to occupy and cover not more than a half-acre of ground, and also to lay pipes from said reservoir over said Sked's lands to the main pipe of the company, three feet beneath the surface

* * * * and to draw and use *all* the water from the reservoir (State of Case p. 15.)

The part of the agreement, with which we are concerned, relates to what is therein called "Middle Spring." (State of Case p. 15.)

It is conceded that the appellant had the right to draw and use all the water from "Middle Spring." (State of Case, page 15; p. 3, line 18 to 21; p. 21, line 18 to 24.)

There is no contention to the contrary

It must be also conceded that appellant has the right to enter upon the lands in question to look after its reservoir.

Such right is incident to the enjoyment of the easement, and the nature of the easement requires access to the reservoir and since the "Middle Spring" is accessible only over lands outside of the granted half-acre, appellant surely may pass and repass for the purpose of exercising and enjoying its rights to supply the reservoir and to keep the latter in repair, etc. Johnston *v.* Hyde, 33 N. J. Eq. 633; Perry *v.* Penn. R. R. Co., 26th Vroom 178.

This is an essential and reasonable exercise and enjoyment.

In fact, nothing in the pleadings or any other part of the case, conflicts with this proposition.

The only injuries complained of are the drilling and boring into the earth and the temporary littering of the lands with waste matter, etc.

These alleged injuries constitute the gravamen of the appellee's complaint.

The agreement between Sked and appellant imposes neither limitation nor restriction as to either the quantity of water to be drawn and used or the means and processes to be employed in drawing and using the water. (See agreement p. 15. State of Case.)

Nor does it contain any condition or restriction that the means and processes initially installed or employed must be continued forever, unchanged and unimproved.

The only restriction is that the operations of appellant on the lands must be confined to a half-acre thereof.

It could make not the slightest difference to Sked whether

appellant drew and used the water, by one or many means, since it was to have and enjoy *all* the water from "Middle Spring," provided its operations to that end, were kept within the *granted bounds.*

Nor was the area or surface of the land alone contemplated in the *grant* for to give the latter reasonable effect, Sked intended that the appellant should have the right to penetrate beneath the surface in digging and building a reservoir, with the essential right to do the same thing for the purpose of supplying that reservoir.

When the original mode of drawing the water and supplying the reservoir therewith, was adopted, appellant's business was tentative entirely, the company being unable then to determine just what the increasing population of Pennington and the increasing consumption of water there might require in the direction of different facilities for adequately and more frequently filling the reservoir.

Before appellant began to drill and bore into the earth with a view to installing an artesian well (State of Case p. 20, line 24 to 39), the public demand for water had greatly increased, in keeping with the increasing population of the town. (State of Case, p. 28, line 27.)

The only difference between what was done in the lifetime of Sked, with his acquiescence, and what has been attempted since his death, consists in the *manner* of drawing the water and supplying the reservoir.

It is not pretended that appellant has attempted to take other or more water than was granted it, but that the means sought to be used now, are different from those first employed.

In point of fact, the means of drawing water from the spring and supplying the reservoir therewith, are essential and indispensable features of a reservoir.

The authorities cited by Vice-Chancellor Bergen stated the law applicable to a certain class of cases, but the facts alleged in the bill and answer herein, render this case distinguishable from such class.

He erred in holding that appellant had elected to occupy and

use *only a portion* of the half-acre of land. (State of Case p. 30, line 30 to line 27 on p. 31.)

Nothing in the record supports that conclusion. The Vice-Chancellor fell into the error of thinking appellant had attempted to extend the boundaries of the grant. (See his remarks on p. 29, State of Case, lines 7 to 20.)

The answer distinctly and positively avers that, before the reservoir was begun, appellant selected the half-acre it preferred and had the same designated and delimited. (State of Case p. 20, line 10 to 15.)

Besides, the bill of complaint admits that appellant entered and built upon the lands of Philip S. Sked, at "Middle Spring." (State of Case p. 3, line 20 to 30) as does also the affidavit of Mary J. Sked, the appellee (State of Case p. 8, line 26 to 30).

Nowhere is it alleged that appellant did not so designate the land or that it elected to take and use less than the full half acre granted by Sked.

The appellant having elected and designated, *in limine,* to take its half acre, it cannot be contended fairly that it was bound to put into *active working use every grain of earth composing that half-acre.*

Assuredly the appellant could select and designate, even if it did not at the precise moment, drill or bore into the land, or otherwise utilize and exercise the easement.

In the proper sense, the appellant did exercise the easement when it selected and delimited the exact half-acre of land. It was an exercise of that right when the appellant so notoriously and positively reduced the half-acre to possession.

The Vice-Chancellor reasoned that since the reservoir did not exactly cover the entire half-acre, the unreservoired part had not been taken. (State of Case p. 31, lines 4 to 12.)

This was an obvious error.

In the cases cited there had been radical and substantial changes of place or manner of exercising the easement to the irreparable injury of the servient tenement; no such changes have been made or attempted by appellant.

The appellant did not elect to use less than the granted half-acre, but did actually take and designate the entire acreage,

and continuously occupied and used it, and Philip S. Sked, in his lifetime had, and the appellee has, since his death, acquiesced therein.

The appellee cannot invoke the doctrine of equitable estoppel, since the defendant had at no time, discontinued the use of the easement, as to any part of the designated half-acre, nor had the appellee done anything respecting the part lying outside of the reservoir structure, to bring the situation within Johnston *v.* Hyde, 33 N. J. Eq. 632.

POINT 2.

Complainant not irreparably injured and therefore not entitled to equitable relief.

Whether appellant had a right to drill and bore into the earth is a question of legality and should be decided by a court of law.

This case falls squarely within the rule established in Hart *v.* Leonard, 42 N. J. Eq. 416; Outcault *v.* Helme Co., 42 N. J. Eq. 676; Todd *v.* Staats, 60 N. J. Eq. 507.

According to the Vice-Chancellor's conclusions, appellant was enjoined because it had essayed to bore into and litter up, lands outside of the reservoir, and which it had not adopted as a part of the half-acre granted by Sked.

If this conclusion were correct, then appellant was a trespasser pure and simple, and appellee had her ordinary legal remedies for such injuries as were inflicted, and could not invoke the aid of a court of equity.

Whether the Vice-Chancellor erred or not, as to this fact, the acts complained of were such as could have been compensated for in a suit at law, and the appellee should have been sent to a court of law.

Irreparable injury was not done.

The drilling of such a hole caused no such injury, and besides, the appellant was a sound and solvent company.

The answer prays the same benefit of this defense as if it had demurred to the bill (State of Case, p. 22, line 29 to 36).

Can it be seriously claimed that such injury is irreparable in the sense that it is an injury to the inheritance, for which com-

pensation cannot be had from a perfectly sound and solvent corporation, particularly for an injury committed upon land having neither agricultural nor commercial value or utility?

No effort was made to meet the answer's averment (p. 22, line 1 to 10) that the land in question possessed no value.

It is submitted that the decree in this case should be reversed, and the bill of complaint dismissed.

