

I N D E X

	PAGE
Order to Show Cause.....	1
Bill of Complaint.....	2
Answer.	10
Order.	12
COMPLAINANT'S TESTIMONY:	
William M. Powell, Jr.—Direct.....	15
John A. Datz—Direct.....	16
DEFENDANT'S TESTIMONY:	
John A. Datz—Direct	18
Cross.	21
Ralston McCausland—Direct	22
Cross.	24
Walter Wilgus—Direct	24
Cross.	25
William A. McArdle—Direct.....	26
Leonard F. Pedrick—Direct.....	27
Cross.	28
Conclusions (Oral)	30
Exhibit C1, Photograph.....	32
Exhibit C3, Letter.....	33

	PAGE
Exhibit D2, Agreement.....	34
Exhibit D3, Permit.....	40
Final Decree	41
Amended Notice of Appeal.....	42
Petition of Appeal.....	43
Answer to Petition of Appeal.....	45

New Jersey State Library

ORDER TO SHOW CAUSE.
IN CHANCERY OF NEW JERSEY.

Between
WILLIAM M. POWELL, JR.,
et al.,
Complainants,
and
JOHN DATZ,
Defendant.)

On Bill, &c.
Order to Show Cause.

10

Upon reading and filing the verified bill of complaint;

It is on this tenth day of May, 1928, on motion of Cole & Cole, solicitors for complainants, ordered that the defendant show cause before the Chancellor, Chambers, Atlantic City, on the 22nd day of May next at the hour of ten o'clock in the forenoon, daylight saving time, why an injunction should not issue, in accordance with the prayer of the bill. 20

It is further ordered that a copy of the bill, affidavit and of this order, none of which need be certified, but may be marked as true copies by solicitors of complainants, be served upon the defendant within five days from the date hereof. 30

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

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

10 Complainants, William M. Powell, Jr., Joseph D.
Farrington, C. S. McGivern, Harry S. Moore, Earle
Godfrey, David C. Gardiner, Seaview Corporation, a
corporation of the State of New Jersey, conducting
business in Margate City, Blanche L. Starr, George
J. Kane, Jr., W. T. Sample, Pauline A. North, M. G.
Cadwallader, Mabel C. Murphy, John Harbourn,
Warren Somers, Jr., J. W. Monaghan, Samuel Som-
ers, Rose M. Call and Charles Murtha, all of Mar-
gate City, Atlantic County, New Jersey, respectfully
20 show that:

1. John Datz is the owner and in possession of
premises situate at the northeast corner of Hunting-
ton Avenue and Ventnor Avenue, Margate City, New
Jersey.

2. On and before the first day of November, nine-
teen hundred and twenty-three, Winchester Develop-
ment Company was the owner and in possession of
30 a large tract of land which included the land de-
scribed in paragraph 1 hereof.

3. In pursuance of a general scheme for the im-
provement and development of said large tract of
land, it incorporated in all the deeds made by it for
portions of said tract, certain restrictive covenants

which were uniform in character and a copy of which is hereto, made a part hereof and marked Exhibit "A."

4. All the deeds so made by Winchester Development Company were recorded in the clerk's office of the County of Atlantic and it was through the deed made by said Winchester Development Company that defendant acquired his title.

10

5. Among others, there is a restriction as follows:

"No stores, apartment houses, hotels, boarding houses or business houses of any description or character shall be built upon the said tract of land nor shall any building, erected or to be erected on said land ever be used for any such purpose."

6. Prior to said John Datz acquiring title to said tract of land a building had been erected thereon by Pedrick & Son, organizers of said Winchester Development Company and developers of said tract of land, which building had been used by them temporarily in the prosecution of the development.

20

7. Sometime during the month of February, 1928, complainants learned that said Datz intended to use said building as a real estate office and in the conduct and prosecution of his real estate business, and with that information caused their solicitors, Cole & Cole, to notify said Datz that he must not use said building for business purposes. A copy of the letter is hereto, made a part hereof and marked Exhibit "B."

30

8. To this communication A. B. Endicott, Jr., sol-

icitor for said Datz replied under date of March 12, 1928, a copy of which is hereto marked Exhibit "C."

9. Said Datz is now using said building in the conduct of his real estate business and intends to continue to do so unless restrained.

10. Complainants severally own lots on said large tract of land, the title to which came through mesne conveyances to them from Winchester Development Company aforesaid, and each of said lots have imposed upon them the said restrictive covenants and were imposed by the deed from said Winchester Development Company to its immediate grantee.

11. Photograph marked Exhibit P1 is to be produced to the Court and is a correct representation of the building of Datz and the advertising which appeared in the window at the time it was taken.

20

Complainants are without adequate remedy in the courts of law and therefore pray:

(1) That John Datz, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

30 (2) That the said John Datz, his agents and servants, may be enjoined and restrained from using the aforesaid building as a real estate office and place of business and advertising same, in violation of the restrictive covenant which reads that "no stores, apartment houses, hotels, boarding houses or business houses of any description or character shall be built upon the said tract of land nor shall any building, erected or to be erected on said land ever be used for any such purpose," and that complainants

may have such other and further relief as may be just.

(3) That a writ of subpoena may issue, commanding said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

COLE & COLE,
Solicitors for and of Counsel
with Complainants. 10

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

WILLIAM M. POWELL, JR., of full age, being first duly sworn according to law upon his oath says:

I am one of the complainants named in the foregoing bill and have read the same, and the statements therein are true. Particularly is it true that Winchester Development Company at one time owned the land referred to in the bill; that in the deeds made by it granting and conveying the premises it imposed restrictive covenants, a copy of which is annexed to the bill; that the property of said Datz and of complainants is burdened with said restrictive covenants, and that Datz in violation of one of said covenants is conducting a real estate business in the building on his property, and is advertising the same. 20 30

WILLIAM M. POWELL, JR.

Sworn and subscribed to before me this 9th day of May, 1928.

THERESA W. SPOTH,
Notary Public of N. J.

EXHIBIT "A."

RESTRICTIONS IN DEED OF DECLARATION
WINCHESTER DEVELOPMENT COMPANY.

Dated—November 1, 1923.

Recorded—December 13, 1923 in Book 726, page 419.

10 Shall be subject as is herein set forth to the following covenants reservations and restrictions which are hereby placed upon said lands as herein above described as blocks #1, 2, 3, 4, 5, 6 and 7, Winchester Gardens in pursuance of a general scheme for the improvement and enhancement of the value of said lands and premises which shall run with said lands to wit:

20 Under and subject nevertheless, to the following restrictions, covenants and conditions, which are hereby made a part of the consideration of this conveyance.

That no building or any part thereof erected upon any part of the land hereby conveyed shall be used as a slaughter house, bone-boiling establishment, piggery, privy or for any other purpose which may create a nuisance; that no building, except for cottage residence purposes shall be erected upon any part of the land of said company, except private Garages.

30 No stores, apartment houses, hotels, boarding houses or business houses of any description or character shall be built upon the said tract of land nor shall any building, erected or to be erected on said land ever be used for any such purpose.

All houses erected on said land shall be used only as dwellings and for one family only. No double dwelling houses shall be built and no apartment houses shall be erected upon said land, nor shall any

building now or hereafter erected be used for any other purpose than for a dwelling house for one family.

