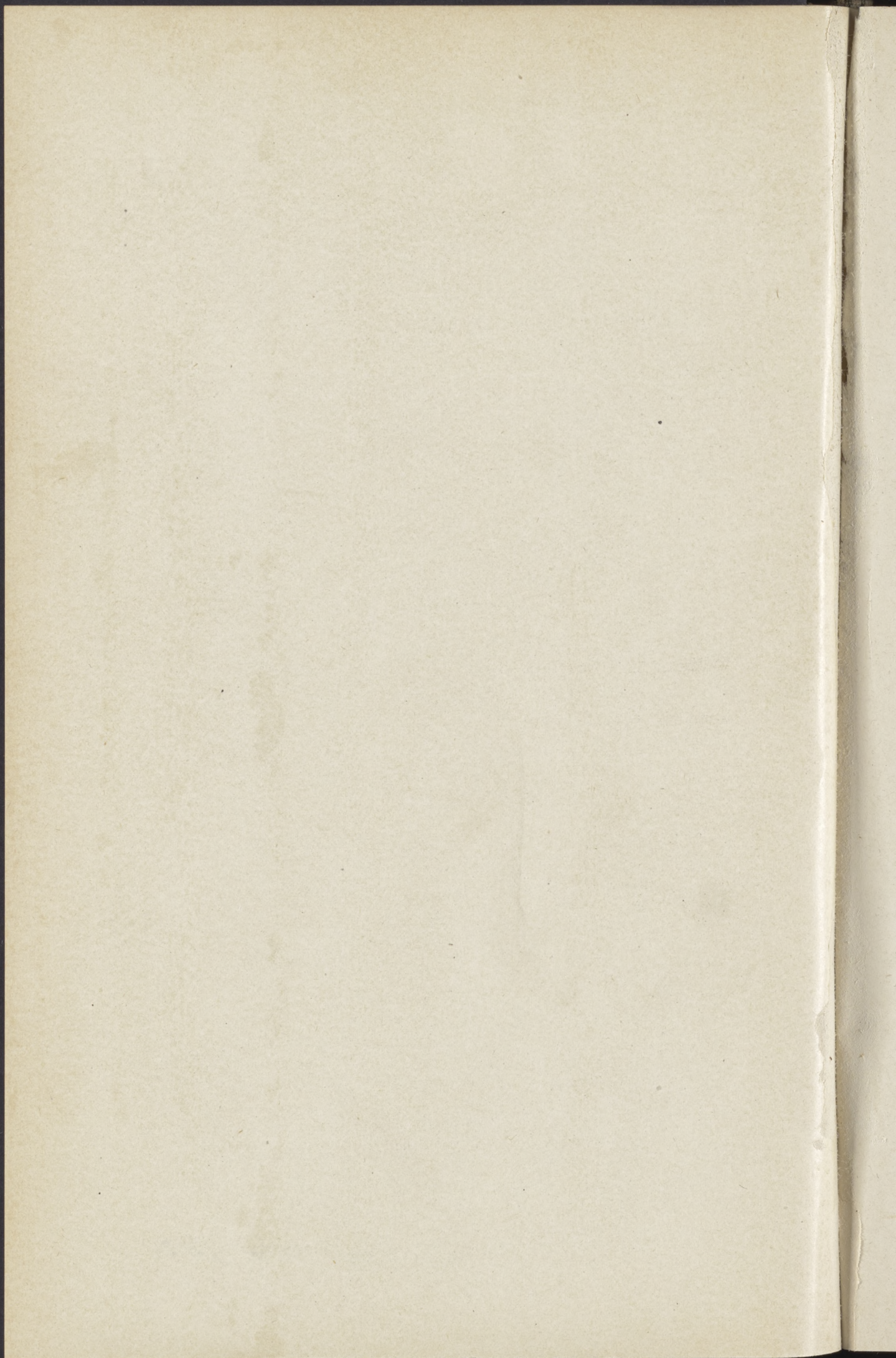


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NEW JERSEY
Court of Errors and Appeals

THEODORE J. LAPRES,
Complainant-Appellant,
vs.
SARAH N. DOUGHTY ET AL.,
Defendants-Respondents. } On Appeal from
Chancery.

BILL OF COMPLAINT.

(Filed April 22, 1913.)

IN CHANCERY OF NEW JERSEY.

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

10

The complainant, Theodore J. Lapres, of Atlantic City, New Jersey, respectfully shows that:

I. On the 26th day of June, 1886, Frederick Hem-
sley was the owner in fee of a tract of land in Atlantic
City, New Jersey, bounded by the easterly line of
Stenton Place and the westerly line of Iowa Avenue,
and between said lines on the north of Baltic Avenue
and the south by the exterior line in Atlantic Ocean,
as fixed by the Riparian Commissioners of the State of
New Jersey.

20

2. Being so seized, said Frederick Hemsley blocked and lotted said tract of land and filed in the Clerk's Office of Atlantic County a map showing the same, and thereafter he and his wife, Annie H., proceeded to grant and convey portions of said premises, and in the several deeds and conveyances there was inserted the following covenants, conditions and restrictions: (1) That no portion of any building shall at any time be erected within seventeen feet of the front property line
10 of any street or avenue bounding said lot or lots, nor within three feet of the rear dividing line, nor within three feet of the northerly dividing line of said lot or lots, nor within 22 feet of the southerly dividing line measuring from the first floor of the main body of any building, nor within fourteen feet of the southerly dividing line, measuring from the second floor, and above, of the main body of said building; provided, however, that bay windows may be added to sides and front of said building, but shall not extend more than two feet
20 from the main body thereof. And provided, also, the front porch or front veranda of said building may be erected not nearer than seven feet from front property line on any street or avenue bounding said lot or lots; excepting therefrom, however, all lots lying on Pacific Avenue or lots between Pacific Avenue and the Ocean Bulkhead now erected, or that may hereafter be erected, on said property, on any of which lots no part of any building shall at any time be erected within eighteen feet of the front property line of any street or avenue
30 bounding said lot or lots, nor within eight feet of the side dividing lines of said lot or lots, nor within three feet of the rear dividing line, excepting, however, the porch or front veranda of said building, which may be erected not nearer than eight feet of the front property line of any street or avenue bounding said lot or lots, and bay windows may be added to sides and front of said building, but shall not extend more than two feet from the main body thereof."

"It is expressly agreed, however, that above restrictions shall not be construed so as to prevent the steps or approaches to any porch or house from being built from the front property line of any lot or lots to the porch or main body of any building, but said steps or approaches shall not be covered, but open and free from overhead and lateral obstructions to view, except foundation and rail; and all porches and verandas except side porches and verandas shall be constructed without temporary or permanent obstructions to view and air 10 other than supports, roof and rail."

"Front of all buildings shall face the front property line of the lots, as laid out on said map; corner lots considered as having two fronts."

"(2) That no building of a value less than \$2,500 shall be erected on said lot or lots."

"(3) That the foundation for all dwelling houses shall be erected and set so that the top of the porch floor shall not be higher than 6 feet above grade of the streets or avenues, as now established." 20

"(4) Private dwellings only shall be built on said premises, excepting, however, premises that may hereinafter be reserved, and not more than one private dwelling house under the same roof shall be erected upon any one of said lots as marked and laid out on said filed map, and said lines as laid out on said maps shall not be changed, except where one person shall own two or more adjoining lots, in which case restrictions as to side lines shall apply only to outside lines of said adjoining lots; this exception is to be exercised only 30 when one owner of adjoining lots desires to erect one private dwelling under one roof covering more than one lot, and cannot be applied to rear dividing lines."

"(5) None of the foregoing restrictions are to apply to any lots on Atlantic Avenue, or side or cross avenues, northwardly therefrom; (corner lots on Atlantic Avenue considered as being on Atlantic Avenue); except that dividing lines of the lots lying on Atlantic Avenue,

or between Atlantic and Arctic Avenues, as laid out on said maps, shall not be changed."

"(6) That no building, or any part thereof, erected on said lot or lots shall be used as a slaughter house, piggery or any other nuisance tending to destroy the health, peaceableness, or proposed character of neighborhood. Warehouses, storehouses, carpenter or paint shops, stores or buildings for general merchandise business, or other like buildings or uses are prohibited; **10** except on lots fronting on Atlantic Avenue, and on lots lying northwardly of the northerly line of Atlantic Avenue; the selling of beer, wine or any intoxicating liquors is prohibited on said lots, excepting on lots lying on the northerly side of Atlantic Avenue, or on side or cross avenues northwardly therefrom, and no building for that purpose shall be erected or used for that purpose, except in locality aforesaid; corner lots on Atlantic Avenue considered as lying on Atlantic Avenue."

"(7) All buildings shall be connected with the sewer- **20** age plant and no drainage of any kind, or filth, shall be allowed to drain in the soil. No privy wells or other artifices for holding drainage or deposit of any kind shall be constructed on said lot or lots, if connection can be made with sewerage plants."

"(8) No stable or stables for livery purposes or for private use shall be erected on said lot or lots; excepting on lots lying northwardly of the lots on the northerly line of Atlantic Avenue as mapped; corner lots on Atlantic Avenue considered as lying on Atlantic **30** Avenue."

"(9) It is expressly agreed and covenanted that the Beach front as laid out on said filed map between the Bulkhead now existing on said premises and the Atlantic Ocean, or between any bulkhead that may hereafter be erected on said premises and the Atlantic Ocean, shall remain free, clear and unencumbered from and by any restrictions contained in above agreement, the said Frederick Hemsley reserving to himself, his heirs

and assigns, the use and enjoyment of said Beach front free from all covenants and restrictions."

"The above restrictions and reservations are hereby placed upon said lots in pursuance of a general plan of the owner to enhance the value by beautifying and making more healthful the occupancy of said lands, and said restrictions and reservations are so created as a part consideration for the purchase of said lots, and each and every purchaser shall abide by such covenant, and be entitled to enforce the rigid observance of the same against any person or persons violating the same, they being made for the mutual benefit of all purchasers; and the said Grantor, his heirs and assigns, will insert in and make a part of each and every deed of conveyance by him or them or his or their remaining restricted property, comprising the tract of which the within is a part, like covenants, conditions and restrictions."

"And also it is expressly covenanted and agreed between the parties hereto that the above restrictions shall attach and run with the land, they being assumed by the purchaser in part consideration of the purchase thereof, and shall be binding upon their heirs and assigns, whether included in subsequent conveyances or otherwise; and it shall be lawful for the said Frederick Hemsley, or any of his heirs or assigns, and for the owner of any lot or lots, to institute and prosecute any proceedings in law or in equity for damages or for injunctions against the person or persons having violated or threatened to violate any of the covenants and restrictions herein."

3. That by deed dated the 6th day of November, 1909, said Frederick Hemsley and Annie H., his wife, granted and conveyed to complainant a portion of said premises described as follows: "Beginning at a point in the east line of Stenton Place, three hundred and fifty feet south of Pacific Avenue, considered as a sixty-foot wide street, and runs (1) east, parallel with Pacific Avenue, one hundred and twenty feet to the

west line of Iowa Avenue; thence (2) southwardly along the westerly line of Iowa Avenue seventeen hundred and twenty-five feet, more or less, to the exterior line as fixed by the Riparian Commissioners of the State of New Jersey; thence (3) westwardly along said exterior line one hundred and twenty feet, more or less, to the easterly line of Stenton Place, if extended; thence (4) northwardly seventeen hundred and fifty feet, more or less, to the place of beginning," which said deed was
10 duly acknowledged and recorded in the Clerk's Office of Atlantic County, at Mays Landing, on November 30, 1909, in Book 415 of Deeds, page 272.

4. That all of the lands and premises described in complainant's deed lies oceanward of a certain bulkhead erected by the said Frederick Hemsley, and which bulkhead is located approximately 350 feet south of the southerly line of Pacific Avenue.

5. That the present owners of the several tracts of land lying within the bound of the original tract between Atlantic Avenue and the Ocean insist, claim and
20 contend that the lands and premises of the complainant are subject to the covenants, conditions and restrictions named and set forth in the respective deeds; and that complainant has no right to construct any building in violation of any of said covenants, conditions and restrictions.

6. Complainant insists and contends that his premises is wholly free from each and every of the said covenants, conditions and restrictions by virtue of the
30 following clause in the respective deeds from Hemsley: "It is expressly agreed and covenanted that the beach front as laid out on said filed map between the Bulkhead now existing on said premises and the Atlantic Ocean, or between any bulkhead that may hereafter be erected on said premises and the Atlantic Ocean, shall remain free, clear and unencumbered from and by any restrictions contained in above agreement, the said Frederick Hemsley reserving to himself, his heirs and as-

signs, the use and enjoyment of said Beach front free from all covenants and restrictions."

7. Complainant avers that he has had several opportunities to sell and convey said premises, but has been prevented from so doing because his prospective purchasers wanted the premises free of the covenants, conditions and restrictions set forth in said deeds, and stated that in view of the contentions and claims made by said owner his, complainant's, premises were subject to said covenants, conditions and restrictions and prevented their purchasing. 10

8. That by reason of such claims of said owners complainant's property in said lands is greatly affected and the same cannot be sold as they otherwise could.

9. Complainant has ever since the making and recording of said deed from Hemsley to himself been in the peaceable possession of the land therein, and above described, and that your orator's free, unencumbered and unrestricted title thereto was disputed by the defendants hereinabove named, who claim an interest in and to said premises by virtue of said covenants, conditions and restrictions, and complainant claims that such contention and claims are utterly without foundation, unjust and vexatious. 20

10. That no suit or action of any kind is pending to enforce and test the validity of such title or claim of the defendants.

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

1. That Sarah N. Doughty, David C. Reed, John B. Slack, William M. Clevenger, William E. Waters, Frank McManus, Charles B. Boyer, Eliza Brown, William B. Loudenslager, Eleanor H. Jordan, Lucius Wright, Mary A. Mehrer, Alfred M. Heston, Arela M. Smith, James B. Alcorn, Catherine S. Lambert, Harry Doherty, Martha K. Crowley, Harry H. Hallman, M. Louise Bryan, Herman M. Sypherd, Eva B. Clark, Daniel W. Meyers, Samuel Rotholtz, Ludora Risley, Charles M. Welsh, 30

Annie Schlecht, Israel G. Adams, Arthelia Johnson, Frederick Hemsley estate, Annie H. Hemlsey and Quincy A. Gillmore, executors, and Pennsylvania Company for Insurance on Lives and Granting Annuities, a corporation of the State of Pennsylvania, trustees of the estate of Frederick Hemsley, deceased, Michael J. O'Meara, Louise T. Langsdorf, Joseph Fralinger, who are the defendants of this suit, may answer this bill of complaint without oath and each statement therein made.

10 2. That a decree may be made that the lands and premises of the complainant herein described are free and unencumbered of the covenants, conditions and restrictions recited in the several deeds from Frederick Hemsley as hereinabove set forth.

3. That the defendants who are herein named have not by reason of said covenants, conditions and restrictions any right, title or interest whatever in the property of complainant.

20 4. That a writ of subpcena may issue commanding the said defendants to answer this bill of complaint, and to abide by such decree as this Court may make in the premises.

C. L. COLE,
Solicitor and of Counsel with Complainant.

IN CHANCERY OF NEW JERSEY.

BETWEEN	THEODORE J. LAPRES,	}	On Bill &c.
	<i>Complainant,</i>		
	AND		
30	SARAH N. DOUGHTY ET AL.,	}	
	<i>Defendants.</i>		

ANSWER.

Answer of the defendants, Sarah N. Doughty, David C. Reed, William M. Clevenger, William W. Waters, Charles B. Boyer, William B. Loudenslager, Eleanor

H. Jordan, Lucius Wright, James B. Alcorn, Harry Doherty, Harry H. Hallman, Daniel W. Myers, Samuel Rotholtz, Ludora Risley, Annie Schlecht, devisee of Adolph Schlecht, Israel G. Adams and Louise T. Langsdorf.

These defendants answering the bill of complaint say that:

1. They admit paragraphs 1 and 2 of the bill of complaint.

2. They admit paragraph 3 of the bill of complaint, 10 and further say that said deed contained the covenants and restrictions set forth in said bill; that said property was thereafter conveyed by the complainant and his wife to Donatello Lamponi, by deed dated February 9, 1910, which deed likewise contained said conditions and restrictions; that thereafter the said Donatello Lamponi and wife conveyed said property to Joseph Fralinger by deed dated January 6, 1915, said conditions and restrictions being omitted; that the said Joseph Fralinger and wife conveyed said premises to the com- 20 plainant by deed dated June 29, 1915, said conditions and restrictions being again omitted.

3. They admit paragraph 4, but further say that the bulkhead therein referred to was erected by the said Frederick Hemsley in the year 1911, or thereabouts; that years before that time, in the year 1897, or thereabouts, the said Frederick Hemsley erected a certain bulkhead across said premises from Stenton Place to Iowa Avenue at a distance of approximately 460 feet 30 south of the southerly line of Pacific Avenue; that said bulkhead is shown upon the map of said premises which was filed by the said Frederick Hemsley on or about the 1st day of May, 1897, being the map referred to in paragraph 1 of complainant's bill; that said map also shows a 20 feet wide alley or passageway extending from Stenton Place to Iowa Avenue immediately adjoining said bulkhead on the landward side thereof;

that said bulkhead and alleyway both pass directly through and across the premises described in paragraph 3 of complainant's bill, and these defendants insist that all that portion of said premises described in paragraph 3 of said bill lying to the north of said bulkhead and alleyway, being lots 130 and 131 on said map, remain and are now subject to the conditions and restrictions imposed upon them by the said Frederick Hemsley as the result of the making of the deeds and the filing of
10 the map as set forth in said bill of complaint.

4. They admit that it is their contention, as alleged in paragraph 5 of said bill, that that portion of the lands and premises belonging to the complainant which lie north of the original bulkhead and alleyway above referred to are subject to the covenants, conditions and restrictions named and set forth in the deeds referred to in the bill of complaint.

5. They deny that complainant's premises are free from each and every of the said covenants, conditions
20 and restrictions as alleged in paragraph 6 of said bill of complaint by virtue of the clause therein quoted from the respective deeds made by said Hemsley.

6. They have no knowledge as to the facts alleged in paragraphs 7 and 8 of said bill of complaint, but leave it to the complainant to make such proof thereof as he may see fit.

7. They admit that the complainant, as alleged in paragraph 9 of said bill, has been in the peaceful possession of said premises except for the period during which
30 the title was out of complainant as hereinbefore set forth, and that these defendants do claim an interest in and to said premises by virtue of the covenants, conditions and restrictions referred to in said bill of complaint, to the extent above set forth.