Respectfully submitted,

J. LEFFERTS CONARD,

10 *Counsel and Solicitor for Appellant.*

FRANK SMITH, Printer, 25 East State Street, Trenton, N J.

New Jersey Court of Errors and Appeals

IN CHANCERY OF NEW JERSEY.

Between Mary J. Sked, individually and as guardian, of Norman S. Sked, et al., Complainant, and Pennington Spring Water Company, Defendant.	On Bill, etc. Filed Nov. 1, 1906.

To His Honor, William J. Magie, Chancellor of the State of New Jersey:

Humbly complaining, showeth unto your Honor, your oratrix, Mary J. Sked, individually and as guardian of Norman S. Sked, Percy A. Sked, Morris M. Sked, Adthur W. Sked and Leroy A. Sked, all infants under the age of twenty-one, of the Borough of Pennington, in the County of Mercer and State of New Jersey; that on or about the fifth day of November, eighteen hundred and eighty-nine, one Philip S. Sked, of the Borough of Pennington, in the County of Mercer and State of New Jersey,

became and was seized in fee of all that certain tract of land and premises situate, lying and being in the Township of Hopewell, County of Mercer and State of New Jersey, and bounded and described as follows:

BEGINNING at a stone corner to land of Charles T. Blackwell, and in the line of Samuel F. Bunn; thence (1) with said Blackwell's land South, eighty degrees, forty minutes West, seventeen chains and twenty-three links to a stone corner to land of Joseph H. Golden; thence (2) by said Golden's land North, one and one-quarter degrees West, seventy-two chains, ninety-five links to a stone for a corner in the line of the said Blackwell's woodland; thence (3) with the said Blackwell's woodland, North seventy-three degrees East, sixteen chains and thirty links, to a stone in line of lands of John Fleming; thence (4) with said Fleming's land and land of the said Bunn, South two degrees, East seventy-four chains ninety-nine links, to the place of beginning. Containing one hundred and twenty-one acres and thirty-one hundredths of an acre. Said lands being conveyed to the said Philip S. Sked by Issac Hoff by deed dated November the fifth, eighteen hundred and eighty-nine, and recorded in the Mercer County Clerk's Office on February the sixteenth, eighteen hundred and ninety-eight, in Volume Two Hundred and Nineteen of Deeds, pages Five Hundred and Eleven, etc.

And your oratrix further shows that on or about the fourteenth day of September, eighteen hundred and ninety-six, the said Philip S. Sked entered into an agreement with the Pennington Spring Water Company, a New Jersey corporation having its office and conducting its business in the Borough of Pennington aforesaid, by the terms and conditions of which agreement the said Philip S. Sked, covenanted and agreed to and with the said Pennington Spring Water Company to grant, bargain and sell to them, the said Pennington Spring Water Company, "the right to enter upon his lands and premises, situate in the Township of Hopewell, County of

Mercer and State of New Jersey, bounded by lands of John Flemming, Samuel F. Bunn, Charles T. Blackwell and lands of the heirs of Joseph H. Golden, deceased, to dig and build a reservoir at what is known as the 'Middle Spring,' the said reservoir not to occupy or cover more than one-half acre of ground; also may lay pipes from the said reservoir over the lands of the said Philip S. Sked, to the main pipe line of the said the Pennington Spring Water Company, three feet beneath the surface of the ground, and may draw and use all the water from the said reservoir; also that the said the Pennington Spring Water Company may make and build a reservoir at the spring upon the above mentioned farm and premises known as the East Spring, said reservoir not to occupy or cover more than one-half an acre of ground, and lay pipes from the said reservoir over the said lands to the main pipe line of the said the Pennington Spring Water Company, and may draw and use all the water from the said spring, except as hereinafter mentioned," as will more fully appear from the copy of the said agreement hereunto annexed and made a part hereof.

And your oratrix further shows that thereafter the said Pennington Spring Water Company did enter and build upon the lands above described a reservoir at what is known as the "Middle Spring," and did lay water pipes therefrom over the said land to the main pipe line of the said the Pennington Spring Water Company, according to the terms and conditions of their agreement with the said Philip S. Sked, and has maintained the said reservoir and the said pipe line to the present time.

And your orators further show that thereafter, to wit, on or about the seventeenth day of January, eighteen hundred and ninety-seven, the said Philip S. Sked departed this life, leaving him surviving his wife, Mary J. Sked, your oratrix, and his sons, Norman S. Sked, Percy A. Sked, Morris M. Sked, Arthur W. Sked and Leroy A. Sked, his only heirs at law, and leaving a will by the terms of which it was provided, among other things, as follows:

"Item One. I give and bequeath unto my beloved wife, Mary J. Sked, the income from one-third of all my property during the term of her natural life, and at her death the income from the said one-third to be divided among my children or their heirs or assigns.

"Item Two. I give, bequeath and devise, and it is my will, and I do order, that as my sons (Norman Sked, Percy A. Sked, Morris May Sked, Arthur W. Sked and Leroy A. Sked) become of age they shall each be possessed of his share of the income from my estate, each one to have control of his own income during the terms of his natural life, then the said income is entailed and shall descend to each of their heirs or assigns, and further, each one of my said children, during their minority, to be supported and educated from the income derived from my estate.

"Item Six. And I do hereby appoint my beloved wife, Mary J. Sked, and my brother-in-law, William L. Titus, my executors of this my last will and testament, and guardians to my children during their minority."

A true copy of the said will of the said Philip S. Sked is hereunto annexed and made a part of this bill of complaint.

And your oratrix further shows that the said will was duly admitted to probate before the Surrogate of the County of Mercer, and letters testamentary issued thereon the ninth day of February, eighteen hundred and ninety-seven, and the same duly recorded in the Surrogate's Office of the County of Mercer in Book P of Wills, pages three hundred and ninety-nine, etc. And that on the tenth day of June, eighteen hundred and ninety-eight, William L. Titus, one of the executors named and appointed in the said will, did, before the Judge of the Orphans' Court of the County of Mercer, formally refuse to take upon himself the office of guardian of the children of the said Philip S. Sked, and on the same date Mary J. Sked, before the Judge of the Orphans' Court of the County of Mercer, formally consented to the renunciation of the said guardianship by the said William

L. Titus, and did take upon herself the office of guardian of the said children, all of which is duly set forth upon the minutes of the Orphans' Court of the County of Mercer, in Book No. Fourteen, page four hundred and seventy-nine, etc.

And your oratrix further shows, that on or about the eighteenth day of October, nineteen hundred and six, the said Pennington Spring Water Company, without the consent or permission of your oratrix, individually or as guardian as aforesaid, and against the protests and objections of your oratrix, entered upon said farm premises, with servants, agents and workmen, who brought with them a steam engine, boiler, drill and other apparatus suitable for the boring of an artesian well, and proceeded to install the same upon the said premises; that on or about the twentieth day of October, nineteen hundred and six, the said Pennington Spring Water Company, by its servants and agents, began to drill, bore and excavate a well upon the said land and premises at a point outside of said reservoir previously constructed by them at said "Middle Spring," and at a distance of from twenty-five to thirty feet therefrom, and are now drilling, boring and excavating said well in utter disregard of the protests of your oratrix and in violation of the agreement hereinbefore mentioned; that the said Pennington Spring Water Company, by its servants and agents, are carting fuel for said engine, materials and supplies for said work over and upon the lands of your oratrix, and have scattered over said land pipes, tools, ashes and waste matter.