That the extreme front line of any extensions, porches, sun parlors balconies, bay windows, etc. shall not be nearer the front property line of any avenue than five feet. That the main body of any building erected on said tract of land shall not be nearer to the front property line of any lot than fifteen feet nor nearer than three feet to the side lines of lots, provided that where a party may own two or more contiguous lots, then a building may be erected on any part of said lots without regard to the intervening side line or lines provided the same is not within the said distance of the side lines of said contiguous lots. 10

That only one building for dwelling purposes shall be built on one lot as planned, provided that where a party may own two or more contiguous lots, then a building may be erected on any part of said lots, provided same is not within the said distance of three feet of the outside lines of the said contiguous lots. 20

It is expressly understood and agreed that the said several covenants above specified shall attach to and run with the land, and it shall be lawful not only for the said grantor, its successors or assigns, but also for the owner or owners of any lot deriving title from or thru the said grantor, its successors or assigns, to institute and prosecute any proceedings at law or equity, against the person or persons violating or threatening to violate the same and that the object of the covenants are to secure the health, beauty, ornamentation and value of the premises. 30

It is expressly understood and agreed, that the foregoing covenants, and conditions are accepted and agreed to by the grantor and grantee, and shall bind

their heirs, executors, administrators, successors and assigns, and that all conveyances hereafter made by the grantor or grantee their heirs, executors, administrators, successors or assigns shall be subject to the foregoing covenants and conditions.

EXHIBIT "B."

10

February 13, 1928.

Mr. John Datz,
Barclay & Atlantic Aves.,
Margate City, N. J.

Dear Sir:

20 We represent a number of property owners on the Marven Garden tract who will contest against any violation of the restrictive covenants imposed upon the land by the original proprietors. We have been retained to institute an action for an injunction as soon as it is made to appear that any violation is contemplated. Our information is that you own or are in some way interested in the property at the northeast corner of Huntington Avenue and Ventnor Avenue on which there is a building, and that you contemplate selling the same for use as a business, or yourself, using it, in violation of said covenants touching the use to which buildings may be put.

30 Will you kindly advise if you have any such purpose in mind or whether our information is unfounded. If you say that you have such a purpose, then we will at once file bill for injunction.

Very truly yours,

Cole & Cole

CLC VDM

EXHIBIT "C."

March 12th, 1928.

Honorable C. L. Cole
Guarantee Trust Bldg.,
Atlantic City, New Jersey

Dear Judge Cole:

Your communication of February 13th, 1928, to
Mr. John Datz, of Margate City, relating to the 10
property at the northeast corner of Huntington Ave-
nue and Ventnor Avenue, has been referred to me
for answer.

Mr. Datz purchased this property, and intends to
use it as a high class real estate office.

The same premises have been used for some three
years for a similar purpose by the Pedrick inter-
ests.

Very truly yours,

ABE, JR/B

Allen B. Endicott, Jr. 20

5. Paragraph five is neither admitted or denied. If material proof is required.

6. It is admitted that Frank J. Pedrick and Son erected a building upon said premises. It is denied that it was for temporary use.

7. The letter referred to was written and received by John Datz.

10

8. Paragraph eight is admitted.

9. Paragraph nine is admitted.

10. Paragraph ten is neither admitted or denied. If material proof is required.

11. Paragraph eleven is admitted.

SPECIAL DEFENSE.

20

1. The premises in question have been used for a real estate office for a long period of time. In 1924 said premises were used by Frank J. Pedrick & Son, who occupied a small building upon the said premises, which in 1926 was replaced by the present large permanent structure.

2. Seashore Properties Corporation purchased said premises for business purposes, assuming and believing that they would be enabled to use the same premises for business purposes, such use having existed in violation of the restrictions for a period of several years. 30

3. That whatever rights to enforce said specific covenants may have existed, were lost by reason of

the violation to promptly assert the same, and because the said complainants failed to take any action to assert their rights to enforce said restrictive covenants.

ENDICOTT & ENDICOTT,
Solicitors for Defendant,
John Datz.

10

ORDER.

68-275

IN CHANCERY OF NEW JERSEY.

20 Between
WILLIAM M. POWELL, JR.,
et al., }
Complainants, } On Bill for Injunction.
and }
JOHN DATZ, }
Defendant. }
Order.

30 It appearing that Seashore Properties Corporation, a corporation of the State of New Jersey, was the owner of premises referred to in the bill at the time of its filing and still is, and not John Datz, who is made defendant;

It is on this 16th day of June, nineteen hundred and twenty-eight, on motion of Cole & Cole, solicitors of complainant,

Ordered that the bill be amended by substituting the Seashore Properties Corporation as defendant, and that the answer filed by John A. Datz stand as the answer of said Seashore Properties Corporation, and that the cause proceed to final hearing as though the bill had been originally filed against Seashore Properties Corporation and it had filed a formal answer.

On motion of

COLE & COLE, 10
Solicitors for Complainants.

We consent to the entry of the foregoing order.

ENDICOTT & ENDICOTT,
Solicitors for Defendant.

20

30

Mr. Endicott: The Judge's statement as to the facts is true, but I would think we should have some definition as to the area involved.

Mr. Cole: Going to prove it.

10

WILLIAM M. POWELL, JR., SWORN.

Direct examination.

By Mr. Cole:

(Photographs offered, admitted in evidence as representing the structure complained against and marked Exhibits C1 and C2.)

20

Q. Mr. Powell, you are one of the complainants in this suit, are you not?

A. Yes, sir.

Q. What is the area, if you know, of the land on which these restrictions have been imposed?

A. It takes in six blocks on Ventnor Avenue, and I believe about twelve blocks back of Ventnor Avenue.

Q. How many houses, approximately, are erected on the restricted ground?

A. I should say two hundred houses.

30

(No cross-examination.)

JOHN A. DATZ, sworn.

Direct examination.

By Mr. Cole:

Q. What is your relation to the Seashore Properties Corporation?

A. President at the present time.

Q. Have you been president since its incorporation?

A. No, sir.

Q. Who was the president immediately after the incorporation?

A. William F. Taubel.

Q. What office did you hold immediately under him?

A. Secretary and treasurer.

Q. When was this company incorporated?

A. I do not recollect the exact date; somewhere in 1925, I think it was.

Q. In your affidavit on file, you admit having received a letter from Cole and Cole, a copy of which is annexed to the bill; you remember that?

A. Yes, sir.

Q. Have you got the letter?

A. Have I?

Q. Yes, or your counsel.

Mr. Endicott: I have it.

(Letter produced, together with copy of answer.)

Mr. Cole: I offer the letter.

(Letter received in evidence and marked Exhibit C3.)

Mr. Cole: And the reply received from Messrs. Endicott and Endicott.

(Copy of reply admitted in evidence and marked Exhibit C4.)

Q. At the time you received that letter had the corporation taken title to the land? 10

A. They had not taken title, no, sir, was under an agreement of sale.

Q. Have you the agreement here?

A. I think I have. Yes, I think Mr. Endicott has that.

(Agreement offered, received in evidence and marked Exhibit C5.)

20

Q. I note that the agreement which is offered is between the Security Building Company and John A. Datz and Ruth T. Datz, his wife; how did the corporation come to get the title?

A. They took the title, instead of personally they took it in the name of the corporation.

Q. Why was that?

A. I don't know particularly why it was done, wasn't any particular reason, practically the same thing, principal owner of the corporation. 30

Q. In other words, you and the corporation are one?

A. Practically.

Mr. Cole: I understand there is no dispute about this being used for office purposes?