8. They admit paragraph 10 of said bill.

9. These defendants further answering say that they are respectively the owners of the lost hereinafter set forth, all of which lots were part of the tract delineated

on the map referred to in the bill of complaint as filed by the said Frederick Hemsley, and were owned by him; that their contention with respect to that portion of the complainant's premises lying north of the bulk-head constructed by the said Hemsley in the year 1897, or thereabouts, *i. e.*, that said portion of said premises is subject to the restrictions, covenants and conditions described in said bill of complaint, is based upon the fact that the various deeds through which their respective titles came to them from the said Frederick Hemsley contained such restrictions, conditions and covenants, which likewise were inserted in the conveyance made by the said Hemsley to the complainant. 10

10. These defendants say that they are respectively the owners of the following described lots, title to which became vested in them, respectively by virtue of the following conveyances:

Sarah N. Doughty: Property 72½ feet in depth by 50 feet in width at the southeast corner of Atlantic Avenue, on the east side of Stenton Place— 20

1. Frederick Hemsley and wife sold to William J. Walls 47½ feet front on Atlantic Avenue by 100 feet deep on Stenton Place, January 31, 1900, Deed Book 242, page 362.

2. Frederick Hemsley and wife sold to William H. Burkard 25 feet on Atlantic Avenue by 100 feet deep immediately in the rear of the above property, June 2, 1900, Deed Book 246, page 415.

3. William H. Burkard and wife sold to William J. Walls the last mentioned lot, June 2, 1900, Deed Book 247, page 139, thus giving Walls 72½ feet on Atlantic Avenue by 100 feet on Stenton Place. 30

4. William J. Walls and wife sold the whole property to John F. Ryon, February 28, 1901, Deed Book 257, page 99.

5. John F. Ryon sold the same property to Thomas J. Dickerson, May 17, 1902, Deed Book 273, page 91.

6. At this point the title splits:

Thomas J. Dickerson sold to Mary E. Salmon 50 feet in front by $72\frac{1}{2}$ feet in depth at the corner, August 14, 1903, Deed Book 290, page 442.

7. Mary E. Salmon sold to Aurelia A. Nixon, September 25, 1903, Deed Book 294, page 96.

8. Smith E. Johnson, Sheriff, under foreclosure, sold to the Union National Bank of Atlantic City the same lot, July 2, 1907, Deed Book 362, page 254.

9. Union National Bank sold the same lot to Sarah
10 N. Doughty, May 13, 1910, Deed Book 431, page 119.

David C. Reed: Property $72\frac{1}{2}$ feet in depth by 50 feet in front, 50 feet south of Atlantic Avenue, on the east side of Stenton Place—

1. Title the same as above into Thomas J. Dickerson.

2. Thomas J. Dickerson sold to Wilbert S. Higbee 50 feet by $72\frac{1}{2}$ feet, July 18, 1902, Deed Book 276, page 27.

3. Wilbert S. Higbee and wife sold the same lot to David C. Reed, May 8, 1907, Deed Book 360, page 99.

20 William M. Clevenger: Property 60 feet in front by 60 feet in depth, 160 feet south of Atlantic Avenue, on east side of Stenton Place—

1. Frederick Hemsley and wife sold to William G. Hoopes, May 7, 1897, Book 213, page 193.

2. William G. Hoopes died leaving a last will and testament devising all of his property to his mother, Martha E. Hoopes.

3. Martha E. Hoopes sold to William M. Clevenger, September 24, 1898, Book 225, page 484.

30 William E. Waters: Property 60 feet in front by 60 feet in depth, 220 feet south of Atlantic Avenue, on the east side of Stenton Place—

1. Frederick Hemsley and wife sold to William G. Hoopes, subject to restrictions, May 7, 1897, Book 213, page 193.

2. William G. Hoopes died leaving a last will and testament devising all of his property to his mother, Martha E. Hoopes.

3. Martha E. Hoopes sold the property to Henry Fitton, December 9, 1898, Deed Book 229, page 48.

4. Henry Fitton sold to Margie McClay and Mary W. Stiles, August 22, 1899, Book 234, page 210.

5. McClay and Stiles and husbands sold to Lizzie P. Sharp, by deed dated March 2, 1900, Book 242, page 376.

6. Lizzie P. Sharp sold to Linnie M. Englehardt, November 7, 1902, Book 393, page 129.

7. Linnie M. Englehardt sold to W. E. Waters, May 10 10, 1910, Deed Book 428, page 330.

Charles B. Boyer: Property 60 feet in front by 60 feet in depth, 340 feet south of Atlantic Avenue, on the east side of Stenton Place—

1. Frederick Hemsley and wife sold to William G. Hoopes, subject to restrictions, May 7, 1897, Book 213, page 193.

2. William G. Hoopes died leaving a last will and testament devising all of his property to his mother, Martha E. Hoopes. 20

3. Martha E. Hoopes sold the property to Leonard D. Algar, deed dated July 18, 1899, Deed Book 232, page 253.

4. Leonard D. Algar and wife sold to Charles B. Boyer, by deed of July 18, 1899, Deed Book 233, page 352.

William B. Loudenslager: Property 90 feet on Stenton Place by 60 feet in depth on Pacific Avenue—

1. Frederick Hemsley sold to William B. Loudenslager, March 22, 1902, Deed Book 262, page 1. 30

Eleanor H. Jordan: Property 90 feet on the westerly side of Iowa Avenue by 60 feet on the northerly side of Pacific Avenue—

1. Frederick Hemsley sold to Sarah T. Crowley, April 7, 1902, Book 271 of Deeds, page 406.

2. Sarah T. Crowley and husband sold to Eleanor H. Jordan, wife of Albert M. Jordan, for life, with

remainder in fee to Margaret T. Watt, wife of Louis H. Watt, January 11, 1913, Book 506, page 71.

Lucius Wright: 60 feet in front by 60 feet in depth, 400 feet south of Atlantic Avenue, on west side of Iowa Avenue—

1. Frederick Hemsley and wife sold to Silas Wootton, November 11, 1899, Deed Book 238, page 215.

2. Silas Wootton sold to Lucius Wright, May 12, 1900, Deed Book 245, page 331.

10 James B. Alcorn: Property 60 feet in front by 60 feet in width, 160 feet south of Atlantic Avenue, on west side of Iowa Avenue—

1. Frederick Hemsley and wife sold to William H. Burkard, November 10, 1899, Deed Book 239, page 132.

2. William H. Burkard and wife sold to Daniel D. Whelan, June 1, 1901, Deed Book 260, page 300.

3. Daniel D. Whelan sold to Allen T. Dixon, December 12, 1903, Deed Book 298, page 52.

4. Allen T. Dixon sold to George G. Omerly, May 27, **20** 1904, Deed Book 301, page 390.

5. George G. Omerly sold to Mary S. Whetherill, June 1, 1904, Deed Book 301, page 406.

6. Mary S. Whetherill sold to George Vaux, Jr., Trustee, May 6, 1911, Deed Book 498, page 18.

7. George Vaux, Jr., Trustee, and Jane Wetherill Bartlett sold to J. B. Alcorn, October 9, 1912, Deed Book 493, page 260.

30 Harry Doherty: Property 54 feet in depth by 50 feet front, southwest corner, west side of Stenton Place—

1. Frederick Hemsley sold to William G. Hoopes, May 7, 1897, Book 213, page 193.

2. William G. Hoopes died leaving a last will and testament in which he named his mother, Martha E. Hoopes as sole devisee and executrix.

3. Martha E. Hoopes sold 100 feet in width on Stenton Place by 54 feet in depth at the southwest

corner to Leonard D. Algar, July 31, 1899, Deed Book 235, page 89.

4. Leonard D. Algar sold 54 feet in depth by 50 feet in front at the southwest corner to Harry A. Doherty, May 15, 1908, Deed Book 384, page 155.

Harry H. Hallman: Property 54 feet in depth by 60 feet in front, 160 feet south of Atlantic Avenue, west side of Stenton Place—

1. Title the same as above into William G. Hoopes.

2. Martha E. Hoopes, sole devisee and executrix, 10 sold to Leonard D. Algar, July 18, 1899, 120 feet in front by 54 feet in depth, 100 feet south of Atlantic Avenue, Deed Book 233, page 253.

3. Leonard D. Algar sold to Charles I. Burkhard, July 17, 1900, 54 feet in depth by 60 feet on front, 160 feet south of Atlantic Avenue, Deed Book 248, page 118.

4. Charles I. Burkard sold to James Darrach same property, November 26, 1900, Deed Book 251, page 490.

5. James Darrach sold to Hubert Somers the same 20 property, June 6, 1902, Deed Book 274, page 73.

6. Hubert Somers sold to Harry H. Hallman the same property, October 6, 1909, Deed Book 411, page 353.

Daniel W. Myers: Property 54 feet in depth by 60 feet front, 340 feet south of Atlantic Avenue, west side of Stenton Place—

1. Title the same as above into Leonard D. Algar.

2. Leonard D. Algar sold to C. J. Adams, July 20, 1899, Deed Book 235, page 38. 30

3. C. J. Adams and wife sold to William H. Burkard, June 25, 1900, Deed Book 247, page 305.

4. William H. Burkard and wife sold to Frank Smathers, August 29, 1907, Deed Book 368, page 36.

5. Frank Smathers sold to Daniel W. Myers, June 8, 1909, Deed Book 403, page 366.

Samuel Rotholtz: Property 54 feet in depth by 60 feet front, 400 feet south of Atlantic Avenue, west side of Stenton Place—

1. Frederick Hemsley and wife sold to William G. Hoopes, May 7, 1897, Book 213, page 193.

2. William G. Hoopes died leaving a last will and testament, in which he named his mother, Martha E. Hoopes, as sole devisee and executrix.

3. Martha E. Hoopes sold to Harry Wootton, July 18, 1899, Deed Book 234, page 3.

4. Harry Wootton and wife sold to William H. Burkard, October 31, 1899, Deed Book 236, page 487.

10 5. William H. Burkard and wife sold to Samuel Rotholz, May 18, 1907, Deed Book 358, page 360.

Ludora Risley: Property 54 feet in depth by 90 feet in width at northwest corner of Stenton Place and Pacific Avenue—

1. Frederick Hemsley and wife sold to Ella C. Howard, December 1, 1902, Book 282, page 80.

2. Ella C. Howard sold to Ludora Risley, November 21, 1911, Deed Book 474, page 57.

20 Annie Schlecht, devisee of Adolf Schlecht: Property 90 feet in front by 60 feet in depth, 75 feet from Pacific Avenue, considered a 60 feet wide street, on east side of Stenton Place—

1. Frederick Hemsley and wife sold to Adolf Schlecht, October 17, 1900, Book 250, page 239.

2. Adolf Schlecht died leaving a last will and testament, devising the property to his widow, Annie Schlecht.

30 Israel G. Adams: Property 90 feet in width by 60 feet in depth, 75 feet south of Pacific Avenue, on the west side of Iowa Avenue—

Frederick Hemsley and wife sold to Israel G. Adams, August 9, 1899, Book 235, page 18.

Louise T. Langsdorf: Property running from Iowa Avenue to Stenton Place on the south side of Pacific Avenue, being 120 feet on Pacific Avenue by 75 feet in depth on Stenton Place, considering Pacific Avenue as a 60 feet wide street—

1. Frederick Hemsley and wife sold the lot to Annie L. Drake, December 23, 1899, Book 240, page 332.

2. Annie L. Drake sold the same property to Louise Teller Langsdorf, July 7, 1914, Deed Book 527, page 342.

By way of counterclaim against the complainant, these defendants say that by reason of the facts set forth in said bill of complaint and said answer, all that portion of the complainant's premises lying north of the line of the original bulkhead, which line is 460 feet south of the southerly line of Pacific Avenue and parallel therewith, extending from Stenton Place to Iowa Avenue, is subject to the right of way 20 feet in width, being the alleyway or passageway designated on said map filed by said complainant in the office of the County Clerk of Atlantic County, at Mays Landing, and that said portion of said premises is likewise subject to all the covenants, conditions and restrictions to which the lots of these defendants are subject, and which are set forth in said bill of complaint. 30

These defendants therefore pray:

1. That said complainant may answer this counterclaim without oath. 10

2. That it may be decreed that said portion of said premises are subject to the lien and encumbrances created by said covenants, restrictions and conditions.

3. That it may be decreed that complainant pay to these defendants their costs sustained in these proceedings. 20

GREY & ARCHER,
Solicitors for defendants above named. 20

Consent is hereby given to the filing of the within answer as within time.

C. L. COLE,
Solicitor for Complainant.

IN CHANCERY OF NEW JERSEY.

BETWEEN

THEODORE J. LAPRES,

Complainant,

AND

SARAH N. DOUGHTY ET AL.,

Defendants.

} On Bill, etc.

} Final Hearing.

Before His Honor, E. B. LEAMING, Vice Chancellor,
 10 at the Chancery Chambers, Atlantic City, New Jersey,
 on Wednesday, October 4th, 1916.

Appearances—Hon. CLARENCE L. COLE, for complainant; GREY & ARCHER, ESQS., for defendants.

Mr. Cole—I offer in evidence a deed dated November 6th, 1909, from Frederick Hemsley to Theodore J. Lapres, recorded in book 415 of deeds, page 272.

(Said paper marked *Exhibit C 1.*)

Mr. Cole—It is admitted for the purpose of this case that all of the deeds made by Frederick Hemsley for
 20 land within the area of the map filed, which will be presently introduced, contain the same restrictions and use the same language respecting the same as is in the deed just offered.

Mr. Archer—Yes. This is the same deed as is copied in the bill?

Mr. Cole—Yes. It is further stipulated that the original bulkhead constructed by Mr. Hemsley was approximately 460 feet south of the southerly line of Pacific avenue, and that the bulkhead as moved is about 350
 80 feet south of the south line of Pacific avenue.

Mr. Archer—As to that point, of course, I would like the stipulation to be that it is on the lot line, as I said in my letter to you, that the new bulkhead was constructed—

Mr. Cole—On the northerly line of the complainant's lot.

Mr. Archer—Yes.

Mr. Cole—Yes, that is right. In other words, we begin 350 feet south.

The Vice Chancellor—On the middle line between lots 122 and 130 and between lots 123 and 131 on the map filed.

Mr. Archer—That is right.

The Vice Chancellor—The bulkhead easterly of the four lots named extending across lot 127, and westerly of the lots named extending across 126.

Mr. Cole—It is further stipulated that the original bulkhead, or the one 460 feet south of Pacific avenue, was constructed between May and October of 1896, 10 and the present bulkhead of 350 feet south of Pacific avenue sometime in 1908.

The Vice Chancellor—That is, about twelve years later?

Mr. Cole—Twelve years later.

Theodore J. Lapres, the complainant, being duly sworn according to law, on his oath says—

By Mr. Cole:

Q. Mr. Lapres, you are the complainant—the one 20 who brings this suit?

A. Yes.

Q. And are you the owner of the land that is described in this deed of November 6th, 1909, from Frederick Hemsley to Theodore J. Lapres?

A. I am.

Q. I notice on the map before the Vice Chancellor that there is a boardwalk extending along the ocean front. Do you know how long that boardwalk has been there?

30

A. Well, I don't know exactly; no.

Q. About?

A. Well, I judge twelve years or more.

Q. And it is there now, isn't it?

A. It is there now.

Q. That is a public highway of Atlantic City, isn't it?

A. Yes.

The Vice Chancellor—Well, it must have been there when this map was filed.

Mr. Cole—I assume so. It says so on the map.

The Vice Chancellor—Have you stipulated the date the map was filed yet?

Mr. Cole—No. The original map will be here. The clerk seems to have gone astray. He was here with the map.

10 Mr. Archer—I have the date of filing.

Mr. Cole—Yes; suppose you put it in. It is agreed that—

Mr. Archer—It is agreed that the first map filed by Hemsley was filed May 1st, 1897.

The Vice Chancellor—And is this the same map which I have here?

Mr. Archer—It is the same except one matter which we will have to endeavor to clear up—with regard to this street (indicating on map).

20 The Vice Chancellor—Otherwise it is the same as this?

Mr. Archer—Yes.

The Vice Chancellor—Let it be stipulated that the map now marked *Exhibit C 2* is an exact copy of the map filed in the Clerk's office with the exception of details which will be explained touching the alleyway which appears on *Exhibit C 2*.

30 Mr. Cole—I think that is correct. If the map filed shows differently I will call Your Honor's attention to it. I think that is the fact.

(Said copy of map marked *Exhibit C 2*.)

The Vice Chancellor—What was the date you said this was filed, Mr. Archer?

Mr. Archer—May 1st, 1897. The second map—I don't know whether you want that now—the filing of the second map was April 22d, 1909.

The Vice Chancellor—Have you a copy of it?

Mr. Archer—Only a rough copy, too rough to be used, a copy I made when the Clerk produced the original. If you will excuse me a minute, I think I know where the Clerk is.

The Vice Chancellor—Is the copy like this one here?

Mr. Archer—No; it is different. (After search for Clerk)—We will have to let that rest for the time being, the Clerk is not in the corridor and cannot be found. 10

Mr. Cole—That is all I want to ask Mr. Lapres now.

Cross-examination, by Mr. Archer:

Q. Mr. Lapres, at the time you bought the property in question, the property described in that deed, were you familiar with this map that is offered in evidence here?

A. No, I did not see that map. 20

Q. Hadn't you ever seen any map, you mean?

Mr. Cole—I think that is not cross-examination.

Mr. Archer—Well, he is a party, I should think—

The Vice Chancellor—I guess it will be all right.

Mr. Archer—That is the reason I hesitated, I didn't know whether you were going to call him again. 30

Mr. Cole—All right.

By the Vice Chancellor:

Q. May I interrupt long enough to inquire when you bought from Hemsley? It has been shown but I don't recall the date.

Mr. Cole—1909.

A. November 6th, 1909.

By Mr. Archer:

Q. Well, after purchasing from Mr. Hemsley the tract in question, you caused this bulkhead to be moved back?

A. No, no; the bulkhead was there when I purchased the property.

Q. Which bulkhead?

A. The one now back, the one 350 feet from Pacific avenue, that was there, that existed at the time I made
10 my purchase.

Q. That existed at the time you made your purchase, and you say you had not seen any maps of any sort?

A. I don't remember. Mr. Fisher sold me the property and he may have possibly showed me a map, but I don't remember seeing any. No map like that one anyway, not a big map like that. He may have showed me a diagram of it.

Mr. Archer—I think I will ask him no more
20 questions now. If he is recalled I may have something else to ask.

Warner I. Risley, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says—

By Mr. Cole:

Q. You are a civil engineer, are you not?

A. Yes, sir.

Q. Have you been on this piece of land recently that is owned by Mr. Lapres?

30 A. Yes, on October 2d.

Q. Did you make a survey for the purpose of indicating high-water line?

A. I found the location of high-water line, yes, sir.

Q. Where did you find it with relation to the boardwalk?

A. On the line of Stenton place; it was 22 feet oceanward of the interior line of the boardwalk, and on the line of Iowa—

By the Vice Chancellor:

Q. Then it would be under the boardwalk?

A. Under the boardwalk, and on the Iowa avenue line it was 27 feet oceanward of the boardwalk.

Q. That would also be under the boardwalk?

A. Under the boardwalk.

By Mr. Cole:

Q. How much land is there between the interior line of the boardwalk, if you know, and 350 feet south of 10 Pacific avenue?