That your oratrix has been informed that it is the intention of said Pennington Spring Water Company to install upon said farm premises a pumping station for the purpose of pumping by steam power the water from the well which they are drilling into the said reservoir.

And your oratrix further shows that the invasion of and trespasses upon said land and premises by the said the Pennington Spring Water Company has been done

and is now being continued without any consent or license from your oratrix; that the drilling, boring, excavating and construction of the said well or wells is a great and irreparable injury to said premises.

And your oratrix further shows that immediately upon the commencement of the said work, or as soon as your oratrix was informed thereof and learned of the proposed boring, drilling and excavating of the said well, she protested against the prosecution of such work, but the said protests have not been heeded and the said Pennington Spring Water Company has continued the prosecution of the said work against the protests of your oratrix, and if the same is not stopped the said lands and premises will be greatly and irreparably injured.

And your oratrix further shows that she has been advised that she has a good and valid right to the undisputed and peaceable possession of the said lands and premises, such as has been heretofore enjoyed, without the interference or presence of the said Pennington Spring Water Company, otherwise than by the terms and conditions of the said agreement between the said Philip S. Sked and the Pennington Spring Water Company, and that all of the said actions and doings of the said Pennington Spring Water Company are contrary to equity and good conscience and tend to the manifest wrong and oppression of your oratrix in the premises.

In tender consideration whereof, and forasmuch as your oratrix is without remedy by the strict rules of common law, and can only have adequate and proper relief in this honorable Court where matters of this nature are properly cognizable and relievable, to the end therefore, that the said the Pennington Spring Water Company may, without oath, to the best and utmost of their knowledge, remembrance and belief, true, full and perfect answer make to all and singular the matters aforesaid, and that they may, if they can, show why your oratrix should not have the relief herein prayed for, and that they may be restrained by the injunction of this honorable Court

from interfering with the peaceable and quiet possession of the lands and premises above described, and from the drilling, boring or excavating of any well or wells, as hereinbefore mentioned, and that your oratrix may have such further and other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your oratrix, 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 the Pennington Spring Water Company, restraining them, their counselors, attorneys, servants, agents and workmen, and each and every of them, from interfering with the quiet and peaceable possession by your said oratrix of the said lands and premises, otherwise than according to the terms and conditions of the said articles of agreement, entered into between the said Philip S. Sked and the Pennington Spring Water Company, and from continuing the drilling, boring or excavating of the said well or wells now in course of excavation by the said the Pennington Spring Water Company on the premises of your oratrix, but also the State's writ of subpoena issuing out of and under the seal of this honorable Court, to be directed to the said defendant, the Pennington Spring Water Company, commanding them by a certain day and under a certain penalty, therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and as shall be agreeable to equity and good conscience.

And your orators will ever pray, etc.

FREDERIC R. BRACE, JR.,
FRANK S. KATZENBACH, JR.,
Solicitors for and of Counsel with Complainant.

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

Mary J. Sked, being duly sworn, according to law, on her oath, says, that she is the complainant in the foregoing bill; that she has read the same, and that the contents thereof are true.

And this deponent further says, that she is the guardian of Norman S. Sked, Percy A. Sked, Morris M. Sked, Arthur W. Sked and Leroy A. Sked, children of this deponent, and her husband, now deceased, Philip S. Sked.

And this deponent further says, that Philip S. Sked, in his lifetime, was seized of the farm premises particularly described and set forth in the foregoing bill; that on or about September fourteenth, A. D. eighteen hundred and ninety-six, the said Philip S. Sked entered into an agreement with the Pennington Spring Water Company, by which he sold to the said Pennington Spring Water Company the right to enter upon said farm lands to dig and build a reservoir which was not to occupy or cover more than one-half an acre of ground, at a point on said farm known as the "Middle Spring," and also gave the right to lay pipes from said reservoir over his lands to the main pipe line of the said Water Company, and also gave to the said Water Company the privilege of drawing and using the water from the said reservoir.

And this deponent further says, that the said Water Company entered upon said lands, erected said reservoir and laid said water pipes, according to the terms of said agreement.

And this deponent further says, that on January seventeenth, A. D. eighteen hundred and ninety-seven, said Philip S. Sked died, leaving this deponent, his widow, and the five sons hereinbefore mentioned; that by the will of the said Philip S. Sked, this deponent has an interest in said farm premises, as have also the said five sons hereinbefore mentioned, as appears by the terms of the will set forth in the foregoing bill.

And this deponent further says, that on October eighteenth, A. D. nineteen hundred and six, the said Water Company, without license or permission, entered upon the said farm premises with workmen, who brought with them a steam engine, boiler, drill and other apparatus suitable for the boring of an artesian well, and proceeded to install the same upon the said premises; that on October twentieth, nineteen hundred and six, the said Water Company, by its employees, began to drill, bore and excavate a well upon the said farm premises, at a point outside of said reservoir, constructed at said "Middle Spring," and at a distance of about twenty-five feet from the fence enclosing said reservoir; that the said Water Company is now drilling said well against the protests of this deponent, and in violation of the agreement made with the said Philip S. Sked; that the said Water Company is carting over said premises fuel for said engine, materials and supplies for the said work, and have scattered over said lands pipes, tools, ashes and waste matter.

And this deponent further says, that on October twenty-fifth, nineteen hundred and six, she attended a meeting of the stockholders of the said Water Company, and was informed by the president of said company that the said company did not intend to desist from its work of boring the said well, and that the only remedy that she had was to appeal to the Courts.

And this deponent further says, that it is the intention of the said Water Company to erect upon said farm premises a pumping station in order to pump the water from the said well into the said reservoir.

MARY J. SKED.

Sworn and subscribed before me this 30th day of October, A. D. 1906.

T. D. DURLING,
Master in Chancery, N. J.

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

Nelson M. Lewis, of full age, being duly sworn, according to law, on his oath, deposes and says, that he is a resident of the Borough of Pennington, in the County of Mercer and State of New Jersey; that on or about the twenty-fifth day of October, nineteen hundred and six, he visited a certain farm property now belonging to the heirs of one Philip S. Sked, lately deceased, the said farm being bounded by lands of Charles T. Blackwell, John Fleming and the late Joseph H. Golden and Samuel F. Bunn, and more fully described in the annexed bill of complaint. That at a certain point on the said farm, not far from a reservoir constructed by the Pennington Spring Water Company, at what is known as the "Middle Spring," he found a steam engine, with a drill for the boring of a well, the same being at that time operated by two men. That the work of boring or drilling the said well was being actively carried on; that the ground in the vicinity was littered with pipes, fuel for the engine, ashes, debris from the excavations; that upon inquiring from one of the men in charge of the operations he was told that the well had obtained a depth of twenty-two feet. That the prosecution of the work was being steadily carried on.