Mr. Endicott: The building is now being used as a real estate office.

(No cross-examination.)

COMPLAINANT RESTS.

10 JOHN A. DATZ, recalled.

Direct examination.

By Mr. Endicott:

Q. Mr. Datz, you occupy the premises which you purchased under the agreement which has just been offered, do you not?

A. Yes, sir.

20 Q. And for what purpose do you use it?

A. General real estate business.

Q. How long have you been acquainted with the location of the property?

A. I would say in the neighborhood of 1924, towards the end of 1924.

Q. What purpose was the property used for in 1924 when it first came to your attention?

A. General real estate office.

Q. What was erected on the property?

30 A. There was a wooden frame structure at that time.

Q. By whom was it occupied?

A. Frank Pedrick & Son.

Q. Were you engaged in the real estate business at that time?

A. Not actively, no. I was in business, but not very active, except purchasing.

Q. Were you buying and selling?

A. Buying and selling, that is all.

Q. Had you been buying and selling and acting as brokerage agent since that time?

A. Since that time, yes, sir.

Q. Did you ever purchase any real estate through the Frank J. Pedrick Company, using the office at Huntington and Ventnor Avenues?

A. Yes, sir.

Q. I show you a memorandum on the stationery 10
of Frank J. Pedrick & Sons Company, dated Sep-
tember 20th, 1925, and ask you if that memorandum
relates to any transaction which was made through
the Huntington Avenue office?

A. Yes, it relates to purchase to some of Pedrick
lots and some outside lots, that is, some owned by
outside people.

Q. And this is a receipt?

A. That particular piece is a receipt for my orig-
inal deposit.

20

Q. For your deposit on that purchase?

A. Yes.

Q. Signed by whom?

A. Signed by Albert Matthews.

Q. Who was Mr. Matthews?

A. A salesman of Pedrick's at that time, or repre-
senting Pedrick & Son, Pedrick & Son by Albert
Matthews.

Q. Is the principal office listed at the head of this
stationery as Huntington and Ventnor Avenues 30
the office in question?

A. The same.

Q. Who represented you at that time, Mr.
Matthews?

A. No, I couldn't tell you who was manager of the
office, he was connected with them, though.

Q. I show you a deed dated March 13, 1928, from

the Security Building Company to the Seashore Properties Corporation, and ask you if that is the deed for the premises in question?

A. It is.

(Deed offered, admitted in evidence, and marked Exhibit D1.)

10 Q. Did you ever engage in any business through the Huntington Avenue office other than the transaction which was identified by the receipt of September 20th, 1925?

A. Personally, you mean?

Q. Personally or as a broker.

A. Well, I had purchased other stuff there, yes.

Q. I show an agreement of sale dated January 19, 1925, between the Winchester Development Company and Mary May Flynn, and ask you if you participated in this transaction in any way?

20 A. I did; purchased it from Mary Flynn, purchased the lot from Mary Flynn.

Q. Was the Huntington Avenue office connected with this transaction?

A. Came through the office, yes, sir.

Q. That is to say, you bought an outstanding agreement?

A. That is right.

(Agreement offered, admitted in evidence and marked Exhibit D2.)

30 Q. Do you remember when the present building on the property was built?

A. It was somewhere around the early part of June, I think, of 1925, the old frame structure was removed to the rear of the lot, and the present structure was built.

Q. Is the present structure in substantially the same condition that it was when it was erected in 1925?

A. Practically the same with some improvements, that is, general repairs that I may have put on it, changed the inside a little bit.

Q. Has there been any substantial structural change in the outside?

A. None whatever.

Q. When you acquired the property, was the small building on the rear of the lot? 10

A. Yes, sir.

Q. Is it there now?

A. No, sir; I had it removed.

Cross-examination.

By Mr. Cole:

Q. Pedrick and Son were the owners who owned this restricted tract and imposed these restrictions; were they not? 20

A. I don't know whether they owned the entire part of it; I understand there were several other owners in there and they were acting as sales agents.

Q. And were Pedrick and Son the developers of this tract of land?

A. I think they were mostly as sales agents, though, I think.

Q. Did they erect any of the buildings on the land? 30

A. Pedrick Construction Company I think they called themselves.

Q. This building that was on the corner was the building in which they operated in their development of this tract, wasn't it?

A. That and a general business, yes, general real estate business.

RALSTON MCC AUSLAND, SWORN.

Direct examination.

By Mr. Endicott:

Q. Where do you live, Mr. McCausland?

10 A. Where do I live? 11 North Granville Avenue, Winchester Gardens.

Q. Have you in the past been associated with Frank J. Pedrick & Sons Company?

A. I have.

Q. When did you begin that association?

A. 1922.

Q. What was your official title with that company in 1924?

A. 1924 I was sales manager.

20 Q. Do you recall the erection of a small building on the property at Huntington and Ventnor Avenues in 1924?

A. I do.

Q. Will you state the character of that building, the nature of the building?

A. It was a small building composed of two interior offices erected for the purpose of selling houses and lots in Winchester Gardens.

Q. Were you located in that office?

A. No, sir, I was not.

30 Q. Did the Frank J. Pedrick Company or any of its associated companies move that original structure and replace it with a larger building?

A. They did.

Q. Can you establish the date?

A. Not exactly, sir; I believe late in 1925 or early in 1926.

Q. Was that new office occupied by your organization?

A. Yes, sir.

Q. They engaged in business there?

A. Yes, sir.

Q. Sell lots from there?

A. Yes, sir.

Q. Did the Frank J. Pedrick & Sons Company sell lots other than those owned by the Winchester Development Company in this tract?

10

A. They may have done so, Frank J. Pedrick & Son held general brokers' licenses, with headquarters at 1415 Atlantic.

Q. Do you recall any sales?

A. No specific transactions out of that office.

Q. Do you know whether there were other owners in the Winchester Gardens area?

A. There were.

Q. Other than Winchester Gardens Company?

A. Yes, sir.

20

Q. How many? Can you give us any approximation of how many or what portion of the total tract?

A. No, I can't. There was on one street two sides owned by Nur J. Collins, who was a stockholder in the Frank J. Pedrick & Sons Company. Through some arrangement with which I am not familiar we sold their lots, but sales representatives of the company only knew incidentally that they did not belong to Pedrick, the commissions were paid by the Pedrick Company and they were sold subject to the same conditions as the Pedrick lots were sold. Aside from this we had nothing regularly for sale in that office.

30

Cross-examination.

By Mr. Cole:

Q. Do you know of your own personal knowledge where the title to the land on which these restrictions were imposed was vested?

A. I do not.

10 Q. Well, Pedrick & Son was a co-partnership, wasn't it?

A. Yes, sir.

Q. Are they the owners who developed the land and put buildings on it?

A. Yes, sir.

Q. And the work of that development was out of this building that you speak of?

A. The sales work.

20

WALTER WILGUS, SWORN.

Direct examination.

By Mr. Endicott:

Q. Mr. Wilgus, were you associated with the Frank J. Pedrick & Sons Company between 1924 and this date?

30 A. Yes, sir.

Q. At what time?

A. Well, about January of 1924, until October of 1926.

Q. Did you ever work through the Huntington Avenue office of the company?

A. Well, I worked through all the offices of the

company; in other words, wherever we had a prospect interested we would take them to that locality and naturally transact the business from that office.