A. The interior line of the boardwalk on the Iowa avenue line is 507 and $84/100$ feet south of Pacific avenue, and on the Stenton place line it is 500 and $57/100$ feet.

Q. What is the condition of the land physically—what is it, between the interior line of the boardwalk and 350 feet south of Pacific?

A. It is beach.

Q. Pure beach? 20

A. Beach sand, yes.

Q. No buildings of any kind there?

A. No.

Q. By the way, is this bulkhead visible—any part of it?

A. As I remember it is, there is a stone shows about in front of it.

By the Vice Chancellor:

Q. What? 30

A. Stone in front of it shows at the present time.

By Mr. Cole:

Q. Do you know the condition of high-water line at any time previous to the time you made this survey?

A. From records I have in my office I have the position of it in 1893.

Q. Where was it then with relation to the boardwalk?

A. I have it with relation to Pacific avenue.

Q. Yes?

A. At Stenton place it was 390 feet south of Pacific avenue.

By the Vice Chancellor:

Q. That is further out than it is now?

A. No, considerably inside. That would be 143 feet landward of the present high-water mark. And on

10 Iowa avenue it was 408 feet south of Pacific avenue, or 127 feet landward of the present high-water mark.

Q. Would you mind telling me again the date of that?

A. That was May, 1893.

By Mr. Cole:

Q. At that time do you know if a boardwalk existed in front of this property?

A. No, I do not.

20 Q. You don't remember?

A. I wouldn't remember back to that date but from records that I have.

Q. You don't happen to know how long a boardwalk has existed in front of this property, approximately?

A. I couldn't say.

By the Vice Chancellor:

Q. That high-water mark you have given in 1893

30 wouldn't be far from where this first bulkhead was, would it? It would be about it?

A. That bulkhead I think is 350 south of Pacific avenue.

By Mr. Cole:

Q. Well, the original was 460 feet.

A. Well, this would be 70 feet landward on the Stenton avenue line and 53 feet landward on the Iowa avenue line.

By the Vice Chancellor :

Q. Which would be landward—the high-water mark?

A. Yes, the high-water mark of 1893 is landward.

Q. How can that be? In 1897, or just a few years later, this map is filed showing a bulkhead, and the high-water mark cannot be landward of the bulkhead.

A. This is 1893.

Mr. Cole—This map was filed in 1897.

The Vice Chancellor—Four years later, that is, apparently. I had thought the bulkhead had 10 been there that long, but maybe not.

Mr. Cole—No. I will show the bulkhead was built in 1896.

Mr. Archer—1896.

Q. Then it would be really somewhat inside of where the bulkhead is shown on this map?

A. Yes, sir.

Q. This map shows it 460 feet above Pacific avenue?

A. Yes, sir.

No cross-examination.

20

Victor J. Fisher, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says :

By Mr. Cole :

Q. Mr. Fisher, you live in Atlantic City?

A. Yes, sir.

Q. How long have you lived here?

A. About seventeen or eighteen years, I should say.

Q. Do you know the land within the line of Stenton 30 place and Iowa avenue and the beach, Atlantic City?

A. Yes, sir.

Q. How long have you known it?

A. Well, I have known it ever since I have been a resident here, back to about 1898.

Q. Did you know of the bulkhead along the ocean front of this property which was 460 feet south of Pacific avenue?

A. Yes, sir.

Q. Do you know what became of it?

A. Why, yes; it was washed away and sank down in the sand, absolutely disappeared.

Q. When did that occur?

A. I should say it was about—to my mind the bulkhead was built in 1898, but I am surprised to learn this morning that the record shows 1896, for I remember distinctly putting a stone there and immediately after
10 that they had quite a heavy tide and with the tide the bulkhead disappeared completely out of sight.

Q. What is your best recollection as to the time that intervened between the completion of that bulkhead and its being washed away?

A. I think it was only a matter of weeks, if I am not mistaken, it was a very short time.

Q. Do you remember the construction of the new bulkhead on the 350 feet line?

A. Do you mean the present bulkhead?

20 Q. Yes.

A. Why, yes; it is a *fac simile* of the original one.

Q. And is there some evidence of its existence now? Can you see it, in other words, now?

A. Oh, yes, yes.

Q. What kind of land is there between the interior line of the public boardwalk and this new bulkhead line?

A. Well, it is nothing more than simply beach, washed by the water at times, when we have a high tide, it depends on the tide.

30 Q. Well, is it just plain beach sand?

A. Plain ordinary beach, yes, what you would call—just beach. It wouldn't be fit for anything unless it was protected or bulkheaded.

Q. Do you know whether at any time after the new bulkhead was erected the tide came up to or over it?

A. Yes, sir; went right over it.

Q. You have personal knowledge of that?

A. Yes, sir; I have seen it.

Q. Seen it yourself?

A. Yes, sir.

Q. What was that, an ordinary tide?

A. No; I wouldn't say it was an ordinary tide, no; it was more than a—rather a high tide; I wouldn't say it was the average mean tide, but for a long time there after this present bulkhead was erected the water came very close to it.

Cross-examination, by Mr. Archer:

10

Q. Mr. Fisher, were you familiar with the physical appearance of these premises for the period immediately following the construction of the original bulkhead?

A. I think so, yes.

Q. Where did you live?

A. Why, I think I was then residing on Providence avenue, if I am not mistaken.

Q. On which avenue?

A. Providence avenue, that is Chelsea, a few squares below.

20

Q. And constantly saw the property?

A. Yes, sir; I passed there nearly every day, very seldom I wouldn't pass that neighborhood.

Q. And you say that within a few weeks after the construction of the original bulkhead it was so completely washed away by this tide that a person going by the property and looking at it wouldn't see the original bulkhead?

A. Absolutely no evidence of it at all. I wouldn't state that it all happened within a few weeks, though, 30 but in the course of time it absolutely disappeared, no signs of it at all.

Q. And how would you prescribe the time during which it disappeared?

A. Well, it is so very long ago now, and it made such a slight impression on my mind at that time, I couldn't really just find the actual time it took in doing that, because I had no interest at that time to make an

impression on me; but it is a fact that the bulkhead disappeared, anybody being in the neighborhood and passing would notice it.

Q. Well, do you realize that it was something like twelve years between the time when the original bulkhead was constructed and the new one was constructed?

A. Yes, sir.

Q. Well, having that fact in mind, can you come anywhere near approximating the time?

10 A. Approximating the time of what?

Q. The time taken for the complete obliteration of the old bulkhead?

A. I say—I am still of the opinion that it was only a matter of weeks from the time—

Q. You mean to say that from recollection you can assert that as a fact?

A. I say it is my opinion, I am not asserting it as a fact.

Q. The unfortunate part of this situation is that
20 we cannot take opinion. I want to know whether you, from your own knowledge, are prepared to say as a fact that within a matter of some weeks that old bulkhead disappeared from view? Now, how do you answer that question?

A. Well, to answer it as a fact, I refuse to answer it, that is, I wouldn't say it was an actual fact, but I am just simply saying my opinion, as my memory serves me now, is that it was only a matter of weeks, because—

Q. You are not at all confident of that, though, are
30 you?

A. Well, I wouldn't want to make an absolute affidavit that it was only weeks, no, because, as I said, it is quite a long time ago.

Q. Are you prepared to say that it had disappeared within a year?

A. Well, I will say this: At the end of—or, say, in the fall of 1898 there was no evidence of the bulkhead there at all. I will say that as a fact.

Q. Well, two years then, approximately, from the time it was constructed?

A. Well, then, suppose it was—say from 1896.

David R. Barrett, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says—

Mr. Cole—Now, may it please Your Honor, I think I should put on the record what my offer now is. Mr. Barrett was for a number 10 of years assessor of Atlantic City, and I can show by him that as far back as 1903 it has been the custom in Atlantic City to regard beach front property for the purposes of assessment as being 200 feet oceanward of the boardwalk, and all assessments have been made upon that theory. I am not confident that the testimony is admissible, but I have a notion that it might assist in determining what was meant by beach front in those days. This proof will show that 20 during all that period, at least since 1903, possibly longer, the city has assessed the property on the beach front back of the boardwalk for a depth of 200 feet as beach front property I mean landward of the boardwalk.

The Vice Chancellor—Even when improvements were made up to the boardwalk?

Mr. Cole—Yes; they still assess the 200 feet and call it beach front property.

The Vice Chancellor—Notwithstanding the 30 Marlborough-Blenheim had built on it?

Mr. Cole—Notwithstanding anything. That is what they do. Everything is assessed on the boardwalk as boardwalk property on that theory, 200 feet landward of the boardwalk, and, of course, if a man owns a greater depth then it is assessed as side street property, when it gets back of the 200 feet of the boardwalk it is side street property.

The Vice Chancellor—You may introduce it for what it is worth, Mr. Cole. I do not know whether it will be of any possible service.

By Mr. Cole:

Q. Mr. Barrett, you are presently in the employ of the city?

A. Yes, sir.

Q. What is your position now?

10 A. In the Street Department.

Q. Were you at one time an assessor?

A. Yes.

Q. How long were you an assessor?

A. From 1903, the time that the board of assessors was established in Atlantic City under the new charter.

Q. And up to what time?

A. Up to 1912.

Q. Now, during that time there were how many others on the board of assessors besides yourself?

20 A. Two others.

Q. And did you assist in assessing property along the beach front?

A. Yes.

Q. In making assessments for property that fronted on the boardwalk what system was adopted and used?

A. We allowed 200 feet in depth from the boardwalk inland, and at all intersections, boardwalk and side streets, we assessed on the side street, and all that hadn't the advantage of the side streets we assessed at
30 a certain percentage of depth, giving or taking all below and above 200 feet.

By the Vice Chancellor:

Q. In other words, the assessment map on the boardwalk would be in the form of lots 200 feet in depth?

A. Yes, sir.

Q. From the boardwalk?

A. From the boardwalk, yes, sir, inland.

Q. And those lots would be assessed as having a valuation on the beach front or boardwalk front?

A. Yes; on the beach front. I would like to go on and say that all those that did not have the depth of 200 feet was allowed that difference, a certain percentage.

Q. In other words, you would assess as at a depth of 200 feet and then subtract from that by reason of the lack of the 200 feet, is that the idea?

A. Yes; that is the idea.

10

Q. How long has that been done?

A. Since 1903, to my knowledge.

Q. And that system has continued up to the present time?

A. Present time, it has not been changed.

Cross-examination, by Mr. Archer:

Q. What is the unit of depth for lots for purpose of assessment during this same period on side streets?

A. Why, we put a separate value on the side streets, 20 whatever street that would happen to be.

Q. Didn't you take a certain prescribed depth of lots on side streets for the purpose of assessment?

A. Yes.

Q. What is that?

A. 100 feet on side streets.

By the Vice Chancellor:

Q. The side streets are more than 200 feet apart, aren't they?

30

A. Yes; the side streets are 350 feet from property line to property line.

Q. How do you assess the land in between the 100 feet lots?

A. We allow a certain percentage of depth. The unit is 100 feet. All above 100 feet we charge a certain percentage more and all that do not have the 100 feet we charge that much less. There is a scale that we have

that works both ways. The present assessors have that scale. One of them is in court and I think can show it to you, the different percentages.

Theodore J. Lapres, recalled.

By Mr. Cole:

Q. Mr. Laprés, have you noticed the condition of the tides in front of your property since you have been the owner?

10 A. I have.

Q. Well, tell us what you know about the condition of the tides with relation to your property since you have owned it?

A. Well, at the present time the tide is underneath the boardwalk, but when I bought this property my wife and I used to take walks down there to look at it, and I know certain occasions where the tide was up to the bulkhead, this bulkhead that is 350 feet from Pacific avenue.

20 Q. About what year would you fix that?

A. Well, I should say about four or five years back, it may possibly be six.

Q. Did you see that condition more than once?

A. Yes; I did.

Q. How often would you think you saw it at the bulkhead?

A. Well, I should say four or five times.

30 Q. At the time you bought in 1909 was there any evidence of the old bulkhead that was 460 feet south of Pacific?

A. There was none whatever.

Q. Had you known this property any length of time before you bought it?

A. No, I hadn't; I hadn't looked at the property before, previous to that.

Q. But you think there was no evidence of the old bulkhead when you bought in 1909?

A. I am sure there wasn't, none that I noticed.

Cross-examination, by Mr. Archer:

Q. Well, Mr. Lapres, at the time you bought in 1909 the new bulkhead was built, wasn't it?

A. Yes, the new bulkhead was there.

Q. Have you any knowledge of how the new bulkhead was built, as to the use of the material of the old bulkhead—

A. No.

Q. —in transferring it to the new?

A. I have not.

Q. As to these tides that you say have come up during your period of ownership to a point—did you say close to the present bulkhead?

A. Yes, close to it.

Q. They have been very extraordinary tides, haven't they—storm tides?

A. They have been storm tides, yes; they have been mostly high tides.

Q. Well, your deed, Mr. Lapres, contains these restrictions that are involved in this litigation, doesn't it?

A. Yes.

Q. Isn't it a fact that you or some one acting for you made application to the West Jersey Title Company for insurance of title?

Mr. Cole—I object to that. It was after he got his title.

Mr. Archer—I mean before he got his title.

The Vice Chancellor—If this relates to a period prior to his getting his title, I think it is competent.

Q. Prior to your acquiring your title didn't you, in connection with the matter of acquiring your title, apply to the West Jersey Title Company for insurance?

Mr. Cole—I object, on the ground that it does not matter.

Mr. Archer—Well, it very distinctly matters, Judge Cole, on this last examination.

The Vice Chancellor—I will admit it.

A. Why, my recollection don't take me back that far, but I feel sure that I did apply to the—

Q. Well, did you secure a policy from the West Jersey Title Company guaranteeing your title?

A. I think I have a policy.

Q. And doesn't that title policy contain an exception?

Mr. Cole—Well, I want the policy in the case.

The Vice Chancellor—That would be the better way, if it can be had.

10 Q. Have you the policy?

A. I have it home unless I gave it to Mr. Cole.

Mr. Cole—I haven't it. I don't think I ever had it.

A. (Continuing) I think I have it in my safe at home, then.

Mr. Cole—Wait a moment. Pardon me. Is this it? That is the only one I have. I don't know whether that is the one or not.

Q. Well, you acquired a title policy, did you not?

20 A. I did, yes.

Mr. Archer—Is there any objection to my asking him whether that policy—

Mr. Cole—He may be confused with this policy.

By Mr. Cole:

Q. Are you referring to this policy (exhibiting paper to witness)?

30 A. No, I am not referring to that policy. I may have given Mr. Cole the wrong policy, but I think I have the policy I got at the time at home and can produce it.

By the Vice Chancellor:

Q. How far away is your home?

A. Why, just two squares.

Q. Well, you can bring it in after luncheon.

A. Yes. I am almost sure I have it.

By Mr. Cole:

Q. You will hunt for the policy and bring it in after luncheon?

A. Yes.

By Mr. Archer:

Q. The matter has not been stated here, but it appears from the record that after you had acquired this title from Mr. Hemsley you transferred it to Mr. Lamponi, and he afterwards transferred it to Mr. Fralinger, and Mr. Fralinger transferred it back to you? 10

A. Yes.

Q. And do you know whether it appears in those deeds that when the title came back to you, under the conveyance from Mr. Fralinger, it was without these restrictions?

A. Why I don't really know.

Q. You don't know?

A. No. I have the deed.

Q. Well, will you bring those deeds also? 20

A. Yes, sir.

Q. Mr. Fralinger was your father-in-law, wasn't he?

A. Yes, he was.

Q. Was there a consideration for those conveyances? Were they outright sales and purchases?

A. Well, there wasn't a real consideration, no.

Mr. Cole—Tell the transaction, Mr. Lapres.

He wants to know, I suppose.

Q. Yes, I would like to know.

A. Well, the property reverted back to me from Mr. Lamponi on account of his not being able to hold it, and it was principally that way, I couldn't explain that thing very well. 30

By the Vice Chancellor:

Q. Well, they weren't real conveyances, in other words?

A. No.

The Vice Chancellor—Do I understand the deed to Mr. Lapres in 1909, when he first acquired title, contains these covenants?

Mr. Cole—All Hemsley deeds contain it. That is the stipulation and I think that is the fact.

By Mr. Archer:

10 Q. Yes, but the deed back subsequently was without the restrictions, was it not?

A. That I don't know. I will bring that deed here from Mr. Fralinger.

Q. I don't want to unnecessarily pry into that situation, but I want to know whether, particularly, the fact that the title came back to you without restriction was the reason for the conveyances?

A. No, it was not.

Q. Eh?

A. No, no, it was not.

20 Q. I can't understand why you did it. Why were these conveyances made?

A. Well, that is another entirely different matter, it has no bearing on this.

Q. Well, tell me after luncheon.

Mr. Cole—I really don't know. I don't think it makes any difference. The land is conveyed by restrictions. You cannot remove them by simply making deeds. But I don't know what he has in his mind.

30 Q. Well, bring the title policy and your deeds here.

Mr. Cole—Bring the deeds and your title policy back after luncheon.

A. Yes.

At this point a recess was taken until 1:45 o'clock P. M.

Hearing of the cause resumed after recess in the presence of the counsel for the respective parties heretofore noted.

Mr. Cole—I want to offer in evidence in behalf of the complainant a map with a legend, "Map of Lands in Atlantic City, N. J., owned by Frederick Hemsley. Dated April 30th, 1897. Filed May 1st, 1897. Lewis P. Scott, Clerk."

(Said map marked *Exhibit C 3.*)

Mr. Cole—Then I will offer a map, linen, marked, **10** "Filed April 27th, 1909, at 9:00 A. M. Samuel Kirby, Clerk, By order of John B. Slack." The legend is "Plan of Chelsea property, F. Hemsley, Atlantic City, N. J. Made April, 1909, by Ashmead & Hackney, Civil Engineers."

Mr. Archer—Suppose I have the clerk make a copy of that map?

The Vice Chancellor—I had better have one, substitute it for the original.

(Said map marked *Exhibit C 4.*)

2000

Mr. Cole—Now, if Your Honor please, subject to my right to call Mr. Gummey when he comes, on the question of the bulkhead, we will rest.

Complainant rests.

David H. Porter, Jr., a witness produced in behalf of the defendants, being duly sworn according to law, on his oath says—

By Mr. Archer:

Q. You are connected, are you not, with the City **3000** Clerk's office?

A. Assistant City Clerk.

Q. And have you the minutes of the meetings of Council there for the year 1909?

A. I have.

Q. Particularly meetings of Council about October, 1909?

A. I have.

Q. Will you kindly refer to your minute book and tell me what is the first reference there to the introduction of an ordinance vacating an alley or street extending from Stenton place to Iowa avenue?