NELSON M. LEWIS.

Sworn and subscribed before me this 25th day of October, 1906.

T. D. DURLING,
Master in Chancery, N. J.

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

John Fleming, of full age, being duly sworn, according to law, on his oath, deposes and says, that he is the owner and occupant of a certain farm adjoining a farm late of one Philip S. Sked, situate in the Township of

Hopewell, in the County of Mercer and State of New Jersey, the said Sked farm being further bounded by lands of Charles T. Blackwell, the late Joseph H. Golden and Samuel F. Bunn, and more fully described in the annexed bill of complaint. That on or about the eighteenth day of October, nineteen hundred and six, several workmen, who represented themselves as in the employ of the Pennington Spring Water Company, transported to the said Sked farm a drill for boring a well, a steam engine and boiler for the working of the said drill, together with the fuel for the engine, frame work for the drill, pipes and other necessary and usual paraphernalia customary for such operations, and that thereupon the said workmen erected the said drill, connecting the engine thereto, at a point on the said Sked farm near the reservoir of the said Pennington Water Company, which is located near what is known as the "Middle Spring"; that on the following Saturday, that is to say, October twentieth, the said workmen began to operate the said engine and the drill in the process of boring a well at the said spot; that at this time the said well has been sunk to a depth to him unknown, and that the work is being steadily prosecuted. The ground around the said engine and drill is being littered with coal, ashes, pipes, debris from the excavation.

JOHN FLEMING.

Sworn and subscribed before me this 26th day of October, 1906.

T. D. DURLING,
Master in Chancery.

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

Frederick Sked, of full age, being duly sworn, according to law, on his oath, deposes and says, that he is a resident of the Borough of Pennington, County of Mercer and State of New Jersey; that on or about the

twenty-fifth day of October, nineteen hundred and six, in the company of one Nelson M. Lewis, he made a visit to a certain farm, formerly the property of Philip S. Sked, since deceased, and now belonging to the heirs of the said Sked, the said farm being bounded by lands of Charles C. Blackwell, John Fleming, the late Joseph H. Golden and Samuel F. Bunn, and more fully described in the annexed bill of complaint. That at a certain spot on the said farm, near the reservoir which was built by the Pennington Spring Water Company at a spring commonly called the "Middle Spring," there was found a steam engine, with a drill for the drilling of a well, the same being at that time operated by two men; that the work of boring the said well was being actively carried on, and that around the ground in that neighborhood was scattered pipes, fuel for the engine, ashes, the excavated debris and other litter and waste matter; that upon inquiry he was told by one of the men in charge of the drill that the well had obtained a depth of twenty-two feet. The work was being steadily pushed and the property was suffering serious damage.

FREDERICK SKED.

Sworn and subscribed before me this 25th day of October, A. D. 1906.

T. D. DURLING,
Master in Chancery, N. J.

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } ss

Alfred Rogers, of full age, being duly sworn, according to law, on his oath, says, that he is the occupant and lessee of the farm bounded by lands of Charles S. Blackwell, the late Joseph H. Golden, John Fleming and Samuel F. Bunn, and more fully described in the annexed bill of complaint. That on or about the eighteenth day of October, nineteen hundred and six, sundry workmen, rep-

resenting themselves as the agents of the Pennington Spring Water Company, brought to the said farm a drill, for drilling a well; an engine, for working the same; together with fuel for the engine, and the other necessary and usual appurtenances, and thereupon erected the said drill, with the engine thereof, at a point near the reservoir of the said Pennington Water Company, at what is known as the "Middle Spring." That on the twentieth of October, nineteen hundred and six, the said workmen began to operate the engine and the drill for the purpose of sinking a well at the said spot. That at this time the said well has been sunk to a depth of not less than twenty-five feet, and the work is being rapidly pushed. The ground around the said engine and drill is being littered with coal, ashes, pipes, debris from the excavation, and the land is being rapidly and irreparably damaged.

ALFRED ROGERS.

Sworn and subscribed before me, at Pennington, N. J., this 25th of October, 1906.

T. D. DURLING,
Master in Chancery, N. J.

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

William E. Blackman, of full age, being duly sworn, according to law, on his oath, deposes and says, that he is a resident of the City of Trenton, in the County of Mercer and State of New Jersey; that on the twenty-fifth day of October, nineteen hundred and six, he made a visit to a certain farm, formerly the property of Philip S. Sked, since deceased, and now belonging to the heirs of the said Sked, said farm being located in the Township of Hopewell, in the County of Mercer aforesaid; that at a certain spot on the said farm, near a reservoir, which, as your deponent was informed and verily believes, was built by the Pennington Spring Water Company, at a

spring commonly called the "Middle Spring," he found a steam engine, with a drill for the boring of an artesian well, the same being at that time operated by two men. That the work of boring the said well was being actively carried on, and that around the ground in that neighborhood were scattered pieces of pipe, fuel for the engine, ashes, the excavated debris and other waste matter; that upon inquiry he was told by one of the men in charge of the drill that the boring had reached a depth of twenty-four feet, the work was being steadily carried on and the land was being rapidly and seriously damaged.

And your deponent further says, that later, upon the afternoon of the same day, in the company with Mary J. Sked, the complainant in the annexed bill of complaint, he attended a meeting of the stockholders of the Pennington Spring Water Company. That at that meeting he heard Mary J. Sked demand of one Frank LeBar, the president of the said Pennington Spring Water Company, that the work of boring the well on her premises, as above described, be abandoned, unless some terms, regarding compensation, could be agreed upon between them. That he heard the said Frank LeBar say to Mary J. Sked that the company would not desist from prosecuting the work as aforesaid, but that if she had any objections to the prosecution of the said work her only remedy would be by an appeal to the Court.

WILLIAM E. BLACKMAN.

Sworn and subscribed to before me this 30th day of October, A. D. 1906.

NELSON L. PETTY,
M. C. C. of N. J.

COPY OF AGREEMENT BETWEEN PHILIP S. SKED AND THE PENNINGTON SPRING WATER COMPANY.

This agreement, made and entered into this fourteenth day of September, eighteen hundred and ninety-six, by and between Philip S. Sked, of the Borough of Pennnington, in the County of Mercer and State of New Jersey, on the one part, and the Pennington Spring Water Company, of the same place, upon the other part, witnesseth, that the said Philip S. Sked, in consideration of the sum of one dollar to him in hand paid by the said the Pennington Spring Water Company and also for other good and sufficient consideration doth for himself, his heirs, executors, administrators and assigns covenant and agree to and with the said the Pennington Spring Water Company to grant, bargain and sell and doth hereby grant, bargain and sell to said the Pennington Spring Water Company the right to enter upon his lands and premises, situate in the Township of Hopewell, County of Mercer and State of New Jersey, bounded by lands of John Fleming, Samuel F. Bunn, Charles T. Blackwell and the lands of the heirs of Joseph H. Golden, deceased, to dig and build a reservoir at what is known as the "Middle Spring," the said reservoir not to occupy or cover more than one-half acre of ground; also may lay pipes from said reservoir over the lands of the said Philip S. Sked to the main pipe line of the said the Pennington Spring Water Company, three feet beneath the surface of the ground, and may draw and use all the water from the said reservoir; also that the said the Pennington Spring Water Company may make and build a reservoir at the spring upon the above mentioned farm and premises, known as the East Spring, said reservoir not to occupy or cover more than one-half an acre of ground, and lay pipes from the said reservoir over the said lands to the main pipe line of the said the Pennington Spring Water Company, and may draw and use all the water from the said spring, except as hereinafter provided.