Q. Did you ever make any sales of Winchester Gardens properties?

A. Yes, sir.

Q. In that connection, did you ever make any sales of any of the Winchester Gardens property on re-sales?

A. Many of them.

10

Q. That is to say, after the Winchester Gardens Company had sold to individual owners, there were re-sales, you have negotiated such sales to the public?

A. Oh, yes.

Q. And you say how many?

A. Many of them.

Q. What do you mean by many of them?

A. Well, perhaps twenty-five or fifty.

Q. In making such re-sales, did the Frank J. Pedrick Company in that particular office receive commissions for their services as agents?

20

A. Frank J. Pedrick and Son, as I understood, always received fifty per cent, and I received the other fifty per cent.

Cross-examination.

By Mr. Cole:

Q. Were you working for Pedrick & Son when this building was erected?

30

A. Yes, sir.

Q. When did you cease to operate in that building?

A. Personally, when did I personally or Pedrick & Son?

- Q. When did you cease to operate?
A. October, 1926.
- 10 Q. When did Pedrick & Sons cease to operate, if you know, in that building I am speaking of?
A. Well, I don't know the date.
- Q. About?
A. Oh, I would say it was in the early part of 1927.
- Q. Was it closed up, the building closed?
10 A. It was closed for non-payment of rent.
- Q. I am not speaking of the reason; I am asking the fact.
A. Oh, yes, the building was closed, I suppose for many reasons.
- Q. Had the development ceased when the office was closed?
A. You mean the physical development of the property?
- Q. Yes, physical development by Pedrick & Sons.
20 A. Shortly after it closed, yes.

WILLIAM A. McARDLE, SWORN.

Direct examination.

By Mr. Endicott:

- 30 Q. Are you the building inspector of Margate City?
A. I am.
- Q. And have you the permits relating to that building?
A. Here is the plumbing permit issued to that particular building, connecting that building with water, sewer and water.

Q. As the building inspector, have you the permit granted for the erection of that particular building?

A. There was no permit granted for the erection of that particular building. If you want me to tell the story I can tell it in my own way.

Mr. Cole: We are not interested in the story.

Mr. Endicott: I offer his record showing the grant of plumbing permit on August 28, 1926, to the Winchester Gardens Development Company. 10

(Permit admitted in evidence and marked Exhibit D3.)

LEONARD F. PEDRICK, SWORN.

Direct examination.

20

By Mr. Endicott:

Q. Mr. Pedrick, you are a member of the partnership of Frank J. Pedrick & Sons?

A. I am or I was.

Q. Do you recall the erection of a building to be used as an office at Huntington and Ventnor Avenues in Margate City?

A. I do.

Q. Can you roughly establish the date?

30

A. It was in 1923 some time.

Q. Was the office used for the purpose of selling the company's real estate or partnership's real estate?

A. Yes, Frank J. Pedrick & Son were agents for a number of companies and we sold the company's

real estate out of that office in addition to general real estate.

Q. Was that office used for general real estate purposes?

A. A number of general real estate deals put through there; yes, sir.

Q. Subsequently you replaced that original building with the present structure?

A. We did.

10 Q. Can you fix that date?

A. That was in May or June of 1925.

Q. Was that new building used for the purpose of the partnership?

A. For some purposes, yes.

Q. Was any general business transacted through that remodeled or the new office?

A. Quite a little of it.

Q. When did you discontinue that office?

A. In 1927, around April.

20

Cross-examination.

By Mr. Cole:

Q. Where was the title to this restricted land?

A. All of it, you mean, or just where the office was?

Q. Talking about the restrictions were imposed on six or eight blocks or more; who owned that?

30 A. The title was in, part of it was in Winchester Development Company and part in the Seaview, and part of it Amherst Improvement Company.

Q. These corporations were corporations in which you were interested, weren't they?

A. They were.

Q. You were developing this tract, weren't you?

A. Yes.

Q. Did you know of these restrictions?

A. I did, I prepared them myself.

Q. Well, when you were doing this business you were talking about there, did you intend to violate the restrictions?

Mr. Endicott: I object.

The Court: I will permit it; cross-examination.

10

Q. Did you intend to violate them?

A. Did not.

Q. You did not think you were, did you?

A. No.

TESTIMONY CLOSED.