A. On October 11th, 1909, an ordinance was introduced.

Q. By whom?

A. By Mr. Riddle, entitled "An ordinance providing for the vacating of a certain street about twenty feet
10 wide, running from the westerly line of Iowa avenue to the easterly line of Stenton place, the northerly line of which is situate 440 feet southwardly from the southerly line of Pacific avenue, considering Pacific avenue as 60 feet wide." The ordinance was read the first time, passed first reading and was referred to the ordinance committee.

Mr. Cole—We admit that the ordinance was passed.

Mr. Archer—It is admitted that the ordinance
20 in question vacating this street was regularly passed on the 25th day of October, 1909.

A. (Continuing.) Approved October 26th, 1909.

Mr. Cole—Of course, I make that admission subject to the objection that it is not relevant.

The Vice Chancellor—Yes. Is it conceded that this is the alley immediately in the rear of the bulkhead on the original map?

Mr. Cole—If there is such an alley, of course, the ordinance refers to it.

The Vice Chancellor—As shown on the map,
30 I mean.

Mr. Cole—Yes; exactly.

No cross-examination.

William M. Clevenger, one of the defendants, being duly sworn according to law, on his oath says:

By Mr. Archer:

Q. Mr. Clevenger, you are one of the defendants in this case, are you not?

A. I am.

Q. As a lot owner of the Hemsley tract?

A. Yes.

Mr. Archer—Is it admitted that he acquired title?

Mr. Cole—Yes.

Q. Do you recollect the date of your deed?

A. My recollection is it is September 28th, 1898.

Q. Did you build there subsequently?

A. Yes.

10

Q. And from the time when you built to the present time have you continuously lived there?

A. I have.

Q. Are you familiar with the frontage of this property adjacent to the ocean?

A. Yes.

Q. Now, at the time when you purchased your lot will you state, please, what the situation was with reference to any bulkhead on the ocean front?

A. My recollection is that there was a stone bulkhead 20 on the front along the line of the alleyway shown on the map in evidence.

Q. Did you see that bulkhead there?

A. Yes.

Q. At or about the time you were making your purchase?

A. I cannot answer that definitely. I saw the bulkhead there. I can't say whether I saw it before—I know I saw it after I got my deed.

Q. Prior to the acquiring of title to your lot in this tract did you see any map of the lands of Mr. Hemsley in that tract? 30

A. Yes.

Q. And have you seen many of such maps?

A. Yes.

Q. I show you *Exhibit C 2* and ask you whether the maps which you saw are duplicates of it?

A. Yes; with the exception that the alleyway is not crossed out on any of them that I have ever seen.

Q. The alleyway is not crossed out on this particular one.

A. With the single exception of the one on file in the Clerk's office.

Q. I beg your pardon?

A. With the single exception of the one on file in the Clerk's office.

10 Q. During the interval of time subsequent to your purchase and for some years thereafter what was the condition of the water front with respect to the existence of a bulkhead?

A. As I recollect it, at times the sand entirely covered the stone bulkhead and at other times it appeared above the sand.

Q. Did that condition continue to exist up to the time of the construction of the second bulkhead?

A. Yes.

20 Q. Now, do you recall the construction of the second bulkhead?

A. No. I know that it was constructed; I know that it is there now, but I don't recall when it was done.

Q. You did not see any of the work done at that time?

A. Not to my recollection. I may have seen it, but I have no recollection of it.

By the Vice Chancellor:

30 Q. But your testimony is to the effect, as I gather it, adding your several answers together, that the sand continued up to the top of or near the top of or over the original bulkhead at the time when the second one was constructed—wouldn't that be the inference to be drawn from your testimony?

A. Yes, I think it would be; yes, sir.

Q. Or, in other words, that the second one was built before the first one was washed away?

A. I don't know about that. I don't think that stone bulkhead ever was washed away; in fact, I am pretty sure that it was not.

Q. You can easily find out by going down and digging, can't you?

A. That is what we have done, and found the stone there. I didn't do it.

Cross-examination, by Mr. Cole:

Q. What time do you fix as your first recollection of 10
the existence of the first bulkhead?

A. I started to build the house immediately after I bought the lot. I moved in on May 4th, 1899, and I have been there continuously ever since, and I suppose I get down to the boardwalk on an average of at least once a month, and that average would probably exist during the whole period of my residence there.

Q. Now, this bulkhead you speak of, did it appear to you to be a bulkhead intact or a remnant of a bulk-
head? 20

A. As I recall, it was simply a pile of loose stones, as I always saw it; it wasn't cemented together, anything of that kind.

Q. Did you find any wood surrounding it—in front or back of it?

A. I have no recollection of any wooden bulkheading there, either in front or back of the stone bulkhead.

Q. Do you know it to be a fact that any of the stone there, if there was any in the original bulkhead, was moved and used in the construction of what we have 30
been calling the second bulkhead?

A. I have no personal knowledge of that, but I understand that that is so.

Q. When do you fix the time when you last saw any stone that was in the original bulkhead?

A. I can't fix that time.

Q. Well, would you mind approximating it?

A. Can you tell me when we had the last big storm here?

Q. We haven't had the last one yet.

A. I can't do it, Judge; I can't fix dates.

Q. Well, would you say it was a year, two, three or four years ago?

A. Whatever I said would be a guess.

Q. This street talked about, alley that has been vacated, was that ever opened on the ground?

10 A. I have no recollection of it, although there are others who do have.

Q. What kind of stone were these you saw?

A. Red stone, broken, quite large.

Q. Varied sizes?

A. Yes.

Q. What about the tides during the years that you have been living there? Have they come up as far as the new bulkhead?

A. I don't recollect ever having seen the tides up
20 to the present bulkhead. I have seen at very high tide, in—I think it was the fall of last year—within four or five feet of it at high water; and this summer I saw the tide—I suppose it was at low water—at least as far as from here to the Atlantic Safe Deposit and Trust Company outside of the boardwalk. Those tides vary very much, according to the time of the year.

Q. Have you seen evidences of the tide having been up to the second bulkhead?

A. Very close to it but not entirely to it.

30 Q. How?

A. Very close to it but not entirely to it.

Q. And as I understand your testimony, during the period before the second bulkhead was built the stone in the first bulkhead was at times up above the surface and at times below?

A. Yes, sir.

Brinckle Gummey, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says—

By Mr. Cole:

Q. Mr. Gumme, you live in Atlantic City?

A. Yes, sir.

Q. How long have you lived here?

A. Since the 16th of February, 1887.

Q. Did you know Mr. Hemsley in his lifetime?

A. I was acquainted with him, yes.

Q. Do you know the property that he, at one time, owned—and he may still own some of it—in Stenton place, Iowa avenue and the beach front?

10

A. Yes, sir.

Q. Do you know about the first bulkhead that was constructed along the ocean front in front of that property?

A. Well, I can't say very much about that. I know there was a bulkhead put there. As far as location—I paid no attention to that, that was a personal matter of Mr. Hemsley's, and he located it.

Q. I want to know whether you know of the fact that there was a bulkhead there?

20

A. Yes, sir; there was a bulkhead there.

Q. And do you know about when the bulkhead was built?

A. Well, it was sometime prior to 1896, or early part of 1896.

Q. Now, of what construction was it? What was it made of?

A. Made of stone.

Q. Anything else? Any wood?

A. There might have been a slight—not much more than a fence there, I don't think, of wood and then stones were put up against that.

Q. Did anything happen to that bulkhead?

A. Well, the storm that occurred in October, 1896—the reason I remember it, that fact, is the peculiar circumstance that Mr. Hemsley had sailed from Europe on the 7th day of October, I looked it up before I came up here, that is the reason that I knew it was in October, and the party hadn't left New York more

30

than about a day when one of the most frightful storms—one of the worst Atlantic City has ever seen—came in and washed things around all up and down the coast, and he had this paved, the streets paved, and the storm was very severe, and a man by the name of Moss—

Q. Well, what happened to the bulkhead? That is what I want to know.

A. Well, this terrible storm came up and washed everything out, it was all leveled down, so that I don't
 10 know whether you could say there was anything left there or not, I doubt if you could, for the reason that after he came back we had a man go down there and—rather he had—and sound around and dig all this flagging out.

Mr. Archer—Just a moment, Mr. GummeY.

Q. Did you see that done?

A. See him go down and sound for this stone?

Q. Yes.

A. Yes.

20 Q. Were you there?

A. Yes, I saw him do it.

Q. All right; then tell us what you saw?

A. It was washed down so the sand was over it sometimes a foot or two, at least, or even more.

By the Vice Chancellor:

Q. That storm was in 1896?

A. 1896, October, 1896, and I can almost say it was
 30 either the 8th or 9th of October, because I remember going over to New York to see Mr. Hemsley start, and they left in the morning of the 7th, and I came down here and the wind was commencing to blow very hard, and the next day we had the storm, and about the day following that, which was the 9th, this terrible wash-out came.

Cross-examination, by Mr. Archer:

Q. In the natural course of events afterwards the stones that were in the bulkhead came to the surface

and remained visible there, didn't they, for a number of years?

A. Not unless they dug them out. There might have been one showing here or there, or a few.

Q. Isn't it a very usual thing on the coast here for storm tides like the one you have described, bad storms of that sort, to do considerable damage, and then after the ocean goes back to its normal position, by reason of cutting and filling on the part of the ocean—I mean, washing up and washing away, that bulkheads and 10 constructive work of that sort is part of the time covered and part not? Isn't that quite the usual thing?

A. As I understand, this sunk down so far that they had to dig for it to get it out, wouldn't have been any good if it had washed the sand off of it, had sunk down in the live sand, as I understand it.

Q. Did you see it afterwards? During the years succeeding that storm did you see a line of bulkhead there or the stones showing in that same place?

A. I don't know whether I can answer that question. 20

Q. You don't know whether or not he ever put any more stones after that storm in the same location?

A. I don't know; I couldn't answer that at all.

Mr. Cole—It is agreed that the first conveyance made by Hemsley out of this tract was in May, 1897.

William B. Loudenslager, a witness produced in behalf of the defendants and one of the defendants, being 30 duly sworn according to law, on his oath says:

By Mr. Archer:

Q. Mr. Loudenslager, you are one of the defendants in this suit?

A. Yes, sir.

Q. And one of the present lot owners in this tract?

A. Yes, sir.

Q. When did you acquire your title?

A. I think it was in February, 1903.

Q. And did you build there?

A. No.

Q. When did you begin to live there on the tract?

A. Why, in February, 1903; I purchased the house from Mr. Hemsley, it was already built.

Q. And have you lived there ever since?

A. Yes, sir.

Q. You are at present the postmaster, are you not, of Atlantic City?

10 A. Yes, sir.

Q. Do you recall what the situation was with respect to the ocean front, and particularly with respect to the existence of any bulkhead on the ocean front, at the time when you made your purchase?

A. When I made my purchase the bulkhead line— I purchased my property from a real estate agent and the restrictions were pointed out to me, that was the reason that I wanted to be in that district, and that stone was designated as the bulkhead, and we could
20 see sometimes a number of stones here and there exposed, and then the sea would wash up and would cover them over at times.

Q. You say that was the situation at the time?

A. Yes.

Q. And did that continue to be the situation for some years afterwards?

A. Yes.

By the Vice Chancellor:

30 Q. That was 1903, did you say?

A. 1903.

By Mr. Archer:

Q. Did the sea cover these stones with sand or with water—this old bulkhead line?

A. Well, we would get a storm tide and probably those stones would be exposed, some of them as much as six inches, and then we would get a westerly wind

and the sea would come up and deposit sand over them and fill them up, fill it all up.

Q. Now, do you recollect the fact that a second bulkhead was constructed further inland?

A. Yes, sir.

Q. Were you living there at that time?

A. Yes, sir.

Q. Won't you tell us, please, what observations you made with regard to the construction of the second bulkhead, what you saw?

10

A. Well, I first saw the lumber hauled there and I wondered what was going on, I thought probably—

Q. Well, not so much that, Mr. Loudenslager, as what you actually saw; I meant to ask what you actually saw happening. What did they do?

A. Well, I saw them build this wooden bulkhead and then remove the stones, dig them out from that old stone bulkhead in front near the boardwalk and wheel them back and place them all along the line of the new bulkhead.

20

Q. During the years that you have been familiar with the property has the ocean advanced at that locality or has it receded?

A. It has receded, it has filled up. That land today—

The Vice Chancellor—You did not give the date of the construction of the new bulkhead.

Q. Do you recall the date of the construction?

A. About 1908.

Mr. Archer—It is stipulated as having been constructed in 1908.

Mr. Cole—Yes.

(Answer of the witness preceding the last answer read by stenographer.)

Q. What were you going to say? "That land today"—

A. Why—is filled up higher than at any time I ever saw it.

Q. Did you yourself make some investigation very recently in an effort to locate the precise line of the original stone bulkhead?

A. Yes, sir.

Q. When did you do that?

A. On Monday morning I finished, that is, verified some of my work, and I think on a Thursday, the week before that—

Q. Well, very recently?

10 A. Yes.

Q. What did you do in order to locate that line?

A. Why, I calculated about where I thought that bulkhead was, and I employed a man to go—a laborer to go and dig down a trench toward the sea, then I struck the stone four and a half feet down, then I began to uncover—and the stones were there for—three and a half feet in width, that bulkhead was, and I uncovered a piece of timber about four inches square, and about three feet of it I uncovered, but I didn't go any further with that because—

20

Q. And did you follow along the line at all longitudinally?

A. Yes; I opened a trench about four feet.

By the Vice Chancellor:

Q. How far did you go lengthwise of the bulkhead?

A. About four feet.

30 By Mr. Archer:

Q. And how much approximately, or perhaps you know exactly, how much depth of sand is now over these stones?

A. Four and—if you will allow me to look at a memorandum I have. Four feet four and a half inches from the top of the sand down to the stones.

Q. Well, Mr. Loudenslager, going back, now, for a moment, to the time of your purchase: You started to say something with reference to an agent and the bulk-

head line and I think I interrupted you. I want to go back to that. What was the fact with regard to that?

A. Well, Mr. Devine was the agent for that property. At least, I went to him to buy a piece of property or rent it and he talked me into this piece, and they showed me the map and showed me how the restrictions were and I was satisfied with it.

Mr. Cole—I object to this testimony touching restrictions in the map. 30

Mr. Archer—It seems to me it is precisely on the point that is involved in the case. May I ask another question to bring out the point?

The Vice Chancellor—Yes.

Q. What was the map that you were shown? (Witness being shown map marked *Exhibit C 2* is asked whether it was a map like that.)

A. Yes.

Mr. Cole—I am objecting to this testimony. We cannot be bound by it.

The Vice Chancellor—Perhaps not, Mr. Cole, but it will show the map was in use, at any rate. I will let it stand.

A. (Continuing.) That is the map; a map like that. 10

Q. Well, do you recall whether the map which you saw at that time had any marks at the ends of the alleyway immediately back of the original bulkhead extending from Stenton place to Iowa avenue?

A. No; I didn't see any marks on it.

Q. Well, what was the situation, as far as you can recollect, with regard to there being physically on the ground any alley or passageway at that point?

A. I never saw one physically on the ground.

Q. Never saw what? 20

A. Never saw any passageway.

Q. Now, going back to that other matter of your conversation with Mr. Devine, unless that objection is sustained, I would like to know what occurred in his

conversation as to the restrictions and physical condition?

Mr. Cole—I am not trying the case before a jury. All I want is the benefit of an objection.

The Vice Chancellor—I do not think the conversation between him and Mr. Devine could possibly be evidential.

10 A. Well, the only thing was that he had more maps than one there, Mr. Devine had, he had a number of those maps, and he said that my property like all others was restricted, and I said I was perfectly satisfied with that, because I preferred a restricted property where my home was to be than property that was not restricted. That is about all the conversation we had in regard to that point.

Cross-examination, by Mr. Cole:

20 Q. Do you know from observation whether or not stones of the size you saw in your excavation sink when they are once planted in the sand?

A. I know that stones will sink. I didn't go down deep enough to see whether they had put brush there to prevent that. That is the reason they always put brush in, to prevent stones from sinking.

Q. It is a natural tendency for the stones to sink, isn't it, on the ocean front?

A. Oh, anything will sink if you allow the water to wash around—if you have stones there and let the water wash around.

30 Q. I am inquiring about stones. There is a jetty out somewhere near this property, isn't there?

A. Yes.

Q. When was that constructed?

A. I guess last year.

Q. Has the beach there built up since that?

A. On this east side of it, yes.

Q. What about the other side?

A. Not so much.

Q. Has it built up any?

A. I think it has.

Q. Mr. Loudenslager, has that beach front during the years that you have known it—speaking now of the beach front in question—been permanent or has it varied up and down—shifted, changed?

A. Oh, well, the beach front will shift on a heavy storm to-day and in a few weeks we will get a westerly wind and it will make up again.

Q. Then, has it during these years that you have 10 been there shifted?

A. At the present time there is more beach there than there ever was, because the children camp out there, I have seen them this summer, in tents.

Q. I am not debating that with you. What I want to know is whether there has been any change?

A. If it has shifted it has shifted to its benefit.

Q. Well, then, it has shifted, has it?

A. Sand will shift always. As I said to you, a storm will come up and shift it a little. 20

The Vice Chancellor—In the description in the Lapres deed from Mr. Hemsley there is, I suppose, a metes and bounds description beginning at where the present bulkhead is and extending out?

Mr. Cole—Yes. It begins 350 feet south of Pacific avenue, which we have agreed is the line of the bulkhead.

Annie Schlecht, a witness produced in behalf of the 30 defendants, being duly sworn according to law, on her oath says—

By Mr. Archer:

Q. Mrs. Schlecht, you are a widow, are you not?

A. Yes, sir.

Q. What was your husband's name?

A. Adolph Schlecht.

Q. Was he one of the purchasers of lots in the Hemsley tract?

A. Yes, sir.

Q. When did he purchase?

A. In 1900, October, I think it is, 16th or 17th.

Q. 1900?

A. 1900, sixte en years ago.

Q. And was there a house built on the property that you purchased, or did you build?

A. We built.

10 Q. And will you kindly tell me from this map, if you can, where your property is located? On what street does it face?

A. It is on Stenton place.

Q. It faces on Stenton place?

A. Yes, sir.

Q. And how near the ocean?

A. Well, the first house from it.

Q. Here is Stenton place (indicating on map) and here is the ocean, this way.

A. 109.

20 Q. Your lot is 109?

A. Yes.

Q. Between Pacific avenue and the ocean?

A. Yes, sir.

Q. At the time you built there were there any houses between your house and the boardwalk?

A. No, sir.

Q. Are there now?

A. No, sir.

30 Q. Still open?

A. Yes, sir.

Q. Do you recall what the situation was in 1900 with respect to the existence of any bulkhead at or near the ocean front of the property?

A. Yes, sir; there was a bulkhead there of stone, which I remember.

Q. A bulkhead of stone?

A. Yes, sir.

Q. Will you describe it? Tell us, can you, how it looked to you?

A. It looked just the same as it did about seven or eight years after they took it away. There was lots of brown stone there.