And the said the Pennington Spring Water Company, in consideration of the said covenants and agreements on the part of the said Philip S. Sked, do hereby covenant and agree to lay a galvanized iron pipe, three-fourths of an inch in diameter, from the above mentioned "East Spring" to a point about twenty feet south of the upper public road across said farm and near the bridge, and to lay said pipe two feet beneath the surface of the ground, said Sked is to have the two-inch pipe he now uses to lead the water to his barnyard. The said the Pennington Spring Water Company agrees to keep the pipe from the "East Spring" to the said farm south of the public road, near the said bridge, in good order and repair. It is further covenanted and agreed that the said Sked, his heirs, executors, administrators or assigns, shall not be responsible to the owners of the lands over which the water flows from the said "East Spring" for any damages they may sustain from the taking of said water by the said the Pennington Spring Water Company. In witness whereof, the said parties to these presents, the said Philip S. Sked, for himself, his heirs, executors, administrators and assigns, hath hereunto set his hand and seal, and Frank LeBar, president of the said the Pennington Spring Water Company, upon behalf of and for said company, hath hereunto set his hand and caused the corporate seal of the said the Pennington Spring Water Company to be hereunto affixed the day and the year first above written.

PHILIP S. SKED. (Seal)

Signed, sealed and delivered in the presence of
OLIVER B. GRAY.

FRANK LE BAR,
President of Pennington Spring Water Co.
(Corporate seal of the
said Water Company)

Acknowledged and proved before Theodore D. Durling, Master in Chancery.

COPY OF THE LAST WILL AND TESTAMENT OF PHILIP S. SKED, DECEASED.

In the name of God. Amen.

I, Philip S. Sked, of the Township of Hopewell, in the County of Mercer, State of New Jersey, being of sound mind, memory and understanding (for which blessing I thank God), do make and publish this, my last will and testament, in manner following, that is to say:

First. It is my will, and I do order, that all my just debts and funeral expenses be duly paid and satisfied as soon as conveniently can be after my dec.

Item 1. I give and bequeath unto my beloved wife, Mary J. Sked, the income from one-third of all my property, during the term of her natural life, and at her death the income of the said one-third to be divided among my children or their heirs or assigns.

Item 2. I give, bequeath and devise, and it is my will, and I do order, that as my sons (Norman Sked, Percy A. Sked, Morris May Sked, Arthur W. Sked and Leroy A. Sked) become of age they shall each be possessed of his share of the income from my estate, each one to have control of his own income during the term of his natural life, then the said income is entailed and shall descend to each of their heirs or assigns, and, further, each one of my said children, during their minority, to be supported and educated from the income derived from my estate.

Item 3. And it is my will that each of my children shall have a good common school education, which may be obtained in our district schools, each child to be placed on an equal footing as near as possible.

Item 4. And it is my will and desire that each of my children abstain from engaging in foot ball games, billiards, card playing or games of chance, and any one violating this rule shall be cut off in their income fifty dollars per year, and those not violating this rule shall receive the benefit of the said fifty dollars.

Item 5. I give and bequeath to my sister, Lucinda

Prall, the use of an eighteen-acre lot, lying on Stony Brook, to cultivate on shares, except a pasture lot for two cows (one-half the products to go to my family), during her lifetime, and at her death the said lot of land to revert to my children or their heirs.

Note.—It is my will and desire that my tenants, Lewis R. Danberry and Noah Reed, remain on the farms they now occupy as long as we can agree.

Item 6. And I do hereby appoint my beloved wife, Mary J. Sked, and my brother-in-law, William L. Titus, my executors of this, my last will and testament, and guardians to my children during their minority, the said William L. Titus to receive a compensation of three hundred dollars per year for his services in looking after the interests of the estate, and to have access to teams and carriages, etc., while so engaged.

(Marginal Note.—And it is my will that my said wife, Mary J. Sked, serve as executor without fees.)

Item 7. And it is my will that if my said executors shall by death or inability to serve, that my sons, Norman Sked and Percy A. Sked, are authorized to act as co-executors thereafter; that is, when they become of age.

Item 8. And, further, that if my executors deem it advisable, they may sell some of the small properties or lots belonging to my estate.

Signed and sealed this fourth day of February, A. D. 1896.

PHILIP S. SKED. (L. S.)

Signed, published and declared by the said Philip S. Sked to be his last will in the presence of us, who were present at the same time and subscribed our names as witnesses in the presence of the testator.

JAMES PRALL.

NATHANIEL R. BLACKWELL.

Testator died January seventeenth, eighteen ninety-seven.

Will proved and letters testamentary issued February ninth, eighteen hundred ninety-seven.

Will recorded in office of the Surrogate of Mercer County, in Book "P" of Wills, pages 389, etc.

IN CHANCERY OF NEW JERSEY.

Between Mary J. Sked, individually and as guardian, etc., Complainant. and Pennington Spring Water Company, Defendant.	ON BILL, ETC. ANSWER. Filed Nov. 27, 1906.

THE ANSWER OF PENNINGTON SPRING WATER COMPANY, DEFENDANT, TO THE BILL OF COMPLAINT OF MARY J. SKED, COMPLAINANT.

This defendant, a corporation organized and existing under the laws of the State of New Jersey, having its office in the Borough of Pennington, in the County of Mercer and State of New Jersey, and there carrying on and conducting its business of supplying the public with water for all uses and purposes, answering, says it is true, as stated in the bill of complaint filed in the above stated cause, that one Philip S. Sked, on or about the fifth day of November, eighteen hundred and eighty-nine, became and was seized in fee of all the certain tract of land and premises in said bill mentioned and described.

And this defendant, further answering, says it is true that on or about the fourteenth day of September, eighteen hundred and ninety-six, the said Philip S. Sked and the defendant entered into the agreement mentioned in said bill of complaint.

And this defendant, further answering, says it is true that the defendant, in accordance with the terms, con-

ditions and stipulations of the said agreement, entered upon the said land and premises of the said Philip S. Sked, that is to say, upon a half-acre part thereof, and dug and built, at what is known as "Middle Spring," within said half-acre, a reservoir for collecting and containing water to be thence distributed among the public of said Pennington, and at great expense, and for an extended distance, laid water pipes therefrom and over the said lands to the defendant's main pipe line in said Pennington, but defendant avers that before the said reservoir was so dug and constructed and the said water pipes were so laid, the defendant designated the half-acre of land within and upon which, according to the terms and stipulations of the said agreement, the defendant's operations there were to be restricted and confined.