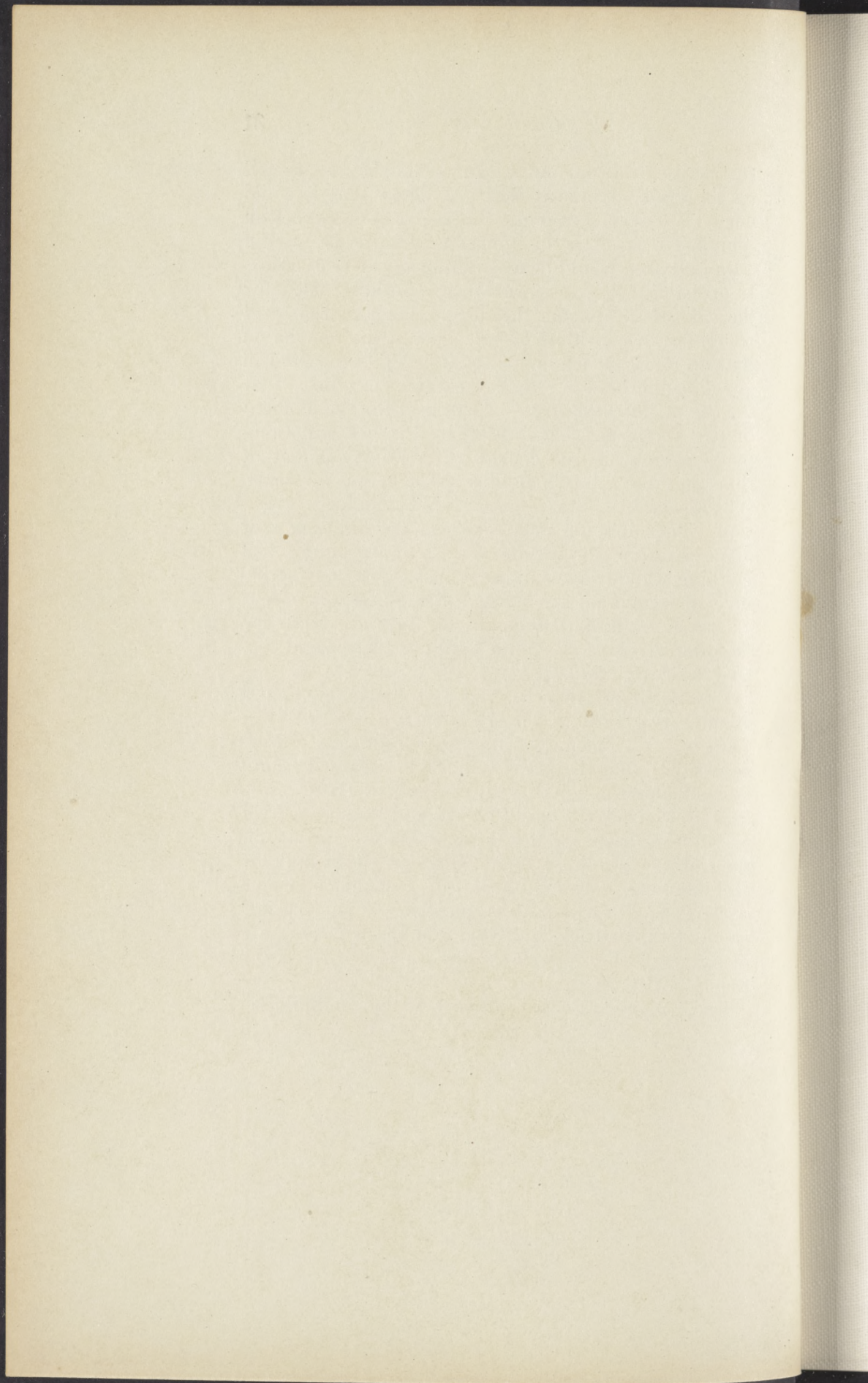
20

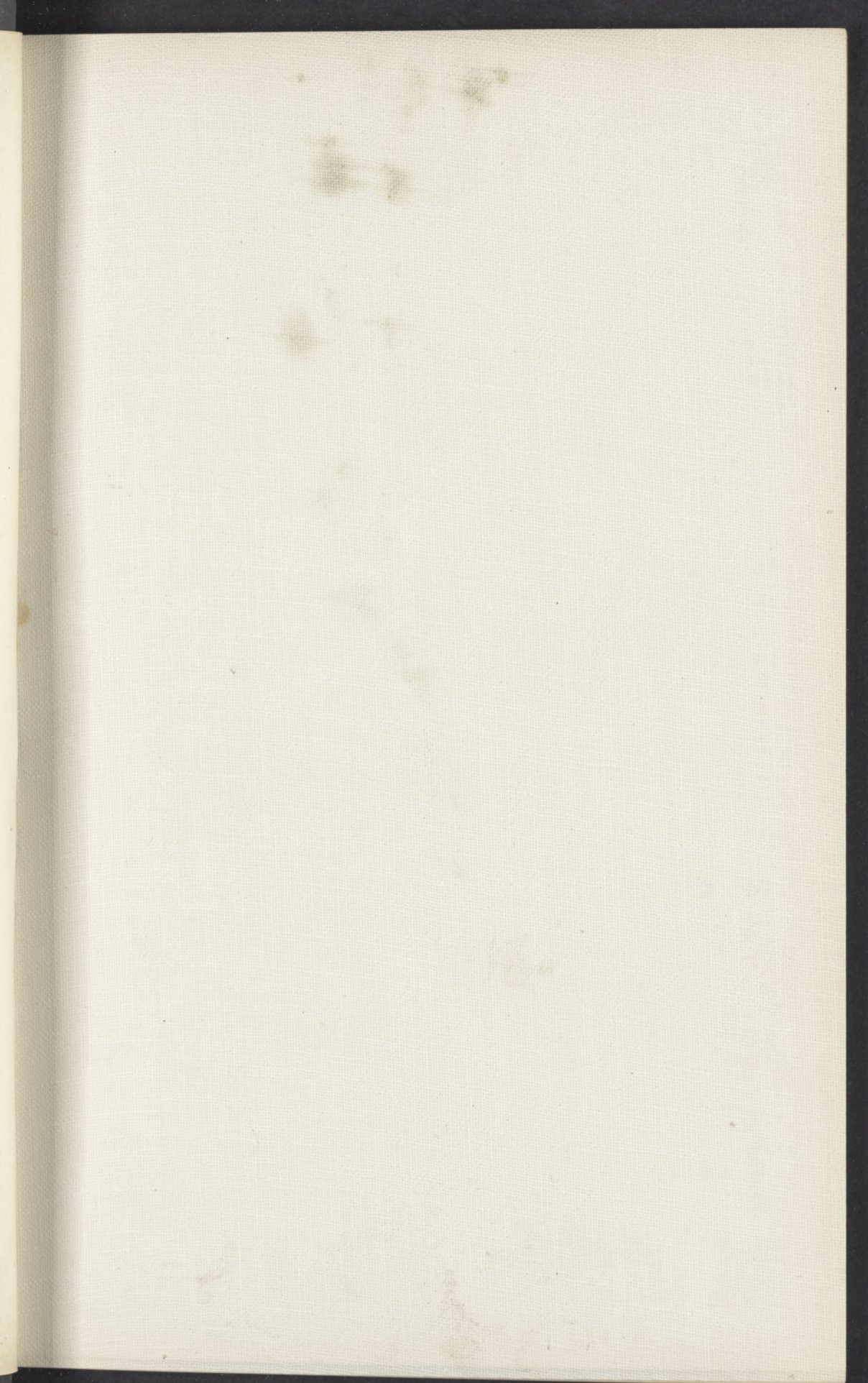
30

restriction that no outbuildings should be erected on the land. I take it that it is clear that it could not be considered that the placing of a construction company or contractor's office or tool house within a limited area would be a violation of the restriction. It probably follows as well that a building used for the sale of the lots in the development of the tract would not be considered a violation of the restriction that no place of business should be upon the land in question. I take it, to that extent, therefore, that the use of this building—we will now for the moment limit it to the first structure—by Pedrick and Company, even if in the course of the development of this tract they sold the land of other people or tracts, sold the land in other tracts, would not be a violation. The question now comes is the building now upon the land, which was built in place of the first building which was of more or less temporary structure, a permanent structure for business purposes? There is nothing before me to indicate that the building of itself is such a building that would violate the restriction.

Having found, therefore, as I do find, that the use of these two buildings by Pedrick & Son was not of necessity a violation of the restrictions, it follows necessarily that the present defendant cannot acquit himself of responsibility by the use of these buildings by Pedrick & Son. Pedrick and Son ceased the use of this building for those purposes and at the time of the purchase by the present defendant the building was not, so far as any testimony is concerned, used for business purposes. It certainly was not by Pedrick and Son, and there is no testimony at all that it was by anyone else. He had a timely notice.

I will advise a decree in favor of the complainant.





Roll, for, at al
Datz - B-1

21

32



EXHIBIT C3.

10

This exhibit is a duplicate of Exhibit B in the bill of complaint, and will be found on p. 8.



EXHIBIT C4.

20

This exhibit is a duplicate of Exhibit C in bill of complaint, and will be found on p. 9.

30

EXHIBIT D2.

12/11/28L

ARTICLES OF AGREEMENT, MADE THIS
Nineteenth day of January in the year of our Lord
one thousand nine hundred and Twenty-five.

10 BETWEEN WINCHESTER DEVELOPMENT
COMPANY, a Corporation under and by virtue of
the laws of the State of New Jersey, party of the
first part, and MARY MAY FLYNN, of the Bor-
ough of Princeton, County of Mercer and State of
New Jersey, (First National Bank), party of the
second part; WITNESSETH, that the said party of
the first part, for and in consideration of the sum of
THIRTY-TWO HUNDRED (\$3200.00) DOLLARS
to be paid and satisfied as hereinafter mentioned and
20 also in consideration of the covenants and agree-
ments hereinafter mentioned, made and entered into
by the said party of the second part, do agree to
and with the said party of the second part, that it,
the said party of the first part, will well and suffi-
ciently convey to the said party of the second part,
her heirs and assigns, by Deed of Special Warranty
free from all incumbrance on or before the

day of Settlement all that lot, tract, or
parcel of land and premises hereinafter particularly
described, situate, lying and being in the City of
30 Margate City in the county of Atlantic and State of
New Jersey.