Q. Mrs. Schlecht, has the beach made up there or has it been cut away?

A. I think it has made up.

Q. Well, you say it looked about the same until they took it away?

10

A. Yes, sir.

Q. What do you mean by that?

A. Well, in all those years before they removed it I didn't notice any change in it.

Q. If you know, when did they remove it?

A. Eight or nine years ago.

Q. And how did they remove it? Where did they remove it to?

A. They moved it back about a hundred feet, ninety or a hundred feet, and they sunk piling, and then took a wheelbarrow and carted the stones away from the bulkhead. 20

Q. To the new location?

A. Yes, to the new location.

Q. And that was eight or nine years ago?

A. Yes, sir.

No cross-examination.

W. Scott Johnson, a witness produced in behalf of the defendants, being duly sworn according to law, on his oath says— 30

By Mr. Archer:

Q. Mr. Johnson, were you one of the purchasers of lots in the Hemsley tract?

A. I was.

Q. When did you purchase a lot there? Do you recall?

A. 1900.

Q. 1900?

A. Yes.

Q. And did you build or was there a house already built?

A. Built.

Q. Built?

A. Yes, sir.

Q. And how long did you live there on that property?

10 A. Until recently.

Q. Well, some years?

A. Yes, sir.

Q. In 1900, when you purchased, what was the condition of the frontage with respect to the existence of any bulkhead?

A. The woodwork that the bulkhead was built of—

Q. I beg your pardon?

A. The woodwork that was used in the bulkhead—
 20 were visible at all times. There was a brush mattress made and the stones were placed on this brush mattress. That is the way that the stone was put there. Then there was, I think, four-by-four or four-by-six uprights dug down in the said with shovels, constituting the bulkhead, the woodwork, and planking nailed to that.

Q. Now, you say that was the situation when you purchased?

A. No, sir; that was the situation when the bulkhead was built.

30 Q. I meant to ask you, and I think I did ask you, what the situation was in 1900 when you purchased?

A. The stones were still there, visible.

Q. The stones were there?

A. Yes.

Q. Visible?

A. Yes, sir.

Q. And how long did the stone bulkhead that you have described continue thereafter?

A. For a number of years. Of course, conditions have gradually grown better. I mean by that that the beach has made up each year, the beach has made up, it has got higher, until eventually you could hardly see the stones, they were all covered up, buried in sand.

Q. Well, do you recollect the construction of a new bulkhead further inland?

A. I do.

Q. Did you see that second bulkhead being constructed?

10

A. Yes, sir.

Q. Well, state what you saw with respect to that? I don't mean the method of construction so much as the material and where it was brought from for the construction of the second bulkhead.

A. The material that was put there and the kind of material?

Q. Yes.

A. The material used for that were piling jettied in, and also stringers, of course, bolted or spiked.

20

Q. Well, I don't care about those details. How about the stones?

A. They took the stones out and hauled them up.

Q. From the other bulkhead?

A. Yes, sir—had laborers to do it.

Q. Did you ever see any maps with regard to this Hemsley tract, Mr. Johnson?

A. Yes, sir.

Q. Will you look at this map which I show you, which is marked *Exhibit C 2*, and say whether you have ever seen a map like that before?

30

A. What are these pencil marks?

Q. I put those pencil marks on that for the use of the Court.

A. That looks like the original map.

Q. You mean without the pencil marks?

A. Without the pencil marks.

Q. Where did you first see the original map that you speak of?

A. At C. J. Adams' office.

Q. And when? Before or after your purchase?

A. Before.

Q. Did the original map, of which you speak, have any lines cutting off the ends of this alleyway immediately back of the original bulkhead?

A. No, sir.

10 Q. Now, what at that time was the real situation with respect to the existence of any alleyway there?

A. I never knew but what the alleyway or the street still existed.

Q. Well, when you looked at the property, was there anything there to indicate the existence of a street or passageway across there?

A. Not when I bought.

Q. Not when you bought?

A. No, sir.

20 Q. Well, at any later time?

A. No, sir.

Q. Well, at an earlier time, then?

A. Yes, sir.

Q. Well, what was the situation?

A. The street was built and curbed, stone curb, flag gutter and flag sidewalk on the side toward Pacific avenue, but the side toward the ocean hadn't; that is, it didn't have flag, curb or sidewalk.

30 The Vice Chancellor—You are referring now to this alleyway?

Mr. Archer—Yes, the alleyway he means.

Q. Did you say that there was any gravel on it?

A. Yes, sir.

Q. Was it used?

A. Yes, sir.

Q. Did you ever use it yourself?

A. Used the sidewalks.

Q. To walk through there?

A. Yes, sir.

Q. And where was that with relation to the original bulkhead—the stone bulkhead that was originally there?

A. The original bulkhead formed, I think, the line—or the sidewalk line on the ocean side.

Q. Of this street?

A. Of this street.

Cross-examination, by Mr. Cole:

10

Q. When did you move in on Stenton place?

A. 1901.

Q. Was this sidewalk you speak of on the street running parallel to Pacific avenue in existence then? During what period was it in existence?

A. I couldn't say how long after it was erected, Judge.

Q. Well, when was it erected?

A. I judge 1896. I have no correct way—

Q. Well, were you around there in 1896?

20

A. Yes, sir.

Q. How long did it remain?

A. I couldn't tell you as to that.

Q. Well, a year or a day or how long?

A. Well, it remained longer than a day.

Q. Did it remain a year?

A. I don't think it did; I don't think it did.

Q. Do you know how it came to be removed?

A. Yes.

Q. You do know?

30

A. Yes.

Q. How?

A. We had a terrific storm.

Q. And the storm washed these things away?

A. Well, it washed the wooden structure.

Q. Did the storm wash—

A. That didn't amount to anything.

Q. Did the storm wash this one-half of street away that you are talking about—that you walked on?

A. When you washed the wooden structure down of course there was nothing else there to hold it.

Q. Well, then, it was washed away, was it?

A. It didn't take much to wash away.

Q. Well, whether it took much or little, was it washed away?

A. Yes.

10 Q. Did you see this original or first bulkhead built?

A. I did.

Q. You were there and saw it built?

A. Yes, sir.

Q. Was there any particular reason why you happened to be around at that time?

A. I lived in that location.

Q. And you were watching it?

A. Yes.

20 Q. Were you living there at the time Mr. Riddle built on Iowa avenue?

A. Yes, sir.

Q. You knew that he built beyond this new bulkhead line, didn't you?

A. I did.

Q. When did he do that?

A. I can't tell you as to the correct date.

Q. About when was it?

A. I couldn't tell you—three or four or five years ago.

30 Q. Did you try to stop him?

A. No.

Q. You let him build? What kind of a house is it he has got there?

A. How?

Q. What kind of a house is it?

A. A brick building.

Q. Is it a dwelling house or apartment house or what?

A. Apartment house.

Q. How large an apartment house?

A. I couldn't tell you.

Q. You are a builder; have built a number of houses?

A. I have no particular interest in the size, the dimensions.

Q. Well, how many stores?

A. I guess two stories.

Q. Above the level of the boardwalk?

A. I judge from the level of the boardwalk, to conform with the building code. 10

Q. And that building is beyond this new bulkhead line, isn't it?

A. To some extent.

Q. On the Iowa avenue side?

A. It is on the east side of Iowa avenue.

Q. On the west side of Iowa avenue, isn't it?

A. On the west side.

Q. And that was built how long ago?

A. Perhaps four or five years ago, I don't just remember. 20

Q. Does that building come out to the property line of Iowa avenue?

A. I couldn't tell you, sir.

Q. How?

A. I couldn't tell you.

Q. Well, what do you think about it?

A. I don't know, sir.

Q. You have seen it, haven't you, a number of times?

A. I have walked by it.

Q. And you don't know after having seen it for a 30 number of years whether it comes out on the property line of Iowa avenue, or not?

A. I don't know.

Q. Do you think it does?

A. I don't know.

Nur J. Collins, a witness produced in behalf of the defendants, being duly sworn according to law, on his oath says—

By Mr. Archer:

Q. Mr. Collins, where do you live?

A. 5 South Brighton avenue, Chelsea.

Q. What is your business?

A. Hotel business.

Q. What hotel do you have?

A. Well, I did have the Hotel Gladstone.

Q. Until when?

A. Until this past year.

10 Q. And the Hotel Gladstone is where, with respect to the Hemsley tract in Chelsea?

A. It adjoins the lot on the east side of Stenton avenue.

Q. Adjoins on the east side of Stenton avenue?

A. Yes, sir.

Q. And on the ocean front?

A. Yes, sir.

Q. How many years were you there, about?

A. The hotel was built eighteen years ago.

20 Q. Are you familiar with the conditions which have existed at the end of Stenton place and Iowa avenue during the past, say, ten or fifteen years?

A. Yes.

Q. Do you recollect the construction of a bulkhead there?

A. I do.

Q. One or more than one?

A. Two.

30 Q. Assuming that the first bulkhead was constructed in 1896, were you there at that time?

A. I was. The hotel was not built at that time, but I lived in Chelsea at that time at the corner of Morris and Atlantic.

Q. For how long a time after that original bulkhead was constructed did it continue to exist there?

A. I don't think for a great while, that is, not in its completed state; the stone was there until it was taken away.

Q. And where was it taken when it was taken away?

A. To the new bulkhead which was built.

Q. The one that was subsequently built in 1908?

A. Yes.

Q. Well, during those years before the second bulkhead was constructed, what was the condition of the first bulkhead as to—well, describe how it appeared.

A. Well, the stone continued to be there, sometimes it would show considerably, and other times it didn't show but very little.

10

Q. You mean it was covered in some way?

A. Covered by sand.

Q. And during those years did the beach at that location cut in or did it build out?

A. Well, it built out most of the time.

Q. Well, at the time the second bulkhead was constructed, was the sea further in or further out than it was at the time the first bulkhead was constructed?

A. I think it was further out.

Q. Do you recollect the existence of any alleyway or street immediately on the landward side of the original bulkhead?

A. I do.

Q. Tell us what you can recollect with regard to that?

A. Well, I recollect that there was a street built there from Iowa to Stenton avenue, the sidewalk on the Pacific avenue side was laid of flagstone, the street was graveled.

Q. A driveway there?

30

A. Oh, yes.

Q. In use?

A. Yes.

Q. What happened to that, do you know?

A. A heavy storm came and washed it away.

Q. It was never rebuilt?

A. No

Cross-examination, by Mr. Cole:

Q. Was that the storm of 1896 that took the street away?

A. I don't remember, but it was the first big storm we had after the thing was completed. I don't remember the year.

Q. What effect did that storm have on the bulkhead? What did it do to it?

A. Well, it washed all the frame work down, that is, **10** it bent it over, the stone laid there just the same as they always had been.

Q. Did it disturb the stone at all?

A. Well, I think it flattened them out, it made more of a flat bed.

Q. Do you know the Eden Apartments owned by Mr. Riddle?

A. Yes.

Q. On the westerly side of Iowa avenue?

A. Yes, the easterly side of Iowa avenue.

20 Q. That adjoins the boardwalk directly, doesn't it?

A. Yes, sir.

Q. And that building is beyond the bulkhead line, isn't it?

A. The original bulkhead line?

Q. Yes.

A. I think it is; I am not sure.

Q. It is right up against the boardwalk?

A. Yes, sir.

Q. How long has it been built?

30 A. Oh, I think six or seven years.

Q. Did you have a bulkhead in front of the Gladstone?

A. I don't know whether you would call it a bulkhead or not.

Q. Well, some sort of protection against the storm?

A. Well, I don't think we built it for the protection against the storm; I built it to hold the sand there, to keep it level.

Q. How did that stand with relation to the new bulkhead of Hemsley?

A. Well, I don't know, but I think it is nearer Pacific avenue.

Q. Yours is?

A. I think so, but I am not sure about that.

Mr. Archer—I think you stated, Judge, at the opening, as a part of our stipulation, that the titles as set up in the answers were correct and that the various deeds to the defendants contained these restrictive covenants? 10

Mr. Cole—Yes.

The Vice Chancellor—Well, I understand—correct me if I am in error—that counsel agreed that this Hemsley tract was laid out in accordance with the plan that was filed by Mr. Hemsley, and that from that day to this the various conveyances made by him have contained these covenants in the deed, pursuant to a general scheme of improvement, except, perhaps, such admission might not include these two lots that are just inside of the bulkhead. 20

Mr. Cole—The stipulation is, Vice Chancellor, that all the deeds which were made by Mr. Hemsley beginning May 1st, 1897, contained the precise language with respect to restrictions and exceptions as contained in the Lapres deed offered in evidence.

Mr. Clevenger—And it was all done pursuant to a general scheme.

Mr. Cole—I don't know that I want to admit that. I take it to be true. The deed says so. 30

The Vice Chancellor—Well, the scheme has at no time been abandoned, if there was an original general scheme?

Mr. Cole—I don't know anything about that. For example, it is shown here that the Eden Apartments were built beyond even the original bulkhead, in violation of the restrictions, on the eastern side of Iowa

avenue. If that land was restricted, then the Eden Apartments were built in violation of those restrictions, because it is beyond the original bulkhead line and it is practically in a line with Iowa avenue.

Mr. Archer—Judge Cole, in a general way, so far as the restrictions in these deeds are concerned, the fact is, I think we will agree, that all these dwelling houses that the defendants own have been constructed in accordance with those restrictions. That is what the Vice
10 Chancellor was asking.

Mr. Cole—I think, for the purposes of this case, that there has been a substantial compliance with the restrictions on the part of the defendants, with the exception shown by the testimony which applies to the Eden Apartments.

The Vice Chancellor—Who are defendants?

Mr. Archer—There are about twenty of them all together.

The Vice Chancellor—Covering what territory?
20

Mr. Archer—All the way back to Atlantic avenue in this tract. There is one bit of testimony I would like to have an opportunity of making some investigation about. Mr. Clevenger says that his recollection is with respect to the subject of maps that there were two maps filed that are like this one, the first of which had no marks on this alleyway and the second of which had. Now, we have had the clerk come over here under subpoena to bring all these maps, and his statement is that he can find no other maps relating to this
30 property than the two that he has produced, but I should like to have an opportunity, if the court considers it—

The Vice Chancellor—He has only produced one.

Mr. Archer—He produced the new map which was filed after construction of the second bulkhead. If that is a matter of consequence in assisting the court, and if it is important I should like an opportunity to produce that testimony. The clerk states that he can find only those two maps.

The Vice Chancellor—Will you consent, Judge Cole, that if another map can be found it may be made a part of the record?

Mr. Cole—Oh, certainly.

The Vice Chancellor—You may produce it if you find it.

Both sides rest.

30

EXHIBIT C I.

THIS INDENTURE, made the sixth day of November in the year of our Lord one thousand nine hundred and nine, between FREDERICK HEMSLEY and ANNE H., his wife of the City of Atlantic City in the County of Atlantic and State of New Jersey, of the first part, and THEODORE J. LAPRES, of the same place, party of the second part,

Witnesseth, that the said parties of the first part, for and in consideration of the sum of Seventy Five Thousand Dollars, lawful money of the United States of America, well and truly paid by the said party of the second part to the said parties of the first part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, as well as the performance of the covenants hereinafter mentioned, have granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, convey and confirm unto the said party of the second part, his heirs and assigns, all that lot, tract, or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

Beginning at a point in the East line of Stenton Place, three hundred and fifty feet South of Pacific Avenue, considered as a sixty foot wide street, and runs

9 LAP

(1) East parallel with Pacific Avenue, one hundred and twenty feet to the West line of Iowa Avenue; thence (2) Southwardly along the Westerly line of Iowa Avenue, seventeen hundred and twenty five feet, more or less, to the exterior line as fixed by the Riparian Commissioners of the State of New Jersey; thence (3) Westwardly along said exterior line one hundred and twenty feet, more or less, to the Easterly line of Stenton Place, if extended; thence (4) Northwardly, seven-
10 teen hundred and fifty feet, more or less to the place of beginning.

Subject, however, to the following covenants, conditions and restrictions:

(1) That no portion of any building shall at any time be erected within seventeen feet of the front property line of any street or avenue bounding said lot or lots, nor within three feet of the rear dividing line nor within three feet of the northerly dividing line of said lot or lots, nor within 22 feet of the southerly dividing
20 line measuring from the first floor of the main body of any building, nor within 14 feet of the southerly dividing line, measuring from the second floor, and above, of the main body of said building; provided, however, that bay windows may be added to sides and front of said building, but shall not extend more than two feet from the main body thereof. And, provided, also, the front porch or front veranda of said building may be erected not nearer than seven feet from the front property line on any street or avenue bounding said lot or lots; ex-
20 cepting therefrom however, all lots lying on Pacific Avenue or lots between Pacific Avenue and the Ocean Bulkhead now erected, or that may hereafter be erected, on said property, on any of which lots no part of any building shall at any time be erected within eighteen feet of the front property line of any street or avenue bounding said lot or lots, nor within eight feet of the side dividing lines of said lot or lots, nor within three feet of the rear dividing line; excepting, however, the

porch or front veranda of said building, which may be erected not nearer than eight feet of the front property line of any street or avenue bounding said lot or lots, and bay windows may be added to sides and front of said building, but shall not extend more than two feet from the main body thereof.

It is expressly agreed, however, that above restrictions shall not be construed so as to prevent the steps or approaches to any porch or house from being built from the front property line of any lot or lots to the porch or main body of any building, but said steps or approaches shall not be covered, but open and free from over head and lateral obstructions to view, except foundation and rail; and all porches and verandas except side porches and verandas shall be constructed without temporary or permanent obstructions to view and air, other than supports, roof and rail. 10

Fronts of all buildings shall face the front property line of the lots, as laid out on said map; corner lots considered as having two fronts. 20

(2) That no building of a value less than \$2500 shall be erected on said lot or lots.

(3) That the foundation for all dwelling houses shall be erected and set, so that the top of the porch floor shall not be higher than 6 feet above grade of the streets or avenues, as now established.

(4) Private dwellings only shall be built on said premises, excepting, however, premises that may hereinafter be reserved, and not more than one private dwelling house under the same roof shall be erected upon any one of said lots as marked and laid out on said filed map, and said lines as laid out on said maps shall not be changed, except where one person shall own two or more adjoining lots, in which case, restrictions as to side lines shall apply only to outside lines of said adjoining lots; this exception is to be exercised only when one owner of adjoining lots desires to erect one private dwelling under one roof covering more than one lot, and cannot be applied to rear dividing lines. 30

(5) None of the foregoing restrictions are to apply to any lots on Atlantic Avenue, or side or cross Avenues, northwardly therefrom; (corner lots on Atlantic Avenue considered as being on Atlantic Avenue;) except that dividing lines of the lots lying on Atlantic Avenue, or between Atlantic and Arctic Avenues, as laid out on said maps, shall not be changed.