And this defendant, further answering, says it is true that the said Philip S. Sked departed this life on or about the seventeenth day of January, eighteen hundred and ninety-seven, leaving the will and the heirs-at-law in said bill of complaint mentioned, but the defendant denies that the said heirs-at-law, or any of them, inherited, under the said will, so far as the said land and premises were concerned, anything but the income therefrom.

And this defendant, further answering, says that it is true that on or about the eighteenth day of October, nineteen hundred and six, it entered upon the said half-acre of land to take preparatory steps for the boring and sinking of an artesian well there, and that on or about the twentieth day of said October the defendant, by its agents, servants and workmen, did bore and sink such well, the same being an ordinary circular hole or aperture bored down into the earth for eighty-one feet to a point where water was found, thus attaining the object of the said boring, the said hole or aperture being eighteen inches in circumference and six inches in diameter, through and by means of which said hole or aperture, so called an artesian well, the waters of the natural springs thereabouts might be drawn and carried into defendant's

reservoir, but the defendant denies that it was incumbent upon it to heed complainant's alleged protests, or first to obtain the consent, or permission, or license of said complainant, either to enter upon said land, or to bore and sink said well.

And this defendant, further answering, says and avers that the said agreement granted to it, in perpetuity, the right and privilege of so entering upon said land and of staying and remaining there and of going to and from the same, as well as of boring and sinking the said well for the purpose of collecting water in its said reservoir.

And this defendant, further answering, denies that it was its intention to place or install a pumping station upon said land, but, on the contrary, it says and avers that its intention was clearly and fully evidenced when it caused said artesian well, rather than such pumping station, to be placed there.

And this defendant, further answering, says that the true intent and meaning of the said agreement was that the defendant might supply its reservoir with water to be collected in such way and by such means as should suit the defendant and meet the exigencies of its said business, provided it were done within the bounds of the said delimited half-acre of land.

And this defendant, further answering, says and avers that it had always, in lawful and reasonable manner and according to the letter and spirit of the said agreement, exercised and utilized the rights and privileges thereby and therein granted to it.

And this defendant, further answering, denies that by entering upon the said land and premises or by boring and sinking said artesian well, it greatly and irreparably, or in any other manner or way, injured the said land and premises, or any part or parcel thereof, or said complainant's inheritance, or that of any other heir-at-law of the said Philip S. Sked.

And this defendant, further answering, avers that

all the boring and installing of the said well and the doing of the work and labor necessary and incident thereto were done within and upon the said half-acre of land so previously designated.

And this defendant, further answering, says that the said half-acre of land upon which its said reservoir was built and into which its said artesian well was bored and sunk was waste land, possessing neither agricultural nor commercial utility or value.

And this defendant, further answering, says that all the doings, workings, actings, trespassings and acts mentioned and alleged in said bill of complaint as having been done and performed by defendant and its agents, servants and workmen, to the injury of the complainant and the said lands and premises, were done, performed and completed before said bill of complaint was filed.

And this defendant, further answering, says that owing to the increased consumption of water by the people of Pennington the defendant found it necessary to adopt and install other means of supplying its reservoir, than those initially adopted and installed by it.

And this defendant, further answering, says that it is a sound and solvent corporation, with full financial and material ability to make compensation to said complainant for all the alleged injuries, trespasses and damages mentioned in said bill of complaint as having been done, inflicted and committed by defendant and its agents, servants and workmen.

And this defendant submits to this honorable Court, that all and every of the matters in said complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief in this Court; and this defendant hopes it shall have the same benefit of this defense as if it had demurred to the said complainant's bill.

And this defendant humbly prays to be hence dis-

missed with its reasonable costs and charges in this behalf most wrongfully sustained.

J. LEFFERTS CONARD,
Solicitor for and of Council with Defendant.

FRANK LE BAR,
President.

Attest:
JNO. G. MUIRHEID,
Secretary.

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

The answer of the defendant, Pennington Spring Water Company, was taken this twenty-sixth day of November, in the year of our Lord nineteen hundred and six, before me and by virtue of a resolution of the Board of Directors of said corporation, under the common seal of said corporation, as by its said seal thereto affixed, appears.

CHAS. M. TITUS,
Deputy Surrogate.

J. LEFFERTS CONARD,
Solicitor for and of Council with Defendant.

IN CHANCERY OF NEW JERSEY.

Mary J. Sked, individually and as guardian of Norman S. Sked, et al., Complainant. vs. The Pennington Spring Water Company, Defendant.	On Bill for Injunction. Replication. Filed Dec. 14, 1906.

The replication of Mary J. Sked, individually and as guardian of Norman S. Sked, et al., complainant, to the answer of the Pennington Spring Water Company, defendant.

The complainant joins issue on the answer of the defendant.

FRANK S. KATZENBACH, JR.,
FREDERIC R. BRACE, JR.,

Solicitors for and of Counsel with Complainant.

IN CHANCERY OF NEW JERSEY.

Between Mary J. Sked, individually and as guardian, etc., Complainant. and Pennington Spring Water Company, Defendant.	On Order to show cause why preliminary injunction should not issue. Conclusions.

Submitted and decided November 7th, 1906, at conclusion of argument.

It appears that the ancestor in title of the complainant, entered into a contract in writing with the defendant, by which there was granted to the defendant the right to enter upon certain lands near Hopewell to dig and build a reservoir at what is known as the "Middle Spring," which was not to occupy or cover more than one-half acre of ground; also to lay pipes from the reservoir to the main pipe line of the company, and in addition to that, an acre of ground at what was known and described in the contract as the "East Spring," was granted under like conditions.

It appears that under that contract, the defendant built a reservoir which included the spring, so that the water coming from the earth through this spring, covered the surface included within the banks of the reservoir, making, in fact, a pond fed from the bottom by this spring. The boundaries of the reservoir do not include

a half-acre, and the acts complained of relate to law without the located lines.

The complainant insists that in building this reservoir, the company located the ground which they intended to take under the contract, and that the lands outside of those embankments did not pass under the grant. If that is true, it seems to me, that the entering upon land outside of the lines of the practical location can be nothing more than a trespass. For if this well has been put down upon land not included in the grant, then plainly the complainant is guilty of a trespass, and if that trespass be established at law ,and thereafter the well was a continuing nuisance, and a violation of the parties' rights, a bill might be filed in this Court, based upon the judgment that it was a continuing injury, and the Court, by a mandatory injunction, might, under proper conditions, order its removal.

But the defendant claims that it is entitled to have all that is within the boundary of a half-acre, whether it is included within the embankment or not, and not having located the whole of the grant, may do so now, and therefore they are operating upon lands which belong to them, and it is not a trespass—for they cannot trespass upon their own land. The complainant says that the defendants are on adjoining land, not subject to the grant, and by sinking this well, they are obtaining water from subterranean sources, without the limits of the land granted.