BEGINNING at a point in the Easterly line of
Huntington Avenue, distant Two Hundred Forty
(240) feet Southwardly from the Southerly line of
Winchester Avenue and extending thence (1) East-
wardly and parallel with Winchester Avenue, Sixty-

seven and Five-tenths (67.5) feet to a point; thence (2) Southwardly and parallel with Huntington Avenue, Forty (40) feet to a point; thence (3) Westwardly and parallel with Winchester Avenue, Sixty-seven and Five-tenths (67.5) feet to a point in said Easterly line of Huntington Avenue; thence (4) Northwardly and in and along the said Easterly line of Huntington Avenue, Forty (40) feet to the point and place of beginning.

BEING Lot No. 7 in Block No. 5, as shown on 10
 "Map of Winchester Gardens, dated June 29, 1923,
 by J. W. Hackney, Civil Engineer."

UNDER and subject to existing restrictions.

AND the said party of the second part, for herself,
 her heirs, executors and administrators, doth cove-
 nant, promise and agree to and with the said party
 of the first part, its successors and assigns, that she
 the said party of the second part, will pay and satis-
 fy or cause to be paid and satisfied unto the said
 party of the first part, the said sum of THIRTY- 20
 TWO HUNDRED (\$3200.00) DOLLARS as and for
 the purchase money of the foregoing described land
 and premises, in the following manner, that is to
 say:

\$ 320.00.. THREE HUNDRED TWENTY DOL-
 LARS, in cash, upon the signing of this
 agreement, receipt of which is hereby ac-
 knowledged.

\$1,152.00.. ELEVEN HUNDRED FIFTY-TWO 30
 DOLLARS in twelve monthly installments
 of Ninety-six (\$96.00) Dollars each; said
 installments due and payable on the first
 day of each month beginning March 1,
 1925.

\$1,728.00.. SEVENTEEN HUNDRED TWENTY-
 EIGHT DOLLARS by the party of the

second part making back to the party of the first part a purchase money mortgage in like amount covering above described lot, said mortgage to be accompanied by the bond of the party of the second part and to be made for a period of one year from date of final settlement hereinafter specified and to bear interest at the rate of 6% per annum, payable semi-annually.

10 _____
\$3,200.00

Final settlement to be made on or before March 1, 1926 at the Atlantic Guaranty & Title Insurance Company, Real Estate & Law Building, Atlantic City, New Jersey.

TIME IS THE ESSENCE OF THIS AGREEMENT.

20 All adjustment of taxes, interest, etc., to be made of as of day of final settlement.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, her heirs, heirs and assigns, may enter into and upon the said land and premises on the day of settlement and from thence take the rents, issues and profits to and their use

30 AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators, and they hereby agree to pay, upon failure to perform the same, the sum of

which they hereby fix and settle as liquidated damages thereof.

IN WITNESS WHEREOF, the said parties have

hereunto interchangeably set their hands and seals
the day and year first above mentioned.

WINCHESTER DEVELOPMENT COMPANY
BY: John A. Fitzsimons

(Seal)

VICE-PRESIDENT
Mary May Flynn (SEAL)

SIGNED, SEALED AND DELIVERED

in the presence of

ATTEST:

10

Dorothy F. Johnson
SECRETARY

STATE OF _____
COUNTY, } ss.

20

BE IT REMEMBERED, That on this
day of _____ in the year of our
Lord one thousand nine hundred and _____
before me _____ personally
appeared

who, I am satisfied, _____ the vendor men-
tioned in the above deed or conveyance, and I hav-
ing first made known to _____
the contents thereof, _____ acknowledged

that _____ signed, sealed and delivered 30
the same as _____ voluntary act and deed. All of
which is hereby certified.

STATE OF
COUNTY, } ss.

BE IT KNOWN, That on this
day of one thousand nine hundred
and before me, the subscriber,
a
personally appeared who,
10 being by me duly sworn according to law, did on his
oath says that he is the Secretary of the
the grantor mentioned in the
foregoing indenture; that he knows the seal of said
Corporation; that the seal affixed to the said Inden-
ture is the common seal of the said Corporation;
that is the
President of said Corporation and did by its order
sign, seal and deliver the said Indenture as its vol-
untary act and deed, in the presence of said de-
20 ponent, pursuant to a resolution of the Board of Di-
rectors of said Corporation; and that the said de-
ponent did, at the execution thereof, subscribe his
name as a witness thereto.

Sworn and subscribed before me
the day and year aforesaid.

30 For value received the undersigned does hereby
grant, bargain, sell, assign, transfer, and set over
John A. Datz
unto William F. Taubel his heirs, executors, admin-
istrator successors and assigns, all right, title and
interest of the undersigned of, in and to the within
instrument.

Witness my hand and seal this day of
A. D., 1925.

Mary May Flynn Seal

Witness

W. W. Wilgus, Sr.

In consideration of the benefits inuring by reason of the assignment of the foregoing agreement to me, I hereby agree to keep and perform all of the obligations of the party of the second part mentioned and set forth in the said agreement. 10

John A. Datz (Seal)

William F. Taubel (Seal)

Address:

Witness:

.....

AGREEMENT
FOR SALE OF LAND 20
WINCHESTER DEVELOPMENT
COMPANY

TO
MARY MAY FLYNN

Dated January 19, 1925

Received.....19...., and
Recorded in the
Office ofCounty
at
in Book..... of 30
Folio

Lot No. 7 Block No. 5,
Winchester Gardens, Margate
City, New Jersey.

Frank J. Pedrick & Son
1415 Atlantic Avenue
Atlantic City, N. J.

10

EXHIBIT D3.

No. 739 Margate City, N. J. 8/28-1926

Permission is hereby granted to
Stewart E. BennettTo do all Plumbing and drainage work on property
of Winchester Gardens Development Co.

Situate No. 31 Lot Block 5

20 The work to be done under the supervision of the
Inspector and in accordance with the ordinances of
the Board of Health.

W. A. McArdle Inspector

Fixtures 4

Fee \$2.00

30

FINAL DECREE.

68-275

IN CHANCERY OF NEW JERSEY

Between

WILLIAM M. POWELL, JR.,
et al.,

Complainants,
and

SEASHORE PROPERTIES
CORP., a corp., &c.,
Defendant.

On Bill for Injunction.
Final Decree.

10

20

This cause came on to be heard on the 11th day of December, nineteen hundred and twenty-eight, in the presence of C. L. Cole, of counsel with complainants, and A. B. Endicott, Jr., of counsel with defendant, on bill, answer, replication and proofs in open court, and the Court having read and considered the pleadings and heard and considered the proofs together with the argument of respective counsel and being of the opinion that complainants are entitled to relief and to an injunction.

30

It is on this 12th day of December, nineteen hundred and twenty-eight, on motion of Cole & Cole, solicitors of complainants,

Ordered that the defendant be, and it is enjoined and restrained from using any part of the building or land described in the bill as situate at the north-

easterly corner of Huntingdon and Ventnor Avenues, in Margate City, New Jersey, as a store, apartment house, hotel, boarding house or business house of any description or character.

It is further ordered that said defendant pay complainants' costs to be taxed.