(6) That no building, or any part thereof, erected on said lot or lots shall be used as a slaughter house, pig-
10 gery or any other nuisance tending to destroy the health, peaceableness, or proposed character of the neighborhood. Warehouses, storehouses, carpenter or paint shops, stores or buildings for general merchandise business, or other like buildings or uses are prohibited; except on lots fronting on Atlantic Avenue, and on lots lying northwardly of the northerly line of Atlantic Avenue; the selling of beer, wine or any intoxicating liquors is prohibited on said lots, excepting
20 on lots lying on the northerly side of Atlantic Avenue, or on side or cross avenues northwardly therefrom, and no building for that purpose shall be erected or used for that purpose, except in locality aforesaid; corner lots on Atlantic Avenue considered as lying on Atlantic Avenue.

(7) All buildings shall be connected with the sewerage plant and no drainage of any kind, or filth, shall be allowed to drain in the soil. No privy wells or other artifices for holding drainage or deposit of any kind shall be constructed on said lot or lots, if connection
30 can be made with sewerage plants.

(8) No stable or stables for livery purposes or for private use, shall be erected on said lot or lots; excepting on lots lying northwardly of the lots on the northerly line of Atlantic Avenue as mapped; corner lots on Atlantic Avenue considered as lying on Atlantic Avenue.

(9) It is expressly agreed and covenanted that the Beach front as laid out on said filed map between the

Bulkhead now existing on said premises and the Atlantic Ocean, or between any bulkhead that may hereafter be erected on said premises and the Atlantic Ocean, shall remain free, clear and unencumbered from and by any restrictions contained in above agreement, the said Frederick Hemsley reserving to himself, his heirs and assigns, the use and enjoyment of said Beach front free from all covenants and restrictions.

The above restrictions and reservations are hereby placed upon said lots in pursuance of a general plan of 10 the owner to enhance the value by beautifying and making more healthful the occupancy of said lands, and said restrictions and reservations are so created as a part consideration for the purchase of said lots, and each and every purchaser shall abide by such covenant, and be entitled to enforce the rigid observance of the same against any person or persons violating the same, they being made for the mutual benefit of all purchasers; and the said Grantor, his heirs and assigns, will insert in and make a part of each and every deed of convey- 20 ance by him or them or his or their remaining restricted property, comprising the tract of which the within is a part, like covenants, conditions and restrictions.

And also it is expressly covenanted and agreed between the parties hereto that the above restrictions shall attach and run with the land, they being assumed by the purchaser in part consideration of the purchase thereof, and shall be binding upon their heirs and assigns, whether included in subsequent conveyances or otherwise; and it shall be lawful for the said Frederick 30 Hemsley, or any of his heirs or assigns, and for the owner of any lot or lots, to institute and prosecute any proceedings in law or equity for damages or for injunctions against the person or persons having violated or threatening to violate any of the covenants and restrictions herein.

And also under and subject to such rights in the premises as the City of Atlantic City may have therein.

Together with all and singular the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances to the same belonging, or in any wise appertaining, and the reversion and reversions, remainder 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
10 to the said premises, with the appurtenances.

To have and to hold the said premises, with all and singular the appurtenances, subject to the restrictions aforesaid, 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 parties of the first part, for themselves and their heirs, executors and administrators, do by these presents covenant, grant and agree to and with
20 the said party of the second part his heirs and assigns, that they, the said parties of the first part, and their heirs, all and singular the hereditaments and premises hereinabove described and granted, or mentioned and intended to be so, with the appurtenances, unto the said party of the second part, his heirs and assigns, against them, the said party of the first part and their heirs and against all and every person or persons, whomsoever, lawfully claiming or to claim the same or any part thereof.

30 Shall and will warrant and forever defend, subject to the covenants, conditions and restrictions aforesaid.

In witness whereof, the said parties of the first part have hereunto set their hands and seals. Dated the day and year first above written.

FRED'K HEMSLEY. [SEAL.]

ANNE H. HEMSLEY. [SEAL.]

Signed, sealed and delivered in the presence of—
Page 2, line 12, word "conditions" written; page 4,
letter "s" on line 19 crossed out. All before signing.

JOHN S. WURTS,
LILLIAN M. McKEOWN.

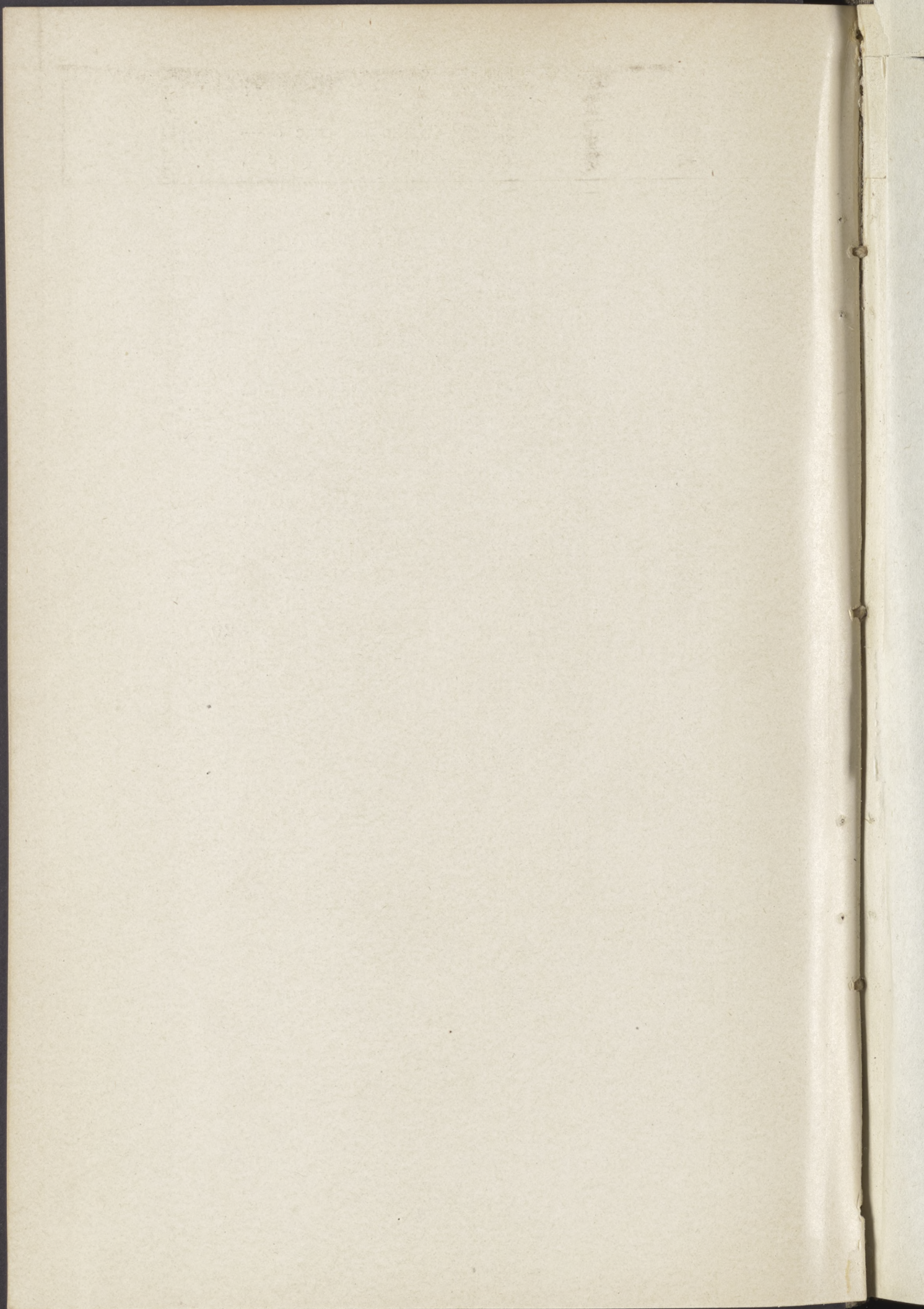
STATE OF PENNSYLVANIA, }
PHILADELPHIA COUNTY. } ss.

Be it remembered, that on this sixth day of November, in the year of our Lord one thousand nine hundred 10
and nine, before me, John S. Wurts, a Foreign Commissioner of said State, personally appeared Frederick Hemsley and Anne H. Hemsley, who I am satisfied are the grantors mentioned in the above deed of conveyance, and I having first made known to them the contents thereof, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed; and the said Anne H. Hemsley, being of full age, on a private examination apart from her said husband, before me acknowledged that she signed, sealed and 20
delivered the same as her voluntary act and deed, freely, without any fear, threats, or compulsion of her said husband. All of which is hereby certified.

JOHN S. WURTS,
*A Foreign Commissioner of Deeds
for the State of New Jersey in Pennsylvania*
[L. S.] *residing at the City of Philadelphia.*

Received November 30th, 1909, at 9 A. M., and recorded in the Clerk's Office of Atlantic County at May's 30
Landing, N. J., in Book of Deeds No. 415, page 272
&c.

SAMUEL KIRBY,
Clerk.



PACIFIC

AVE.

60'

65.63'	2724	109	113	119	123	127	65.63	133
85'		60'	"	"	"	"		70'

Law
AVE.

26'	34'	90'	"	"	"	90'
2800	108	108	116	122	130	60'
120'	60'	109	117	123	131	60'
54'	60'	90'	"	"	90'	

Newton Place

75'	108	114	120	126	132	73'
54'	2814					

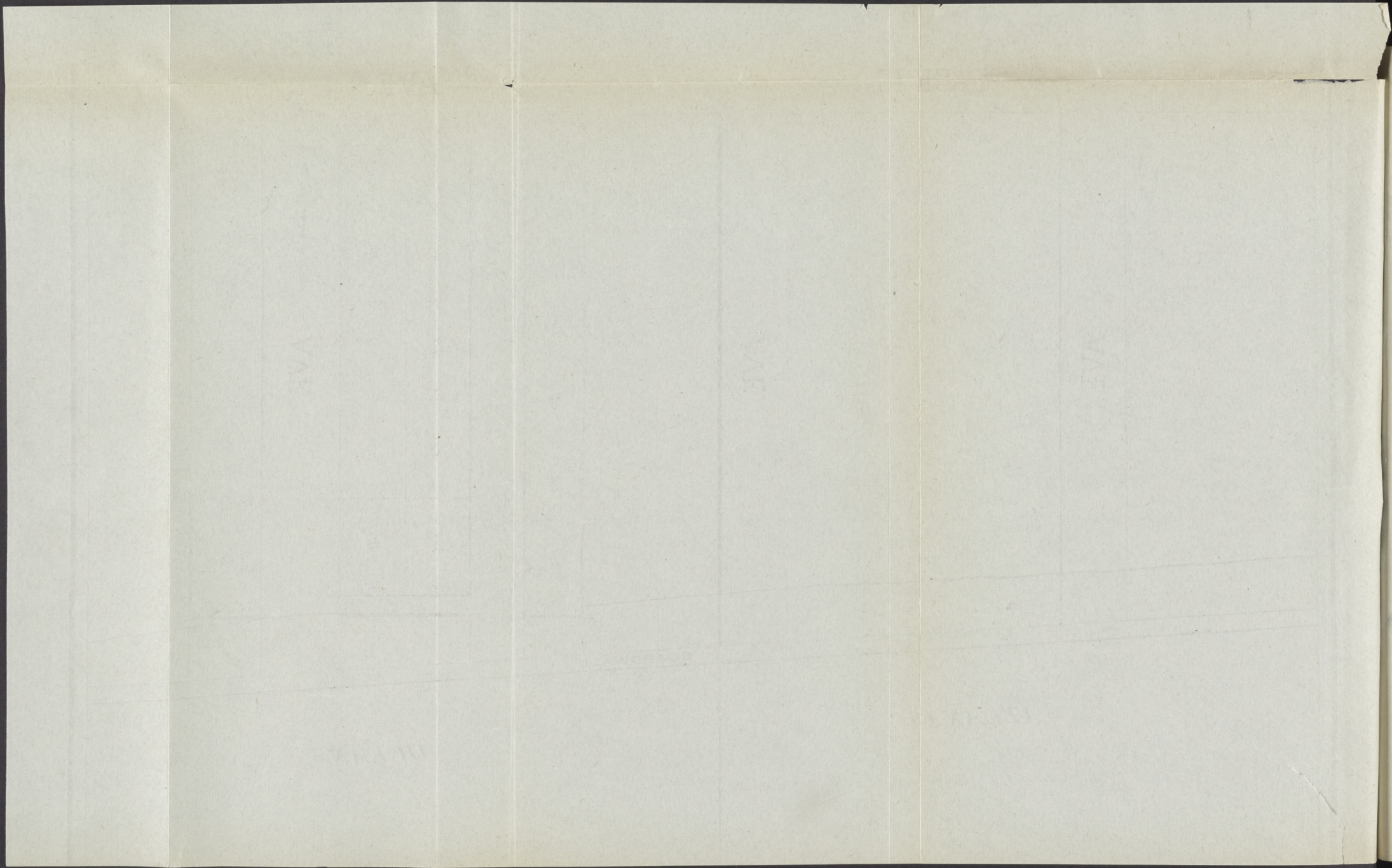
AVE.

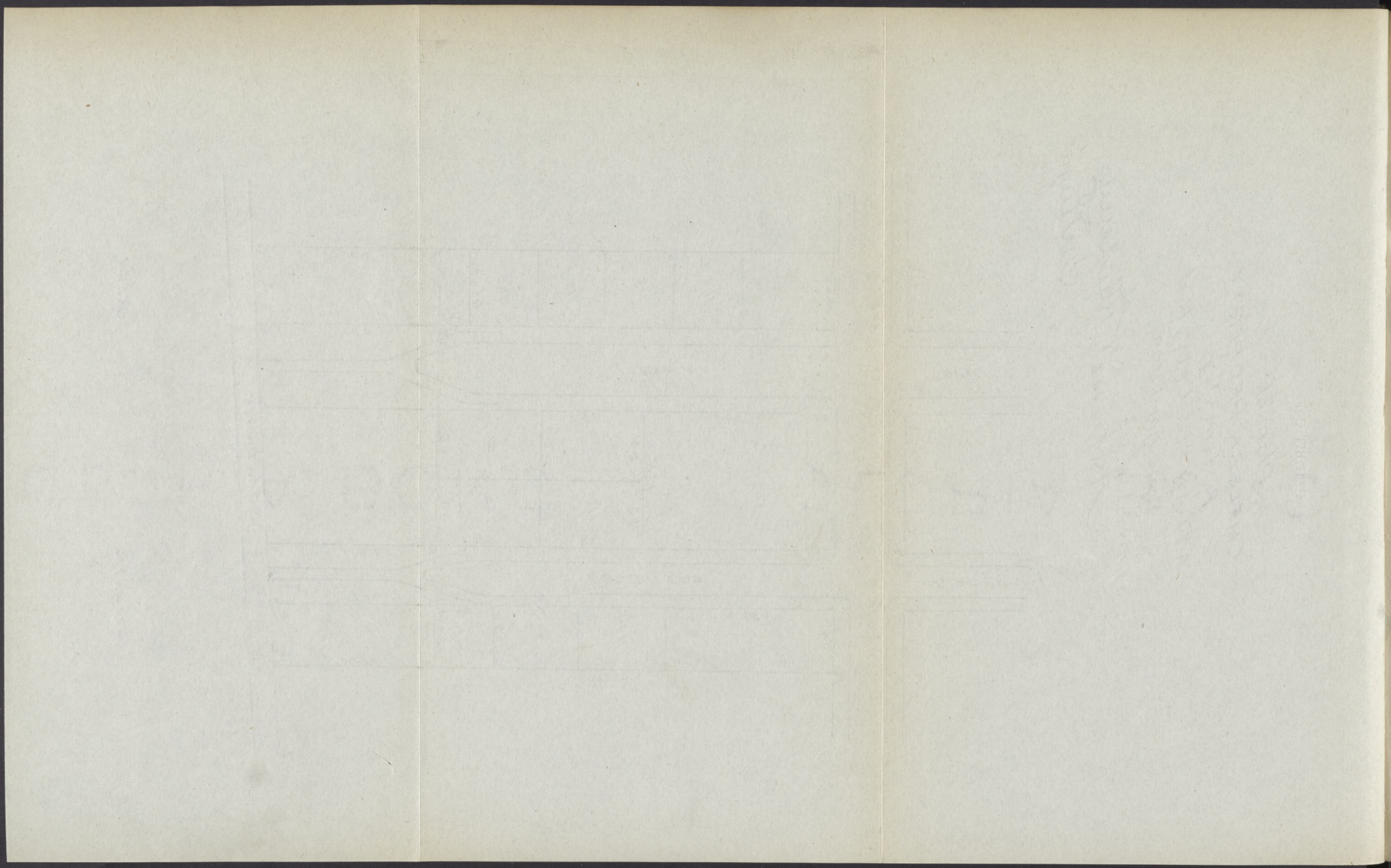
AVE.

BOARDWALK

ATLANTIC

OCEAN





IN CHANCERY OF NEW JERSEY.

BETWEEN

THEODORE J. LAPRES,

Complainant,

AND

SARAH N. DOUGHTY ET AL.,

Defendants.} Final Hearing
} on Bill to
} Quiet Title.

CONCLUSIONS.

10

(Filed November 21, 1916.)

Complainant is grantee of Frederick Hemsley of certain land at Atlantic City and has filed a bill to quiet title thereto by reason of claims made by the several defendants that complainant's title to a portion of the land so purchased is subject and subservient to the operation of certain restrictive building covenants impressed thereon by Hemsley in behalf of defendants, and which covenants defendants claim to be entitled to enforce. Defendants have answered, and by their answer, assert the rights in the land suggested by the bill, and by way of counter claim pray that a part of the land may be decreed "to be subject to the lien and encumbrances created by said covenants, restrictions and conditions."

20

The evidence discloses that on and prior to May 1st, 1897, Hemsley was the owner of a tract of land westerly of the improved part of Atlantic City which extended across the island from the thoroughfare on the northerly side thereof to the exterior line established by the Riparian Commissioners in the Atlantic ocean as its southerly boundary. On May 1st, 1897, a map of the land was filed by Hemsley in the county clerk's office of Atlantic county. On that map the land is delineated in streets and lots, and each lot is numbered. The part of the tract now in controversy is the territory embraced within the boundaries of two of the most southerly or oceanward lots delineated on the map; these lots are

30

respectively numbered on the map as lots 130 and 131, and together, extend from Stenton Place to Iowa avenue.