All these matters can be settled upon final hearing. What is now asked is a preliminary injunction to restrain the defendants from doing something which they have already accomplished, and to now enjoin them would have no possible effect, unless what the Court should allow a mandatory injunction. Counsel well know that that is seldom resorted to; only in unusual cases can that be resorted to. The well, as appears from the proceedings here, the pleadings and the affidavits, is to be used to furnish a public water supply. The Court never re-

strains a public works of that character, except it be imperative, and then only with great reluctance. It must be a complete case, and must show that a great damage is being done which could not be remedied or repaired, after final hearing. That does not seem to be the case here. If, upon final hearing, it appears that this is a trespass which can be remedied at law, then the bill would have to be dismissed.

If, on the other hand, it is not a trespass, and the parties are violating a covenant, then the complainant might be entitled to some remedy by way of mandatory injunction to compel the defendant to take up the pipe which they have put down in violation of their agreement.

My present conclusion is, not to restrain this defendant by a preliminary injunction, because it does not appear to me that the complainant will suffer to any serious extent, if at all, between the present and the time of final hearing.

I will, therefore, discharge this order to show cause, but say, however, that my action is influenced by the affidavits of the defendant, which state that no pumping machinery is designed to be put there, until the cause is finally disposed of. If they undertake to go beyond what the affidavits state on the subject, I will then entertain an application to immediately restrain them, because I am refusing this preliminary injunction solely upon the ground that the defendant says that all has been done that is intended to be done at present, and, therefore, it is not necessary to allow a preliminary injunction.

IN CHANCERY OF NEW JERSEY.

Between Mary J. Sked, individually and as guardian of Norman S. Sked, et al., Complainant. and Pennington Spring Water Company, Defendant.	On Bill, etc. Final Hearing.

Transcript of proceedings taken in the above entitled cause before his Honor, JAMES J. BERGEN, Vice-Chancellor, at the Chancery Chambers, State House, Trenton, N. J., on the twenty-second day of January, 1907, at 11 A. M.

APPEARANCES.

MR. FREDERIC R. BRACE, JR., and MR. F. S. KATZENBACH, for the Complainant.

MR. J. LEFFERTS CONARD and MR. J. H. BACKES, for the Defendant.

MR. KATZENBACH.—It is admitted on the part of the defendant that the well, which in the answer is alleged to have been completed, has not been completed and connected with the reservoir built by the defendant, under the agreement with Philip S. Sked.

Mr. Backes also desires me to admit a matter which is capable of proof, and that is, that the population of Pennington within the last ten years has increased.

And also Mr. Backes, for the defendant, admits that the Pennington Spring Water Company has other sources

of supply for the Borough of Pennington other than the spring and reservoir built upon the complainant's land, and that the other reservoir is on lands of one Goulden, but they are not sufficient to supply the entire demand.

(CLOSED.)

ARGUMENT.

COURT.—I want to examine somewhat into the rights of the parties to extend the boundaries of the grant, having once established it, and I will render my decision in a few days.

IN CHANCERY OF NEW JERSEY.

Between Mary J. Sked, et al., Complainant. and Pennington Spring Water Company, Defendant.	On Bill for Injunction. Final Hearing.

Submitted January 22d, 1907.
Decided January 25th, 1907.

MR. F. S. KATZENBACH, JR., for Complainants.

MR. J. LEFFERTS CONARD and MR. JOHN H. BACKES, for Defendants.

BERGEN, V. C.

CONCLUSIONS.

Filed January 28, 1907.

On September 14th, 1896, Philip S. Sked, from whom these complainants took title, being the owner of a farm containing about one hundred and twenty acres of land, entered into an agreement with the defendant in writing, by the terms of which he granted, bargained and sold to the defendant the right to enter upon said premises "to dig and build a reservoir at what is known as the 'Middle Spring,' the said reservoir not to occupy or cover more than one-half acre of land; also may lay pipes from the said reservoir over the lands of the said Philip S. Sked to the main pipe line of the said the Pennington Spring Water Company, three feet beneath the surface of the ground, and may draw and use all the water from said reservoir." Immediately after the execution of the agreement, the defendant entered upon the lands, built a reservoir, in which it collected the water from the spring, and for the last ten years has conducted the water thus

impounded through pipes laid across the lands of the grantor to its main distributing pipe, and thus applied the water for public and private use, as allowed by its charter. The area of ground covered by the reservoir is less than a half-acre, and the defendant, now requiring a larger supply of water than flows from the spring, has recently, in order to acquire an additional supply, commenced sinking a well, by driving an iron tube into the ground outside of the reservoir, upon lands adjacent thereto, which would be within an area, including the reservoir, of one-half acre, if its boundaries be now fixed where the defendant desires.

The complainants deny this right, insisting that as no precise amount of land was granted, the only description being that the quantity taken should not exceed one-half acre, and the defendant having, by building its reservoir, established the area required for it, fixed, by practical location, the limit of the grant, has not now, after so long a period, the right to increase it in any direction it may choose, thereby taking lands of the complainants lying beyond the boundary of the original selection.

The effect of the agreement is a grant to enter upon the lands now of the complainants, to dig and build a reservoir, to collect therein and draw therefrom, at its pleasure, the water flowing from the "Middle Spring," and creates only an easement.

In Owen v. Field, 102 Mass. 90, the grantor granted, sold and conveyed to the grantee the whole use of four springs and the right and privilege of laying an acqueduct across other lands of the grantor, together with the right and privilege of making reservoirs, and in construing this grant the Court said, "They were at liberty to dig up their pipes and abandon the enterprise whenever they found it for their interest to do so. The effect of the indenture seems to be that it gave a license or authority to the party of the second part to be exercised so long as they should see fit; or, more properly, that it granted to them an easement."

The agreement which we are now considering is substantially like the contract between the parties considered and interpreted by the Court in the case just referred to. By it the defendant is to have the right to draw and use all of the water from the reservoir, which manifestly means all the water from the spring. The important element in the grant is the right to use the draw all the water from the spring, and such right is only an easement. Race v. Ward, 4 E. & B. 702.

The defendant having had granted to it by the owner of a tract of land, a right to enter upon said lands, to build a reservoir thereon, "at what is known as the 'Middle Spring,'" provided the reservoir should not occupy or cover more than one-half acre of ground, acquired an easement thereunder of indefinite location, but not the right to enlarge its scope when it had been once fixed and exercised in a definite manner. This defendant, acting under its grant, located its reservoir at the "Middle Spring" and occupied therewith so much of the land as it deemed necessary for its purposes, and now since the extent of the grant as determined by the defendant at the time has been acquiesced in by the parties for ten years, it is committing an act which amounts to an enlargement of the easement, and violates the rule, that when a grant is made in terms so general or indefinite that its construction is uncertain and ambiguous, the contemporaneous acts of the parties giving a practical construction to it, is to be taken as a manifestation of the intention of the parties. When a right granted has been once exercised in a fixed and definite course with the full acquiescence and consent of both parties, it cannot be changed at the pleasure of the grantee. If it be admitted that he has the right originally to select the place in which the easement is to be enjoyed, he cannot afterwards alter it. Convenience and justice both require this limitation on the right, otherwise it would be open to questions of great doubt, and would make the servient estate in a great measure subject to the unrestrained

control of the owner of the easement." Jennison v. Walker, 77 Mass. 423. To the same effect is the opinion of Mr. Justice Knapp, delivering the judgment of our Court of Errors and Appeals in Jaqui vs. Johnson, 27 N. J. Eq. 526. See also Wynkoop v. Burker, 12 Johns. 222; Lorre v. Stiles, 25 N. J. Eq. 381-383.