Respectfully advised,

R. H. INGERSOLL,

V. C.

10

AMENDED NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY

20

Between

WILLIAM M. POWELL, JR.,
et al.,

Complainants,

and

SEASHORE PROPERTIES
CORPORATION, a corp.,
etc.,

Defendant.

On Bill, etc.
Amended Notice of
Appeal.

30

The defendant, Seashore Properties Corporation, hereby appeals from the final decree made in the above entitled cause, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor Robert H. Ingersoll, on December 12, 1928, from the whole and every part

thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated: January 24th, 1929.

ENDICOTT & ENDICOTT,
Solicitors for Defendants.

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

ALLEN B. ENDICOTT, JR.,
Of Counsel with Defendants. 10

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between

WILLIAM M. POWELL, JR.,
et al.,

*Complainants-
Respondents,*
and

SEASHORE PROPERTIES
CORPORATION,

*Defendant-
Appellant.*

20

Petition of Appeal.

30

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

The petition of Seashore Properties Corporation, defendant-appellant, in the above cause respectfully shows, that:

The petitioner finds itself aggrieved by the final decree made in the Court of Chancery, by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 12th day of December, A. D. 1928, in a certain cause in said Court of Chancery, wherein William M. Powell, Jr., *et al.*, were complainants and Seashore Properties Corporation was defendant in this respect, to wit:

- 10 1. Because the decree grants the relief prayed for in the bill of complaint.

And your petitioner appeals from the said decree, in the above respects:

1. Because the relief prayed for in the bill of complaint should not have been granted.

- 20 2. Because the Court of Chancery failed to apply the doctrine of laches against the complainants-respondents.

3. Because the complainants-respondents were equitably estopped from obtaining any relief in the Court of Chancery.

- 30 Petitioner, therefore, prays that the said decree of the said Court of Chancery may be wholly set aside for nothing holden. And that, petitioner, may have such relief in the premises as to this Court shall seem proper.

ENDICOTT & ENDICOTT,
*Solicitors for and of Counsel
with Defendant-Appellant.*

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between		10
WILLIAM M. POWELL, JR.,	}	
<i>et al.,</i>		
<i>Complainants-</i>		On Appeal from
<i>Respondents,</i>		Chancery.
and		Answer to Petition of
SEASHORE PROPERTIES		Appeal.
CORPORATION,		
<i>Defendant-</i>		
<i>Appellant.</i>		20

The answer of William M. Powell, Jr., and others, the above-named respondents, to the petition of appeal of Seashore Properties Corporation, the above-named appellant.

These respondents, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on December 12, 1928, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree these respondents beg leave to refer thereto when the same shall be produced.

These respondents are advised and believe that the said decree is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these respondents.

COLE & COLE,
*Solicitors for and of Counsel
with Respondents.*

10

20

30

82/

New Jersey Court of Errors and Appeals

Between
WILLIAM M. POWELL, JR., *et al.*,
Complainants-Respondents,
and
SEASHORE PROPERTIES CORPORATION,
Defendant-Appellant.

ON APPEAL FROM CHANCERY.

RESPONDENTS' BRIEF.

STATEMENT.

This is a bill for injunction to restrain the appellant from violating a restrictive covenant which reads:

“No stores, apartment houses, hotels, boarding houses or business houses of any description or character shall be built on the said tract of land, *nor shall any building, erected or to be erected on said land ever be used for any such purpose.*”

It is undisputed if not expressly admitted that the covenant was imposed in pursuance of a general

scheme within the meaning of our cases. The answer admits and the proofs establish the violation so far as the use is concerned. The attempted defense is that there had been a violation to such an extent as to cause a waiver or abandonment. The tract of land affected by the covenant is in Margate City and comprises six blocks on Ventnor Avenue and twelve blocks in the rear thereof, and at the time of the taking of the proof there were two hundred residences therein (p. 15).

Pedrick & Son were the developers and their corporation imposed the restrictions. During the progress of the development they constructed a temporary building on a portion of the land and used it in the development, and there was some proof that they did a general real estate business there, but there is no proof that this fact was ever brought to the attention of any of the complainants. Subsequently this structure was removed and the present structure erected. The structure itself was not in violation of the covenant. As soon as it was brought to the attention of the complainants that the defendant-appellant was using the building for his business enterprise the bill was filed. There is no evidence of any other violation of the covenant or any other restrictive covenant on the entire tract.

ARGUMENT.

THE DECREE SHOULD BE AFFIRMED.

As pointed out in the statement, the prayer was for an injunction to prevent the use of the building in violation of the covenant and the user was ad-

mitted and justified on the ground of a like use by former owner. The Vice-Chancellor in his conclusion very properly says:

“There is nothing before me to indicate that the building of itself is such a building that would violate the restriction.”

He also found as a fact, and it is a fact, that Pedrick & Son, the developers, had ceased to use the temporary structure as well as the permanent structure at the time of the conveyance to the appellant. It is not a case of a continuous use in violation of the covenant nor a case where a purchase was made relying upon a right to continue the use because at the time the purchaser found some one in possession violating the covenant. It is admitted that the covenant was imposed as a general scheme, and notwithstanding the proof is there are two hundred buildings, at least, on the tract, there is not a single violation except that of the appellant. There is no proof that any one of the complainants knew of the alleged violation until shortly before the filing of the bill when correspondence passed, as will appear by the exhibits. Promptly upon receipt of a letter from the solicitor of the appellant that the violation was to continue, the bill was filed.

Before complainants can be charged with having waived or abandoned the covenant it must be shown that they had knowledge of the violation. The agreement of purchase through which appellant claims (Exhibit D2) expressly provides: “Under and subject to existing restrictions.” This was after the erection of both the temporary building used by Pedrick & Son and also the erection of the present structure.

Appellant's brief says: “It is apparent that if Frank J. Pedrick & Son could have successfully de-

fended a suit of this nature then defendant-appellant as the successor of Frank J. Pedrick & Son to title in said premises should also succeed." We have already pointed out Pedrick & Son's relation to the Winchester Development Company and the fact that they imposed the covenant and developed the land. Moreover, repeating what has been said, it does not appear that any one of the complainants had knowledge that they were using the building in any way except in the development of the tract, and Leonard F. Pedrick, the son, testified, that he did not intend to violate the covenant and did not think he was doing so (p. 29).

Besides we contend that they could not have successfully defended; equity would have estopped them from repudiating their own covenant. The case of *Trout v. Lucas* cited, has no application in the light of the admitted and proven facts of this case.

Complainants' right to enforce the covenant is clear. There is no doubt and therefore *Fortescue v. Carroll* and other cases cited by appellant, lack application.

Since appellant relies wholly upon an alleged violation to justify the claim of waiver or abandonment, or both, and neither has been shown, it seems idle to burden this brief with a single citation touching complainants' right to the injunction.

Respectfully submitted,

COLE & COLE,
Solicitors for Respondents.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

WILLIAM H. POWELL, JR., *et al.*,
Complainants-Respondents,

and

SEASHORE PROPERTIES CORPORATION, a corporation
of the State of New Jersey,
Defendant-Appellant.

ON BILL FOR INJUNCTION.

APPEAL FROM COURT OF CHANCERY.

BRIEF FOR DEFENDANT-APPELLANT.

FACTS.

This is an appeal from a final decree enjoining Seashore Properties Corporation from using any part of the building or land situate at the northeast corner of Huntington and Ventnor Avenues, in Margate City, New Jersey, as a store, apartment house,

hotel, boarding house or business house of any description or character.