The map discloses as its most southerly object the words "Atlantic Ocean." Adjacent to and northerly of these words a boardwalk is disclosed running easterly and westerly. About fifty feet northerly of the boardwalk there is delineated a waving line extending easterly and westerly across the map, which line is obviously
10 designed to represent high-water mark. Coincident with this line, and extending between Stenton place and Iowa avenue—two streets running northerly and southerly on the map—there is delineated on the map a double line, which is shown by the evidence to represent a bulkhead which had been erected prior to the date the map was filed. No numbered lots are disclosed on the map oceanward of the high-water mark and bulkhead. Adjacent to the bulkhead and northerly thereof and extending from Stenton place to Iowa avenue, the map
20 delineates an alley. Adjacent to that alley and northerly thereof are the two lots now in controversy. Lot 131 extends northerly from the alley along Stenton place ninety feet; lot 130 is adjacent to and easterly of lot 131, and extends northerly from the alley ninety feet along Iowa avenue. The two lots together embrace all the territory between Stenton place and Iowa avenue, and extend northerly from the alley ninety feet. North-
erly of these two lots are two lots of the same size which are respectively numbered on the map 122 and
30 123; these two lots in like manner together extend from Stenton place to Iowa avenue. Pacific avenue crosses the tract in an easterly and westerly direction four hundred and sixty feet northerly of the bulkhead shown on the map.

The evidence fully discloses that this map was filed by Hemsley in furtherance of a general improvement or development scheme which he had determined upon, which scheme included a plan to fasten on the several

lots certain restriction relating to their use. To that end, and for that purpose, Hemsley thereafter inserted in all conveyances made by him certain restrictive covenants touching the use of the lots, and all or nearly all of the lots have since been conveyed by him by conveyances containing these covenants, and up to this time these restrictive covenants appear to have been uniformly observed. It is to quiet the title of lots 130 and 131 against the claim that those lots are held by complainant subject to the restrictive covenants that the present bill has been filed. 10

The uniform covenants which have been inserted in all deeds are nine in number. The first covenant restricts the location of buildings to be erected on the several lots, but provides for buildings oceanward of Pacific avenue to be located a greater distance from the streets than for buildings landward of Pacific avenue. Touching lots lying oceanward of Pacific avenue, the provision is:

“All lots lying on Pacific Avenue or lots between Pacific Avenue and the Ocean Bulkhead now erected, or that may hereafter be erected, on said property, on any of which lots no part of any building shall at any time be erected within eighteen feet of the front property line of any street or avenue bounding said lot or lots, nor within eight feet of the side dividing lines of said lot or lots, nor within three feet of the rear dividing line; excepting, however, the porch or front veranda of said building, which may be erected not nearer than eight feet of the front property line of any street or avenue bounding said lot or lots, and bay windows may be added to sides and front of said building, but shall not extend more than two feet from the main body thereof.” 20 30

The second and third covenants fix the minimum cost of any building to be erected on any lot, and restricts foundations and the height of porches.

The fourth covenant forbids the erection of any building except private dwelling on any lot, and the fifth covenant excepts from the operation of all the preceding covenants lots on Atlantic Avenue and northward thereof.

The sixth, seventh and eighth covenants relate to nuisances and other undesirable uses of buildings which are forbidden in certain locations.

The ninth covenant, which in connection with the
10 part of the first covenant above quoted occasions this controversy, is as follows:

“It is expressly agreed and covenanted that the Beach front as laid out on said filed map between the Bulkhead now existing on said premises and the Atlantic Ocean, or between any bulkhead that may hereafter be erected on said premises and the Atlantic Ocean, shall remain free, clear and unencumbered from and by any restrictions contained in above agreement, the said
20 Frederick Hemsley reserving to himself, his heirs and assigns, the use and enjoyment of said Beach front free from all covenants and restrictions.”

Then follows, as a part of the ninth covenant, statements that the restrictions and reservations are placed on the lots as a part of a general plan of the owner to enhance the value of beautifying and making more healthful the occupancy of the land, and that the restrictions are so created as a part consideration for the purchase of the lots and that each and every purchaser shall abide by the covenants and be entitled to
30 enforce them against any person violating them and that they are made for the mutual benefit of all purchasers, and that the grantor, his heirs and assigns, will insert in and make part of each and every deed of conveyance by him or them of his or their remaining restricted property like covenants, conditions and restrictions; and that the restrictions shall attach to and run with the land, they being assumed by the purchasers in part consideration of the purchase price, and that

it shall be lawful for Hemsley or his heirs or assigns and for any owner of any lot to institute and prosecute any proceedings in law or in equity for damages or for injunctions against persons violating or threatening to violate any of the covenants or restrictions.

The evidence disclosed that prior to the time the map was filed a bulkhead had been erected at the place designated on the map, and at the time the map was filed it had been partially destroyed by a storm.

Conveyances of lots were thereafter made by Hemsley 10
by reference to the filed map, and in the year 1898 nearly all of the lots had been sold, but Hemsley then still owned not only lots 130 and 131, now in controversy, but also the two adjoining lots numbered 122 and 123. In that year (1898) a new bulkhead was erected by Hemsley extending from Stenton place to Iowa avenue on the line which separates lots 130 and 131 from lots 122 and 123. April 27th, 1909, a new map was filed by Hemsley in Atlantic County Clerk's office, on which map the new bulkhead was delineated 20
and no lots or alleys were shown oceanward thereof, the intervening space being left blank on the new map. October 25th, 1909, an ordinance was passed by the City Council of Atlantic City vacating the alley shown on the first map as adjacent to and landward of the bulkhead shown on that map. November 6th, 1909, a deed of conveyance was executed by Hemsley to complainant herein for the land lying between the new bulkhead and the Riparian Commissioners' exterior line in the ocean. The deed from Hemsley to complainant 30
contains the same covenants that all former deeds from Hemsley had contained.

Complainant now claims that by reason of the fact that the restrictions here in question are imposed only on the lots lying between Pacific avenue and the "ocean bulkhead now erected or that may hereafter be erected on said property," as contained in the first covenant, and by reason of the additional provision contained in

the ninth covenant, "that the beach front as laid out on said filed map between the bulkhead now existing on said premises and the Atlantic Ocean, or between any bulkhead that may hereafter be erected on said premises and the Atlantic ocean, shall remain free, clear and unencumbered from and by any restrictions contained in above agreement, the said Frederick Hemsley reserving to himself, his heirs and assigns, the use and enjoyment of said beach front free from all covenants
10 and restrictions," lots 130 and 131, which now lie wholly outside or oceanward of the present bulkhead are free from the operation of the restrictive covenants.

Hon. Clarence L. Cole, for complainant.
Messrs. Grey & Archer, for defendants.

LEAMING, *V. C.*

I am unable to adopt the view which has been suggested in behalf of defendants that the language con-
20 tained in these covenants relating to a possible future bulkhead has reference alone to a future bulkhead located on the site of the old one or oceanward thereof. These covenants, to be accurately understood, must be not only considered in their entirety, but also in connection with their obvious purpose as disclosed by the circumstances surrounding their adoption; when so considered I think their meaning, force and application clear and unmistakable. At the time these covenants were adopted the old bulkhead had been partially
30 destroyed by the ocean, and the fact that there was then an apparent and well known possible necessity of the removal of the bulkhead landward by reason of the future encroachment of the ocean must be accepted as a fact; in like manner it cannot be doubted that the possibility of the recession of the ocean was equally well known. Nor can the well known office or purpose of bulkheads on the ocean front be disregarded; they are to afford protection from high tides and storms

and mark the line to which the property landward is to be filled in and built upon with supposed safety. It will also be observed that these covenants provided that private dwellings only should be erected on lots between Pacific avenue and the bulkhead then existing or thereafter to be erected. The land oceanward of the bulkhead then existing or thereafter to be constructed is referred to in the ninth covenant as "beach front"; it is there declared that Hemsley reserves to himself the "said beach front free from all covenants and restrictions." The improvement enterprise thus clearly and unmistakably anticipated and depicted by the general plan as disclosed by the covenants in their entirety was a tract of land on which attractive residences only should be erected extending territorially from Pacific avenue to an "ocean bulkhead," and the land next oceanward of the bulkhead contemplated as "beach front" which should remain free from the restrictions. In such an enterprise, contemplating an improved residential section extending to an ocean bulkhead and an unrestricted beach front oceanward thereof, any general reference to a possible change of location of the bulkhead landward could only be understood by purchasers of the lots as changes in location made necessary for the preservation of the general improvement scheme as distinguished from changes of location not rendered necessary by the ocean's encroachment, but made at the caprice of Hemsley for the purpose of removing restriction from lots otherwise restricted. A mental photograph of the general improvement scheme as depicted by a consideration of the covenants in their entirety is unchanged and wholly unaffected by a removal landward of the bulkhead when such removal is rendered necessary by the encroachment of the ocean, for the original map discloses building lots extending to a bulkhead located at a place which is delineated on the map as high-water mark and discloses an open beach front extending oceanward thereof. The spirit

of the whole enterprise clearly contemplates a continuance of those conditions and renders it impossible for Hemsley to release the front lots from the restrictions by an arbitrary removal of the bulkhead location landward without an accompanying necessity for such removal.

The evidence discloses the existence of no such necessity, but on the contrary discloses that when the bulkhead location was changed by Hemsley the ocean had
10 in fact receded. The testimony further discloses that the new bulkhead was erected in 1908, that the new map depicting the new bulkhead was filed in April, 1909, that the alley was vacated by ordinance passed in October, 1909, and the deed to complainant made in November, 1909. These sequential events, when considered in connection with the fact that the ocean had been gradually receding for many years prior, strongly
20 suggest that the change of location of the bulkhead may have been for the defined purpose of relieving the lots from the restrictions; but whether for that purpose or not, the evidence clearly fails to disclose that the change of location was based on any necessity for such change having arisen, and must be regarded as arbitrary and not contemplated by the covenants.

I will advise a decree denying the relief prayed by the bill.

Submitted, November 4, 1916.

Determined, November 13, 1916.

IN CHANCERY OF NEW JERSEY.

BETWEEN

THEODORE J. LAPRES,
Complainant,

AND

SARAH N. DOUGHTY ET AL.,
Defendants.

} On Bill, &c.

30

DECREE.

(Filed November 28, 1916.)

This cause coming on to be heard in the presence of Clarence L. Cole, of counsel with the complainant, and Grey & Archer, of counsel with the defendants, Sarah N. Doughty, David C. Reed, William M. Clevenger, William W. Waters, Charles B. Boyer, William B. Loudenslager, Eleanor H. Jordan, Lucius Wright, James B. Alcorn, Harry Doherty, Harry H. Hallman, Daniel W. Myers, Samuel Rotholtz, Ludora Risley, Annie Schlecht, devisee of Adolph Schlecht; Israel G. Adams and Louise T. Langsdorf, and the pleadings, 10
proofs and exhibits having been read and considered and the argument of the respective counsel having been heard, and the Chancellor having considered the same, and it appearing to his satisfaction that said defendants who appeared and who filed the answer in this cause, have, by their said answer, set up the claim that part of the lands and premises in the bill of complaint in this cause described, is subject to the covenants, conditions and restrictions set forth in the deeds referred to in the bill of complaint, and have, in respect to the remainder 20
of said lands and premises, disclaimed having any such claim. And it further appearing that the claim of the defendants to that part of said land and premises which they claim is subject to such covenants, conditions and restrictions, is valid.

II LAP

It is, on this 27th day of November, 1916, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, and the said Chancellor, by virtue of the power and authority of this court, does hereby ORDER, ADJUDGE and DECREE that as to that portion of the lands and premises in said bill described, to which the said defendants disclaimed by their answer having any claim to its being subject to the covenants, conditions and restrictions set forth in the bill of complaint, that is to say, that portion of the lands and premises belonging to the complainant, lying south of the southerly boundary line of lots 130 and 131, as delineated on the map filed by Frederick Hemsley, in the office of the county clerk of Atlantic county on the 1st day of May, 1897, which line is 440 feet south of Pacific avenue, considered as a sixty-foot-wide street, that said portion of said premises is not subject to the conditions, covenants and restrictions set forth in the said bill of complaint.

20 And it is further ORDERED, ADJUDGED and DECREED that as to that portion of the lands and premises described in said bill of complaint, which constitutes lots 130 and 131 as delineated on said map, and described as follows:

30 Beginning at a point in the easterly line of Stenton place, 350 feet south of Pacific avenue, considered as a sixty-foot-wide street, and extending thence (1) eastwardly, parallel with Pacific avenue, 120 feet to the westerly line of Iowa avenue; thence (2) southerly along the westerly line of Iowa avenue, 90 feet; thence (3) westwardly along a line parallel with Pacific avenue and 440 feet therefrom, 120 feet to the easterly line of Stenton place; thence (4) northwardly 90 feet along the easterly line of Stenton place, to the place of beginning.

that said portion of said lands and premises is subject to the covenants, conditions and restrictions set forth

in said bill of complaint; that the prayer of said bill with respect to said portion of said premises be denied and that complainant pay to said defendants their costs of suit to be taxed.

E. R. WALKER, C.

Respectfully advised:

E. B. LEAMING, V. C.

10

IN CHANCERY OF NEW JERSEY.

BETWEEN

THEODORE J. LAPRES,

Complainant,

AND

SARAH N. DOUGHTY ET AL.,

Defendants.

} On Bill, etc.

NOTICE OF APPEAL.

20

(*Filed November 28, 1916.*)

The complainant hereby appeals from the final decree made on the twenty-seventh day of November, 1916, and from the whole and every part thereof made in this court in the above-stated cause to the Court of Errors and Appeals, the court of last resort in all causes.

C. L. COLE,

Solicitor of and Counsel

with Complainant. 30

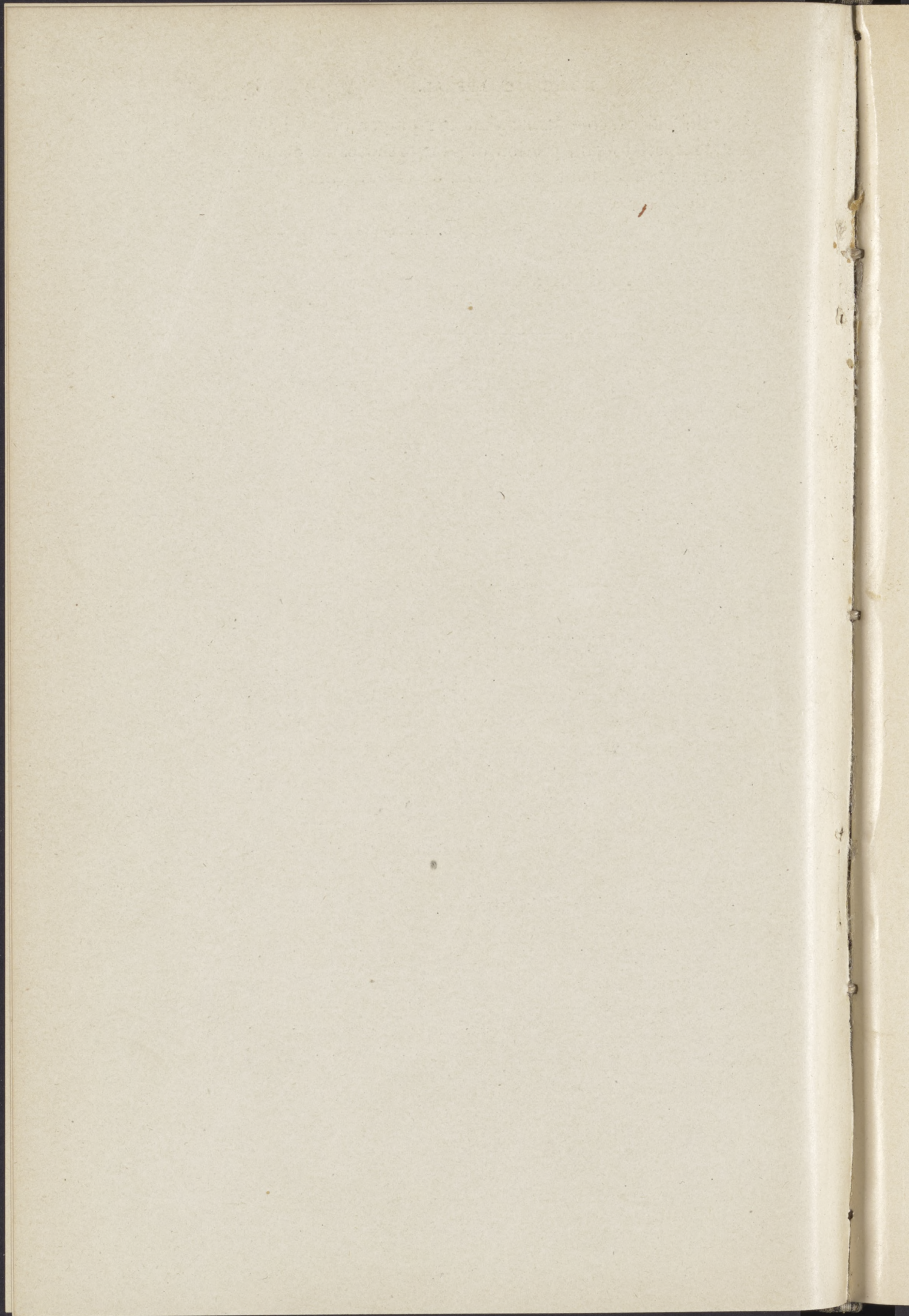
Dated November 28th, 1916.

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

C. L. COLE,

Solicitor of and Counsel

with Complainant.



NEW JERSEY
Court of Errors and Appeals

THEODORE J. LAPRES,
Complainant-Appellant,
vs.
SARAH N. DOUGHTY ET AL.,
Defendants-Respondents.

Brief for Appellant.

FACTS.

The bill in this case is filed pursuant to the provisions of an act entitled "An act to compel the determination of the existence and validity of covenants, conditions, agreements, &c." (P. L. 1909, page 233, Compiled Statutes, page 5405).

Frederick Hemsley was the owner of a tract of land in Atlantic City, bounded by Iowa avenue and Stenton place and the Ocean and Baltic avenue. He plotted and mapped the tract and the map was filed May 1st, 1897, and a copy of which is Exhibit C-2. Sometime between May and October of 1896 he constructed a bulkhead on the Ocean front of the property at a point 460 feet south of Pacific avenue, and in 1908 constructed a bulkhead at a point 350 feet south of Pacific avenue (page 19). Shortly after the filing of the map he proceeded to convey lots within the plotted section

and in every deed inserted uniform restrictions concerning property lines, the uses to which the buildings might be put, &c., with certain provisions that restrictions were not to apply to lots on certain avenues and then follows (bottom of page 68):

“It is expressly agreed and covenanted that the beach front as laid out on said filed map between the bulkhead now existing on said premises and the Atlantic Ocean, or between any bulkhead that may hereafter be erected on said premises and the Atlantic ocean, shall remain free, clear and unencumbered from and by any restrictions contained in above agreement, the said Frederick Hemsley reserving to himself, his heirs and assigns, the use and enjoyment of said beach front free from all covenants and restrictions.”

On November 6th, 1909, he conveyed to the appellant the remainder of the property standing in his name, being the land on the ocean front, and described as (page 65): Beginning at a point in the east line of Stenton Place, three hundred and fifty feet south of Pacific avenue, considered as a sixty-foot wide street, and runs (1) east parallel with Pacific avenue, one hundred and twenty feet to the west line of Iowa avenue; thence (2) southwardly along the westerly line of Iowa avenue, seventeen hundred and twenty-five feet, more or less, to the exterior line as fixed by the Riparian Commissioners of the State of New Jersey, and thence by several courses to the beginning.