To adopt the view of the defendant in this case would permit it from time to time, without limitation, whenever it saw fit, to pass and repass over the lands of the complainant, either to make constant enlargement of the reservoir or to sink driven wells at its pleasure, thereby imposing a continuing burden upon the servient tenement, which could not have been within the intention of either party when the grant was made. The grantor may be willing to suffer thei nconvenience of a singlei nvasion necessary for the purpose of constructing defendant's works, but it by no means follows that he would contract to allow constant invasions covering an indefinite period, and justice requires that this defendant be limited to the selection made by it as to the extent of the easement to be enjoyed by it under the indefinite terms of this grant.

As the defendant is putting upon complainant's land a permanent structure, and under its claim of right may continue to sink numerous wells, which, in my opinion, it has not right to do, I will advise a decree restraining it.

IN CHANCERY OF NEW JERSEY.

Mary J. Sked, individually and as guardian of Norman S. Sked, et al., Complainant, and Pennington Spring Water Company, Defendant.	On Bill for Injunction. Final Decree. Filed Feb. 21, 1907.

This cause coming on to be heard in the presence of Frederic R. Brace, Jr., and Frank S. Katzenbach, Jr., of counsel with the complainant, and of J. Lefferts Conard and John H. Backes, Esquires, of counsel with the defendant, and upon reading the pleadings, examining the documentary proofs and the statement of facts agreed upon, and hearing the argument of counsel, and after having duly considered the same, it appearing to the Court that the acts of the defendant, set forth in the complainant's bill, done upon the lands of the complainant, in the Township of Hopewell, in the County of Mercer and State of New Jersey, and particularly described in the bill of complaint, are not within the easement granted to the defendant by a certain agreement in writing, made by and between the defendant and the complainant's predecessor in title, Philip S. Sked, dated September fourteenth, eighteen hundred and ninety-six, by which the said Philip S. Sked granted to the defendants, "the right to enter upon his lands and premises situate in the Township of Hopewell, County of Mercer and

State of New Jersey, bounded by lands of John Fleming, Samuel F. Bunn, Charles T. Blackwell and lands of the heirs of Joseph H. Golden, deceased, to dig and build a reservoir at what is known as the 'Middle Spring,' the said reservoir not to occupy or cover more than one-half acre of ground," and that said acts are an additional burden upon said lands of the complainant.

IT IS, thereupon, upon the nineteenth day of February, nineteen hundred and seven, on motion of Frederic R. Brace, Jr., and Frank S. Katzenbach, Jr., of counsel as aforesaid,

ORDERED, adjudged and decreed that the well or wells being sunk and driven by the defendant as aforesaid are not within the said easement as granted by the said agreement of September fourteenth, eighteen hundred and ninety-six, but are an additional burden upon the said lands of the complainant.

And it is further ORDERED, adjudged and decreed that the defendant, its servants and agents be perpetually restrained and enjoined from sinking and boring a well or wells upon the lands of the complainant or using any well or wells heretofore sunk or driven upon complainant's lands or enlarging its reservoir, and from entering upon and passing or repassing over the said lands of the complainant, except for the purpose of cleansing, repairing and attending to its reservoir as at present constructed; and that an injunction issue accordingly.

And it is further ORDERED, that the defendant pay to the complainant her costs, to be taxed.

W. J. MAGIE, C.

Respectfully advised,

J. J. BERGEN, V. C.

IN CHANCERY OF NEW JERSEY.

Between Mary J. Sked, individually and as guardian of Norman S. Sked, et als., Complainant. and Pennington Spring Water Company, Defendant.	On Bill for Injunction. Appeal from Final Decree. Notice. Filed Feb. 26, 1907.

The defendant hereby appeals from the whole and every part of the final decree made in this Court, in the above stated cause, to the Court of Errors and Appeals in the last resort in all causes.

Dated February 26, 1907.

J. LEFFERTS CONARD,
Solicitor for and of Counsel with Defendant.

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

J. LEFFERTS CONARD,
Of Counsel with Defendant.

IN CHANCERY OF NEW JERSEY.

Between Mary J. Sked, individually and as guardian of Norman S. Sked, et als., Respondent. and Pennington Spring Water Company, Appellant.	Petition on Appeal. Filed March 4, 1907.

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

The petition of Pennington Spring Water Company, the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, James J. Bergen, Vice-Chancellor of New Jersey, bearing date the nineteenth day of February, nineteen hundred and seven, wherein the said Mary J. Sked, individually and as guardian of Norman S. Sked, et als., was complainant, and the said Pennington Spring Water Company was defendant, in these respects, to wit: that the said decree adjudges that the well or wells being sunk and driven, and the acts done by the defendant, upon the lands of the said complainant, and as set forth in the complainant's bill filed in the said cause, are not within the easement as granted by the agreement of September fourteenth, eighteen hundred and ninety-six, also set forth in the complainant's said bill, but are an additional burden upon the said lands of the said complainant, and also that the defendant, its servants and agents,

be perpetually restrained and enjoined from sinking and boring a well or wells upon the said lands or using any well or wells heretofore sunk or driven upon the said lands, or enlarging its reservoir and from entering upon and passing or repassing over the said lands, except for the purpose of cleansing, repairing and attending to its reservoir as at present constructed, and that an injunction issue accordingly, and that the defendant pay to the complainant her costs to be taxed. And your petitioner humbly appeals from the said decree of the Vice-Chancellor, which decrees as aforesaid, upon the grounds that the same is erroneous, for that the Vice-Chancellor should have decreed that the well or wells being sunk and driven by the defendant as aforesaid are within the said easement and are not an additional burden upon the said lands, and also for that the Vice-Chancellor should have decreed that the defendant, its servants and agents, be not perpetually restrained and enjoined as aforesaid, and also for that the complainant's said bill should have been dismissed, with costs to the defendant to be taxed.

Your petitioner therefore prays that the said decree of the said Vice-Chancellor may be in all respects and particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this honorable Court shall seem meet.

J. LEFFERTS CONARD,
Solicitor of Appellant.
Of Counsel with Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	
Mary J. Sked, individually and as guardian of Norman S. Sked, et al., Respondents, and Pennington Spring Water Company, Appellant	On Appeal. Answer to Petition of Appeal. Filed May 3, 1907.

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The answer of the above named respondent to the petition of appeal of the above named appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits, that a decree was, on the nineteenth day of February, nineteen hundred and seven, made and entered in the Court of Chancery, in the cause for that purpose 20 mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity, and she prays that the same may be affirmed, with costs to be adjudged to this respondent.

FRANK S. KATZENBACH, JR.,
FREDERIC R. BRACE, JR.,
Solicitors for and of Counsel with the Respondent. 30

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