On or about November 1, 1923, Winchester Development Company, a corporation of New Jersey, was the owner of a large tract of land known as Winchester Gardens, located in Margate City, New Jersey. Included in the tract, are the premises described above. The Winchester Development Company, in pursuance of a general scheme for the development and sale of parcels of this tract, imposed restrictive covenants upon the land (see copy attached to bill of complaint). The final decree enjoining defendant follows the language of the covenant.

In the year of 1924, Frank J. Pedrick & Son, a partnership, erected, opened and maintained a branch real estate office in a small office building at northeast corner of Huntington and Ventnor Avenues, now owned by defendant-appellant. Frank J. Pedrick & Son were the agents for Winchester Gardens but were not confined, in their activities as realtors, to the sale of lots only contained in said tract, but used their branch office and handled through it, many transactions involving lands located outside of the said tract.

On or about June 25, 1926, Frank J. Pedrick & Son removed the small office building to a rear part of the said premises and, in its place, began and completed the erection of a large stucco office building of permanent construction, and had connected thereto the city sewer and water service. A photographic likeness of this building is found on Page 32 of the state of the case.

The testimony shows, and it is uncontradicted, that upon the completion of the office building, Frank J. Pedrick & Son, occupied the same with their employees and agents, and there conducted a

general real estate office from the time of the completion of the building until August 24, 1927, at which time they ceased doing business, and during all of which time the firm of Frank J. Pedrick & Son engaged in the business of real estate, buying, selling and renting, as brokers, for the general public.

On March 13, 1928, the defendant-appellant acquired by deed the said property. The purchase of the property in controversy was for the sole purpose of furthering its activities as a realtor. Thereafter, and prior to the filing of the bill for injunction, subsequently recited herein, Seashore Properties Corporation spent approximately one thousand (\$1,000.00) dollars on the beautification and improvement of said premises, and to make the same fit for occupancy. Seashore Properties Corporation thereafter took possession of the said premises and engaged in its business as real estate broker. Complainants-respondents, who are owners of land located in Winchester Gardens, filed a bill in the Court of Chancery praying that the defendant-appellant be enjoined from using their premises in violation of the restrictive covenant recited above. The cause duly came on to be heard before Vice-Chancellor Robert H. Ingersoll, who advised the decree from which this appeal is taken.

ARGUMENT.

The complainants-respondents should not have obtained relief because they were estopped by their laches, waiver and acquiescence in the violation of the restrictive covenant.

The evidence and photographs in evidence conclusively show that the building erected on premises is a permanent structure designed to be used for a real estate office. The learned Vice-Chancellor, in giving his conclusions upon which the final decree is based, in part says and finds (Page 31 of the state of the case), "The question now comes, is the building now upon the land, which was built in place of the first building which was of more or less temporary construction, a permanent structure, for business purposes? There is nothing before me to indicate that the building of itself is such a building, that it violated the restriction."

Certainly such a finding is unfounded and unwarranted in view of the fact that the question of "permanency" was not disputed. Our answer alleged the structure to be permanent and this allegation was not disputed.

In the case of *Ten Eyck v. Rector of Protestant Episcopal Church*, 20 N. Y. Supp. 157, defines "permanent" to mean "not temporary or subject to change; abiding, remaining, fixed, or enduring in character, state or place."

In the case of *McGalliard v. Chapman*, 3 N. J. Misc. Rep. 609, the Court found a structure, about thirty-two feet long by eight feet wide, consisting of four poles along each side, six inches in diameter, eight feet high, set six inches in the ground and a similar line of four poles slightly higher, along the center line, having an outer line of poles connected by stringers at the top, and a ridge pole along the center line, with rafters run between stringers and ridge pole, and a few boards lain on these boards to prevent the sagging of the removable canvas covering, the sides not being enclosed, but a strip of canvas four feet wide hung on whichever was the sunny side, was a building, and there-

fore in violation of a restrictive covenant in deed restricting the erection of any building. The Court in part said, "The photographs show it to be quite a substantial thing in the way of a roof, and it is significant that neither by answer or proof, was there any allegation that it was a mere temporary structure. It was built in August, 1924, and from the evidence, is still standing, in the same condition, and it appears to be capable of standing in the same condition for several years at least." (This cause was decided June 3, 1925.) Certainly, a stuccoed building of the size and character as the building in controversy, to which has been connected the city sewer and water service, is a permanent structure, within the meaning of the spirit and letter of the words, "permanent structure."

The learned Vice-Chancellor also finds in his conclusions that the defendant-appellant "had a timely notice." Not so. The defendant-appellant received no notice from the complainants-respondents until and after the defendant-appellant's owner had executed and become bound by an agreement of sale for the purchase of the said premises (John Datz's testimony, Page 17 of the state of the case).

It is apparent that if Frank J. Pedrick & Son could have successfully defended a suit of this nature, then the defendant-appellant, as the successor of Frank J. Pedrick & Son to title in said premises, should also succeed.

In the case of *Trout v. Lucas*, reported in 54 N. J. E. 361, the Court of Chancery, in a very comprehensive opinion, laid down the law as follows (Page 365): "A court of equity does not invariably enforce such covenants, and there are classes of cases in which the remedy by injunction is refused. Two of these classes may be specially mentioned, as claimed to be applicable here; first, where

the person imposing the restriction has allowed or acquiesced in material violations of the covenant or restriction, thus waiving the covenant *pro tanto*; and second, where the party injured has not made prompt application for the relief, and has permitted money to be expended. In these cases the party otherwise entitled to the benefit of the covenant cannot apply for an injunction, and whether there has been such waiver or laches depends upon the circumstances of the particular case." This doctrine has been firmly adhered to and followed in *Sutcliffe v. Eisele*, 62 N. J. E. 222; *Zellman v. Kaufherr*, 76 N. J. E. 52; *Sanford v. Keer*, 80 N. J. E. 240; *Goater v. Ely*, 80 N. J. E. 46; *Meany v. Stork*, 80 N. J. E. 60; 81 N. J. E. 210; *Smith v. Spencer*, 81 N. J. E. 389; *Scull v. Eilenberg*, 119 Atl. Rep. 275.

It is respectfully submitted that the circumstances of this case are squarely within the doctrine above stated.

The testimony discloses, and it is uncontradicted, that Frank J. Pedrick & Son erected the stuccoed building at an undoubtedly large expense without any protest or dissent by the complainants-respondents, and therefore comes with the second class of the doctrine of *Trout v. Lucas*, *supra*, and, for a period of more than a year openly conducted, in that building, a general real estate business, which activity was not limited to the lots contained in the Winchester Gardens tract, without any protest by the complainants-respondents, which fact brings this case also into the first class of the doctrine above recited. (See testimony of Leonard F. Pedrick on Page 28 of state of the case.)

At any rate, unless the complainants-respondents' right to enforce the restrictive covenant is perfectly clear, such relief must be denied them. *Fortescue v. Carroll*, 76 N. J. E. 583; *Goater v. Ely*, *supra*;

Meany v. Stork, supra; Howland v. Andrus, 81 N. J. E. 175.

It is most respectfully urged that the decree of the Court of Chancery may be wholly set aside and for nothing holden.

ENDICOTT & ENDICOTT,
*Solicitors for and of Counsel
with Defendant-Appellant.*