After this conveyance the appellant asserted the right to build on the land conveyed as though it were wholly unrestricted, and the prior grantees of Hemsley on the plotted tract made the claim that the whole of the land conveyed to the appellant was subject to the restrictions, but that if this contention was untenable, then, certainly, the land lying between the point 350 feet south of Pacific avenue and the point 460 feet

south of Pacific avenue was restricted. In this posture the bill was filed.

The conclusion of the Vice Chancellor is that while Hemsley had a right to move the bulkhead either oceanward or landward and free the land landward of the bulkhead from the restrictions, that it was not a right that could be capriciously exercised, and he found that Hemsley's act in moving the bulkhead was unnecessary, and, therefore, capricious. He then concluded that the land lying between a point 350 feet south of Pacific avenue and 440 feet south of Pacific was subject to the restrictions.

FIRST POINT.

HEMSLEY'S JUDGMENT AS TO THE WISDOM OR NECESSITY OF MOVING THE BULKHEAD WAS FINAL AND CONCLUSIVE UPON HIS GRANTEEES.

Appellant insists that no part of his land is subject to any of the restrictions imposed by Hemsley for the reason that the land is within the exceptions named in all the deeds. The identical language of the reservation had been used in all previous deeds so that it requires no strained construction to say that Hemsley intended to reserve to himself or to anyone to whom he might convey the beach front the right to use the same unaffected by the restrictions. The question then is, what land was intended to be within the exceptions? We say intended because the Court must ascertain the intent of Mr. Hemsley, and that intent is to be gathered from the language used and all the relative surrounding circumstances. It is insisted by the respondents that the bulkhead as constructed in 1896 was a fixed line, so that no matter what the changed conditions might be on the beach front that the only property of Hemsley that was to be unfettered was that which lay oceanward of a point 460 feet south of Pacific avenue. Our insistence is that Mr. Hemsley intended that the beach front was

to be movable in the sense that as conditions changed the point oceanward of which the restrictions were not to operate was movable. It is not without profound significance that the original bulkhead had been partly destroyed when Hemsley made his first grant. The ocean had encroached and swept over the bulkhead, from which Hemsley undoubtedly concluded that there was a great likelihood of his fast land being submerged and the amount that he owned diminishing between high-water line and Pacific avenue. With this undisputed fact in the case there is afforded an obvious reason for his using the language in the exception. He anticipated the possibility of having to move the bulkhead landward as a protection to his remaining land landward of the bulkhead. Of course, it is understood that the object of the bulkhead was first to protect the land landward thereof, and, secondly, to, if possible, build up the land oceanward. To accept respondents' interpretation, the language of the exception must be held to mean that the original bulkhead was intended as a line immovable in character. Such an interpretation cannot be arrived at without straining the language and refusing to give some of it its legitimate effect. The language is "*It is expressly agreed and covenanted* that the beach front as laid out on said filed map between the bulkhead now existing on said premises and the Atlantic ocean, or between any bulkhead that may hereafter be erected on said premises and Atlantic ocean, &c." This language is inept to accomplish that for which respondents contend. It was easy to determine how many feet south of Pacific avenue the original bulkhead was, and if that bulkhead was intended as a line, apt language would have had to read something like this: "It is expressly agreed and covenanted that the beach front as laid out on said filed map at a point 460 feet south of the southerly line of Pacific avenue and the Atlantic ocean shall remain free, clear, &c." The language "Or between any bulk-

head that may hereafter be erected on said premises" must be entirely eliminated from the language if respondents contention is to prevail. It was suggested by counsel for the respondents that this had in mind the possibility of having a second bulkhead erected as a substitute for the original, but it seems to us that such a construction is forced. We have already suggested that he is not using the word bulkhead in a sense of a line; if he had, he could have entirely avoided the use of the words last quoted by adding the word "line" after the first bulkhead, so that it would read, "It is expressly agreed and covenanted that the beach front as laid out on said filed map between the bulkhead line now existing on said premises and Atlantic ocean, etc." But, manifestly, it was the physical structure of a bulkhead that he had in mind, and the possibility of the necessity of its removal. It is a matter of which the Court will take judicial notice that beach front is a variable quality. Accretions are formed and erosions are made. The law gives to a riparian owner the benefit of the accretions as a compensation for the possibility of a loss by erosion. The suggestion at the time of the trial that Mr. Hemsley or his assigns might move the bulkhead oceanward, but not landward, seems to us to be untenable. Once conceded that Mr. Hemsley had a movable line or movable bulkhead in mind, there is nothing in the exception that indicates a limitation upon its removal oceanward. That he had a right to move it oceanward we insist is clear, but it is equally clear that he had a right to move it landward if in his judgment the moving landward was essential to the preservation of the beach front. And there was method in Mr. Hemsley's desire to reserve to himself and assigns an unfettered piece of land adjoining the public boardwalk. It is a fact of which the Court will take notice that the beach front has a peculiar value, and that buildings on the beach front and immediately adjoining the public boardwalk

face the boardwalk. Restrictions that might apply to a side street would have no application as to beach front property. This property is used exclusively for hotels, stores and amusement places, and nowhere within the builtup section of Atlantic City is it used for cottage purposes. Effect must be given to the meaning of "beach front" in the exception. It is that which he says is to be free from the covenants and restrictions. The respondents and their predecessors accepted their grants with that express exception, and they cannot be heard to say that they did not know what these words meant. The undisputed evidence is that all the land south of a point 350 feet south of Pacific avenue is ordinary beach front. Ordinary high-water mark now reaches the inland line of the boardwalk.

It will be observed that the thing or tract of land that is excepted by Hemsley from the operation and effect of the restrictions is beach front, and he has defined what he meant by beach front, and all his grantees must accept his definition. His definition is all the land oceanward of the existing bulkhead and Atlantic ocean, or oceanward of any bulkhead that may hereafter be erected and Atlantic ocean. The public boardwalk was an existing structure at the time Hemsley laid out the tract of land, and his evident purpose was to preserve sufficient land landward of the boardwalk for the construction of stores or a hotel or such other building as might be characteristic of the buildings along the ocean front. He did not want to be caught by reason of the erosions of the sea with a strip of land between high-water mark and the limit of his title that would be inadequate for boardwalk properties and so he sought by the language used not to impress the restrictions upon so much of the property as might be needed for such a purpose. It cannot be that when he used the language "or between any bulkhead that may hereafter be erected on said premises and Atlantic ocean" he meant as

a substitute in the precise location of the existing bulkhead. If a fixed line had been in his mind, the natural thing was to have fixed it so many feet from Pacific avenue as a fixed monument, or to have said "or between any bulkhead that may hereafter be erected in the place of and as a substitute for, or along the line of, the existing bulkhead." Then, again, if he had in mind only to move the bulkhead oceanward, apt language at his command would have required him to say "between the bulkhead now existing on said premises and Atlantic ocean or between any bulkhead that may hereafter be erected on said premises oceanward thereof and the Atlantic ocean." The point of it all is that to secure the result sought by the respondents you must interpolate words, which is unnecessary to secure the result for which we contend. Taking the language in its plain, ordinary, natural sense, it can mean but one thing, and that is that Mr. Hemsley excepted from the impress of the restrictions the beach front which he declared to be such land as was oceanward of the then existing bulkhead, or any bulkhead that he might thereafter erect. Of course, the bulkhead which he might thereafter erect must necessarily be on his own land, so that whenever he sold any land landward of the existing bulkhead he necessarily withdrew it from the exception. And it is worthy of observation that while he built the original bulkhead in 1896, and began to make conveyances in 1897, that he did not part with the beach front until 1909, and that he had sold off practically the entire tract. It seems to us that we are not justified in speculating upon the effects on Hemsley's grantees in the light of unequivocal language. It should be given its plain meaning and import.

We find no significance so far as the alley or street is concerned which crosses the tract in question. It is not made to appear that any conveyances were made with reference to the alley, and the filed map shows the alley eliminated. Besides, if the alley exists in law

it could not be subject to the restrictions, and the question of whether or not the appellant has a right to close it is one over which this Court, in this case at least, has no jurisdiction.

SECOND POINT.

THE ACTION OF HEMSLEY IN MOVING THE BULKHEAD LANDWARD WAS NOT CAPRICIOUS.

Assuming that Hemsley could not arbitrarily and without reason move the bulkhead landward, we submit that any doubt as to the wisdom or necessity of the removal must defeat the respondents. This Court ought not lightly to substitute its judgment, based wholly upon the printed record, for that of Mr. Hemsley, who was on the ground and best knew what had happened and what might possibly happen. Considerable stress was laid by counsel for respondents because the bulkhead was moved landward and on a line of division between lots 130, 131 and lots 122 and 123. As lots 130 and 131 were all the land which Hemsley owned other than that which was oceanward thereof, it was but a natural and logical thing that he should place the bulkhead on the line of division. The evidence does not warrant the finding that the action of Hemsley was wholly arbitrary and unnecessary in order that he might perfect his purpose which was in mind at the time of the insertion of the exception in the deeds. He cannot be charged as having idly inserted the exceptions. It was for his protection and benefit, and no grantee of his could have been deceived. They were told in their deed that the restrictions were not to affect the beach front nor any land oceanward of the bulkhead then erected or might thereafter be erected. At the time of the trial, ordinary high-water mark was under the boardwalk, and the interior line of the boardwalk at Stenton place is only 500 feet south of Pacific avenue, so that from the point of the new bulkhead to

the boardwalk is only 150 feet. A lot on the beach front with a lesser depth is hardly suitable for the purpose to which beach front lots are put. In 1893 high-water line was only 390 feet south of Pacific avenue. (See testimony of Risley, pages 22-25.)

The original bulkhead built in 1896 was greatly damaged and practically destroyed a few weeks after its construction by reason of the inroads of the sea. (Testimony of Fisher, page 26.) Mr. Clevenger, one of the respondents, testified (page 42) that the tides had come within four or five feet of the point of the second bulkhead. Mr. Gummey testified (page 43) that the original bulkhead was washed out. Johnson, one of the residents (page 57), testified that in 1896 there was a terrific storm that washed away the bulkhead and the intervening street. When Hemsley constructed the second bulkhead he could not be assured that the ocean would recede or that there might not be a repetition of the storm of 1896 which destroyed the first bulkhead. Even assuming that the land had made up since 1896, it certainly cannot be said that Hemsley was required to rebuild the bulkhead on the line of the old. As he was the judge of the necessary method to be adopted to properly protect his beach front, the Court cannot now justly say that he was unwarranted in moving the bulkhead landward. If he was justified in moving it any distance landward, the Court cannot determine the exact number of feet he should have moved it unless it is perfectly manifest that there was no need for moving it at all. This we contend is not evident.

It is in the case (testimony of Barrett, page 29) that the custom is universal in Atlantic City to assess beach front property as fronting on the boardwalk for a depth of 200 feet. The amount of land between the boardwalk and the second bulkhead is about 200 feet. It must be concluded that Hemsley expected that the unrestricted property would be built upon and that there

should always be enough land between the bulkhead line and the boardwalk upon which to construct a building that should be in keeping with other properties on the beach front. This must have been known to all of his grantees.

To affirm the decree of the Vice Chancellor means that the unrestricted portion of appellant's land between the line of the old bulkhead and the interior line of the boardwalk will be inadequate for building purposes, and he will be deprived of a major portion of its value.

THIRD POINT.

THE APPELLANT IS AN INNOCENT PURCHASER FOR VALUE UNAFFECTED BY RESPONDENTS' RIGHTS.

When appellant bought he found the bulkhead 350 feet south of Pacific avenue. All the deeds which preceded his, and his own deed, excepted from the portion of the restrictions all land oceanward of the bulkhead originally built or that might thereafter be constructed. He was innocent of any claim on the part of the respondents that the removal of the bulkhead was unwarranted. He was justified in assuming that all land oceanward of the second bulkhead was unaffected by the restrictions. The respondents took no action to stop Hemsley from building the second bulkhead, nor did they do anything to notify subsequent purchasers. They are estopped now to insist that the action of Hemsley in building the second bulkhead was a capricious act.

It is respectfully submitted that appellant is entitled to have it declared that his land is free from the operation of the restrictive covenants, and that the decree should be reversed.

C. L. COLE,
Solicitor for and of Counsel
with Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THEODORE J. LAPRES,
Complainant-Appellant,
vs.
SARAH N. DOUGHTY, ET AL,
Defendants-Respondents.

BRIEF FOR
RESPONDENTS.

FACTS.

The facts are not stated adequately in the brief for appellant, but are so fully and accurately stated in the Conclusions and Opinion (pp. 73-80) that we deem it unnecessary to repeat them here, particularly as they are not in dispute.

To the facts stated by the Vice Chancellor we would add only these facts:

During the years when the various conveyances were being made to the respondents, the bulkhead constructed in 1896 remained in view and maps like Exhibit C-2 were exhibited to prospective purchasers, showing not only the "Beach Front" and bulk-head, but a passageway, thereby dedicated to public use, immediately north of the bulkhead and extending from Stenton Place to Iowa Avenue.

We would also emphasize these facts:

When the new bulkhead was erected the ocean had not encroached upon the land, but had receded from 127 to 143 feet, and the new bulkhead was erected on a purely arbitrary line, which constituted the division line between lots 122 and 123 on the one side, and 130 and 131 on the other side.

ARGUMENT.

I.

The right to move the bulkhead inland 110 feet and to thus eliminate lots 130 and 131 from the plan and free them from the restrictions is based upon the words used in the first paragraph of Clause 9, which reads:

“It is expressly agreed and covenanted that the Beach Front as laid out on said filed map between the bulkhead now existing on said premises and the Atlantic Ocean, or between any bulkhead that hereafter be erected on said premises and the Atlantic Ocean shall remain free, clear and unencumbered,” etc.

In connection with his efforts to thus free lots 130 and 131 it was necessary also, in order that Hemsley might make title to the complainant, that an ordinance of Atlantic City should be passed vacating the dedicated passageway and that the new map should be filed.

Now, if complainant's contention that lots 130 and 131 were thus freed from the restrictions is to prevail, it is also true that Hemsley could as well have run his bulkhead between lots 116 and 117, on the one side, and

lots 122 and 123 on the other side, so long as he retained the title to lots 122 and 123; in fact, logically, the complainant must contend that Hemsley could have destroyed the effect of his own grant by going still further inland with his bulkhead. Such a construction of the first clause of paragraph 9 is wholly impossible.

II.

If complainant's construction is to prevail, Hemsley had it within his power to completely destroy the thing which he referred to in the covenant as "the Beach Front as laid out on said filed map," that is to say, the Beach Front delineated as lying on the Ocean side of the dedicated street, which was shown at the ocean end of the tract containing the numbered lots. Having in mind the other covenants in the deed and, particularly, the first covenant (quoted in the Conclusions on p. 75), this construction is also impossible, for it is provided in this first covenant that on all lots between Pacific Avenue and the ocean bulkhead no part of any building should be erected within eighteen feet of the front property line, whereas the buildings on the lots further inland could be constructed within seventeen feet of the front property line. (Pp. 66, line 14). It is evident that the "general plan" expressly provided for in the deed (p. 69, line 10) contemplated an unobstructed ocean view from the porches of houses further inland, which would be seriously impaired by the elimination of the "Beach Front as laid out on said filed map," and the elimination of the restrictions on said lots lying between Pacific Avenue and the dedicated passageway.

It may be true, as stated in appellant's brief, that the question as to whether appellant has the right to close the passageway is one that does not arise in this case, but we nevertheless insist that the delineation of the passageway on the map clearly indicates that the Beach Front was never to extend further inland than the dedicated street.

III.

We respectfully submit that the words in Clause 9,

"between the bulkhead now existing on said premises and the Atlantic Ocean, or between any bulkhead that may hereafter be erected on said premises and the Atlantic Ocean"

mean precisely the same thing as the words in Clause 1

"between Pacific Avenue and the bulkhead now erected or that may hereafter be erected on said property"

and that when Hemsley constructed the bulkhead in 1896, filed the map showing it in 1897, and proceeded to make numerous conveyances referring to the map, the location of the bulkhead was fixed for all time; in fact, irrespective of the construction which might be put upon Clause 9, the language of Clause 1 is in itself sufficient to prevent Hemsley, after constructing the bulkhead, from moving it landward and into the block lying between Pacific Avenue and the passageway.

It may be true that the language of Clause 9

"between the bulkhead now existing on said premises and the Atlantic Ocean, or between any bulkhead that may hereafter be erected on said premises and the Atlantic Ocean"

is attributable to the fact that at the time the map was filed the bulkhead constructed in 1896 had been partly destroyed by a storm (p. 77, line 5). If so, the line of the bulkhead was nevertheless fixed and Hemsley was reserving as free land that portion lying between the bulkhead then erected or that might thereafter be erected *in the same location*. This view is strengthened by the fact that the bulkhead is delineated on the filed map.

IV.

If the foregoing view is not the correct one, the conclusion of the Vice Chancellor, that the action of Hemsley in moving the bulkhead was capricious, and that the language of Clause 9 did not permit Hemsley to capriciously move the bulkhead to its present location, is undoubtedly correct. That the real object in moving the bulkhead was to free lots 130 and 131 from the restrictions is shown by these facts:

That the ocean had, in fact, receded approximately 140 feet when the new bulkhead was constructed; that the division line between lots 130 and 131, on the one side, and 122 and 123 on the other side, was arbitrarily chosen as the new location of the bulkhead; that shortly after the bulkhead was moved the new map was filed and the ordinance was passed vacating the dedicated passageway; and that the conveyance to the complainant shortly followed.

To say that Hemsley, in the absence of all necessity, could thus free lots 130 and 131 from the restrictions *in the face of* the language used in Clause 1, and *because* of the words contained in paragraph 9, is to place a con-

struction upon his covenants which would enable him to seriously impair, if not entirely destroy, the general plan so conspicuously provided for in the deed and filed map.

V.

The argument of counsel for appellant that he was an innocent purchaser, unaffected by respondents' rights, is now raised for the first time. No such claim is made in the pleadings, no testimony was consequently taken on this point at the hearing (p. 21, line 21) and no argument in favor of this point was raised in the court below.

The argument, however, is without merit, for Lapres, as a purchaser, in taking his deed, which disclosed the general plan, was put upon notice of the map on file showing the original bulkhead and, in fact, his testimony (p. 22, line 8), in so far as it goes, discloses that he did have knowledge of the original bulkhead; nor is there anything in the case which would indicate that the respondents were guilty of laches in not seeking to enjoin Hemsley from moving the bulkhead, for their rights were not affected by the mere moving of the bulkhead, so long as Hemsley did not seek to violate any of the restrictions imposed upon lots 130 and 131.

We respectfully submit that the decree should be affirmed.

GREY & ARCHER,
Solicitors for and of Counsel with Defendants-
Respondents.

